



*Team: 036*

**ELSA MOOT COURT COMPETITION ON WTO LAW**

**2015 - 2016**

**Eriador – Measures Affecting the Electricity Sector**

**Between**

BORDURIA

*(Complainant)*

**And**

ERIADOR

*(Respondent)*

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**SUBMISSION FOR THE RESPONDENT**

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## **List of References**

### **Conventions**

1. Framework Convention on the Promotion of Renewable Energy (2010)
2. General Agreement on Tariffs and Trade, 15 April 1994, 1869 U.N.T.S. 190
3. Vienna Convention on the Law of Treaties 23 May 1969 1155 U.N.T.S. 331
4. Agreement on Subsidies and Countervailing Measures

### **Publications**

1. International Law Commission, Fourth Report on the Law of Treaties by Sir Gerald Fitzmaurice, UN Doc A/CN.4/120.
2. Working Party Report, *Border Tax Adjustments*, adopted 2 December 1970, BISD 18S/97.
3. Lester, S., Mercurio, B., Davies, A., Leitner, K., *World Trade Law: Text, Materials and Commentary*, Oxford and Portland, Oregon, Hart Publishing. (2008)

## Cases

Short title	Full case title and citation
<i>Brazil – Aircraft (Article 21.5 – Canada)</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS46/AB/RW, adopted 4 August 2000, DSR 2000:VIII, 4067
<i>Canada</i>	Appellate Body Report, - <i>Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies</i> -
Canada- Renewable Energy	Panel Report, - <i>Certain Measures Affecting the Renewable Energy Generation Sector; Measures Relating to the Feed –in Tariff Program:</i>
<i>Canada-Renewable Energy</i>	Appellate Body Report, - <i>Certain Measures Affecting the Renewable Energy Generation Sector; Measures Relating to the Feed –in Tariff Program:</i> WT/DS412/AB/R • WT/DS426/AB/R. 6 May 2013
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011
<i>EC Asbestos</i>	Appellate Body Report, <i>European Communities- Measures Affecting Asbestos and Asbestos- Containing Products</i> , WT/DS/135/AB/R
<i>US – Carbon Steel (India)</i>	Panel Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/R and Add.1, circulated to WTO Members 14 July 2014
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3

<p><i>US- Anti-Dumping and Countervailing Duties (China)</i></p>	<p><i>Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869</i></p>
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**Table of Abbreviations**

ABR	Appellate Body Report
EC	European Community
EEC	Eriadorian Electricity Corporation
FCPRE	Framework Convention on the Promotion of Renewable Energy
GATT	General Agreement on Tariffs and Trade
GoB	Government of Borduria
GoE	Government of Eriador
Para	Paragraph
PR	Panel Report
SCM Agreement	Agreement on Subsidies and Countervailing Measures
The Case	ELSA Moot Court Competition (EMC2) on WTO Law Case on Eriador- Measures affecting the electricity sector

## **Summary of Pleadings**

**A) The ‘Innovation for the Future’ grant is consistent with Article 3.1(a) of the SCM Agreement because it is not contingent in fact upon the export by Future Energy of equipment for renewable energy generation**

- The Innovation for the Future Grant is not a subsidy within the meaning of Article 1 of the SCM Agreement.
- Even if the Innovation for the Future Grant is a subsidy within the meaning of Article 1 of the SCM agreement, it does not fall within the scope of the SCM Agreement.
- The Innovation for the Future Grant is consistent with Article 3.1 (a) of the SCM as it is not contingent in fact upon export performance.
- The Innovation for the Future Grant is justified by Article 11 of the FCPRE.

**B) 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:I 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**

- Eribank is not a public body, hence the financial contribution by the Bank is not a subsidy under Article 1:1 of the SCM Agreement;
- The Grant under the Innovation for the Future Program is not a specific subsidy under Article 2 of the SCM Agreement;
- Even if the loan and grant are subsidies, there is no serious prejudice within the meaning of Article 5 (c) and 6.3 (c) of the SCM Agreement;
- Eriador is protected under Article XX of the GATT 1994 since measures taken were necessary to protect natural resources from exhaustion

**C) 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 XVI:I 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**

- The FIT Scheme is not a Subsidy under article 1.1a of the SCM Agreement as it does not confer a benefit to Future Energy;
- The FIT Scheme causes no prejudice to the state of Borduria as contemplated by Article 6.3 (c) of the SCM Agreement as it is not a like product

**Statement of Facts**

Eriador and Borduria are industrialized countries and are parties to the Framework Convention on Promotion of Renewable Energy (FCPRE), and members of the World Trade Organization (WTO). The FCPRE requires states parties to embrace the use of renewable energy. In line with the FCPRE, Eriador is seeking to limit dependence on fossil fuels and enhance full reliance on renewable energy. Eriador consists of privately owned electricity generating facilities that are diverse, while Borduria majorly produces coal fired electricity. The Eriadorian generators and foreign suppliers sell their energy to Eriadorian Electricity Corporation (EEC) which is a government agency that controls the Eriadorian electrical grid.

CleanTech, a large technology company in Eriador conducted successful research into cold fusion and even invented the Fusillscope, a revolutionary device that enables users to temporarily overcome repulsive forces between atomic particles, at low energy cost. It established a production facility for Fusillscopes in 2008 and obtained a \$750m loan on favourable terms from Eribank. Eribank is an entity majorly owned by the Eriadorian state which conducts its business with regard to government policies. After perfecting production of the Fusillscope, CleanTech sold the entire Fusillscope business to Future Energy. Future Energy uses the Fusillscope to manufacture electricity locally and also produces Fusillscopes specifically for export. The production of electricity by use of Fusillscopes proved expensive and Future Energy sought help from the Eriadorian government which in turn awarded Future Energy a \$500 grant through the 'Innovation for the Future' program.

The Eriadorian government also implemented a new Feed in Tariff Scheme where EEC awards long term contracts to participants but with guaranteed price payment calculated by a special formula. In other normal contracts, prices are set under competitive tendering and spot on auction method. These measures have increased Eriador's market share in Eriador's electricity market and its export of Fusillscopes to over 50 countries. Contracts for supply of electricity into the Eriadorian grid by Bordurian companies have not been renewed. Future Energy also offered to sell Fusillscopes to Elektrica (a company in the state of Carpathia) at 50% less the market price, which action made Elektrica break off negotiations with SolarTech (a company in Borduria) regarding the sale of solar panels to Elektrica.

## **Identification of the Measures at Issue**

The measures at issue include: (i) the loan by Eribank to CleanTech which Eriador contends was not issued by a public body and thus not a subsidy; (ii) the Innovation for the Future Grant to Future Energy which Eriador argues is not contingent on exports and has no link to the displacement of the solar panels' market in Carpathia; (iii) the FIT scheme and the long term contract between EEC and Future Energy concluded pursuant to it, does not cause serious prejudice to the interests of Borduria; and (iv) the legal position of the FCPRE regarding the resolution of the above mentioned issues is also a measure at issue.

## **Legal Pleadings**

### **A. The 'Innovation for the Future' grant is consistent with Article 3.1(a) of the SCM Agreement because it is not contingent in fact upon the export by Future Energy of equipment for renewable energy generation**

#### **1. The Innovation for the Future Grant is not a subsidy within the meaning of Article 1 of the SCM Agreement**

1. The Innovation for the Future Grant cannot be subjected to Article 3.1 (a) of the SCM Agreement as it is not a subsidy within the meaning of Article 1 of the SCM Agreement. In *Canada — Aircraft Credits and Guarantees*, the Panel first interpreted the text of Article 3.1(a) and found that, in order to prove the existence of an export subsidy within the meaning of Article 3.1 (a), a Member must prove the existence of a subsidy within the meaning of Article 1 of the SCM Agreement and contingency of that subsidy upon export performance.<sup>1</sup>
2. Article 1 of the SCM Agreement defines a measure to be a subsidy if it contains three key elements namely: it is a financial contribution; the contribution is by a government or any public body within the territory of a Member; and the contribution confers a benefit on the recipient of the financial contribution.

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<sup>1</sup> Panel Report, *Canada — Aircraft Credits and Guarantees* para. 7.16.

### **1.1.Financial Contribution**

3. Eriador does not contend that the Innovation for Future Grant to Future Energy was a financial contribution by a public body but objects to the conferment of a benefit within the meaning of Article 1.1 (b) of the SCM Agreement.

### **1.2.Benefit**

4. In *Canada — Aircraft*, the Appellate Body stated that the term benefit means benefit to the recipient. The Appellate Body also stated that the term benefit, as used in Article 1.1(b), implies some kind of comparison where the benefit to the recipient makes it better off than it would otherwise have been, without that contribution. The appropriate basis for comparison in determining whether a benefit has been conferred, was stated to be the market place because the trade-distorting potential of a financial contribution can be identified by determining whether the recipient has received a financial contribution on terms more favourable than those available to the recipient in the market.<sup>2</sup>
5. It is well established that a financial contribution confers a benefit within the meaning of Article 1.1(b) of the SCM Agreement if the terms of the financial contribution are more favourable than the terms available to the recipient in the market.<sup>3</sup> In the present case, the recipient of the grant was Future Energy, an electricity generating company using the inventive cold fusion technology.

### **1.3.Relevant Market**

6. Thus the relevant market to be considered for analysis should be that of renewable electricity generated from the cold fusion technology. The question therefore is whether the terms of the grant to Future Energy were more favourable than those available to it in the cold fusion generated electricity market. Notably, the generation of electricity using the cold fusion technology creates a new market in Eriador in the renewable energy sector.

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<sup>2</sup> ABR, *Canada – Aircraft* para. 157.

<sup>3</sup> Panel Report, *US — Large Civil Aircraft* (2nd complaint), para. 7.475.

7. The Appellate Body in *Canada–Renewable Energy* stated that where a government creates a market, it cannot be said that the government intervention distorts the market, as there would not be a market if the government had not created it.<sup>4</sup> The financial contribution by the Eriadorian government therefore did not confer a benefit to Future Energy as it did not distort the market but merely, created it. Thus Eriador submits that Innovation for the Future Grant to Future Energy is not a subsidy.

**2. Even if the Innovation for the Future Grant is a subsidy within the meaning of Article 1 of the SCM Agreement; it does not fall within the scope of the SCM Agreement.**

8. Article 1.2 of the SCM Agreement provides that a subsidy shall be subject to the Agreement’s disciplines if it is shown to be specifically provided to an enterprise or industry or group of enterprises or industries as per Article 2 of the Agreement.

9. Subsidies that are provided specifically to an enterprise distort the allocation of resources within an economy while those that are widely available are presumed to be non-distortionary. In the event that the panel find the Innovation for the Future Grant to be a subsidy, Eriador submits that the subsidy is not specific within the meaning of Article 2 of the agreement and thus not subject to the SCM Agreement.

10. Article 2.1 prescribes that a subsidy is specific where the granting authority explicitly limits it to certain enterprises. Specificity however, does not exist where objective criteria or conditions governing the eligibility for, and the amount of, a subsidy are applied. The criteria and conditions applied must be neutral; must not favour certain enterprises over others; must be economic in nature and horizontal in application<sup>5</sup>

11. In *US — Upland Cotton*,<sup>6</sup> the Panel considered that the concept of “specificity” in Article 2 of the SCM Agreement serves to acknowledge that some subsidies are broadly available and widely used throughout an economy and are therefore not subject to the Agreement’s subsidy disciplines. The Panel also noted that neutral criteria or conditions used to determine eligibility to access subsidies, would preclude an affirmative conclusion of specificity.

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<sup>4</sup> ABR, *Canada–Renewable Energy / Canada–Feed-In Tariff Program*, para. 5.188.

<sup>5</sup> Article 2.1 (b) of the SCM Agreement.

<sup>6</sup> Panel Report, *US — Upland Cotton*, paras. 7.1139, 7.1140, 7.1142 and 7.1143.

12. According to paragraph 10 of the Case, the Innovation for the Future Grant is open to any business operating in any sector of the Eriadorian economy. The Eriadorian government considers all applications by reference to the criteria of whether and to what extent they are likely to ‘make a significant contribution to the sustainable growth and global integration of the Eriadorian economy’. The size of grants awarded to different successful candidates is based on the request made, the business plan on which the request is founded, and the judgment of the Eriadorian government as to amount which ought to be awarded.
13. Eriador therefore submits that the Innovation for the Future program does not explicitly limit financial assistance to certain industries and that the criteria applied in determining recipients of the grant is objective and neutral.
14. Article 2.1 (c) of the SCM Agreement provides for *de facto* specificity where a subsidy at face value is non-specific, but it is in fact operated in a specific manner. If there are reasons to believe that the subsidy may in fact be specific, other factors such as the use of a subsidy programme by a limited number of certain enterprises; predominant use by certain enterprises; the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy may be considered.
15. In *US — Softwood Lumber IV*<sup>7</sup>, the Panel stated that Article 2.1(c) provides that if there are reasons to believe that the subsidy may in fact be specific, other factors “may” be considered. In the view of the Panel, the use of the verb “may,” rather than “shall” indicates that if there are reasons to believe that the subsidy may in fact be specific, an authority may want to look at any of the four factors or indicators of specificity. Thus, Eriador submits that the consideration of these other factors is not mandatory. As such, the consideration of the factors stated in Article 2.1 of the SCM Agreement is not compulsory.
16. Eriador submits further that the Innovation for the Future Grant to Future Energy is not a specific subsidy as Article 2.1 of the SCM Agreement does not apply. In the event that it does, Eriador submits that the fact that 90% of funds disbursed under the Innovation for

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<sup>7</sup> Panel Report, *US — Softwood Lumber IV*, para. 7.123.

the future program have gone to companies operating in the renewable energy sector over the three years it has been running, does not disclose predominant use certain enterprises.

17. In *EC and certain member States — Large Civil Aircraft*, the Panel considered that in making a finding of specificity of a subsidy, the last sentence of Article 2.1(c) requires that account be taken of:

- (i) the extent of diversification of economic activities within the jurisdiction of the granting authority; and
- (ii) the length of time during which the subsidy programme has been in operation.

18. Predominant use of a subsidy is not automatically detected in the case of a new subsidy programme that has not yet operated for enough time to understand its full impact on an economy. The Panel also stated that account has to be taken of the extent to which it would be reasonable and appropriate to determine whether the subsidy under examination is in fact sufficiently broadly available throughout an economy so as not to benefit “certain enterprises” on the basis of the entire duration of the subsidy programme or some shorter period of time.

19. Eriador submits that the Innovation for the Future Grant Program is a relatively new program having only been existence for three years. The program has not operated long enough to understand its full impact on the Eriadorian economy. Moreover, the grants under the program have been broadly available throughout the Eriadorian economy and do not benefit certain enterprises therefore a finding for specificity under Article 2.1 (c) should not be made.

### **3. The Innovation for the Future Grant is consistent with Article 3.1 (a) of the SCM as it is not contingent in fact upon export performance**

20. Article 3.1(a) prescribes that, subsidies which are dependent upon export performance either in law or in fact are prohibited. In *Canada — Aircraft*, the Appellate Body stated that while determining export contingency in fact, the existence of the relationship of contingency, between the subsidy and export performance, must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case.<sup>8</sup> The facts must

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<sup>8</sup> ABR, *Canada — Aircraft*, paras. 166–167.

demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to *actual or anticipated exportation* or *export earnings*. The mere fact that a subsidy is granted to enterprises which exports shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

21. Further, the Appellate Body in *Canada — Aircraft* identified three elements for determining when a subsidy is contingent in fact upon export performance namely: the granting of a subsidy..., tied to... and ...actual anticipated exports or export earnings. The Appellate Body also stated that the initial inquiry must be on whether the granting authority imposed a condition based on export performance in providing the subsidy. Eriador submits that it did not grant a subsidy within the meaning of the SCM Agreement and as such Article 3.1 (a) does not apply to it.
22. Eriador submits that the grant to Future Energy was not contingent on export performance. In *EC and certain member States — Large Civil Aircraft*<sup>9</sup>, the Appellate Body established a test for determining whether a subsidy is *de facto* contingent on export performance. It was held that the existence of *de facto* export contingency must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy which may include the following:
  - a. the design and structure of the measure granting the subsidy;
  - b. the modalities of operation set out in such a measure; and
  - c. the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation.
23. In *Canada — Aircraft*, the Panel noted that the nature of the required conditionality is that one of the conditions for the grant of the subsidy is the expectation that exports will flow thereby.<sup>10</sup> The Panel in *Australia — Auto motive Leather II*<sup>11</sup> held that expectation cannot be the sole determinative fact on the evaluation. The Panel also considered the

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<sup>9</sup> ABR, *EC and certain member States — Large Civil Aircraft*, paras. 1046–1048.

<sup>10</sup> Panel Report, *Canada — Aircraft*, para. 9.336.

<sup>11</sup> Panel Report, *Australia — Automotive Leather II*, para. 9.66.

extent to which circumstances surrounding a loan contract can be facts on the basis of which the determination of an export contingent subsidy can be made.

24. Eriador submits that the conditions for the grant under the Innovation for the Future Program did not require that energy equipment be exported. The fact that the company was exporting Fusilliscopes before the grant was issued is not reason sufficient enough to demonstrate contingency on anticipated export performance. The fact that the grant brought the Fusilliscopes closer to sale on the export market should not be regarded as a legal presumption. The legal standard to be applied requires one to establish each of the three substantive elements in footnote 4 of the SCM Agreement<sup>12</sup> which in the present case have not been established.

#### **4. The Innovation for the Future Grant is justified by Article 11 of the FCPRE**

25. Eriador further submits that the Innovation for the Future Grant issued to Future Energy is justified by Article 11 of the Framework Convention on the Promotion of Renewable Energy 2010 (FCPRE) which requires state parties 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.
26. Further, Article 8.2 (c) of the SCM Agreement provides that subsidies which promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms are non-actionable, provided that the assistance:
- a. is a one-time non-recurring measure;
  - b. is limited to 20 per cent of the cost of adaptation;
  - c. does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms;
  - d. is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and

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<sup>12</sup> ABR, *Canada — Aircraft*, para. 174.

- e. is available to all firms which can adopt the new equipment and/or production processes.

The term "existing facilities" means facilities which have been in operation for at least two years at the time when new environmental requirements are imposed.<sup>13</sup>

- 27. Eriador submits that the Innovation for the Future Program was intended to encourage the rapid development of renewable energy generated from the cold fusion technology. This new means of producing energy uses nuclear reaction at, or close to, room temperature, without the toxic by-products associated with current nuclear (fission) technology. Further, the invention of the Fusillscope enables users to temporarily overcome repulsive forces between atomic particles, at comparatively low energy cost. The production facility for the Fusillscopes was established in 2008 and was in operation for at least two years before the FCPRE was signed.
- 28. Eriador submits that the Innovation for the Future Grant to Future Energy meets the threshold under Article 8.2 (c) of the SCM Agreement and is thus a non-actionable subsidy which cannot be subjected to the disciplines of the SCM Agreement relating to prohibited subsidies.

**B. 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:I 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**

**1. The loan by Eribank is not a subsidy as per Article 1:1 of the SCM Agreement**

- 29. Eriador has conceded that the loan by Eribank would confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement if it is established that the loan was granted by a public body. The issue to determine, therefore, is whether Eribank is a public body. Eriador argues that it is not a public body.

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<sup>13</sup> Footnote 33 of the SCM Agreement.

30. The Appellate Body in *US Anti-Dumping and Countervailing Duties (China)* found that a public body must be one that exercises or is vested with the authority of the government.<sup>14</sup> Further, the panel should consider and determine whether the functions of the body can be considered to be governmental in the legal order of the Member.<sup>15</sup> The functions of a bank, including Eribank, include providing loans to individuals and legal entities. This function is not a governmental function in the legal order of Eriador. The loan was advanced on favourable terms, which has been interpreted to mean that the terms of the loan were not varied in favour of CleanTech, but rather that the loan enabled CleanTech to access funds, which were not available from private investors. In fact, Eribank is run largely on a commercial basis, hence it is not a governmental body within the Republic of Eriador.
31. The Appellate Body also stated that ownership of a body by the government does not demonstrate that the government exercises meaningful control over that entity.<sup>16</sup> Eribank is majorly owned by the state. The state also appoints directors to the bank, through its Ministry of Commerce. However, the directors act in their independent capacity. This essentially means that the state of Eriador does not have administrative control over Eribank. The right of the state to appoint directors to the bank flows from its ownership of shares in the bank. In any case, although the bank consulted the Ministry of Environment as to the commercial viability of cold fusion, the Ministry maintained that the final decision to grant or deny the loan was for Eribank itself. Therefore the loan by the bank to CleanTech cannot be treated as a governmental function, rather it is an action of the bank independently.

## **2. The grant to Future Energy does not amount to a specific subsidy within the meaning of Article 1 and 2 of the SCM Agreement**

32. We reiterate the submissions made here above that although the grant to Future Energy amounted to a financial contribution from the government, it was not specific to the renewable energy, hence is not a subsidy according to Article 1 of the SCM Agreement.

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<sup>14</sup> ABR, *US Anti-Dumping and Countervailing Duties (China)* para 317

<sup>15</sup> ABR, *US Anti-Dumping and Countervailing Duties (China)* para 297

<sup>16</sup> ABR, *US Anti-Dumping and Countervailing Duties (China)* para 318

**3. Even if the loan and grant are subsidies, there is no serious prejudice within the meaning of Article 5 (c) and 6.3 (c) of the SCM Agreement**

33. The fact that the government advances financial assistance to an entity does not automatically mean that it amounts to an actionable subsidy, unless the results are prejudicial to the complainant. Article 6.3(c) of the SCM Agreement provides that there shall be serious prejudice under Article 5(c) if “*the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market*”.
34. This provision does not make the actions of Eriador to advance a grant to Future Energy actionable because: (i) Future Energy’s deal with Elektrica was independent and neutral from the perspective of the government instruments and actions; (ii) solar energy and nuclear energy are not “like products”.
35. The Eriadorian government provided grants to ‘any business operating in any sector of the Eriadorian economy... to provide financial assistance to projects which promise to make a significant contribution to the sustainable growth and global integration of the Eriadorian economy’. Future Energy obtained the grant to enable it to construct an additional production facility for Fusilliscopes. The agreement between Future Energy and Elektrica was therefore not in any way facilitated by the grant by the Eriadorian government.
36. The state of Eriador argues that Fusilliscopes and solar panel units are not like products. A four-fold criterion has been adopted to determine the likeness of products:
- i) the physical properties of products;
  - (ii) the extent to which the products are capable of serving the same or similar end uses;
  - (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and
  - (iv) the international classification of the products for tariff purposes.<sup>17</sup>

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<sup>17</sup> The Report of the Working Party on *Border Tax Adjustments* adopted 2 December 1970, BISD 18S/97; ABR *EC Asbestos*, Para 101

37. Although solar panels and Fusilliscopes serve the same end purpose, and are perceived as alternative sources of energy, the two are not “like products” because the two do not have similar physical characteristics or tariff classifications. The four item classification should be applied as a whole, and the specific elements are interdependent.
38. The Respondent herein urges the Panel to adopt the ration of the Appellate Body in *EC-Asbestos*, which that the fact that two products have the same end use does not make them identical, or equivalent.<sup>18</sup> Therefore, although solar energy and nuclear energy have the same end use, they are significantly different in terms of physical characteristics, components and structure.
39. Further, the best place to compare the likeness of products is the market place. The relevant markets in this case are different. Products which are like to Fusilliscopes would be other sources of electricity produced using nuclear energy.
40. We affiliate ourselves with the finding of the Appellate Body that the physical properties of products that are likely to influence the competitive relationship between products in the marketplace should be considered in analysing the likeness of products<sup>19</sup>, and urge this panel to adopt the same.

**C. 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 XVI:I 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**

41. The Long term purchase agreement between Future Energy and EEC, concluded pursuant to the FIT scheme, causes no serous prejudice to the interests of Borduria within the Meaning of Article 5(c) of the SCM Agreement and XVI: 1 of the GATT 1994, it has neither displaced nor impeded imports of electricity from Borduria into Eriador within the meaning of Article 6.3(a) of the SCM Agreement.

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<sup>18</sup> ABR, *EC Asbestos*, para 111

<sup>19</sup> *Ibid*, para 114

**1. The FIT Scheme is not a Subsidy under article 1.1a of the SCM Agreement as it does not confer a benefit to Future Energy.**

42. As stated earlier in this memorial, for a subsidy to exist under Article 1.1(a) of the SCM Agreement there must be a financial contribution by the government. The Transactions between EEC and Future Energy through the FIT Scheme are based on a price that mirrors the true cost of electricity on the market hence not a financial contribution. Quoting the Appellate Body position in the *Large Civil Aircraft*,<sup>20</sup> Canada submitted that the question as to whether a benefit is conferred must be based on whether the terms of the transaction reveal that the government has paid more than an ‘adequate’ price, for that specific form of electricity, with its specific inherent qualities.<sup>21</sup>

43. In this regard, there was no evidence to show that EEC paid more for Electricity from Future Energy; specifically the electricity generated through cold fusion by use of Fusilliscopes. This is because there is no other generator of electricity by use of Fusilliscopes on the Eriadorian Market with which to compare. There is, in essence, no market benchmark with which to compare electricity generated from Fusilliscopes.

44. Given that the electricity from Future Energy was purchased at market rate, there was neither a subsidy nor price support as contemplated under Article XVI: 1 of GATT 1994. As such, any reduction of imports from Borduria cannot be directly associated with the sale of electricity under the FIT scheme. There is thus no serious prejudice to Borduria as envisaged under Article 5(c) and footnote 13 of the SCM Agreement.

45. From paragraph 11 of the Case, should the cost of electricity generated by Fusilliscopes and sold under the FIT scheme turn out to be higher than the normal cost of other forms of electricity, it is because the cost of carbon emitted was factored in. There is no advantage accruing to Future energy if it sells its electricity at market value with the cost of carbon included in the wholesale price.

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<sup>20</sup> ABR, *Canada- Measures Affecting the Export of Civilian Aircraft*; Recourse by Brazil to Article 21.5 of the DSU (2000) para 975

<sup>21</sup> ABR ABR, *Canada- Certain Measures Affecting the Renewable Energy Generation Sector; Measures Relating to the Feed –in Tariff Program* para 2.181

46. Rather than act as a subsidy, the economic impact of a FIT scheme is to provide the incentive for investment in new renewable energy capacity and equipment installation.<sup>22</sup> The government of Eriador was mandated under the requirements of the FCPRE to reduce reliance on fossil fuels and increase reliance on clean energy. The use of the FIT scheme was, as stated under paragraph 11 of the case, a directive from the Ministry of Commerce. The directive was aimed at incentivizing investment in production of clean energy which would directly lead to an increase in the production of clean energy. As a result, there would be more reliance on clean energy thus fulfilling the mandate of Eriador under the FCPRE.

47. It is the submission of the respondent that even without the FIT scheme, Future energy would still have been able to manufacture and sell its electricity on the Eriadorian market. In essence, there was no guarantee that Future energy would be awarded contracts; the only guarantee was the pay. The fact that Future Energy was able to secure the long term contracts competitively shows that the guaranteed payment did not give it any upfront advantage.

**2. Electricity sold under the FIT Scheme Causes no prejudice to the Interests of Borduria as it is not a like Product contemplated under Article 6.3(a) of the SCM Agreement.**

48. From paragraph 6.3(a) of the SCM agreement, Serious Prejudice in the sense of paragraph c of Article 5 of the SCM Agreement may arise in a case where the subsidy displaces or impedes the imports of a like product of another member into the market of the subsidizing State. If the products in consideration are not like products, then it is untenable to argue that there is displacement. The Appellate Body in *Canada Renewable Energy* stated that there is a clear distinction between electricity from other generation and electricity generated from certain renewable sources.<sup>23</sup> Similarly, electricity generated from fossil fuels sold into the Eriadorian Market by Bordurian companies is different from electricity generated by Future Energy using Fusilliscopes.

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<sup>22</sup> ABR, *Canada- Renewable Energy*, para 9.

<sup>23</sup> ABR, *Canada Renewable Energy*, para 5.178.

**3. There is no nexus**

49. As a consequent, even if adverse effects are caused to Bordurian electricity by way of displacement and lost sales as contemplated under Articles 6.3a and b; and 6.3c of the SCM agreement, there is no direct link between the effects and the subsidized product. Eriador's concern, which is the central question for determination in this regard, is whether electricity sold under the FIT scheme and that sold under general contracts concern the same product and whether there exists a sufficient nexus with the purportedly subsidized product and the particular effects-variable under examination. Following the Respondents submissions in the preceding paragraph, we humbly maintain that there is no direct nexus and request the panel to hold thus.

50. The determination of the relevant market under Article 6.3 of the SCM Agreement depends on the subsidized product in question.<sup>24</sup> Since electricity from cold fusion is different from other forms of electricity, it cannot be said to be competing in the same market with those other forms of electricity. The electricity generated by Future Energy can therefore not be said to cause serious prejudice to Borduria.

51. The Respondent further submits that just as held by the Panel in the *Large Civil Aircraft* case, the fact that certain products share particular characteristics or that they have the same general uses does not constitute a basis on which to find that they compete on the same product market.<sup>25</sup> As such, the fact that electricity from fusilliscopes might not be distinguishable or that it may be put to the same use as electricity from fossil fuels does not make them like products. It is not a product in the same market that is capable of displacing or impeding sales from Borduria.

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<sup>24</sup> ABR, *United States- Subsidies on Upland Cotton* (2005) para 408.

<sup>25</sup> Panel Report, *European Communities and Certain Member States- Measures Affecting Trade in Large Civil Aircraft*, (2011) para 7.1664.

**Request for findings**

For the above reasons, the Eriador urges the panel to find that:

1. The FCPRE is relevant to this dispute;
2. The forms of electricity in this case are not like products under the SCM Agreement and GATT Article XVI:1 1994;
3. Eribank is not a public body within the meaning of Article 1.1 of the SCM Agreement;
4. The ‘Innovation for the Future Grant’ is consistent with Article 3.1(a) of the SCM Agreement since it is not contingent in fact upon export by Future Energy of equipment for renewable energy generation;
5. The grant to Future Energy is not a specific subsidy within the meaning of Article 1.2 and Article 2 of the SCM Agreement;
6. The loan by Eribank and the grant to Future Energy do not cause serious prejudice to the interests of Borduria within the meaning of Article 5(3) and Article 6.3(c) of the SCM Agreement since the products in question are not like products;
7. The FIT Scheme is not a subsidy within the meaning of Article 1.1 of the SCM Agreement and Article XVI:I of GATT 1994; and
8. The FIT Scheme does not cause prejudice to the interests of Borduria, since the products in question are not like products.