

**ELSA Moot Court Competition (EMC2)  
on WTO Law  
Case 2015-2016**

***Eriador – Measures affecting the electricity sector***

by Andrew Lang

Professor of Law in the Law Department of the London School of Economics

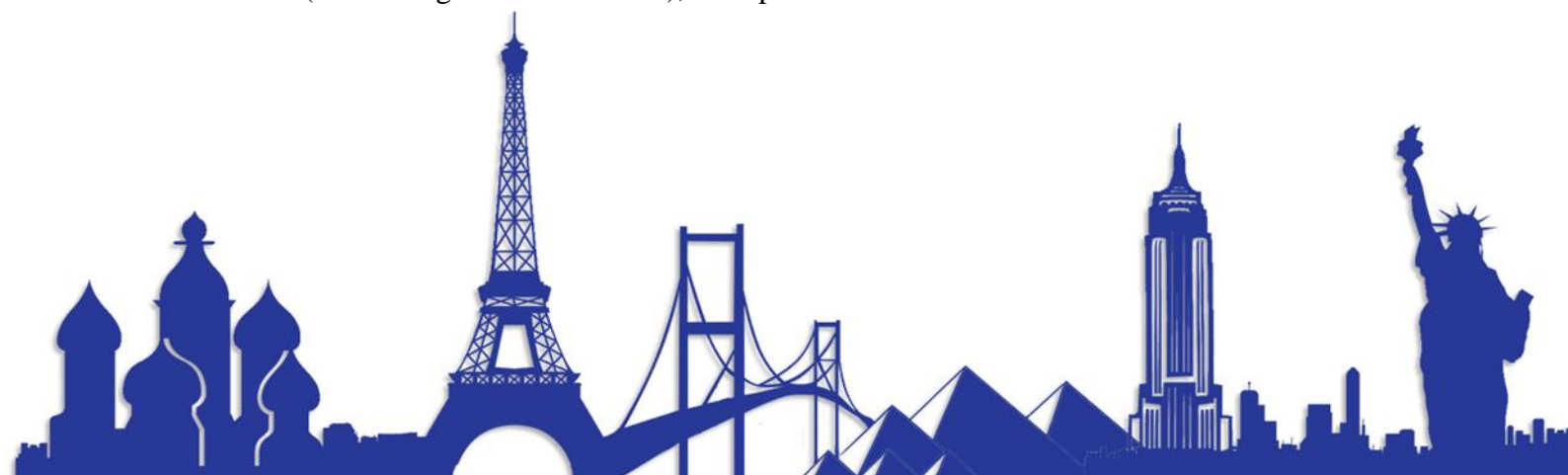
1. Eriador is a major industrialised country, and a Member of the WTO, which is actively seeking to limit its dependence on fossil fuels, and to move its economy towards full reliance on sustainable and renewable energy sources. It is a party to the Framework Convention on the Promotion of Renewable Energy 2010 ('FCPRE'), a large multilateral treaty with 173 states parties. 145 countries are both WTO Members and states parties to the FCPRE. The Preamble to the FCPRE reads:

*Recognising* that existing global energy markets are distorted, due to the failure of such markets to internalise the full cost of carbon,

while Article 11 requires each states party to 'use all available means to encourage the rapid development of renewable energy, with a view to ensuring that at least half of its population's energy needs are met by renewable energy suppliers by 2020'.

2. Electricity generation facilities in Eriador are all privately owned, and include plants representing a wide range of generation technologies (coal, natural gas, nuclear, solar, wind, tidal, hydro). These electricity generators, as well as some foreign suppliers, sell their energy to the Eriadorian Electricity Corporation (EEC), a government agency whose function is to administer the day-to-day functioning of the grid in the interests of stability and efficiency. The EEC then sells the energy directly to consumers. The EEC is under an obligation to ensure that a specified (and gradually increasing) proportion of the electricity it purchases is generated from renewable sources. In 2015, the mandated proportion was 30%, and the actually achieved proportion was 31%.

3. Prices at the wholesale level are set by a combination of long-term contracts of 20 to 30 years duration (accounting for one third of supply), medium-term contracts of 5 to 15 years duration (accounting for another third), and spot market transactions for the remainder.



Contracts are awarded through open competitive tendering processes. Prices in spot markets are set via the auction method.

4. CleanTech is a large technology company based in Eriador, which specialises in the development and commercialisation of cutting edge, innovative technologies for the renewable energy sector.

5. For many years, CleanTech has been conducting research into cold fusion, a means of producing energy through nuclear reaction at, or close to, room temperature, without the toxic by-products associated with current nuclear (fission) technology. This research has been very successful. In just over a decade, CleanTech managed to develop cold fusion technology close to the point of commercialisation, most significantly through the invention of the Fusillscope, a revolutionary device which enables users temporarily to overcome repulsive forces between atomic particles, at comparatively low energy cost.

6. In 2008, CleanTech established a production facility for the Fusillscope. Initially, it sought funds for this project from private investors, but was unsuccessful due to the project's extremely high risk profile, the unproven nature of the technology, uncertainty concerning the anticipated costs of electricity generation using the technology, and the huge capital investment needed. Instead, it obtained a \$750m loan on favourable terms from Eribank, an entity majority owned by the Eriadorian state. Eribank is governed by a board of directors appointed by the Eriadorian Ministry of Commerce, but with each appointee acting in his or her independent capacity. It is run largely on a commercial basis, but by its constitution is required to conduct its business 'having regard to the strategic policy priorities of the Eriadorian state' and 'in consultation, as appropriate, with relevant government ministries'. In the case of the loan to CleanTech, Eribank consulted with the Eriadorian Ministry of the Environment as to their view of the commercial viability of this new technology, as well as its significance for Eriadorian economy generally. The Ministry of the Environment expressly supported the loan, while acknowledging that the final decision whether or not to grant it was for Eribank itself. Eribank is also, separately, used on occasion as the vehicle through which the Eriadorian government disburses funds to Eriadorian businesses under government grant programs.

7. Over the next 12 months, CleanTech perfected its production process, made minor amendments to the design of the Fusillscope, and developed relationships with potential users of the technology, as it prepared this division of its business for sale. Then, in early 2009, CleanTech sold the entire Fusillscope business – including the production facility, as well as all intellectual property rights to the technology – to Future Energy, a company



incorporated in Eriador whose core business is the construction and operation of power plants in Eriador. Future Energy is unrelated to CleanTech, and the purchase of the Fusillscope business was at a price which reflected its full market value, as certified by an independent auditor.

8. Future Energy quickly integrated the Fusillscope into its domestic power generation facilities, and also began selling the Fusillscope to electricity suppliers operating in foreign markets. To safeguard its position as market leader in the commercialisation of cold fusion technology in Eriador, it did not sell or license the Fusillscope to other generators of electricity operating in Eriador.

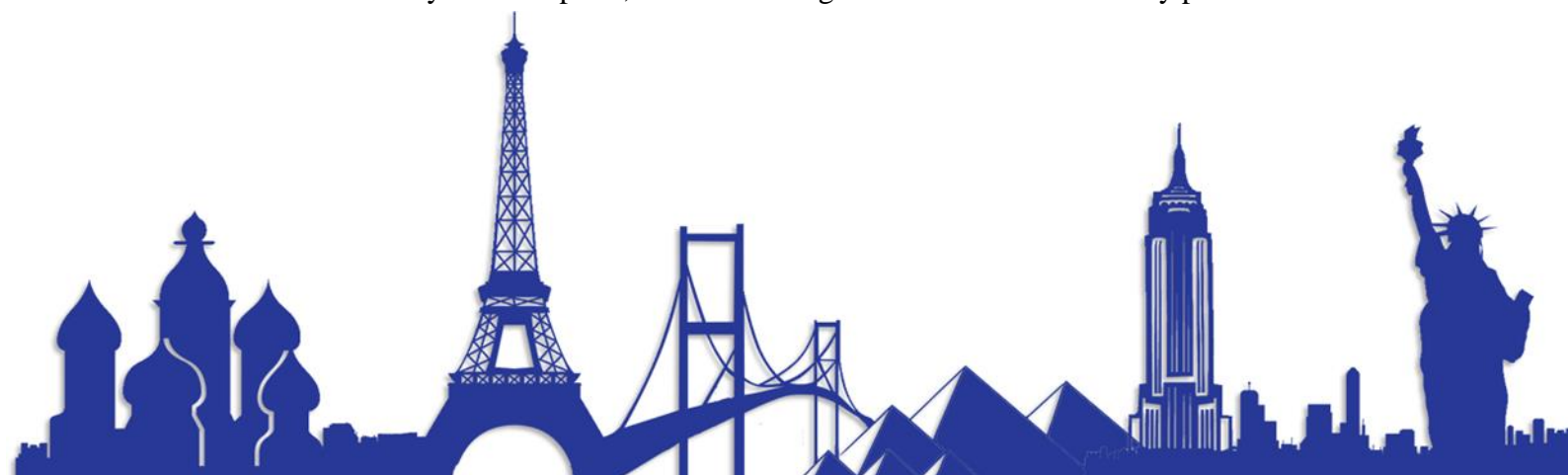
9. However, it soon became clear that the costs of producing electricity using the Fusillscope were considerably higher than the wholesale price of electricity in the Eriadorian electricity market. It consequently turned to the Eriadorian government for assistance.

10. Convinced of the long term viability of this technology, and of the potential significance of exports of Fusillscopes for the Eriadorian economy, Future Energy was awarded a \$500m grant under the Eriadorian government's 'Innovation for the Future' program. Open to any business operating in any sector of the Eriadorian economy, this program seeks to provide financial assistance to projects which promise to make a significant contribution to the sustainable growth and global integration of the Eriadorian economy. Over the three years it has been running, 90% of funds disbursed under this scheme have gone to companies operating in the renewable energy sector.

11. In addition, at the same time, the Eriadorian government implemented a new feed-in-tariff scheme to increase the supply of electricity from cold fusion, pursuant to a Direction from the Ministry of Commerce in the exercise of its statutory authority. Participants in the scheme are awarded contracts with the EEC, containing the same standard terms, and of the same duration, as long term purchase agreements between the EEC and other providers of both renewable and non-renewable energy. The only salient difference is the price offered. Under this scheme, Future Energy was awarded a long term purchase agreement with EEC, under which EEC would pay a guaranteed price to Future Energy, for all electricity produced from its cold fusion plants, for a period of 30 years. The guaranteed price under the contract was set according to the following formula:

$$C = M + X*Y$$

where C is the daily contract price, M is the average unit wholesale electricity price in

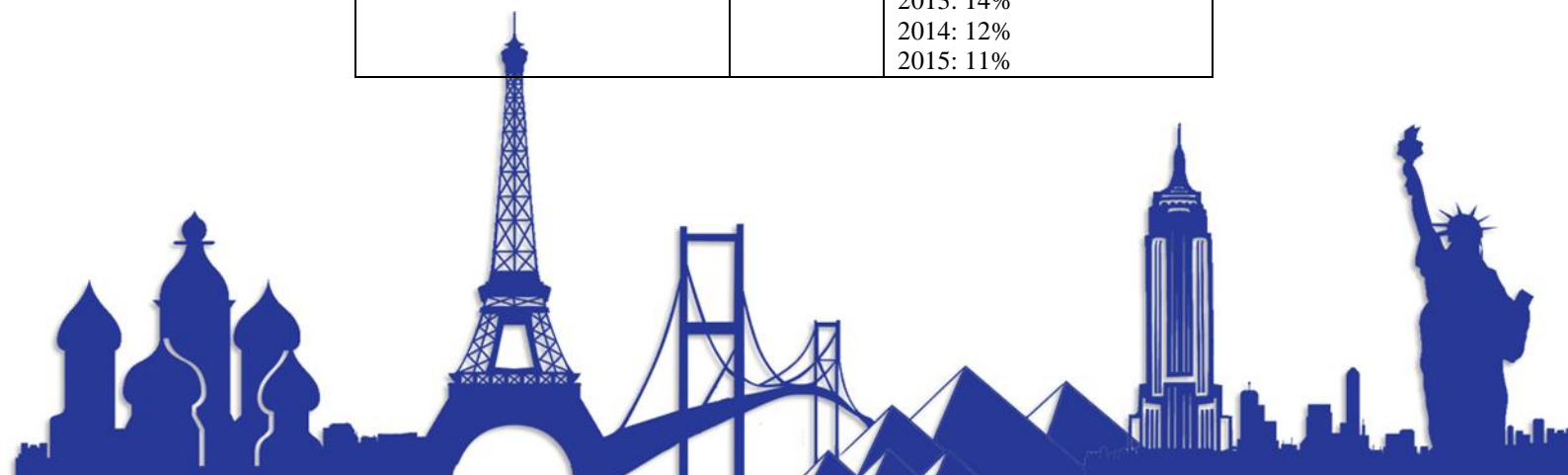


Eriador for that day, X is the average number of tons of carbon emitted in the production of one unit of electricity placed on the wholesale market, and Y is the true social cost of one ton of carbon, initially set at \$152/ton by an independent agency on the basis of peer-reviewed papers and international practice, but periodically reviewed. The formula was designed to ensure that the price paid to Future Energy closely approximates the 'true' cost of electricity – namely, what the wholesale cost of electricity would be, if the full social costs of carbon were fully internalised. The Direction of the Ministry of Commerce establishing the scheme notes that it has been adopted in accordance with Eriador's obligations under Article 11 of the FCPRE.

12. In the five years since these measures were put in place, Future Energy has significantly increased its market share in Eriador's wholesale electricity market, from 2% in 2010 to 36% in 2015. It has built several more generation facilities using cold fusion technology, and sells all its energy from them into the grid under the terms of the long term contractual agreement outlined above. In addition, it has spent \$500m constructing and commissioning an additional production facility for Fusilliscopes, which has allowed it massively to expand its export sales of Fusilliscopes. It now exports this technology under licence to electricity producers in over 50 countries worldwide. It does not sell any Fusilliscopes domestically, in part because that may increase the number of suppliers competing for contracts under the government's feed-in-tariff scheme.

13. Borduria is an industrialised country, and Member of the WTO, which shares a border with Eriador. Like Eriador, it is a party to the FCPRE. The electrical grids of the two countries are interconnected, such that Bordurian electricity generators are able to transmit their electricity into the Eriadorian grid, and sell into the Eriadorian market. Borduria's two primary electricity producers, and its only electricity exporters – both of whom still operate traditional coal-fired power stations – have complained that their share of the wholesale electricity market in Eriador has declined precipitously since 2010, from 50% to just 23% in 2015, just as Future Energy's market share has risen, in accordance with the following table.

Company	Nationality	Market Share
Future Energy	Eriador	2010: 2% 2011: 3% 2012: 15% 2013: 22% 2014: 29% 2015: 36%
Borduria Energy Corporation	Borduria	2010: 20% 2011: 20% 2012: 16% 2013: 14% 2014: 12% 2015: 11%



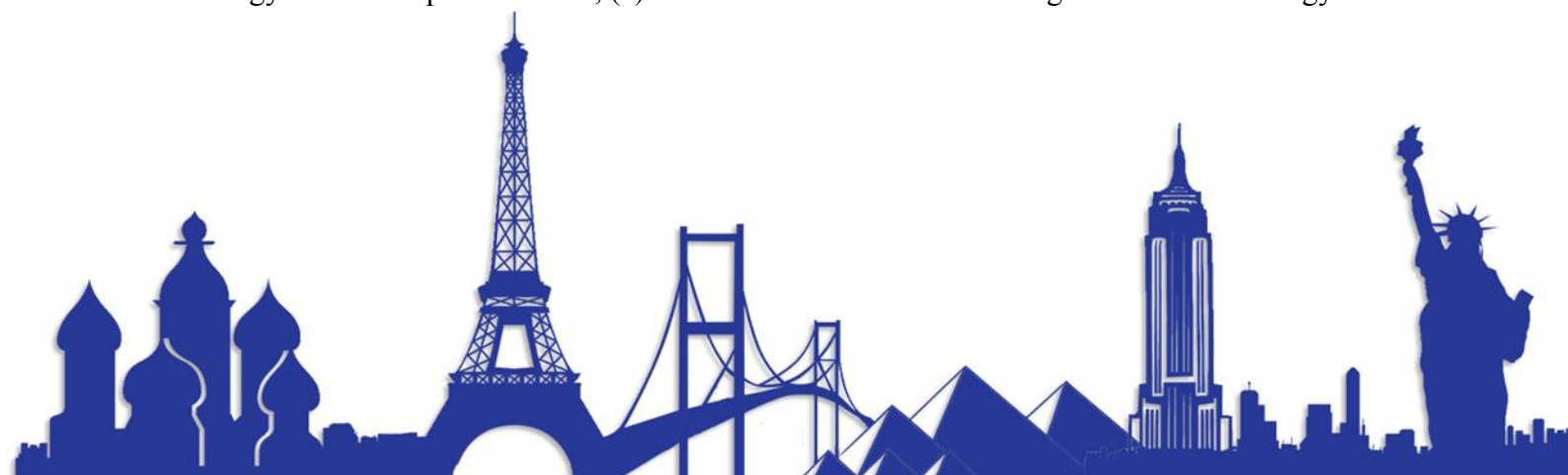
Electricity Borduria	Borduria	2010: 30% 2011: 30% 2012: 26% 2013: 21% 2014: 17% 2015: 12%
Other	Eriador	2010: 46% 2011: 45% 2012: 41% 2013: 41% 2014: 41% 2015: 40%
Other	Other	2010: 2% 2011: 2% 2012: 2% 2013: 2% 2014: 1% 2015: 1%

No company other than Future Energy has gained market share in that period, and the size of the overall market has stayed essentially stable over the period. The Bordurian suppliers complain also that their contractual arrangements with the Eriadorian government for the wholesale supply of electricity into the Eriadorian grid have not been renewed, with five major contracts expiring in 2012, 2013 and 2014 (two for the Bordurian Energy Corporation, and three for Electricity Borduria). They note that in its Annual Reports of Operations, the EEC has reported that this was the direct result of the unexpectedly large size and costs of the long-term contracts put in place with Future Energy.

14. Borduria is also home to SolarTech, a world leading company specialising in the production and export of solar panels. In late 2012, it signed a Memorandum of Understanding with Elektrica, an electricity generation company based in the state of Carpathia, for the supply of 40,000 solar panel units on terms to be agreed. In 2013, Elektrica broke off negotiations in their final stages, informing SolarTech that they had been approached by Future Energy with an offer for the sale of Fusilliscopes at 50% of the price at which they would normally be sold, and as a result had decided on the basis of cost to refocus their investments away from the creation of new solar energy facilities, towards cold fusion.

### Legal Claims

15. Borduria requests consultations with the government of Eriador, in respect of: (a) the loan by Eribank to CleanTech; (b) the FIT scheme, and the contract between EEC and Future Energy concluded pursuant to it; (c) the 'Innovation for the Future' grant to Future Energy.



The Request was accompanied by a Statement of Available Evidence in the form required by Articles 4.2 and 7.2 of the *SCM Agreement*. During the course of these consultations, both parties agreed to proceed on the basis that electricity is a product, not a service. Eriador also made clear that, it does not contest that the Eribank loan would confer a benefit within the meaning of Article 1.1(b) if it were established that the loan was granted by a public body. The parties could not resolve their disagreement concerning the legal relevance to this dispute of the FCPRE.

16. Borduria considers that these measures constitute specific subsidies within the meaning of Article 1 of the *SCM Agreement*, and claims that they are inconsistent with Eriador's obligations under that agreement as follows:

- a. that the 'Innovation for the Future' grant is inconsistent with Article 3.1(a) of the *SCM Agreement* because it is contingent in fact upon the export by Future Energy of equipment for renewable energy generation;
- b. that the loan by Eribank and the 'Innovation for the Future' grant cause serious prejudice to the interests of Borduria within the meaning of Article 5(c) of the *SCM Agreement* and Article XVI:1 of the GATT 1994, as they have resulted in lost sales of solar panels in the market for energy generation equipment in Carpathia within the meaning of Article 6.3(c) of the *SCM Agreement*;
- c. that the long term purchase agreement between Future Energy and EEC, concluded pursuant to the FIT Scheme, causes serious prejudice to the interests of Borduria within the meaning of Article 5(c) of the *SCM Agreement* and Article XVI:1 of the GATT 1994, as it has displaced and impeded imports of electricity from Borduria into Eriador within the meaning of Article 6.3(a) of the *SCM Agreement*.

### **Selected Relevant Case Law**

Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011

Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R.



Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014.

Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R and Add.1, adopted 19 December 2014, as modified by Appellate Body Report WT/DS436/AB/R.

Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013.

Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/R and Add.1 / WT/DS426/R and Add.1, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R .

Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011.

Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R.

Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012

Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R.

Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000

Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R and Corr.2, adopted 7 June 2000, upheld by Appellate Body Report WT/DS138/AB/R



Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015

Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006

Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003

