



The European Law Students' Association

Team: 031C

**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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LIST OF ABBREVIATIONS

AB	Appellate Body
ABR	Appellate Body Report
ARO	Annual Report of Operations
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 2010
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 is inconsistent with Arts.1 and 3.1(a) SCM, as it is in fact contingent upon export performance, and therefore a prohibited subsidy. Consequently, it is also specific under Art.2.3 SCM.

- The “IFF” grant amounts to a subsidy under Art. 1 SCM:
 - first, it is a financial contribution by the government of Eriador, in the form of direct transfer funds;
 - second, it confers a benefit to Future Energy (FE).
- It is tied, in the meaning of footnote 4 SCM, to FE’s actual and anticipated export performance:
 - first, the design and structure of the “IFF” program points towards dependence on exports;
 - second, the modalities used by the grantor connote the latter’s focus on exporters;
 - finally, an assessment of the factual circumstances surrounding the awarding of the grant illustrates export contingency.
- FE had already exports at the moment of the granting, and also Eriador anticipated a further increase in exports.

Claim II:

The Loan by Eribank and the “IFF” grant amount to actionable subsidies under the SCM Agreement.

- The Loan by Eribank is a specific subsidy:
 - first, it is a financial contribution under Art.1.1(a) SCM in the form of direct transfer of funds by Eribank, a public body of the Eriadorian state, or alternatively a private body entrusted or directed by the state;
 - second, the benefit initially conferred to CleanTech passed-through to FE;
 - finally, the Loan de jure specific under Art.2.1(a) SCM.
- The “IFF” grant is a specific subsidy:
 - first, it is a subsidy under Art.1.1 SCM, according to the analysis under Claim I;

- second, even in the unlikely event that it is not found to be export contingent, it is *de facto* specific under Art.2.1(c) SCM.
- The Loan and the grant have caused serious prejudice in the form of lost sales to the interests of Borduria under Arts.5(c) and 6.3(c) SCM:
 - first, the Fusillscope and the solar panels compete in the same market and SolarTech lost 40.000 units' sales therein, a loss significant for the latter;
 - second, the Loan and the grant gave the same competitive advantage to FE, thus the measures genuinely and substantially caused FE's 50% price discount, and further the lost sales.

Claim III:

The Long Term Purchase Agreement (LTPA), concluded pursuant to the Feed-in-Tariff (FIT) scheme, amounts to an actionable subsidy under the SCM Agreement.

- The LTPA is a subsidy in the meaning of Art. 1 SCM:
 - the LTPA is an income or price support that almost self evidently confers a benefit to FE;
 - alternatively, the LTPA is a financial contribution in the form of a purchase of goods. A benefit is thereby conferred provided a more than adequate remuneration to FE under the LTPA by virtue of an analysis based on the relevant single wholesale electricity market.
- The LTPA is a *de jure* specific subsidy under Art.2.1(a) SCM.
- The LTPA causes 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 like products;
 - second, displacement or impedance occurred in the Eriadorian market;
 - third, the market phenomena are the effect of the LTPA.

STATEMENT OF FACTS

1. Eriador and Borduria are neighbor industrialised Members-states to the WTO and parties to the Framework Convention on the Promotion of Renewable Energy (FCPRE), interconnected with electrical grids. The Eriadorian Electricity Corporation (EEC), an Eriadorian government agency, administers the function of the domestic grid under a supply-mix. It concludes electricity supply contracts with private generators and distributes electricity to retail consumers.

2. CleanTech, an Eriadorian technology company, invented a cold fusion device, the Fusilliscope. Yet, it soon reached a financial stalemate. The initiative only managed to survive due to a \$750m government Loan awarded to CleanTech by Eribank, an entity owned and controlled by Eriador, after a full front approval of Eriadorian Ministry of Environment. Using the funds of Eribank, CleanTech succeeded to improve the Fusilliscope and began its commercialization. Shortly after, it sold the cold fusion division of business to FE, an Eriadorian energy company. The latter rapidly became a market leader due to its choice to never sell the device to any possible domestic competitor.

3. Eventually, the device's inherent disadvantages surfaced and the company had to formally seek governmental funding. Eriador, persuaded by FE's plan to massively boost exports and Fusilliscope's export potentiality, awarded FE a \$500m grant under the "IFF" program. A government scheme that highly favored the RES sector. Meanwhile, in 2012 the Eriadorian government introduced an FIT scheme that offered only to FE a no-cap LTPA setting a significantly above-market guaranteed price.

4. FE, due the grant, built and operated a new production facility for Fusilliscopes, which massively increased its export capabilities. In addition, in the three following years, the LTPA malignly diminished the market shares held by Borduria's primary electricity producers and exporters in Eriador, Borduria Energy Corporation and Electricity Borduria. At that time, the market's trade volume remained steady and FE was the only company that gained market share. In addition, main contracts held by Bordurians suppliers were not renewed.

5. In 2013, SolarTech, a Bordurian world leading solar PV enterprise, concluded an MoU with Elektrika, a carpathian electricity generation company, which was cancelled during the final stages of the negotiations due to FE's offer for the vending of the highly subsidized Fusilliscopes in 50% discount.

IDENTIFICATION OF THE MEASURES

Measure 1: The \$750m favorable Loan awarded to CleanTech by Eribank.

Measure 2: The non-reciprocal \$500m “IFF” grant disbursed to FE.

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

LEGAL PLEADINGS

I. THE “IFF” GRANT IS INCONSISTENT WITH ART. 3.1(A) OF SCM

1. Pursuant to Art.3.1(a) SCM, non-agricultural subsidies are prohibited when “*contingent, in law or in fact[...], whether solely or as one of several other conditions, upon export performance*”, including those illustrated in the Annex I SCM Illustrative List.¹ Footnote 4 SCM, attached to Article 3.1(a), describes the relationship of *de facto* contingency by stating that the grant of a subsidy must be “*in fact tied to actual or anticipated exportation or export earnings*”. Moreover, and pursuant to Arts.1.2 and 2.3 SCM, an irrefutable presumption of specificity applies in the case of export subsidies.²

2. In our case, following the structure used by the AB in *Canada-Aircraft*,³ Eriador's non-reciprocal \$500m “IFF” grant to FE constitutes a prohibited export subsidy under Art. 3.1(a) SCM and footnote 4, since: *first*, a “*subsidy*” in light of Art. 1 SCM has been granted (A); *second*, the “*subsidy*” which is “*tied to*” (B); “*actual or anticipated exportation*” (C). Thus, by virtue of to Art.2.3 SCM, the “IFF” grant is “*deemed to be specific*” for the purposes of the SCM.

A. The “IFF” grant amounts to a “subsidy” in the meaning of Art. 1 SCM

3. The first element listed by the AB in *Canada-Aircraft* is the requirement to demonstrate that a subsidy has indeed been granted.⁴ The grain of WTO jurisprudence verifies that “*financial contribution by a government or any public body*” and “*benefit*” under Art.1.1 SCM are two separate and cumulative elements that determine whether a subsidy exists.⁵ *Ergo*, the “IFF” grant indeed constitutes a financial contribution (1) conferring a benefit (2).

1. The “IFF” grant is a “financial contribution” by Eriador under Art. 1.1 (a)(1) SCM

4. Government practice directly transferring funds under no repayment obligation in the form of a *grant* is a *par excellence* form of a financial contribution under Art.1.1(a)(i) SCM.⁶

The AB in *US-Aircraft* introduced the concept of a “*conditional grant*”, noting that a

¹ *Adamantopoulos & Akritidis* (2008), 478; *Cai* (2009), 870; *Coppens* (2014), 117.

² PR, *Indonesia-Autos* [14.155]; PR, *US-Cotton Subsidies* [7.1153]; *Coppens* (2014), 101.

³ ABR, *Canada-Aircraft* [162-180].

⁴ ABR, *Canada-Aircraft* [170]; PR, *EC-Aircraft* [7.648]; .PR, *US-Aircraft* [7.1531];.

⁵ PR, *Brazil-Aircraft* [7.24]; ABR, *Brazil-Aircraft* [157]; PR, *US-Export Restraints* [8.42].

⁶ PR, *US-Export Restraints* [8.65]; ABR, *US-DRAMS* [108]; *Adamantopoulos* (2008), 428; *Mavroidis et al.* (2008), 304; *Hagermeyer* (2014), 268.

requirement to utilize the received funds towards a certain goal does not preclude a finding under Art. 1(a)(i) SCM.⁷ *In casu*, FE received an unconditional \$500m grant by the State of Eriador under the “IFF” program, with no repayment obligation.⁸ Obviously, this \$500m grant constitutes a financial contribution to FE, by Eriador directly.

2. The “IFF” grant confers a "benefit" to FE under Art. 1.1(b) SCM

5. A "benefit" exists when the “*financial contribution*” makes the recipient "better off" than it would have been in the market absent the subsidy.⁹ WTO jurisprudence verifies that a grant self-evidently confers a benefit to the recipient.¹⁰ For instance, it was accepted beyond doubt in *Australia-Leather* that the 30\$ grant conferred a benefit to Howe.¹¹ *A fortiori*, this applies also with the \$500m “IFF” grant from Eriador to FE in the case at hand.¹²

B. The “IFF” grant was “tied to” actual and expected exportation

6. The second substantive element in footnote 4 of the SCM Agreement is “*tied to*”.¹³ This term displays a relationship of *conditionality* between the granting of the subsidy and the exportation, stemming from the total configuration of the facts.¹⁴ The required standard of dependence is met when the *conditions of supply and demand in export and domestic market*, distorted by the subsidy, illustrate an incentive towards export.¹⁵ Following the AB's analysis in *EC-Aircraft*, the examination of the design and structure of the “IFF” grant (1), the modalities of its operation (2) and the surrounding factual circumstances (3), all jointly and separately testify that the “IFF” grant was indeed "tied to" FE's export performance.¹⁶

1. The design and the structure of “IFF” program point towards dependence on exports

7. The design and structure of the subsidy should induce the promotion of export performance at the expense of domestic commercial activities. The government's policy reasons of the subsidy, when objectively reviewed, are pertinent to this analysis.¹⁷

8. In *Canada-Aircraft*, the fact that the Technology Partnerships Canada (“TPC”) programme explicitly provided for contributions to specific industrial development projects in order to enable Canadian aerospace and defence industries to "*compete fairly and openly on the world*

⁷ ABR, *US-Aircraft* [616, 617, footnote to 616].

⁸ EMC² Case [10]; Clarifications 22, 25, 27, 130.

⁹ PR, *Canada-Aircraft* [9.112]; ABR, *Canada-Aircraft* [157]; ABR, *US-Aircraft* [662].

¹⁰ PR, *Australia-Leather* [7.45]; PR, *EC-Aircraft* [7.1213, 7.1492]; PR, *US-Aircraft* [7.1362, 7.833].

¹¹ PR, *Australia-Leather* [9.44].

¹² EMC² Case [10]; Clarification 25.

¹³ ABR, *Canada-Aircraft* [171].

¹⁴ ABR, *Canada-Aircraft* [166-167]; ABR, *US- Cotton Subsidies* [572]; ABR, *EC-Aircraft* [1046].

¹⁵ ABR, *EC-Aircraft* [1045]; *Coppens* (2014), 122.

¹⁶ ABR, *EC-Aircraft* [1046, 1051].

¹⁷ PR, *Australia- Leather* [7.231]; ABR, *EC-Aircraft* [1047-1048, 1051]; *Van de Bossche* (2013), 773.

competitive stage", was "*especiallly relevant*" for its *de facto* export contingency findings.¹⁸ Very similarly, the "IFF" program explicitly provides for the injection of funds to projects capable of contributing significantly to the "*global integration of the Eriadorian economy*", i.e. reiterating dependence on export.¹⁹

2. The modalities used connote Eriador's focus on exporters

9. The prescription of eligibility criteria by the grantor establishing an export performance precondition either as such or as applied, connote export contingency.²⁰ The modalities employed by the Eriador associate the distribution of funds under the "IFF" program with three considerations, namely the beneficiaries' track records, their specific plans for the expenditure of the grant and their future plans emphasizing on their contribution to the goals of the program.²¹ In our case, FE's earnings came exclusively from export-dependent transactions on the grounds that domestically it did not sell any Fusillscope.²² Consequently, Eriador's granting authority approved FE's application based solely on its export sales and its plans for the establishment of an export-oriented production facility.

3. The factual circumstances surrounding the grant illustrate export contingency

10. Further, the current factual veil, reflecting market circumstances critical for a contingency finding, displays the granting of an export incentive.²³ First, the grant was given to the sole exporter and producer of the Fusillscope, whose export orientation and unwillingness to proceed to domestic sales, is well-known by the Eriadorian government. Second, the usage of Fussillscopes for domestic generation is finite; there is no domestic market for the vending of Fussillscope.²⁴ Thus, export sales were the only terrain for the absorption of the second major production line.²⁵ Consequently, the *ratio* of the anticipated export sales to domestic sales was more than expected to skyrocket.²⁶

C. FE has actual exports and Eriador expected a rise of exportation

11. The third substantive element in footnote 4 of the SCM Agreement is "*actual or anticipated exportation or export earnings*".²⁷ The AB in *Canada-Aircraft* stated that positive and objective evidence should glean the existence of actual or anticipated exports. When

¹⁸ PR, *Canada-Aircraft* [9.340].

¹⁹ EMC² Case [10]; Clarifications 22, 130.

²⁰ ABR, *Canada-Aircraft* [169]; ABR, *US-FSC (Art.21.5 - EC)* [111]; *Coppens* (2014), 120.

²¹ EMC² Case [10]; Clarifications 22, 130.

²² EMC² Case [8, 10, 12, 13]; Clarifications 1, 22, 33, 130.

²³ ABR, *US-Stainless Steel(Mexico)* [158]; ABR, *EC-Aircraft* [1047]; PR, *Australia-Leather* [9.69];

²⁴ EMC² Case [8, 10]; Clarification 1, 22, 29, 33, 130.

²⁵ PR, *Australia-Leather* [9.67]; PR, *Canada-Aircraft II* [7.372]; *Mavroidis et al* (2008), 418.

²⁶ ABR, *EC-Aircraft* [1048].

²⁷ ABR, *Canada-Aircraft* [172]; *Green & Trebilcock* (2010), 134.

provided the “IFF” grant, FE had already demonstrated actual sales, the majority of its existing production being exported.²⁸ In addition to its actual sales, FE received the “IFF” grant on the basis of the anticipation of its substantial export performance, this being *foreseen* by the granting authority in the first place.²⁹ Moreover, FE had future business plans for the construction of an additional export-oriented production facility for Fusilliscopes.³⁰

II. The Loan by Eribank and the “IFF” Grant are Actionable Subsidies under Arts.5(c) and 6.3(c) of the SCM Agreement in Conjunction with ART.XVI:1 GATT

12. Pursuant to Art.5(c) SCM, non-agricultural subsidies under Arts.1.1 and 2 SCM are actionable when 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, including threat of serious prejudice. Art.6.3(c) SCM defines 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 (A) and the “IFF” grant (B) qualify as specific subsidies under the chapeau of Art.5 SCM that cause “*serious prejudice*” in the form of lost sales (C).³¹

A. The Loan by Eribank

1. The Loan by Eribank amounts to a “subsidy” under Art.1 SCM

13. The Loan by Eribank is a financial contribution in the form of a direct transfer of funds (a) conferring a benefit that passed-through to FE (b).

(a) It is a financial contribution under Art.1.1(a) SCM

i. The Loan by Eribank is a direct transfer of funds under Art.1.1(a)(1)(i) SCM

14. The Loan amounts to one of the forms of direct transfer of funds expressly listed in Art.1.1(a)(1)(i) SCM.³² A *transfer of pecuniary value* is indeed a financial contribution.³³

ii. Eribank is a public body

15. The AB in *US-AD & CVD (China)* noted that an entity featuring core commonalities with the *stricto sensu* government is *vested with governmental authority* and therefore constitutes a public body in the meaning of Art.1.1(a)(1) SCM.³⁴ Eribank consistently provides financial incentives to private actors under government grant programs. No repayment obligations are prescribed;³⁵ hence, said conduct assimilates to governmental rather than private functions.³⁶

²⁸ EMC² Case [8,10];

²⁹ PR, *Canada – Aircraft* [9.343]. ABR, *EC-Aircraft* [1043].

³⁰ Clarifications 1, 22, 29, 33, 130.

³¹ PR, *US-Offset Act (Byrd Amendment)* [7.106]; PR, *US-Cotton Subsidies* [7.1392-7.1395].

³² PR, *Korea-Commercial Vessels* [7.411- 7.412]; ABR, *US- Lumber CVDs Final* [154]; ABR, *US-Aircraft* [613-614]; *Adamantopoulos & Akritidis* (2008), 431.

³³ PR, *Korea-Commercial Vessels* [7.408]; ABR, *Japan-DRAMS* [96].

³⁴ ABR, *US-AD & CVDs (China)* [291, 317]; ABR, *US-Carbon Steel (India)* [4.2]; *Jerjian* (2012), 6.

³⁵ PR, *US-Aircraft* [7.1229]; EMC² Case [6].

16. *Meaningful control* by the government over the entity serves as evidence of governmental authority in the exercise of government related functions.³⁷ The government of Eriador meaningfully controls the conduct of Eribank. In *US-AD/CVD (China)*, China exercised meaningful control over the SOCBs. Complete state ownership, governmentally appointed directors and the pursuit of governmental policies were the formal links assessed.³⁸ These elements furnish the factual surroundings of Eribank. As, the latter is a state-owned entity having its board appointed by the Ministry of Commerce and operating with *regard to the strategic policy priorities of the Eriadorian state*.³⁹ Further, the critical intervention of the Ministry of the Environment in the board's decision-making process, despite the allowed degree of flexibility, reiterates a *meaningful control* finding.⁴⁰

iii. In any event, Eribank was entrusted or directed by the state of Eriador

17. Even accepting the doubtful premise that Eribank is a private body, its actions are indirectly attributable to the government of Eriador under Art.1.1(a)(1)(iv) SCM.⁴¹ Evidence of *entrusting* the responsibility or *directing* the exercise of governmental functions establishes a *demonstrable link* between the government and the private body.⁴² In this case, Eribank was not only *guided* by the government, but further *induced* through ministerial consultations and *threatened* by the legal duty to conform with Eriadorian policies,⁴³ awarded the commercially unreasonable Loan of \$750m to CleanTech.⁴⁴

(b) The benefit conferred by the Loan passed-through to FE

18. The Loan by Eribank was inherited to FE. The uncontested benefit deriving from the Loan conferred to CleanTech evidently flowed to FE.⁴⁵ SCM is silent on the pass-through of the benefit after a change in ownership.⁴⁶ Accordingly, an interpretation of "*benefit*" under Art. 31 VCLT, taking into due account SCM's object and purpose of discouraging subsidies harmful to the other producers,⁴⁷ defines the term as the amelioration of the *competitive*

³⁶ ABR, *US-AD & CVDs (China)* [297, 318]; PR, *Japan-DRAMS* [7.92]; *Rubini* (2012), 543.

³⁷ ABR, *US-AD & CVDs (China)* [318]; ABR, *US-Carbon Steel (India)* [4.10]; *Ding* (2014), 179; *Coppens* (2014), 52.

³⁸ ABR, *US-AD & CVDs (China)* [318, 349, 350, 355]; *Adamantopoulos & Akritidis* (2008), 429.

³⁹ EMC² Case [6]; Clarification 71.

⁴⁰ PR, *Korea-Commercial Vessels* [7.51-7.52]; EMC² Case [6]; Clarification 71, 90.

⁴¹ PR, *US-Export Restraints* [8.53]; ABR, *US-DRAMS* [108, 112].

⁴² ABR, *US-DRAMS* [116]; PR, *EC-DRAMS* [7.119]; AB, *US - Lumber CVDs Final* [52]; ABR, *US-AD & CVD (China)* [302].

⁴³ ABR, *US-DRAMS* [116]; PR, *US-Export Restraints* [8.28]; EMC² Case [6]; Clarification 90, 98.

⁴⁴ ABR, *US-DRAMS* [116]; ABR, *Japan-DRAMS* [138]; EMC² Case [6]; Clarification 84, 93.

⁴⁵ EMC² Case [15]; Clarification 82, 152.

⁴⁶ *Van Damme* (2009), 147.

⁴⁷ *Grossman & Mavroidis* (2003), 186.

position of the recipient.⁴⁸ Therefore, the *enhanced competitive position* should be taken into consideration,⁴⁹ since the wealth criterion of the market value paid qualifies only for a *sunk cost*.⁵⁰ This stems from the fact that the change in ownership does not interrupt the subsidy's *useful life*, which is incorporated in the company's assets.⁵¹ It is for the subsequent competitive advantage that the buyer invests on the business at stake, opting to be recouped through the market return of the full amount of their investment.⁵²

19. In this respect, CleanTech sold the cold fusion division of business at fair market value. Yet, the latter was only shaped by the circumstances of the non-commercialized Fusillscope and the relevant broadly unfavorable opinion of the market. In the near future circumstances were to alter due to the high competitive significance of the technology, owed to its massive export competence and its direct effect on the market's price equilibrium.⁵³

2. The Loan by Eribank amounts to a “specific subsidy” under Art. 2.1(a) SCM

20. The Loan by Eribank is a *de jure* enterprise specific subsidy *explicitly* limited to CleanTech. The limited eligibility stems from the granting authority itself, namely Eribank. For, the latter indulged in discrete lending by individually negotiating the Loan and tailoring at the outset its terms to the needs of the Fusillscope project.⁵⁴

B. The “IFF” grant

1. Analysis under Arts.5(c) and 6.3(c) as an alternative to a finding under 3.1(a) SCM

21. WTO Members are not precluded from challenging the same measure under both prohibited and actionable subsidy claims.⁵⁵ Accordingly, in the unlikely event that the “IFF” grant is not found to be a prohibited export subsidy under Art.3.1(a) SCM, Complainant submits that it has nevertheless caused serious prejudice to the interests of Borduria under Art.5(c) and 6.3(c) SCM, in conjunction with Art.XVI:1 GATT.⁵⁶

(a) The “IFF” grant amounts to a “subsidy” under Art.1 SCM

22. Complainant wishes to adhere to its previous argumentation under section I, concerning the financial contribution by Eriador to FE in the form of the “IFF” grant, and the benefit conferred thereby.

(b) The “IFF” grant amounts to a “specific” subsidy under Art.2.1(c) SCM

⁴⁸ 3.2 DSU; 31.1 VCLT; ABR, *US-Gasoline*, 17; *Grossman & Mavroidis* (2003), 186, 187.

⁴⁹ *Goetz et al.* (1986), 17-32; *Grossman & Mavroidis* (2003), 188.

⁵⁰ *Grossman & Mavroidis* (2003), 198-199; *Coppens* (2014), 472.

⁵¹ ABR, *US-Countervailing Measures (China)* [84]; ABR, *EC-Aircraft* [707]; *Kelly* (2014), 307.

⁵² ABR, *US-Countervailing Measures on EC products* [121-124]; PR, *EC-Aircraft* [7.243].

⁵³ EMC² Case [6, 7, 8, 10].

⁵⁴ PR, *EC-Aircraft* [7.920]; ABR, *US-Aircraft* [748]; EMC² Case [6]; Clarification 71.

⁵⁵ PR, *US- Cotton Subsidies* [7.1193].

⁵⁶ Clarification 13.

23. The “IFF” grant is *de facto* specific to certain industries, namely the renewable energy sector.⁵⁷ The underpinning for this conclusion is the “IFF Program”, as a general subsidy scheme allocating funds for the overarching purpose of *sustainable growth and global integration of the Eriadorian economy*.⁵⁸ A sector is a set of industries,⁵⁹ regardless of the diversity of products and types of manufacture encompassed therein.⁶⁰

24. In this vein, the 90% disbursement of funds to the renewable energy sector provides for *reasons to believe de facto* industries specificity. Three considerations set the terrain of positive evidence for specificity.⁶¹ *First*, the funds during the program’s five-year operation in the highly diversified Eriadorian economy were predominantly used by the renewable energy sector.⁶² *Second*, the disproportionate granting of the funds 90% *significantly exceeds* the representing hardly 5% percentage of the recipient in the broader economy.⁶³ *Third*, the government’s misuse of discretion due to the absence of transparent and justified application review, led to the excessive boosting the renewable energy sector.⁶⁴

C. The Loan by Eribank and the “IFF” grant caused “serious prejudice” under Art.5(c) and 6.3(c) SCM in conjunction with Art.XVI:1 GATT

25. Under Art.5(c) SCM,⁶⁵ specific subsidies causing serious prejudice in the form of “*lost sales*”, as designated in Art.6.3(c) SCM, are actionable.⁶⁶ An assessment of lost sales is twofold: *first*, the phenomenon of significant lost sales should be identified in the relevant market (1) and *second*, lost sales must be “*the effect of*” the granted subsidy (2).⁶⁷

1. Significant “lost sales” occurred in the Carpathian energy equipment market

(a) Solar panels and Fusilliscopes compete “in the same market”

26. The Carpathian market of electricity generation equipment, even though located in a third party’s territory,⁶⁸ stands for the preliminary element for the lost sales analysis, namely the “*same market*”.⁶⁹ Same market is defined within the parameters of the relevant products’

⁵⁷ ABR, *US- Lumber CVDs Final* [72]; ABR, *US-AD & CVDs (China)* [366-371].

⁵⁸ PR, *EC-Aircraft* [7.1566]; ABR, *US-Aircraft* [752];

⁵⁹ *Windon* (2010), 214; *Van den Bossche & Zdouc* (2013), 764.

⁶⁰ PR, *US-Lumber CVDs Final* [7.120].

⁶¹ PR, *US-Lumber CVDs Final* [7.123]; PR, *EC-DRAMS* [7.226, 7.230]; EMC² Case [10]; Clarification 69.

⁶² PR, *EC-Aircraft* [7.974, 7.975]; PR, *US-Lumber CVDs Final* [7.224]; *Evtimov* (2008), 467; *Ehlermann & Goyette*. (2006), 702; EMC² Case [10]; Clarification 36.

⁶³ PR, *EC-Aircraft* [7.973]; EMC² Case [10]; Clarification 36.

⁶⁴ Footnote 3 to Art.2 SCM; *Evtimov* (2008) 466; Clarification 22.

⁶⁵ Footnote 13 to Art.5 SCM.

⁶⁶ *Van den Bossche & Zdouc* (2013) 786.

⁶⁷ ABR, *EC-Aircraft* [1220]; *Durling* (2008), 8.

⁶⁸ *Pierola* (2008) 514; EMC² Case, [14].

⁶⁹ ABR, *US-Cotton Subsidies* [404]; ABR, *EC- Aircraft* [1119].

competitive relationship reflected in their substitutability.⁷⁰ The latter may in turn be demonstrated by cross price elasticity.⁷¹ In the case of FE's Fusilliscopes, the modification of the coefficient of price, due to the radically reduced offer, directly altered the coefficient of demand by Elektrica, resulting to the annulment of SolarTech's 40,000 solar PVs sales.⁷²

(b) SolarTech's 40.000 units' sales were lost to FE's Fusilliscopes

27. "Lost sales" under Art.6.3 SCM, have been defined as the *failure of the supplier to obtain sales, won instead by another firm*.⁷³ The MoU concluded between SolarTech and Elektrica advocates the former's legitimate expectations that the 40,000 sales would be obtained. Particularly since, *first* the MoU's written form mirroring the parties' agreement on product, quantity, price and *second* the one-year extended negotiations successfully reaching their final stages crystallize the parties' conduct as binding.⁷⁴

(c) SolarTech's loss is "significant"

28. Indeed, the loss of the 40.000 units' sales is "*significant*" under both a quantitative and a qualitative assessment.⁷⁵ *First*, they correspond to 10% of its annual total sales, an amount amplified by the tight margin of benefit received in the RES sector. *Second*, this phenomenon was only the tip of the iceberg, provided the preclusion of subsequent purchases. Since, Elektrica's investment focus completely shifted, concerning the creation of new energy facilities. *Third*, SolarTech's losses were of strategic importance since they permanently disconnected the company from a strategic customer with the prospect of considerable expansion in renewable energy production.⁷⁶

2. The lost sales were "the effect of" the Loan and the "IFF" grant

29. Lost sales must be "*the effect of*", namely the *consequence of*, the subsidy.⁷⁷ Thus, the phenomenon must evince a *genuine*, as being real, and *substantial*, as being actually important, *link* of cause and effect.⁷⁸ The Loan and the grant are individually capable of causing serious prejudice. However, they should be *collectively assessed* for a "lost sales" finding, as proposed by the AB in *US-Aircraft*.⁷⁹ This is due to the fact that the effect of both subsidies are highly interrelated with the production process and cost of Fussiliscopes and a

⁷⁰ ABR, *EC- Aircraft* [1120-1121].

⁷¹ PR, *Chile-Alcohol* [7.71]; OECD/IEA (2003), 20; *Mankiw* (2014), 94.

⁷² EMC² Case, [14].

⁷³ ABR, *EC-Aircraft* [1214].

⁷⁴ UNIDROIT Principles Art. 2.1(2); EMC² Case [14].

⁷⁵ PR, *US - Cotton Subsidies* [7.1325]; ABR, *EC- Aircraft* [1218].

⁷⁶ PR, *EC-Aircraft* [7.1845]; EMC² Case [14]; Clarification 75.

⁷⁷ ABR, *US-Cotton Subsidies (21.5)* [372].

⁷⁸ PR, *Korea-Commercial Vessels* [7.612]; ABR, *US-Cotton Subsidies* [438]; ABR, *US-Aircraft* [footnotes 1865, 1866 to 914]; *Pierola* (2008), 521; *Coppens* (2014), 165.

⁷⁹ PR, *US-Cotton Subsidies* [7.1192]; ABR, *US-Aircraft* [1284]; *Van den Bossche & Zdouc* (2013) 807.

clinical isolation of each subsidy would not meaningfully reflect the particularities of cold fusion's subsidization and the dynamics of the electricity equipment market, as depicted by low cross-price elasticity.⁸⁰

30. Accordingly, Complainant submits that a *competitive advantage* flowed from the two subsidies (a), while a genuine link between *each* measure and the market phenomenon (b) and a substantial link between the measures *together* and the market phenomenon (c) are present.⁸¹

(a) The Loan by Eribank and the "IFF" grant gave to FE the same competitive advantage

31. The Loan and the grant similarly benefitted FE, as highlighted by the interaction of the two subsidies.⁸² At first, it was the Loan that allowed the design perfection and the competitively viable commercial existence of the Fusillscope. FE's position as the market leader in commercializing cold fusion facilitated by the Loan, welcomed and fully optimized the subsequent grant and its effects. Since, the establishment of the second production facility as a direct result of the grant, enhanced Fusillscope's competitiveness by enabling a vast price reduction.⁸³

(b) The Loan by Eribank and the "IFF" grant are separate and genuine causes of the lost sales

32. Undertaking a counterfactual analysis of the market *but for* the measures, the *genuine* link between the latter and the phenomenon is aptly evinced.⁸⁴ Private investors in the Eriadorian market are evidently hesitant to finance such an unstable, risky and expensive initiative. Accordingly, the Fusillscope being under-financed absent the Loan's kiss of life, the construction of the production facility would be impossible and the company would have reached a dead-end.⁸⁵

33. Similarly, FE's major exports would not have existed without the grant, the contribution of which is manifested at the production levels.⁸⁶ Indeed, the governmental grant was used to establish the new production facility that led to an abrupt increase in export products and FE's evolution into a major exporter.⁸⁷

(c) The Loan and the "IFF" grant are substantially linked with the lost sales

⁸⁰ PR, *Korea-Commercial Vessels* [7.560]; ABR, *US-Aircraft* [1284]; PR, *Canada-Renewable Energy* [7.202]; Kepler *et al* (2007), 51.

⁸¹ ABR, *US-Aircraft* [1290]; Coppens (2014), 174.

⁸² ABR, *US-Aircraft* [1293]; EMC² Case [8].

⁸³ EMC² Case [6, 7, 8, 9, 10]; Clarifications 6, 10, 73, 106.

⁸⁴ ABR, *EC-Aircraft* [1233]; ABR, *US-Cotton Subsidies* [357, 438]; ABR, *US- Aircraft* [914]; PR, *Korea-Commercial Vessels* [7.560].

⁸⁵ EMC² Case, [6]; Clarifications 57, 94.

⁸⁶ ABR, *US-Cotton Subsidies (21.5)* [355].

⁸⁷ EMC² Case [10, 12].

34. The Loan and the “IFF” grant even though not the sole, they are substantial causes of lost sales, as they armed FE with the *ability and incentive* to lower the product price by 50%.⁸⁸ *First*, the 750\$ Loan initially infused to the Fusillscope technology *knowledge, experience and confidence* and diminished the associated risks, thus indulging the high-profile initiative to flourish into a mature and reliable product.⁸⁹ *Second*, regarding the “IFF” grant, due notice should be given to its magnitude, as a factor correlated with the likeliness of the occurrence of adverse effects.⁹⁰ Indeed, the \$500m grant was colossal, as in juxtaposition with Canada’s, namely the second world electricity exporter’s, total 630\$ yearly expenditure in similar projects.⁹¹ In addition, the grant facilitated the creation of the second production facility thus leading FE to the point of economies of scale and the diminution of production.⁹² The latter was decisive for Elektrica’s shift of investment leading to the acquisition of sales in the Carpathian competitive market.⁹³

35. Consequently, the acquired price dynamic enabled FE to turn its sales campaign into a *gambling game* and the 50% reduction was the “Ace of Spades”. Accordingly, FE’s major disincentive, namely its huge initial capital investment, was vanished. As a result and given the tight margins of the industry, Elektrica decided to shift its investment focus and thus break off the negotiations with SolarTech.⁹⁴

III. The LTPA concluded pursuant to the FIT Scheme is an Actionable Subsidy under Arts. 5(c) and 6.3(a) of the SCM Agreement in Conjunction with Art.XVI:1 GATT

36. 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*”. The LTPA between EEC and FE concluded under the FIT Scheme is such an actionable subsidy, since it constitutes a “*subsidy*” (A), which is “*specific*” (B) and causes “*serious prejudice*” to the interests of Borduria in the form of displacement and impedance (C).⁹⁵

A. The LTPA amounts to a “subsidy” under Art.1 SCM

37. The definition of “*subsidy*” is to be construed within the SCM disciplines, namely as a

⁸⁸ ABR, *US-Cotton Subsidies (21.51)* [372]; ABR, *EC-Aircraft* [1233]; ABR, *US- Aircraft* [914].

⁸⁹ PR, *US-Aircraft* [7.1747]; ABR, *US-Aircraft* [917]; Clarification 10.

⁹⁰ ABR, *US-Cotton Subsidies* [461]. ABR, *US- Aircraft* [1254, 1255]; *Van de Bossche & Zdouc* (2013), 794.

⁹¹ Energy Market Fact Book [10].

⁹² Art.15.4 SCM; Art.31.1 VCLT; Art.3.2 DSU; ABR, *US-Gasoline* [16,17]; ABR, *US-Cotton Subsidies* [438]; PR, *EC-Aircraft* [7.1734]; Clarification 10.

⁹³ ABR, *US-Aircraft* [1260].

⁹⁴ ABR, *US-Aircraft* [1261, 1292]; EMC² Case [14]; Clarifications 75, 137.

⁹⁵ PR, *US-Offset Act (Byrd Amendment)* [7.106]; PR, *Indonesia - Autos* [14.254-14.255].

leeway for capturing measures with a potential to distort trade.⁹⁶ The manner in which this potential materializes, even if a crystal-clear reflection of legitimate objectives, *as the idea of “social costs”*, is not conclusive; for, policy considerations are manifestly absent from Art.1 SCM.⁹⁷ Accordingly, Complainant submits that the LTPA between EEC and FE is “*a form of income or price support*” that confers a benefit to FE (1) or, in the alternative, a financial contribution in the form of “*a purchase of goods*” also conferring a benefit (2).

1. The LPTA is “a form of income or price support” conferring a benefit under Art.1.1(a)(2) & 1.1.(b) SCM

(a) The LTPA as a form of income or price support

38. Government measures that undeviatingly focus on the setting and maintaining of prices or income fall under Art.1.1(a)(2) SCM, as income or price support.⁹⁸ The price for cold fusion electricity is fixed at a desired level by EEC through the LTPA price, thus generating excess income for FE.⁹⁹ The LTPA is, therefore, a price or income support and indeed one “*in the sense of GATT*”.¹⁰⁰ For, it reduces the need for energy imports, as will be demonstrated further in respect of BEC and BE’s electricity imports.¹⁰¹

(b) The LTPA confers a benefit to FE as an income or price support

39. “*Income or price support*” captures government interventions with *a direct or indirect* impact on the income of the recipient.¹⁰² Thus, similarly to financial contributions by negative action,¹⁰³ a benefit seems *ipso facto* conferred; since price support boosts income, and in turn excess income equates with benefit.¹⁰⁴ Evenly, a comparison between the market-oriented equilibrium price (M) and the applied administrative price (C), by virtue of the context of Annex 3 of the AoA,¹⁰⁵ advocates that FE benefited with 10% higher proceeds.¹⁰⁶

2. Alternatively, the LTPA is a “financial contribution” conferring a benefit under Arts.1.1(a)(1)(iii) and 1.1(b) SCM

40. In any event, even if the fundamental pricing character of the LTPA is outweighed by the

⁹⁶ ABR, *Canada-Aircraft* [157]; PR, *Korea-Commercial Vessels* [7.427]; ABR, *Japan-DRAMS* [225]; ABR, *US-Aircraft* [662].

⁹⁷ ABR, *Canada-Renewable Energy* [5.228]; *Charnovitz & Fischer* (2014), 22; *Sykes* (2003), 3; *Sykes* (2010), 502.

⁹⁸ PR, *China-GOES* [7.84]; ABR, *US-Lumber CVDs Final* [52]; *Rubini* (2014), 542-543.

⁹⁹ EMC² Case [11]; Clarification 69.

¹⁰⁰ PR, *China-GOES* [7.83]; *Mavroidis et al* (2008), 323.

¹⁰¹ ECJ, C-279/98 *PreussenElektra* [70]; *Jerjian* (2012), 10.

¹⁰² *Luengo* (2006), 122.

¹⁰³ PR, *US-FSC* [7.103]; PR, *US-FSC (Article 21.5)* [8.46]; PR, *US-Aircraft* [7.170].

¹⁰⁴ *Coppens* (2014), footnote 163 to 61.

¹⁰⁵ Art.31.1(a) VCLT; Art.3.2 DSU; ABR, *US-Gasoline*, 17; ABR, *Japan-Alcohol*, [34]; ABR, *Argentina-Footwear* [81-83]; PR, *US-Cotton Subsidies* [7.1003]; ABR, *China-GOES* [7.87].

¹⁰⁶ ABR, *China-GOES* [7.87]; *Lang* (2014), 9; EMC² Case [11]; Clarification 19.

prescribed purchasing obligation, the contract is a financial contribution.¹⁰⁷

(a) The LTPA as financial contribution in the form of a purchase of goods

41. FIT reciprocal electricity supply contracts between a supplier and a governmental electricity distributor fall under Art.1.1(a)(1)(iii) SCM, as purchase of goods.¹⁰⁸ As under the Ontario FIT contracts examined in *Canada-Renewable Energy*, the supplier needs to deliver electricity, *i.e.* transfer entitlement, to the governmental wholesaler and the latter has to pay for taking possession.¹⁰⁹ Evenly, FE delivers electricity to EEC under the LTPA and the agency pays the FIT price, while taking possession of the electricity for the retail transmission to end consumers.¹¹⁰

(b) The LTPA confers a benefit to FE as a purchase of goods

42. At the outset of the benefit analysis, Complainant stresses, that FIT programs provide for favorable terms of long-term guarantee above-market pricing;¹¹¹ thus by definition conferring a benefit to the recipient.¹¹² Yet, in detail, Complainant further submits that on the basis of the *relevant* single wholesale Eriadorian market **(i)**, the remuneration provided to FE was more than adequate compared to market benchmark (M) **(ii)**, as Respondent's attempts to set as appropriate benchmark the government price (C) are void **(iii)**.

i. The wholesale electricity market as a whole is the relevant market for the benefit analysis

43. Under the context of Art.1.1(b) SCM, a "*benefit*" analysis connotes an assessment of whether the recipient obtained an *advantage* in selling its product in the *relevant market*,¹¹³ namely in the *forum where consumers choose between different products*.¹¹⁴

44. In Eriador, electricity consumers' choices, whose demand automatically shapes demand at the wholesale level,¹¹⁵ denote the existence of one single market. Indeed, *first*, electricity is physically identical and indistinguishable, regardless of generation processes;¹¹⁶ *second*, Fusillscope generated electricity may be relied for base-, intermediate- and peak-load energy supply, thus performing similar end-uses with other types of electrical energy;¹¹⁷ and *third*,

¹⁰⁷ ABR, *US-Lumber CVDs Final* [52]; ABR, *Canada-Renewable Energy* [5.41]; Adamantopoulos (2008), 428.

¹⁰⁸ ABR, *Canada-Renewable Energy* [5.128]; Charnovitz & Fischer (2014), 19.

¹⁰⁹ ABR, *Canada-Renewable Energy* [5.122-5.128].

¹¹⁰ EMC² Case [2, 11].

¹¹¹ Charnovitz & Fischer (2014), 7; Couture et al (2010), 6; Mendoca et al (2010), 40.

¹¹² PR, *Brazil-Aircraft* [7.24]; ABR, *Canada-Aircraft* [154-157]; PR, *Korea-Commercial Vessels* [7.427]; ABR, *EC-Aircraft* [705].

¹¹³ PR, *Brazil-Aircraft* [7.427]; ABR, *Canada-Aircraft* [157-158]; PR, *Korea-Commercial Vessels* [7.427]; PR, *EC-DRAMS* [2225]; ABR, *Japan-DRAMS* [225]; ABR, *EC-Aircraft* [705]; PR, *US-Aircraft* [7.475]; Pal (2014), 131.

¹¹⁴ ABR, *Korea-Alcoholic Beverages* [114]; PR, *Mexico-Soft Drinks* [8.68].

¹¹⁵ PR, *Canada-Renewable Energy* [7.318].

¹¹⁶ ABR, *EC-Asbestos* [114]; ABR, *Canada-Renewable Energy* [5.170].

¹¹⁷ ABR, *EC-Asbestos* [117]; Clarification 94.

electricity supply contracts include the same standard terms.¹¹⁸ This demonstrated demand-side substitutability is reinforced by the less immediate supply-side considerations;¹¹⁹ namely, FE's ability to rapidly switch its production from conventional to cold-fusion generation processes at limited costs.¹²⁰

45. The single market conclusion is further reinforced by the fact that no separate cold fusion electricity market was created.¹²¹ In *Canada-Renewable Energy* the Ontario FIT contracts were found to create separate markets for the otherwise excluded from the market wind and solar PV electricity.¹²² *Per contra*, cold fusion electricity from the point of its commercialization and before any government intervention, entered the competitive wholesale Eriadorian market.¹²³

ii. The given remuneration was more than adequate compared to the market benchmark (M)

46. Under Art.14(d) SCM, the benefit flowing from a purchase of goods is determined through a comparison between the remuneration received and a benchmark price approximating the prevailing market conditions.¹²⁴ In the present dispute, the market equilibrium (M) is determined by market-based, price-discovery processes, thus offering close proximity to the prevailing market conditions in Eriador.¹²⁵ Therefore, the FIT price being 10% higher than (M), a benefit *vis-a-vis* the market is established.¹²⁶

iii. The alternative market benchmark (C) is not appropriate under Art.14(d) SCM

47. In a distorted or newly created market, one can in the alternative resort or construct benchmarks *other than the financial contribution at issue*,¹²⁷ corresponding to the prevailing market conditions.¹²⁸ The proposed by the Respondent benchmark (C) constitutes the remuneration received by the recipient of the subsidy at bar and therefore must be rejected.¹²⁹ Further, (C) is available exclusively to FE, thus not mirroring a genuinely undistorted energy market, as it falls short of the standard of marketability.¹³⁰

¹¹⁸ ABR, *Canada-Renewable Energy* [5.170]; EMC² Case [3, 11]; Clarification 56.

¹¹⁹ ABR, *US-Cotton Subsidies* [407]; ABR, *EC-Aircraft* [1120]; *Melishek* (2013), 153.

¹²⁰ ABR, *EC-Aircraft* [1.121]; *Choi* (2003), 66-67; *Melischek* (2013), 151; EMC² Case [7, 8].

¹²¹ ABR, *Canada-Renewable Energy* [5.176, 5.178]; *Coppens* (2014), 457.

¹²² ABR, *Canada-Renewable Energy* [5.175, 5.189]; *Coppens* (2014), 457; *Rubini* (2014), 15; *Pal* (2014), 136.

¹²³ EMC² Case [2, 8, 13]; Clarification 3.

¹²⁴ ABR, *Canada-Aircraft* [155, 158]; PR, *US- Lumber CVDs Prelim* [7.5]; ABR, *EC-Aircraft* [703]; ABR, *Canada-Renewable Energy* [5.165].

¹²⁵ ABR, *Canada-Renewable Energy* [5.233]; PR, *US-AD & CVDs (China)* [10.186]; EMC² Case [3, 11]; Clarifications 5, 20.

¹²⁶ ABR, *US-AD & CVDs (China)* [297, 318]; *Rubini* (2012), 543; EMC² Case [11]; Clarification 19.

¹²⁷ ABR, *US-Carbon Steel* [4.168].

¹²⁸ Art.14(d) SCM; ABR, *US-Lumber CVDs Final* [102, 108]; ABR, *US-AD & CVDs (China)* [10.186]; ABR, *Canada-Renewable Energy* [5.228]; *Sykes* (2010), 508; *Coppens* (2014), 75.

¹²⁹ EMC² Case [11]; Clarifications 17, 18, 19, 20, 21, 54, 59.

¹³⁰ ABR, *US-Lumber CVDs Final* [89]; EMC² Case [11]; Clarifications 17, 18, 19, 20, 21, 54, 59.

B. The LTPA amounts to a “specific subsidy” under Art.2(a) SCM

48. The parameters of the specificity analysis must be set by the relevant general subsidy scheme, the FIT scheme, implemented by the 2012 Direction of the Ministry of Commerce;¹³¹ since, the governmental program amounts to a legislative mechanism for the conclusion of cold fusion generated electricity supply contracts, with the strict overarching purpose of increasing the supply of cold fusion electricity.¹³² As aptly demonstrated by the content of the Direction, eligibility is explicitly limited under the scheme to an industry, namely the *particular branch* of cold fusion electricity generation.¹³³

49. This positive finding of *de jure* specificity under subparagraph (a) cannot be hampered by any allegation regarding the usage of bidding processes under the scheme as objective eligibility criteria.¹³⁴ Since, the processes are themselves expressly targeted, thus further resulting to the program’s limited application to a discrete segment of enterprises¹³⁵ and evincing the granting authority’s discriminatory conduct.¹³⁶

C. The LTPA caused serious prejudice under Arts.5(c) and 6.3(a) SCM in conjunction with Art.XVI:1 GATT

50. Under Art.6.3 (a), three considerations substantiate serious prejudice in the form of displacement or impedance: the likeness of the relevant products (1); the occurrence of displacement or impedance of the imports of the like product in the market of the subsidizing Member (2); the identification of the market phenomena as “*the effect of*” the subsidy (3).¹³⁷

1. Conventional and renewable electricity are “like products”

51. Pursuant to footnote 46 SCM, “like” are products identical or closely resembling.¹³⁸ The factors for establishing the likeness of products are *i.* physical properties, *ii.* end-uses, *iii.* consumer’s preferences and *iv.* tariff classification.¹³⁹ Under SCM’s narrow context, physical resemblance is the crux of likeness.¹⁴⁰ Accordingly, in order for process and production methods (PPMs) to form part of the relevant analysis, they should affect the product’s

¹³¹ PR, *EC-Aircraft* [7.1566]; ABR, *US-Aircraft* [752].

¹³² EMC² Case [11]; Clarifications 51, 58, 64, 65.

¹³³ ABR, *US-AD & CVDs (China)* [372, 373]; ABR, *US-Aircraft* [757]; EMC² Case [11]; Clarification 51, 58, 64, 65.

¹³⁴ *Coppens* (2014), 106; Clarification 57.

¹³⁵ PR, *EC-DRAMS* [7.226]; ABR, *US-Aircraft* [857].

¹³⁶ ABR, *US-AD & CVDs (China)* [367]; ABR, *EC-Aircraft* [945].

¹³⁷ PR, *Indonesia-Autos* [8.316]; ABR, *EC-Aircraft* [1160]; *Pierola* (2008), 510.

¹³⁸ Footnote 46 to Art. 15.1 SCM; ABR, *Japan-Alcohol* [22]; PR, *Indonesia-Autos* [14.172]; *Choi* (2003), 129; *Jerjian* (2012), 11.

¹³⁹ ABR, *Japan-Alcohol*, 20; PR, *Indonesia-Autos* [14.109]; ABR, *EC-Asbestos* [101]; *Border Tax Adjustments* [18].

¹⁴⁰ PR, *Indonesia-Autos* [14.173]; *Potts* (2008), 15.

physical quality.¹⁴¹ In the same vein, the AB in *EC-Asbestos* noted that carbon footprints would have to influence the *product as such*, and not its PPM, in order to serve as a factor in distinguishing between products.¹⁴² Respectively, electrical energy is physically identical and with the same end-uses notwithstanding generation processes,¹⁴³ as the AB in *Canada-Renewable Energy* firmly stated.¹⁴⁴ Notably, electricity, as a single product, falls under the same tariff classification,¹⁴⁵ namely ‘Electrical Energy’ in HS 2716.00 and UNCPD 17100.¹⁴⁶

2. “Displacement and impedance” exist under Art. 6.3(a) SCM exists

52. The substitution effect boring into “displacement” and “impedance” under Art.6.3(a) SCM is illustrated in another Member’s “like” product sales’ volume decline and potential sales obstruction respectively.¹⁴⁷ Market shares, trends or concrete expectations evolved in the relevant market are the evidentiary basis of these market phenomena.¹⁴⁸

53. Presently, the focus is on the single competitive wholesale electricity market of Eriador, as plainly defined by Complainant. FE gained 31% of the market shares from 2012 to 2015. This was at the expense of the Bordurian exporters, who faced a 27% concomitant decline.¹⁴⁹ Notably, all other market actors’ presence was unfluctuated, while the market trade volumes remained stable.¹⁵⁰ In tune with the above, EB and BEC’s market shares long-term stability and their vast volume amounting to 50% clearly set a fixed market trend reiterating the preliminary demonstration of displacement and impedance.¹⁵¹

3. The distortive market phenomena are the “effect of” the LTPA

54. The LTPA is the *genuine* and *substantial* cause which displaced and impeded the Bordurian exporter’s imported electricity.¹⁵²

(a)The market phenomena would not have occurred but for the LTPA

55. In a counterfactual reading of the facts illustrating the Eriadorian market’s course *but for* the LTPA, the renewal of BEC and EB’s contracts occurs and their general market shares remain steady.¹⁵³ Since, the market has been stable for a long time, notwithstanding the mandated supply proportion materializing the state’s primary policy of reliance on

¹⁴¹ *Stilwell & Bohanes* (2005), 540; *Diebold* (2010), 343; *Cottier* (2015), 3.

¹⁴² ABR, *EC-Asbestos* [151].

¹⁴³ *Cottier* (2015), 2

¹⁴⁴ ABR, *Canada-Renewable Energy* [5.170]; *Genest* (2014), 247.

¹⁴⁵ PR, *US-Gasoline* [3.22].

¹⁴⁶ UNDoc.ST/ESA/STAT/SER.M/77/Ver.2.1, 42; Harmonised Convention, 2716.00.

¹⁴⁷ ABR, *EC-Aircraft* [1160-1161].

¹⁴⁸ PR, *Indonesia-Autos* [14.211, 14.227]; PR, *Korea-Commercial Vessels* [7.555]; PR, *EC-Aircraft* [7.1751].

¹⁴⁹ EMC² Case, [13].

¹⁵⁰ *Coppens* (2014), 179.

¹⁵¹ ABR, *EC-Aircraft* [1200]; *Couture et al.*, (2010) 71; Clarification 102.

¹⁵² ABR, *US-Aircraft* [1865, 1866]; *Coppens* (2014), 165.

¹⁵³ ABR, *EC-Aircraft* [1119, 1233].

sustainable energy sources. For, Respondent consistently relied on the Bordurian exporters' conventional electricity imports by 50%, while the RES generators market shares never exceeded 7%. Particularly, FE, in its one year operation as a cold fusion electricity supplier, managed to gain only 1%. Apparently, absent the safehaven of the FIT scheme, FE would not be able to effectively compete in the Eriadorian market and even more to be the only company gaining market shares in Eriador in the expense of BEC and EB.¹⁵⁴

(b) The LTPA was the substantial cause of displacement and impedance

56. The unexpected expansion of FE altered the core of the wholesale circumstances rendering the spot market the “*Calvary*” for the Bordurian exporters. An assessment of the competitive dynamics, proposed by Art.15.4 SCM,¹⁵⁵ demonstrates that the vast rise of FE's shares created strict spot market competitive constraints by reducing the supply range available for spot sales.¹⁵⁶ Hence, it permitted the aggregate pricing of RES generators to secure electricity sales when peak-load demand escalated. Thus, BEC and EB's conventional electricity lacking the necessary ramping capacity to effectively compete in these conditions was heavily displaced.¹⁵⁷

57. Moreover, the nature and operation of the LTPA in conjunction with the market prevailing conditions evince a *substantial* relationship of cause and effect.¹⁵⁸ The LTPA is inherently designed to amplify the supply of cold fusion electricity. The contract does not specify the quantity of supply. Rather, it only predetermines a guaranteed above-market pricing for all cold fusion electricity FE will generate within the next 30 years.¹⁵⁹ In other words, the LTPA is a “*fire at will*” order. As a corollary, the FIT terms being over the edge lucrative, FE expanded its supply capabilities above and beyond EEC's expectations. Accordingly, as EEC unequivocally acknowledged in ARO, the large size and costs of FE's supply contracts directly resulted in the non-renewal of BEC and EB's contracts.¹⁶⁰

¹⁵⁴ EMC² Case [1, 2, 9, 13]; Clarification 4, 39, 53.

¹⁵⁵ PR, *US-Cotton Subsidies* [1.289-7.1167].

¹⁵⁶ ABR, *EC-Aircraft* [1110].

¹⁵⁷ PR, *Canada-Renewable Energy* [7.14, 7.16]; *Mäntysaari* (2015), 464-466.

¹⁵⁸ PR, *Korea-Commercial Vessels* [7.560]

¹⁵⁹ EMC² Case [11]; Clarification 19.

¹⁶⁰ PR, *Australia-Leather* [9.65]; PR, *Mexico- Soft Drinks* [8.76-8.77]; PR, *Turkey-Rice* [7.78-7.79]; PR, *EC-Biotech* [7.532]; PR, *Argentina-Import Measures* [6.80].

REQUEST FOR FINDINGS

Borduria asks the Panel to find that:

1. The “IFF” grant violates the SCM Agreement, since it is a prohibited subsidy contingent in fact upon the export by FE of the Fusillscope under Art.3.1(a) SCM. In any event, the “IFF” grant, as an actionable subsidy, also violates the SCM Agreement causing serious prejudice to the interests of Borduria in the sense of Art. 5(c) SCM and Art. XVI:1 GATT 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 cannot be justified on any legal grounds.

and

2. The Loan by Eribank violates the SCM Agreement in conjunction with Article XVI:1 GATT, since it is an actionable subsidy causing serious prejudice to the interests of Borduria in the sense of Art. 5(c) SCM Agreement and Art. XVI:1 GATT in the form of lost sales of solar panels in the Carpathian market for energy generation equipment under Art. 6.3(c) SCM Agreement, and cannot be justified on any legal grounds.

and

3. The LTPA between FE and EEC, concluded pursuant to the FIT Scheme violates the SCM Agreement in conjunction with Article XVI:1 of the GATT, since it is an actionable subsidy causing serious prejudice to the interests of Borduria in the sense of Art. 5(c) SCM Agreement and Art. 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 cannot be justified on any legal grounds.

Borduria further requests, by virtue of Article 19.1 DSU, that the Panel recommend to the Dispute Settlement Body that Eriador bring its measures into conformity with its obligations under the SCM Agreement.