



Team: 039

**ELSA MOOT COURT COMPETITION ON WTO LAW
2015 - 2016**

**Eriador – Measures Affecting the
Electricity Sector**

Borduria
(Complainant)

VS

Eriador
(Respondent)

SUBMISSION OF THE COMPLAINANT

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SCM	<i>Agreement on Subsidies and Countervailing Measures</i> , in Annex 1A of the <i>Marrakesh Agreement Establishing the World Trade Organization</i> , 15 April 1994, 1867 UNTS 14.
II. ELSA MATERIALS	
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<i>US - Large Civil Aircraft (2nd Complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> (23 March 2012) WT/DS353/AB/R.
<i>US - Lead and Bismuth II</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> (7 June 2000) WT/DS138/AB/R.
<i>US - Upland Cotton</i>	Appellate Body Report, <i>United States - Subsidies on Upland Cotton</i> (3 March 2005) WT/DS267/AB/R.
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Trebilcock et al.	Michael Trebilcock, Robert Howse and Antonia Eliason, <i>The Regulation of International Trade</i> (3rd ed, Routledge 2013).
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List of Abbreviations

Abbreviation	Full Form
AB	Appellate Body
EEC	Eriadorian Electricity Company
FCPRE	Framework Convention on the Promotion of Renewable Energy 2010
FIT Scheme	Feed-in Tariff Scheme
Grant	Innovation for the Future Grant
Loan	Eribank Loan
Purchase Agreement	Long-term purchase agreement concluded pursuant to the Feed-in Tariff Scheme
SCM	<i>Agreement on Subsidies and Countervailing Measures</i>
WTO	World Trade Organization

Summary of Arguments

I. ERIADOR HAS VIOLATED ITS OBLIGATIONS UNDER THE *SCM* THROUGH THREE PROGRAMS THAT PROVIDE EITHER PROHIBITED EXPORT SUBSIDIES, ACTIONABLE SUBSIDIES, OR BOTH.

- Eriador has provided trade-distorting subsidies to Eriadorian enterprises for the purposes of developing Eriador's domestic cold fusion sector.
- Protectionist industrial policies that violate a Member's obligations under WTO law cannot be saved by any incidental affects that they may have on the environment.

II. THE 'INNOVATION FOR THE FUTURE' GRANT IS A PROHIBITED SUBSIDY THAT VIOLATES ARTICLE 3.1(A) OF THE *SCM* AGREEMENT.

- The Grant is a subsidy because it was a financial contribution made by a public body, which conferred a benefit to Future Energy.
- The Grant is an export subsidy because it was contingent upon the anticipated export earnings from the sale of the Fusillscope to 3rd markets.

III. THE ERIBANK LOAN AND THE 'INNOVATION FOR THE FUTURE' GRANT ARE ACTIONABLE SUBSIDIES THAT VIOLATE ARTICLE 5(C) OF THE *SCM*.

- The Loan is a subsidy because it was a financial contribution made by Eribank to CleanTech. Eribank is a commercial-lending bank that operates pursuant to direction from the Eriadorian government. This financial contribution conferred a benefit to CleanTech in that it allowed CleanTech to develop the Fusillscope technology.
- The Grant was given to the renewable energy sector, which is a specific industry. The Loan was given to CleanTech, a specific enterprise.
- The Loan and the Grant are part of a broader subsidy regime initiated by the Eriadorian government for the purpose of developing Eriador's domestic cold fusion sector.
- SolarTech, a company located in Borduria, experienced significant lost sales of its solar panels. These solar panels were competitive with the Fusillscope in Carpathia. These lost sales were caused by the Eriadorian subsidy program, which allowed Future Energy to sell a competitive product at a significantly discounted price.

IV. THE PURCHASE AGREEMENT BETWEEN FUTURE ENERGY AND THE EEC IS AN ACTIONABLE SUBSIDY THAT VIOLATES ARTICLE 5(C) OF THE *SCM* AGREEMENT.

- A Purchase Agreement was given to Future Energy under the FIT Scheme. This Purchase Agreement was a subsidy because it was a financial contribution awarded by the

B. Substantive*Borduria (Complainant)*

Eriadorian Electricity Corporation. Future Energy received a benefit from the FIT Scheme as the price was granted on terms more favourable than the price provided to other renewable energy producers in Eriador.

- The FIT Scheme is available to the cold fusion sector. Future Energy is the only enterprise operating in this industry, making the subsidy enterprise specific.
- Borduria exported a significant amount of electricity into Eriador prior to the introduction of the FIT Scheme. This supply of electricity was consequently displaced by the FIT Scheme.

Statement of Facts

1. Eriador is a major industrialised country that is attempting to transition its economy towards full reliance on sustainable and renewable energy. All of the Eriadorian electricity generation facilities are privately owned; however, a government agency, the Eriadorian Electricity Corporation (EEC) is responsible for the management and functioning of the Eriadorian electricity grid. To this end, the EEC purchases energy from both Eriadorian and foreign energy suppliers and then sells this energy directly to consumers.
2. CleanTech is an Eriadorian technology company that developed the Fusillscope, which generates energy through cold fusion. In order to develop this technology, CleanTech received a \$750m loan (the “Loan”) from Eribank, an entity majority owned by the Eriadorian government. CleanTech then sold the entire Fusillscope business, including production facilities and intellectual property rights, to Future Energy, which is a business incorporated in Eriador.
3. The cost of producing energy with the Fusillscope was considerably higher than the wholesale price of electricity in the Eriadorian market. Accordingly, Future Energy sought government assistance from Eriador. Consequently, the Eriadorian Government provided Future Energy with a \$500m grant under the Eriadorian Government’s ‘Innovation for the Future’ Grant (the “Grant”). The purpose of the Grant is to provide financial assistance to projects that would contribute to the sustainable growth of the Eriadorian economy.
4. In addition, the Eriadorian government introduced a feed-in-tariff (FIT) scheme to increase the supply of electricity from cold fusion. Future Energy was awarded a long term purchase agreement (the “Purchase Agreement”) pursuant to the FIT scheme. This purchase agreement provided Future Energy with a guaranteed price for all electricity produced by its cold fusion plants for a period of thirty years.
5. Borduria is a neighbouring country, which is also a member of the WTO. The electrical grids of the two countries are interconnected and two Bordurian electricity producers have historically sold their electricity into Eriador. SolarTech, which is a company located in Borduria that produces solar panels, lost a contract with Elektrica after Elektrica opted to purchase the Fusillscope from Future Tech instead.

Identification of the Measure at Issue

6. **Measure 1:** The Innovation for the Future Grant, a \$500 million measure awarded by the Eriadorian government to Future Energy.
7. **Measure 2:** The Eribank Loan, a \$750 million loan awarded by Eribank, a commercial lending bank that is majority owned by the Eriadorian government, to CleanTech.
8. **Measure 3:** The Eriadorian feed-in-tariff scheme, under which a long-term purchase agreement was made with Future Energy.

Legal Pleadings**I. ERIADOR HAS VIOLATED ITS OBLIGATIONS UNDER THE WTO SCM AGREEMENT THROUGH THREE MEASURES THAT PROVIDE EITHER PROHIBITED EXPORT SUBSIDIES, ACTIONABLE SUBSIDIES, OR BOTH.**

9. The Eriadorian Government has engaged in the systematic subsidization of its developing cold fusion sector. In pursuit of this aim, Eriador has provided a number of trade-distorting subsidies to Eriadorian enterprises. These subsidies derive from an industrial policy that is both protectionist and mercantilist. For this reason, Eriador's subsidy regime cannot be saved by any incidental effect that it may have on the environment. While the pursuit of green energy policies is laudable, states may only implement such measures in a manner that is consistent with their pre-existing obligations under WTO law.¹
10. Borduria will demonstrate that Eriador violates the *Agreement on Subsidies and Countervailing Measures (SCM)* obligations relating to both prohibited export subsidies and actionable subsidies with the following three programs. First, Borduria will show that the 'Innovation for the Future' Grant is a prohibited subsidy under Article 3.1(b) of the *SCM*. Second, Borduria will demonstrate that the Grant to Future Energy and the Eribank Loan to CleanTech are actionable subsidies under Articles 5(c) and 6.3(a) of the *SCM*. Third, Borduria will show that the long term purchase agreement, concluded pursuant to the Eriadorian FIT scheme, is an actionable subsidy in accordance with Articles 5(c) and 6.3(c) of the *SCM*.

¹ ABR, US – Gasoline, [78].

II. THE 'INNOVATION FOR THE FUTURE' GRANT IS A PROHIBITED SUBSIDY THAT VIOLATES ARTICLE 3.1(A) OF THE *SCM* AGREEMENT.

11. The Eriadorian government provided a subsidy in the form of a Grant to Future Energy that was contingent upon Future Energy exporting the Fusillscope into foreign markets. Consequently, the Grant is a prohibited export subsidy within the meaning of Article 3.1(a) of the *SCM*.
12. In general, an export subsidy is “any government program or practice that increases the profitability of export sales but does not similarly increase the profitability of sales for domestic consumption.”² This type of subsidy is prohibited where the subsidy is contingent, in law or in fact, upon export performance. 'In fact' or *de facto* prohibited subsidies require an examination of the nature of the subsidy, its structure and operation, and the circumstances in which it was provided.³ Specifically, a *de facto* export subsidy will be found where: **(a)** a subsidy has been granted; **(b)** that is contingent, in fact, upon export performance.⁴

a. The Grant was a subsidy

13. A measure is a subsidy within the meaning of Article 1 of the *SCM* where: (i) there is a financial contribution; (ii) by a government or public body; and, (iii) a benefit is conferred.⁵ Under *SCM* Article 3, a subsidy is automatically deemed specific under *SCM* article 2.3 where it is found to satisfy the requirements of a prohibited subsidy.⁶

i. The Grant was a financial contribution

14. A government practice involving a direct transfer of funds to a private entity in the form of money or some other type of financial resource is a financial contribution.⁷ The *SCM* identifies grants, loans and equity infusions as specific examples of a direct transfer of funds.⁸

² Sykes (1989), 203.

³ ABR, EC – Large Civil Aircraft, [1046]; Van den Bossche and Zdouc (2013), 773.

⁴ *SCM*, art 3.1(a).

⁵ *SCM*, art 1.

⁶ *SCM*, art 3.

⁷ ABR, Japan – DRAMs (Korea), [250]; Trebilcock et al (2013), 368.

⁸ *SCM*, art 1.1(a)(1)(i).

15. Future Energy was awarded a \$500 million grant under the ‘Innovation for the Future’ program.⁹ This Grant was awarded after Future Energy turned to the Eriadorian government for assistance.¹⁰

ii. The Grant was awarded by a government body

16. The Grant was provided by the Eriadorian government to Future Energy under the ‘Innovation for the Future’ program.¹¹ This program was initiated by the Eriadorian government to provide financial assistance to projects that would contribute toward the global integration of the Eriadorian economy.

iii. The Grant conferred a benefit to Future Energy

17. In order to confer a benefit, a financial contribution must be provided “on terms that are more advantageous than those that would have been available to the recipient on the market.”¹² Accordingly, the evaluation of a benefit requires both a recipient and a market with which to make a comparison.¹³ Further guidelines are provided in Article 14(d) of the *SCM*, which holds that a benefit will be conferred where the recipient receives more than adequate remuneration than what they would have received on the market.¹⁴

18. The \$500 million Grant conferred a benefit to Future Energy by making them 'better off' than they otherwise would have been absent the contribution. Prior to receiving the Grant, Future Energy had already integrated the Fusillscope into its domestic power generation facilities.¹⁵ In order to secure its monopoly position as the only producer of the Fusillscope, Future Energy sought and received financial assistance from the Eriadorian government. Future Energy then constructed a \$500 million production facility.¹⁶ It is not by coincidence that the cost of this new facility was identical in value to the Grant. Consequently, without the Grant, Future Energy would not have been able to build this facility and massively expand its export sales of the Fusillscope.¹⁷ There is no evidence that a similar amount of financial assistance was available or forthcoming on the open market.

⁹ Problem, [10].

¹⁰ Problem, [9].

¹¹ Problem, [10].

¹² PR, Canada – Aircraft, [9.112-9.113].

¹³ ABR, Canada – Aircraft, [154]; Trebilcock et al (2013), 371.

¹⁴ *SCM*, art 14(d); ABR, Canada – Renewable Energy, [5.228].

¹⁵ Problem, [8].

¹⁶ Problem, [12].

¹⁷ Clarification, [6].

b. The Grant was contingent on export performance

19. A subsidy is contingent on export performance where the granting of the subsidy is tied to actual or anticipated export earnings.¹⁸ The words ‘tied to’ require that a relationship of conditionality exist between the subsidy and actual or anticipated exports.¹⁹ An assessment of conditionality involves determining whether the subsidy has incentivized the recipient to skew its anticipated sales toward exports.²⁰ Evidence of this incentive could be based on a comparison of “the ratio of *anticipated* export and domestic sales of the subsidized product that would come about in consequence of the granting of the subsidy, and, on the other hand, the situation in the absence of the subsidy.”²¹
20. The Eriadorian government had no reason to provide Future Energy with the Grant other than to enable Future Energy to significantly expand the export of Fusilliscopes. At the same time that the Grant was provided, the Eriadorian government also provided Future Energy with a Purchase Agreement to supply cold fusion energy into the Eriadorian electricity grid.²² If the Eriadorian government’s sole objective was to increase the share of renewable energy in its domestic electricity market, the Purchase Agreement would have been sufficient. However, Eriador decided to supplement the Purchase Agreement with a Grant that it knew was for the purpose of building an additional production facility for Fusilliscopes.²³ Accordingly, the Grant was awarded solely based on Future Energy’s ability to expand the export of Fusilliscopes given that Eriador knew that Future Energy had no intention of selling the Fusilliscopes domestically.²⁴
21. Evidence that the Grant was tied to anticipated export performance is demonstrated by comparing the ratio of Future Energy’s domestic sales of Fusilliscopes versus export sales. Future Energy has never had any intention of selling the Fusilliscopes domestically because it does not want any competitors under the Eriadorian government’s FIT Scheme.²⁵ By contrast, Future Energy intended to massively expand its export of Fusilliscopes into other markets. In this instance, Future Energy viewed Carpathia as a market of strategic interest and sought to establish a market-leading presence in that

¹⁸ *SCM*, footnote 4; *ABR, Canada – Aircraft*, [169].

¹⁹ *ABR, Canada – Aircraft*, [171].

²⁰ *ABR, EC – Large Civil Aircraft*, [1063]; *PR, Canada – Aircraft*, [9.346].

²¹ *ABR, EC – Large Civil Aircraft*, [1048].

²² *Problem*, [11].

²³ *Clarification*, [17].

²⁴ *Problem*, [12].

²⁵ *Problem*, [12].

country as quickly as possible.²⁶ Without the Grant, Future Energy would not have been able to construct a second production facility; and without a second production facility, Future Energy would have been unable to offer such a large discount on sales of its Fusilliscopes. Consequently, the available evidence indicates that the Grant allowed Future Energy to skew its future sales toward exports. This evidence is weighed against the historical performance of Future Energy, who has never sold the Fusilliscopes domestically.²⁷

III. THE ERIBANK LOAN AND THE ‘INNOVATION FOR THE FUTURE’ GRANT ARE ACTIONABLE SUBSIDIES THAT VIOLATE ARTICLE 5(C) OF THE *SCM AGREEMENT*.

22. Collectively, the Grant and the Loan are actionable subsidies that caused adverse effects to the Bordurian economy. In disputes that involve multiple subsidies, the analysis of the measures should be consolidated to better understand the totality of their effects.²⁸ In this situation, the Grant and the Loan both complement and supplement each other as they are part of a broader subsidy program. It is therefore essential to assess these measures in regard to their cumulative effect.

23. A subsidy will be actionable where it causes adverse effects in the form of serious prejudice to the economy of another WTO Member.²⁹ Both the Loan and the Grant are actionable within the meaning of Articles 1 and 2 of the *SCM* because: **(a)** they are both *subsidies*; **(b)** that were *specific*. In addition, **(c)** these two measures are part of a broader subsidy regime implemented by the government of Eriador and should be considered as such. Accordingly, **(d)** this subsidy program caused serious prejudice to the economy of another WTO member in the form of lost sales.³⁰

a. The Grant and the Loan are both subsidies

24. The Grant³¹ and the Loan are both subsidies within the meaning of Article 1 of the *SCM*. The Loan is a subsidy because: (i) the Eribank Loan was a financial contribution; (ii) this financial contribution was made by Eribank, a public body; and, (iii) the loan conferred a benefit on the recipient, CleanTech.

²⁶ Clarification, [7].

²⁷ Problem, [12].

²⁸ ABR, US – Large Civil Aircraft (2nd Complaint), [1284]; Van den Bossche and Zdouc (2013), 810.

²⁹ *SCM*, art 5(c).

³⁰ *SCM*, art 6.3(c).

³¹ Complainant Factum, [13-18].

i. The Loan was a financial contribution

25. A direct transfer of funds in the form of a loan is a financial contribution.³² The recipient of the loan incurs reciprocal obligations to repay the loan in exchange for the funds provided.³³
26. The measure in question was a \$750m Loan by Eribank to CleanTech.³⁴ The Loan was provided on terms that were more favourable than what CleanTech could have received on the open market. The Loan was then inherited by Future Energy during the sale of the cold fusion technology from CleanTech.³⁵ Consequently, the Loan constitutes a direct transfer of funds, which is a form of financial contribution.

ii. Eribank is a public body

27. A public body is an entity that possesses, exercises or is vested with governmental authority.³⁶ State-managed, commercial lending banks can be a form of public body. In *EC – Large Civil Aircraft*, the Appellate Body found Credit Lyonnaise to be a public body because it was controlled by the French government and had provided a FF 1.4 billion financial contribution to a French enterprise.³⁷ In *EC - DRAM*, the Panel found the Korean Development Bank to be a public body as it was under government entrustment and direction.³⁸
28. Eribank is a commercial lending bank that exercises governmental authority. Notably, Eribank is majority owned by the state and whose board of directors is appointed by the Eriadorian government. Eribank's business practices are based upon the "strategic policy objectives of the Eriadorian state".³⁹ In this regard, it serves as a vehicle for the Eriadorian government to disburse funds through grants and loans to Eriadorian businesses. Furthermore, the Loan given by Eribank to CleanTech was done after consultations with the Eriadorian Ministry of the Environment about the commercial viability of the cold fusion technology.

29. Where a government has entrusted or directed a private body to carry on activities normally vested in the government, then this private body will have satisfied the criteria

³² *SCM*, art 1.1(a)(a)(i); *ABR, Japan — DRAMs (Korea)*, [251].

³³ *ABR, US – Large Civil Aircraft (2nd Complaint)*, [617].

³⁴ *Problem*, [6].

³⁵ *Clarification*, [63].

³⁶ *PR, US - Carbon Steel (India)*, [4.9]; *ABR, US — Anti-Dumping and Countervailing Duties (China)*, [317].

³⁷ *PR, EC – Large Civil Aircraft*, [7.1359].

³⁸ *PR, EC – Countervailing Measures on DRAM Chips*, [7.146].

³⁹ *Problem*, [6].

under the *SCM*.⁴⁰ The reason is that “Members are not permitted to circumvent the *SCM* Agreement by requiring another entity to make a ‘financial contribution’.”⁴¹ In this instance, Eriador has entrusted the Eribank to make financial contributions in furtherance of the strategic aims of the state.

iii. Future Energy inherited the benefit originally conferred to CleanTech

30. Eriador concedes that the Loan conferred a benefit to CleanTech provided that Eribank is found to be a public body.⁴² For the reasons previously stated, Eribank satisfies the criteria of a public body; accordingly, a benefit has *prima facie* been conferred.
31. The Loan conferred a benefit upon CleanTech. CleanTech sought funds from private investors in order to conduct research and development of the cold fusion technology.⁴³ However, they were unable to secure any private financing on the open market. Consequently, the Eriadorian government awarded them with a \$750 million loan.
32. The benefit of the Loan, originally received by CleanTech, ultimately passed-through to Future Energy. Under ordinary circumstances, “the effects of any subsidy can be expected to diminish....with the passage of time.”⁴⁴ Still, there may be residual effects stemming from the subsidy that still give rise to a benefit. In this situation, the spillover effects from the subsidy offered Future Energy the ability to perfect the process for producing Fusilliscopes, thereby allowing them to expand production. The consequence of this is that the tangible benefits stemming from the loan were not realized until recently. This indicates that the benefit from the subsidy has not been diminished.

b. The Grant and the Loan are both specific

33. The Grant, which was given to the renewable energy industry (*i*), and the Loan, which was given to CleanTech (*ii*), are both specific within the meaning of Article 2 of the *SCM*.

i. The Grant was given to a specific industry

34. “Industry” refers to a “particular form or branch of productive labour; a trade, a manufacture.”⁴⁵ The type of industry can be inferred from the type of products they

⁴⁰ *SCM*, art 1.1(a)(1)(iv); ABR, US - Countervailing Duty Investigation on DRAMS, [116].

⁴¹ Trebilcock et al. (2013), 370.

⁴² Problem, [15].

⁴³ Problem, [6].

⁴⁴ ABR, EC – Large Civil Aircraft, [1238].

⁴⁵ ABR, US - Anti-Dumping and Countervailing Duties (China), [366].

produce and relates to the producers of certain products.⁴⁶ The identified industry in this dispute should be the renewable energy industry that is linked by their production of non-conventional electricity. A subsidy is *de facto* specific where there has been a predominant use of a subsidy program by a particular industry.⁴⁷ In determining whether there has been predominant use by a certain industry, the diversification of economic activities within the jurisdiction granting the subsidy must be taken into account. Accordingly, a subsidy program that is only available to a small industry within a highly diversified economy indicates predominant use.⁴⁸

35. The Grant was *de facto* specific because its predominant use was by the renewable energy sector. Over 90% of the disbursed funds have gone to companies in the renewable energy sector during the three years that the Grant has been in effect.⁴⁹ Furthermore, the renewable energy sector represents, at most, 5% of the entire Eriadorian economy.⁵⁰ As such, the renewable energy sector has received a disproportionately large share of the subsidy, which is indicative of predominant use. Therefore, the Grant was *de facto* specific.

ii. The Loan was given to a specific enterprise

36. A subsidy is specific if it is given to a single enterprise where an enterprise is defined as a business firm or company.⁵¹ The Eribank Loan was provided to a specific enterprise, CleanTech.⁵²

c. The Grant and the Loan are part of a broader subsidy program

37. An integrated analysis should be performed when assessing the effect of multiple subsidies. This type of analysis is necessary when “these subsidies have a sufficient nexus with the subsidised product and the particular effects-related variable under examination.”⁵³ In this instance, there were a number of subsidies provided by Eriador that contributed toward the development of the Fusillscope. Attempting to disentangle

⁴⁶ PR, US - Upland Cotton, [7.1142].

⁴⁷ SCM, art 2.1(c); ABR, US – Carbon Steel (India), [4.369].

⁴⁸ PR, EC – Large Civil Aircraft, [7.975].

⁴⁹ Problem, [10].

⁵⁰ Clarification, [29].

⁵¹ SCM, art 2.1(c); ABR, US – Anti-Dumping and Countervailing Duties (China), [373].

⁵² Problem, [6].

⁵³ Van den Bossche and Zdouc, (2013), 807; PR, US – Upland Cotton, [7.1192].

the chain of causation for each of these subsidies would not be possible. Therefore, it is necessary to consider the total effect of these subsidies.⁵⁴

38. One method for determining the effect of multiple subsidies is to conduct an ‘*aggregation*’ analysis. This method entails grouping together a variety of subsidies that are similar in purpose to determine if there is a ‘genuine and substantial relationship of cause and effect’ between the subsidies and the relevant market phenomenon.⁵⁵
39. The Loan and the Grant are part of a broader subsidy program initiated by the Eriadorian government. The purpose of these subsidies, amounting to over \$1.25 billion, was to develop the cold fusion sector within Eriador. Accordingly, the chain of causation that began with the Loan to CleanTech ultimately allowed Future Energy to produce and market the Fusillscope at an artificially low cost. These subsidies consequently had a genuine and substantial link with the adverse effects experienced within the Bordurian economy.

d. The Eribank Loan and the Innovation for the Future Grant caused serious prejudice to a 3rd market

40. The aggregate effect of the Eriadorian subsidies is that they caused serious prejudice to the Bordurian economy within the meaning of Article 6.3(c) of the *SCM* because: (i) SolarTech, a Bordurian company, experienced lost sales of its solar panels; (ii) SolarTech’s lost sales were significant; (iii) the solar panels were competing with the Fusillscope in the same market; and, (iv) the lost sales were caused by the Eriadorian subsidies.
- i. SolarTech, a Bordurian company, lost sales of its solar panels*
41. Lost sales are sales that a supplier failed to obtain and that were instead obtained by a competitor.⁵⁶ Accordingly, determining whether lost sales occurred requires a comparison of sales made by the subsidised firm with the competing firm.⁵⁷
42. SolarTech had a Memorandum of Understanding with Elektrica, a Carpathian electricity generation company, to supply Elektrica with 40,000 solar panels.⁵⁸ However, Elektrica broke off negotiations with SolarTech in the final stages, informing SolarTech that they

⁵⁴ WTO Secretariat (2006), 202.

⁵⁵ ABR, EC – Large Civil Aircraft, [1377]; ABR, US – Large Civil Aircraft (2nd complaint), [1285].

⁵⁶ ABR, EC – Large Civil Aircraft, [1214].

⁵⁷ Van den Bossche and Zdouc (2013), 791.

⁵⁸ Problem, [14].

would purchase the Fusillscope from Future Energy instead.⁵⁹ Accordingly, SolarTech lost the opportunity to sell 40,000 units to Elektrica due to Elektrica's decision to purchase Fusillscopes rather than solar panels.

ii. SolarTech's lost sales were significant

43. Lost sales will be significant where they are "important, notable or consequential."⁶⁰ In a specific sense, an assessment of the significance of lost sales entails both a quantitative and qualitative analysis of the magnitude of the loss.⁶¹

44. SolarTech's lost sales of 40,000 units accounts for approximately 10% of their overall annual sales.⁶² Given the tight margins in the industry, this loss had a significant impact upon SolarTech's revenue.⁶³ Furthermore, Elektrica was an important customer for SolarTech as Elektrica was seeking to expand its use of renewable energy sources in the coming years.⁶⁴ This loss will therefore adversely affect SolarTech's potential future sales in the Carpathian market.

iii. The solar panels were competing with the Fusillscope within the same market

45. A finding of serious prejudice requires a determination of whether lost sales occurred with respect to products competing in the same market.⁶⁵ In general, a market is a geographical space where there is a demand for commodities and services.⁶⁶ Substitutability, whereby producers and consumers are able to replace one commodity or service with another, "is an indispensable... criterion to consider when assessing whether two products are in a single market."⁶⁷

46. Both SolarTech and Future Energy were competing for the sale of their products within the single market of Carpathia. This is demonstrated by Elektrica's decision to forego the purchase of solar panels in order to buy Fusillscopes.⁶⁸ Elektrica was negotiating the purchase of solar panels from SolarTech before deciding to purchase the Fusillscope from Future Energy instead. In situations where customers solicit a variety of products to

⁵⁹ Problem, [14].

⁶⁰ PR, US – Upland Cotton, [7.1325]; ABR, US – Upland Cotton, [426].

⁶¹ ABR, US – Large Civil Aircraft (2nd Complaint), [1052]; ABR, EC – Large Civil Aircraft, [1218].

⁶² Clarification, [58].

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ SCM, art 6.3(c).

⁶⁶ ABR, US – Upland Cotton, [7.1236]; Van den Bossche and Zdouc (2013), 787.

⁶⁷ ABR, EC – Large Civil Aircraft, [1121].

⁶⁸ Problem, [14].

meet their needs, this may be taken as evidence that, “such products could be competing in the same market.”⁶⁹ Both solar panels and Fusilliscopes are forms of technology that are capable of generating renewable energy. In this respect, they are substitutable products.

iv. The lost sales were caused by the Eriadorian subsidies

47. A unitary approach that uses a counterfactual analysis is the proper method for determining whether a subsidy causes serious prejudice.⁷⁰ This method entails comparing the actual sales made by the competing firm of the complainant member with the hypothetical sales that would have been made by the subsidised firm had that firm not received a subsidy. Accordingly, “there would be lost sales where the counterfactual analysis shows that, in the absence of the challenged subsidy, sales won by the subsidized firm(s) of the respondent Member would have been made instead by the competing firm(s) of the complaining Member.”⁷¹

48. Elektrica’s decision to purchase Future Energy’s Fusilliscopes instead of SolarTech’s solar panels was based on costs. Future Energy was able to cut the price of its Fusilliscope by 50%.⁷² The capital costs for constructing a Fusilliscope power generation facility are known to be higher than for a similarly sized solar energy facility.⁷³ Profit-maximizing companies set prices for their products at rates which allow them to secure the, “average cost of production plus a margin of profit.”⁷⁴ When Future Energy received the Grant, it allowed them to lower the price of the Fusilliscope while still achieving the same profit margin. Future Energy would not have been able to aggressively cut its prices without the subsidies that it received from the Eriadorian government. Therefore, SolarTech would not have lost sales of its solar panels to Elektrica if Future Energy was not competitive.

49. Under the “product” theory of causation, subsidies that bring a product closer to market can be evidence of serious prejudice.⁷⁵ The Loan allowed CleanTech to perfect the Fusilliscope technology and the Grant allowed Future Energy to increase production.⁷⁶

⁶⁹ ABR, EC – Large Civil Aircraft, [1120].

⁷⁰ *Ibid*, [1163].

⁷¹ *Ibid*, [1220].

⁷² Problem, [14].

⁷³ Clarification, [94].

⁷⁴ ABR, EC – Large Civil Aircraft, [1260].

⁷⁵ *Ibid*, [1260].

⁷⁶ Problem, [7,12].

Without these two subsidies, Future Energy would never have been able to offer the Fusilliscopes to Elektrica. The result of these measures was that Fusilliscopes were brought “to market” faster than would otherwise have been possible. In a hypothetical situation where the Loan and the Grant are removed, Elektrica would not have had the option to purchase Fusilliscopes at the price they paid. They would have been forced to purchase the solar panels offered by SolarTech or another renewable energy supplier. Given that Elektrica had a Memorandum of Understanding with SolarTech, it is unlikely that they would have chosen another supplier absent the 50% discount offered by Future Energy.

IV. THE PURCHASE AGREEMENT BETWEEN FUTURE ENERGY AND EEC IS AN ACTIONABLE SUBSIDY THAT VIOLATES ARTICLE 5(C) OF THE SCM AGREEMENT.

50. The Purchase Agreement between Future Energy and the EEC, made pursuant to the FIT Scheme, is an actionable subsidy that causes serious prejudice to the Bordurian economy. Specifically, a subsidy that is specific will be actionable where it displaces the imports of a like product of another Member into the market of the subsidizing member.⁷⁷ In this instance, (a) the Purchase Agreement is a *subsidy*, (b) granted to a *specific* enterprise, (c) which causes serious prejudice by *displacing* the import of electricity from Borduria into Eriador.

a. The Purchase Agreement, made pursuant to the Eriadorian FIT Scheme, is a subsidy

51. The Purchase Agreement is a subsidy within the meaning of Article 1 of the *SCM* because: (i) the Purchase Agreement is a financial contribution; (ii) granted by a government agency; (iii) which conferred a benefit to Future Energy.

i. The Purchase Agreement is a financial contribution

52. A financial contribution will be found where the government purchases goods.⁷⁸ In particular, the procurement of electricity by a government constitutes a purchase of goods.⁷⁹

53. The Purchase Agreement was awarded to Future Energy pursuant to the Eriadorian government’s FIT scheme.⁸⁰ The terms of this agreement were that Future Energy would

⁷⁷ *SCM*, art 6.3(a).

⁷⁸ *SCM*, art 1.1(a)(1)(iii).

⁷⁹ PR, Canada – Renewable Energy, [7.168]; Charnovitz and Fischer (2014), 19; D’Orsi (2014), 704.

⁸⁰ Problem, [11].

be paid a guaranteed price for all electricity produced by its Fusilliscopes for a period of thirty years. Therefore, the Eriadorian government made a financial contribution to Future Energy.

ii. The Purchase Agreement was awarded by the Eriadorian government

54. The Eriadorian government implement the FIT Scheme pursuant to a Direction by the Ministry of Commerce in the exercise of the Ministry's statutory authority.⁸¹ The EEC was subsequently tasked to act as the agency responsible for awarding long-term purchase agreements pursuant to the FIT Scheme. Consequently, the FIT Scheme represents a concerted effort by Eriador to subsidize its domestic cold fusion sector.

iii. Future Energy received a benefit from the FIT Scheme.

55. A benefit will be conferred where the recipient of a financial contribution is placed in a more advantageous position than would have been the case but for the financial contribution.⁸² The first stage of a benefit analysis requires that a relevant market be defined for the purposes of conducting a benchmark comparison.⁸³ The second stage of the analysis must determine whether the recipient is better off than they would have been in comparison with the prevailing conditions in the marketplace.⁸⁴

56. The benchmark comparison is made in relation to the government defined-energy supply mix.⁸⁵ In Eriador, the government is seeking to limit its dependence on fossil fuels by increasing its reliance on renewable energy sources.⁸⁶ Eriador adopted a number of measures to increase the proportion of renewable energy in the energy sector.⁸⁷ Specifically, Eriador mandated that 30% of its energy supply mix would come from renewable sources. This target was exceeded in 2015, as 41% of the Eriadorian energy supply mix came from renewable energy, of which 36% was from cold fusion produced by Future Energy.⁸⁸ For the purposes of the benefit analysis, the benchmark comparison should therefore be made between Future Energy and the other renewable energy generators that supply electricity to the Eriadorian energy grid.

⁸¹ Problem [11].

⁸² ABR, Canada – Renewable Energy, [5.246]; Pal (2014), 130; Rubini (2014), 910.

⁸³ ABR, Canada – Aircraft, [149]; ABR, Canada – Renewable Energy, [5.169].

⁸⁴ ABR, EC – Large Civil Aircraft, [873]; PR, US – Large Civil Aircraft (2nd Complaint), [7.475].

⁸⁵ ABR, Canada – Renewable Energy, [5.227]; Pal (2014), 128.

⁸⁶ Problem, [1].

⁸⁷ Problem, [2].

⁸⁸ Clarification, [3].

57. Future Energy received a financial contribution more favourable than what is provided to other renewable energy producers in Eriador. An analysis of the methodology used to establish the price given to Future Energy reveals that cold fusion was remunerated at a higher rate than other renewable energy providers in the Eriadorian market. Specifically, the guaranteed price given to Future Energy contained a premium above the average wholesale electricity price granted to other renewable energy producers in the market.⁸⁹ Consequently, Future Energy received a benefit from the long term purchase agreement pursuant to the Eriadorian FIT Scheme.
58. By using “price-discovery mechanisms”, Eriador could have demonstrated that contracts awarded pursuant to the FIT Scheme were limited to adequate remuneration.⁹⁰ Price-discovery mechanisms include practices such as competitive bidding or the negotiation of prices. Practices such as these would have ensured that “the price paid by the government is the lowest possible price offered by a willing supply contractor.”⁹¹
59. In this instance, there is no evidence that Eriador used any price-discovery mechanism in awarding contracts under the FIT Scheme. Given that Future Energy is the only producer of cold fusion in Eriador, it is unlikely that any kind of competitive bidding process was undertaken. Additionally, prices awarded pursuant to the FIT Scheme were not negotiated between the government and the supplier but were rather designed by the government itself.⁹² Consequently, the Eriadorian government has failed to implement any kind of measures to ensure that prices awarded pursuant to the FIT Scheme are limited to adequate remuneration.

b. The Purchase Agreement was given to a specific enterprise

60. A subsidy will be specific where it “expressly and unambiguously restricts the availability of the subsidy” to a certain enterprise or industry.⁹³
61. The FIT Scheme was created “pursuant to a Direction from the Ministry of Commerce in the exercise of its statutory authority.”⁹⁴ The purpose of the FIT Scheme was to increase the supply of electricity from cold fusion into the Eriadorian energy grid. Accordingly, the FIT Scheme was restricted to only those enterprises that produced electricity from

⁸⁹ Problem, [11].

⁹⁰ ABR, Canada – Renewable Energy, [5.228]; Charnovitz and Fischer (2014), 34.

⁹¹ ABR, Canada – Renewable Energy [5.228].

⁹² Problem [11].

⁹³ *SCM*, art 2.1(a); Casier and Moerenhout (2013), 5.

⁹⁴ Problem, [11].

cold fusion. Future Energy is the only company in Eriador that has access to the cold fusion technology.⁹⁵ Accordingly, access to the FIT Scheme was provided to a specific enterprise.

c. The FIT Scheme displaces the import of electricity from Borduria into Eriador

62. The FIT Scheme causes serious prejudice to the Bordurian economy within the meaning of Article 6.3(a) of the *SCM* because: (i) Bordurian imports of electricity into Eriador were displaced; (ii) Bordurian and Eriadorian electricity were competing in the same market; and, (iii) the displacement of Bordurian energy was caused by subsidies given to Future Energy.

i. Bordurian imports of electricity into Eriador were displaced

63. Displacement refers to an “economic mechanism in which exports of a like product are replaced by the sales of the subsidized product.”⁹⁶ A complainant must demonstrate that it has lost export sales that it would have otherwise made in the absence of the subsidy.⁹⁷ This displacement of export sales can be demonstrated by an analysis of market data. A decline in market share that corresponds with the introduction of a comparable, subsidised product is indicative of displacement.⁹⁸

64. In 2010, when Future Energy received the Purchase Agreement from EEC, the Borduria Electricity Corporation and Electricity Borduria had 20% and 30% of the Eriadorian electricity market respectively.⁹⁹ By contrast, Future Energy only had 2% of the Eriadorian electricity market. However, after five years, the market share of the two Bordurian electricity companies declined to 11% and 12% whereas Future Energy’s share of the Eriadorian electricity market increased to 36%. Based on this data, the Purchase Agreement given to Future Energy displaced the import of electricity from Borduria.

ii. Bordurian and Eriadorian electricity are competing in the same market

65. A “market” within the context of Article 6.3(a) of the *SCM* is a geographical area where there is demand for like products.¹⁰⁰ In *EC – Large Civil Aircraft*, the Appellate Body conducted an objective assessment of the competitive relationship between two like

⁹⁵ Problem, [12]; Clarification, [41].

⁹⁶ ABR, US – Large Civil Aircraft (2nd Complaint), [1071]; ABR, EC – Large Civil Aircraft, [1119].

⁹⁷ PR, Indonesia – Autos, [14.209].

⁹⁸ PR, Indonesia – Autos, [14.211].

⁹⁹ Problem, [13].

¹⁰⁰ ABR, US – Upland Cotton, [404].

products in order to make a finding of displacement under Article 6.3(a) of the *SCM*.¹⁰¹ In this regard, two products will be held to be “like products” where they are substitutable within the same market.

66. Electricity generated by Bordurian energy producers competed for market share with domestically produced energy in Eriador.¹⁰² Accordingly, the common market in this instance is the Eriadorian electricity market.

67. In Eriador, electricity produced by Future Energy was competitive and thus substitutable with electricity provided by the Bordurian electricity producers. The relative increase in Future Energy’s market share in combination with the decrease in the Bordurian producer’s market share is evidence of demand-side substitutability. As a consequence, cold fusion energy produced by the Fusillscope and electricity produced by the Bordurian coal-powered plants are “like products” within the meaning of Article 6.3(a) of the *SCM*.

iii. The displacement of Bordurian energy was caused by subsidies given to Future Energy

68. There must be a genuine and substantial link of cause and effect between the impugned subsidy and the relevant market phenomena.¹⁰³ However, the subsidy need not be the sole or the only substantial cause of displacement.¹⁰⁴ The close correlation in time between the introduction of a subsidized good and the drop in market share of a competitive, imported product is sufficient evidence of a causal link between the two phenomena.¹⁰⁵

69. The import of Bordurian energy into Eriador declined beginning with the introduction of the FIT Scheme. This decline corresponded with an increase of cold fusion into the Eriadorian energy supply mix. As a consequence, the correlation of data within the Eriadorian energy market is sufficient to prove that subsidies granted to the Future Energy caused the displacement of imports of Bordurian energy.

¹⁰¹ ABR, EC – Large Civil Aircraft, [1123]; Pal (2014), 140.

¹⁰² Problem, [13].

¹⁰³ ABR, US – Upland Cotton, [438]; ABR, EC – Large Civil Aircraft, [1231].

¹⁰⁴ ABR, US – Large Civil Aircraft (2nd complaint), [913].

¹⁰⁵ PR, Indonesia – Autos, [14.214].

Request for Findings

70. For the above stated reasons, Borduria requests that the Panel finds:

1. That the Innovation for the Future Grant is a prohibited export subsidy in accordance with Art 3.1 of the *SCM*.
2. That the Innovation for the Future Grant and the Eribank Loan collectively are actionable subsidies that violate Arts. 5(c) and 6.3(c) of the *SCM*.
3. That the Purchase Agreement concluded pursuant to the FIT Scheme is an actionable subsidy in accordance with Art. 5(c) and 6.3(a) of the *SCM*.