

Team Code: 124C

**11th GNLU INTERNATIONAL LAW MOOT COURT COMPETITION 2019
IN THE WORLD TRADE ORGANISATION PANEL**



OXYONIA – TRANSNATIONAL SUBSIDIES ON STRATEGIC MINERALS

WT/DSXXX

CLIMATIA

(Complainant)

v.

OXYONIA

(Respondent)

-WRITTEN SUBMISSION FOR THE COMPLAINANT-

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LIST OF ABBREVIATIONS

AB/R	Appellate Body/Report
Annex	Annexure
Doc.	Document
EC	European Communities
FutureZ	FutureZ Cars
GATT	General Agreement on Tariffs and Trade
GOO	Government of Oxyonia
GreenO	GreenO Motor Company
GRMM	Global Refineries of Metal and Minerals
IBD	International Bank for Development
<i>Id.</i>	<i>Ibidem</i>
LDC	Least Developed Countries
MMO	Ministry of Mining Operations
MOC	Mining Operations Company
n.	Footnote
No.	Number
SCM	Subsidies and Countervailing Measures
UMMC	Ultron Metals Mining Company
US	United States
USD	United States Dollar
v.	<i>Versus</i>
WT/DS	World Trade/Dispute Settlement
WTO	World Trade Organisation

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STATEMENT OF FACTS

Prologue

Inflation of prices and reduced supply of petroleum and diesel coupled with environmental regulations banning the use of petrol-powered and diesel-powered cars lead to its replacement with electric-powered ones in 2037. GreenO and FuturZ are two of the biggest electric car manufacturers in the world constituting 70% of total global production headquartered in two highly developed economies Oxyonia and Climatia respectively. The manufacture of lithium-ion batteries used in their electric cars demands a significant amount of refined cobalt. Despite the dearth of cobalt reserves the production units for these batteries are located in their respecting countries. They are important members of the UN and WTO and founding members of IBD.

The business of cobalt in Minera

Minera, a LDC holds 15% of the global cobalt reserves in its Adamtiuman mines where cobalt is extracted as a primary product. UMMC is a public limited mining company listed on the Eldora Stock Exchange having exclusive mining rights in Minera since 2007 by way of contract. The mining rights could be renewed at least twice, for 15 years each time, on mutually agreeable terms. By 2023, when negotiations for the same commenced, UMMC was on the brink on financial collapse. The Minera Government sensed the risk and expressed its reluctance to proceed without advance payment of estimated royalties, as well as an increase in the royalty rate. The Government of Oxyonia (GOO) bought 25% minority stake in the company which led to an increase in investor confidence in UMMC and renewal of contract by Minera. By 2037, it became one of the most important suppliers of cobalt for refineries manufacturing battery-grade cobalt for companies like GreenO and FuturZ. GRMM, a major supplier of battery-grade cobalt to GreenO started negotiations with UMMC in December 2036 which ended up in a 20-year supply agreement to supply half of its cobalt concentrates at fixed price of 90000 USD per metric ton.

The business of cobalt in Rarisia

Rarisia is another LDC possessing 50% of the global cobalt reserves in its Conda mines. MOC who is under the control of MMO has the exclusive right to mine in Rarisia since 2009. The level of cobalt obtained from these mines is influenced by the international demand of copper

as cobalt is a by-product obtained during copper mining. In 2030 MOC entered into a 20-year supply agreement with GRMM to supply at least one-third of its cobalt concentrates at a fixed price of 90000 USD per metric ton. To discourage the export of ores and to encourage the growth of value-added industries, the Government of Rarisia decided to impose an *ad valorem* duty of 100% on export of copper, cobalt etc. to come into effect from 2039. Despite this, the demand for cobalt concentrates accelerated which increased the financial resources that MOC required to devote to Conda mines, for which in 2036 the MOC along with the Rarisian Government approached IDB for a loan. In January 2037 IDB transferred a loan amount of 5 billion USD at an interest rate of 2% with a loan waiver clause. The loan was waived in 2040.

Cobalt refining in Oxyonia

By 2038, GRMM became one of the biggest producers of refined cobalt in the world exporting 40% of its produce with 90% of domestic sales to GreenO. In February 2038, GOO proposed the imposition of 50% export duty on refined and battery grade cobalt. Subsequently, GRMM and GreenO entered into for the supply of battery-grade cobalt for 10 years at prices to be negotiated on a monthly basis. The prices paid subsequent to this were 30-40% lower than market price which stopped imports into Oxyonia and also doubled GreenO's exports between 2039-2042. GRMM did not go into loss because of its fixed-term supply agreements with MOC and UMMC.

Pushback

FuturZ experienced a major pushback as it was unable to import battery-grade cobalt from GRMM since 2038. The long-term supply agreements of GRMM with Minera and Rarisia doubled the effect. The increased demand and reduced supply of battery-grade cobalt increased its price in the world market. Climatia identifies the export duties, long term supply agreement between UMMC and GRMM and the unrepaid loan to be in violation of SCM Agreement causing trade distortions.

Panel Establishment

After unsuccessful consultations with GOO, the Government of Climatia submitted a request for the establishment of a panel to the WTO Dispute Settlement Body.

MEASURES AT ISSUE

1. THE 20-YEAR SUPPLY AGREEMENT BETWEEN UMMC AND GRMM IS AN EXPORT SUBSIDY PROHIBITED WITHIN THE MEANING OF ARTICLE 3. 1 (a) OF THE SCM AGREEMENT.

1.1. The 20-year supply agreement between UMMC and GRMM is a financial contribution within the meaning of Article 1. 1 (a) (1) (iv) and Article 1. 1 (a) (1) (iii) of the SCM Agreement in the form of government entrustment or direction to a private body to provide goods.

1.1.1. The supply agreement is a financial contribution within the meaning of Article 1. 1 (a) (1) (iii).

1.1.2. The supply agreement is a financial contribution within the meaning of Article 1. 1 (a) (1) (iv).

1.2. The 20-year supply agreement confers a benefit to GRMM within the meaning of Article 1. 1 (b) of the SCM Agreement as it gives long-term access to cobalt concentrates to GRMM at fixed and below current world-prices.

1.3. The 20-year supply agreement is a prohibited subsidy within the meaning of Article 3. 1 (a) of the SCM Agreement as it is contingent on export performance.

2. LOANS GIVEN BY IBD TO THE RARISIAN GOVERNMENT TO THE EXTENT IT WAS NOT REPAYED BY RARISIA (UNREPAID LOAN) IS A PROHIBITED SUBSIDY WITHIN THE MEANING OF ARTICLE 3. 1 (a) OF THE SCM AGREEMENT.

2.1. The unrepaid loan given by IBD to the Rarisian Government is a financial contribution by a public body, namely, IBD, in the form of government payments to a funding mechanism (which, in this case, is MOC), within the meaning of Article 1. 1 (a) (1) (iv) of the SCM Agreement.

2.1.1. IBD is a 'public body' within the meaning of Article 1. 1 (a) (1) of SCM Agreement.

2.1.2. The unrepaid loan given by IBD to Rarisian Government is a financial contribution in the form of government payments to a funding mechanism.

2.2. The unrepaid loan confers a benefit within the meaning of Article 1. 1 (b) to, *inter alia*, GRMM in terms of increased supply of cobalt concentrates at fixed prices.

2.3. The unrepaid loan is a prohibited subsidy within the meaning of Article 3. 1 (a) of the SCM Agreement as it is contingent on the exports of cobalt concentrates from Rarisia to, *inter alia*, Oxyonia.

3. THE EXPORT DUTIES IMPOSED ON, *INTER ALIA*, BATTERY-GRADE COBALT EXPORTED FROM OXYONIA ARE PROHIBITED SUBSIDIES WITHIN THE MEANING OF ARTICLE 3. 1 (b).

3.1. The export duties imposed on exports of, *inter alia*, battery-grade cobalt exported from Oxyonia are a form of “income or price support in the sense of Article XVI of GATT 1994”.

3.2. The export duties imposed on exports of, *inter alia*, battery-grade cobalt from Oxyonia confer a benefit to GreenO by depressing the price of this product in the domestic market.

3.3. The export duties are prohibited subsidies within the meaning of Article 3. 1 (b) of the SCM Agreement as the facts surrounding the grant of this subsidy show that this subsidy to GreenO was de facto contingent on the use of domestic over imported goods.

SUMMARY OF PLEADINGS

ARGUMENT 1

The 20-year supply agreement between GRMM and UMMC is a prohibited subsidy within the meaning of Article 3. 1 (a) of the SCM Agreement having trade distortion effects. This claim can be based on three grounds:

Firstly, the long-term supply agreement is a financial contribution as identified under Article 1. 1 (a) (iii) in the form of goods or services provided or purchased by the government and under Article 1. 1 (a) (iv) in the form of ‘entrustment’ and ‘direction’ of a private body.

GOO, through the exercise of its control over UMMC is ‘making available continued supply of cobalt concentrates at fixed prices to GRMM, a refinery company based in Oxyonia. As this has the potential of reducing production cost of GRMM, it is a financial contribution.

UMMC, in the present case is being used as a proxy by GOO and thereby entrust and direct them to confer a financial contribution in the form of supply agreement. The control exercised by GRMM as a shareholder right takes the shape of a ‘threat’. The ‘commercial unreasonableness’ of the transaction attributes the tag of a financial contribution to the long-term supply agreement.

Secondly, the analysis of prevailing market structure and demand-supply conditions reveals that GRMM received the contribution paying inadequate remuneration, lower than what would have been payable in the market. The added stability that GRMM would receive upon having long term supply agreements with two major suppliers makes GRMM ‘better off’ than other players in the relevant market. Therefore, the financial contribution confers a benefit.

Thirdly, the supply agreement is an export subsidy under SCM Agreement as there exists an export contingency. The availability of cobalt at fixed prices lower than the market rates confers a benefit of anticipated low production for GRMM. Therefore, it can be identified that the supply agreement was geared to induce future anticipated exports. The ratio analysis involving the comparison of sales behaviour in the presence and absence of supply agreement also concludes that it is a prohibited export subsidy within the meaning of Article 3. 1 (a) of the SCM Agreement

ARGUMENT 2

The unrepaid loan received by MOC pursuant to the waiving of loan in 2040 is a prohibited subsidy on the following grounds:

Firstly, the unrepaid loan qualifies as a payment made by GOO under the garb of IBD to MOC. Here, a government payment through a public body is made to a funding mechanism and the same is identified as a financial contribution under Article 1. 1 (a) (1) (iv) of the SCM Agreement.

IBD, an international financial institution, is a ‘public body’ by virtue of it possessing, exercising and being vested with governmental authority through the interventions by GOO. The exercise of veto power by GOO in the decision making process, the text of Article 210 of the Constitution of Oxyonia which exhibits similar nature of that of the goals of IBD and the instrumental pain-staking efforts of Oxyonia in establishing IBD, all are conclusiveness of the conferment of governmental authority on IBD which ought to have been exercised by GOO. Hence, it is a ‘public body’.

The loan-waiver clause stipulates conditions for effectuating the waiver. Payment in the laymen as well as legal parlance is identified in relation to an obligation upon satisfaction of the condition. Since, here the contribution in the form of unrepaid loan is made in return of increased exports, this can be seen as a remuneration, effectively a payment.

Secondly, as MOC is absolved from repaying the loan, to the extent of the unrepaid loan, it is an additional asset conferring an additional financial stability. The nature of the market suggests any such increments or additional gain to be a benefit as it makes a huge difference in the returns due to lower production costs. The lower production cost of MOC is directly linked with its extend of mining which has a direct nexus to the supply of cobalt to GRMM.

Thirdly, the unrepaid loan is an export subsidy with *de facto* export contingency. The terms of the loan agreement, in particular, the loan-waiver clause demonstrates conditionality attached to proof of exportation which forms the test of *de facto* export contingency. The anticipated ‘secure and stable supply’ of cobalt concentrates to member States in the light of the supply agreement between GRMM and MOC demonstrates an anticipation of increased supply to GRMM, hence, a subsidy within the meaning of Article 3. 1 (a).

ARGUMENT 3

The export duty imposed on cobalt concentrates in combination of the long-term supply agreement between UMMC and GRMM have serious trade distortion effects. The export duty imposed is an import substitution subsidy on the basis of the following grounds:

Firstly, in the present case, the export duty has a direct effect on the income of GreenO as the export duties was aimed at price depression. The export duties were imposed by GOO as a response to the lobbying by end users including GreenO suggesting that it was a planned action aimed at inducing price depression. As it acts in favour of GreenO, the exports duties falls within the meaning of ‘financial contribution’.

Secondly, the price depression in the domestic market induced by the export duties have left with GreenO with a high negotiating power. Being the largest domestic customer accounting for purchase of 54% of total production, by virtue of the imposition of export duty, GreenO enjoys a meaningful control over price structure. On analysis of relevant benchmark, it can be concluded that in the absence of imports and where GRMM would try to close the margin created by sale to GreenO at lower prices, small players would be made to pay comparatively higher prices than what GreenO pays. This has only two implications, one where the small players are removed from the market and second, where small players rely on cheaper sources if available. In either case, GreenO get an assurance as to continued supply of cobalt concentrates from GRMM, thereby making GreenO ‘better off’ than other players.

Thirdly, the fact that the imposition of export subsidy was induced by lobbying and the interest exhibited by GOO in GreenO are demonstrative of *de facto* contingency of ‘use of domestic goods over imported goods’. The decrease in exports eventually leading to the elimination of imports is the anticipation in the present case. As GRMM would be getting uninterrupted supplies of cobalt concentrates at lower prices and as the export duties would compel them to focus down on domestic market, GreenO can benefit through secured supplies of cobalt at lower prices. Thus the export duties imposed is an import substitution subsidy.

The export duty along with the supply agreement confers benefit to GreenO effectively making it hard for its competitors. GRMM being one of the biggest suppliers of cobalt and them supplying majority of concentrates to GreenO brings in an imbalance in the distribution of raw material creating trade distortion. Hence the claim.

LEGAL PLEADINGS

1. THE 20-YEAR SUPPLY AGREEMENT BETWEEN UMMC AND GRMM IS AN EXPORT SUBSIDY PROHIBITED WITHIN THE MEANING OF ARTICLE 3. 1 (A) OF THE SCM AGREEMENT.

1.1. The 20-year supply agreement between UMMC and GRMM is a financial contribution within the meaning of Article 1. 1 (a) (1) (iv) and Article 1. 1 (a) (1) (iii) of the SCM Agreement in the form of government entrustment or direction to a private body to provide goods.

1. Article 1.1 of the SCM Agreement¹ stipulates that a ‘subsidy’ shall be deemed to exist if there is a ‘financial contribution by a government or any public body’ and ‘a benefit is thereby conferred’.² Article 1. 1 (a) provides as to what constitute a financial contribution and subparagraphs (i) - (iv) exhausts the types of government conduct deemed to constitute financial contribution.

2. Article 1. 1 (a) (1) subparagraph (iii) contemplates two distinct types of transactions. The first is where a government “provides goods or services other than general infrastructure” and the second relates to situations in which a government “purchases goods” from an enterprise.³ Article 1. 1 (a) (1) (iv) refers to financial contributions where a ‘government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions’ illustrated in subparagraphs (i)-(iii), which would normally be vested in the government and the practice, in no real sense, differs from the practices normally followed by governments.⁴

¹ Agreement on Subsidies and Countervailing Measures art. 1. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

² Appellate Body Report, *United States - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶ 4.8, WTO Doc. WT/DS436/AB/R (adopted Dec. 19, 2014) [hereinafter Appellate Body Report, *US – Carbon Steel (India)*].

³ Appellate Body Report, *United States - Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶ 618, WTO Doc. WT/DS353/AB/R (adopted Mar. 23, 2012) [hereinafter Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*].

⁴ PETER VAN DEN BOSSCHE, WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 782 (4th ed. 2017) [hereinafter PETER VAN DEN BOSSCHE].

3. In the present case, the long term supply agreement between UMMC and GRMM is a financial contribution within the meaning of Article 1.1(a)(1)(iii) and Article 1.1(a)(1)(iv) of the SCM Agreement.

1.1.1. The supply agreement is a financial contribution within the meaning of Article 1.1(a)(1)(iii).

4. Article 1.1 of the SCM Agreement act as a check against governmental actions wherein benefits are conferred distorting trade. The inclusion of ‘financial contribution’ in the text of the provision was meant to guarantee that not all government measures that confer benefits would be considered to be subsidies.⁵ In the present case, Governmental action has crossed the limits envisaged by the agreement and hence the challenge.

5. The Appellate Body in *US – Softwood Lumber IV*⁶, evaluating the existence of a financial contribution noted that such an evaluation involves consideration of the nature of the transaction through which something of economic value is transferred by a government. As such, the Article contemplates two distinct types of transaction of which the first identified squarely falls within the ambit of the present case. The first is where a government provides goods or services other than general infrastructure and such transactions have the potential to lower artificially the cost of producing a product by providing, to an enterprise, inputs having a financial value.

6. Upholding the Panel’s finding, the Appellate Body found that the definition of the term ‘provides’ as used in the provision means to ‘supply or furnish for use; make available’.⁷ This ‘making available’ or ‘putting at the disposal of’ requires there to be a reasonably proximate relationship between the action of the government providing the good or service on one hand, and the use or enjoyment of the good or service by the recipient on the other.⁸ Thus the test is that of government control over the availability of a specific thing being ‘made available’.

⁵ Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, ¶ 8.65, WTO Doc. WT/DS194/R (adopted Aug. 23, 2001) [hereinafter Panel Report, *US – Export Restraints*].

⁶ Appellate Body Report, *United States -Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, ¶ 51, WTO Doc. WT/DS257/AB/R (adopted Feb. 17, 2004) [hereinafter Appellate Body Report, *US – Softwood Lumber IV*].

⁷ *Id.* at 69.

⁸ Appellate Body Report, *US – Carbon Steel (India)*, *supra* note 2, ¶ 71.

7. In the present case, the GOO is exercising an apparent dominating control over the decision leading to the culmination of a long term supply agreement between UMMC and GRMM by being a minority shareholder in UMMC. It is true that the mere fact that a government is a shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity. However, where the evidence shows that the formal indications of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity is exercising governmental authority.

8. Transcript of the shareholder's meeting of UMMC⁹ reveals that Ensen Brothers, the majority shareholders are not interested in the proposal placed by GRMM as the market analysis reports¹⁰ give a different picture. But the representative of GOO is able to push them into signing the agreement threatening that in other case, they would sell their stakes. Considering the fact that GOO's investment resulted in increased investor confidence in UMMC and its share doubling in the Eldora listing¹¹, the decision taken by Ensen Brothers were meaningfully controlled by GOO. GRMM is one of the biggest refineries and owned refineries only in Oxyonia and it being the major supplier of battery-grade cobalt to GreenO reveals Oxyonia's interest in the matter.¹² Also, GRMM had one long term supply agreement in Rarisia.¹³ The agreement with UMMC therefore has the potential of reducing the production cost of GRMM. Hence it can be concluded that the agreement wouldn't have been a reality if there wasn't an intervention by GOO and as there exists a meaningful control of GOO effectuating a reduction in the production cost of GRMM, the 20-year supply agreement is a financial contribution within the meaning of Article 1. 1 (a) (1) (iii).

1.1.2. The supply agreement is a financial contribution within the meaning of Article 1. 1 (a) (1) (iv).

9. The paragraphs (i) through (iii) identify the types of actions that, when taken by private bodies that have been so 'entrusted' or 'directed' by the government, fall within the scope of

⁹ Moot Problem, Annex II 11.

¹⁰ Moot Problem 2 n.1.

¹¹ Moot Problem 3, ¶ 2.

¹² Moot Problem 3, ¶ 3.

¹³ Moot Problem 3, ¶ 4.

paragraph (iv). In other words, paragraph (iv) covers situations where a private body is used as a proxy by the government to carry out those functions listed in paragraphs (i) through (iii).¹⁴ It is an anti-circumvention provision intended to prevent the use of private bodies by governments to evade their obligations under the SCM Agreement.¹⁵

10. The Agreement does not define the terms ‘entrusts’ or ‘directs’. The Appellate Body clarified that ‘entrustment’ occurs where a government gives responsibility to a private body, and ‘direction’ refers to situations where the government exercises its authority over a private body.¹⁶ This delegation as understood by the term ‘entrust’ could be informal too. The test is that of a demonstrable link between the government and the conduct of the private body.¹⁷ ‘Entrustment’ and ‘direction’ imply a more active role than mere acts of encouragement. Also, the involvement of any form of threat or inducement serves as evidence of entrustment or direction.¹⁸ While ‘entrustment’ refer to situations where the government gives responsibility to a private body, ‘directs’ is defined as to give authoritative instructions to, to order the performance of something, to command, to control, or to govern an action and thereby include some degree of compulsion, over a private body; the condition being that the public body itself possess such authority, or ability to compel or command.¹⁹

11. In the present case, though a minority shareholder holding only 25% stake in UMMC²⁰, GOO enjoys a meaningful authority over decision making in UMMC by virtue of the impact created by the action of acquiring stake in UMMC. The fact that it was this intervention by GOO in 2023 that effectively came in favour of UMMC with regard to the negotiations between them and the Government of Minera²¹ has taken the shape of threat in the shareholder’s meeting of UMMC,²² seen particularly in the light that the renewal contract was signed only in 2039.²³

¹⁴ Appellate Body Report, *United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, ¶ 108, WTO Doc. WT/DS296/AB/R (adopted July 20, 2005) [hereinafter Appellate Body Report, *US- Countervailing Duty Investigation on DRAMs*].

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 114.

¹⁸ *Id.*

¹⁹ Appellate Body Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 294, WTO Doc. WT/DS379/AB/R (adopted Mar. 25, 2011) [hereinafter Appellate Body Report, *US – Anti-Dumping and countervailing Duties (China)*].

²⁰ Moot Problem 3, ¶ 2.

²¹ Moot Problem 3, ¶ 2.

²² Moot Problem, Annex II 11, ¶ 4.

²³ Moot Problem 3 n.3.

The decision of GOO to sell its stakes at the event of UMMC²⁴ not agreeing to the proposal placed by GRMM establishes the demonstrable link between GOO and UMMC's subsequent actions, that is, the entering of agreement with GRMM. There exists an evident inducement and compulsion.

12. Furthermore, in Japan – DRAMs (Korea),²⁵ the Appellate Body recognized that the “commercial unreasonableness” of a financial transaction is a relevant factor in determining the existence of entrustment or direction under Article 1. 1 (a) (1) (iv). The Metallurgy International News had stated in 2036 that the global demand for cobalt concentrates and refined cobalt would remain high at least till 2042.²⁶ In spite of Ensen Brothers, pointing out this fact, GOO rejected their argument on no valid grounds from which it could be concluded that the transaction involved resulting in the supply agreement was rooted in “commercial unreasonableness”.

13. Hence it can be concluded that the 20-year supply agreement is a financial contribution within the meaning of Article 1. 1 (a) (1) (iv) in the form of government entrustment or direction to a private body to provide goods.

1.2. The 20-year supply agreement confers a benefit to GRMM within the meaning of Article 1. 1 (b) of the SCM Agreement as it gives long-term access to cobalt concentrates to GRMM at fixed and below current world-prices.

14. A financial contribution by a government or a public body is a subsidy within the meaning of Article 1. 1 of the SCM Agreement only if the financial contribution confers a benefit.²⁷ Article 1. 1 (b) though speaks of benefit, never defines it. The determination of ‘benefit’ under Article 1. 1 (b) of the SCM Agreement seeks to identify whether the financial contribution has made the ‘recipient better off’ than it would otherwise have been, absent that contribution.²⁸ In *Brazil – Aircraft (Article 21.5 – Canada II)* the Panel found the payments in support of export

²⁴ Moot Problem, Annex II 11, ¶ 4.

²⁵ Appellate Body Report, *Japan — Countervailing Duties on Dynamic Random Access Memories from Korea*, ¶138, WTO Doc. WT/DS336/AB/R (adopted Dec. 17, 2007) [hereinafter Appellate Body Report, *Japan – DRAMs (Korea)*].

²⁶ Moot Problem 1 n.1.

²⁷ SCM Agreement, *supra* note 1, art. 1. 1 (b).

²⁸ Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, *supra* note 3, ¶ 690.

credit transactions to be ‘benefit’ as without such support, export credit would likely not have been available to purchasers of regional aircraft.²⁹

15. Thus there exists an element of comparison in the analysis of benefit determination. Market place provides an appropriate basis for comparison as 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.³⁰ In other words, benefit is to be assessed as one that is financial in nature and in which the behaviour of the grantor and the recipient of the alleged subsidy at issue are assessed as against the behaviour of commercial actors in the market.³¹ The test is whether the price paid to the government provider is less than the price that would be required by the market.³²

16. Article 14 (d) dealing with the Part V, uses the term ‘benefit’ in the same context³³ and hence comes in aid to determine the proper benchmark for assessment. Article 14 (d) provides that the provision of goods or services or the purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration. This adequacy of remuneration has to be assessed in relation to the prevailing market conditions in the country of provision.³⁴

17. In the present case, the supply agreement is entered into in 2037 for 20-year period to the effect that half of the cobalt concentrate from the Adamtiuman Mines would be supplied at a fixed price of 90000 USD.³⁵ The legislative interventions in various nations of banning fuel-driven cars and its replacement with electric-powered ones³⁶ read along with the market structure analysis focused on demand-supply interaction by Metallurgy International News³⁷ establishes the prospective future of the relevant market and the ‘commercial

²⁹ Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, ¶ 27, WTO Doc. WT/DS46/AB/R (adopted Aug. 4, 2000) [hereinafter Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada II)*].

³⁰ Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, ¶ 157, WTO Doc. WT/DS70/AB/R (adopted Aug. 4, 2000) [hereinafter Appellate Body Report, *Canada - Aircraft*].

³¹ Appellate Body Report, *European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft*, ¶ 636, WTO Doc. WT/DS316/AB/R (adopted Jun. 1, 2011) [hereinafter Appellate Body Report, *EC and certain member States – Large Civil Aircraft*].

³² Appellate Body Report, *US – Carbon Steel (India)*, *supra* note 2, ¶ 4. 128.

³³ *Id.*

³⁴ *Id.* at ¶ 4. 151-52.

³⁵ Moot Problem, Annex III 12.

³⁶ Moot Problem 1 ¶ 1.

³⁷ Moot Problem 1 n.1.

unreasonableness’ in the agreement terms. Also the data on international prices of cobalt concentrates³⁸ reveals that there had been a linear upward growth in the rates all through from 2036 – 2042 establishing that GRMM received the goods at a rate lower than the market benchmark, effectively a ‘benefit’.

18. The data on future prices, expected prospective prices and the demand-supply analysis forms a proper benchmark. A proper benchmark is derived from an examination of the conditions pursuant to which the goods/services at issue would under prevailing market conditions, be exchanged.³⁹ The Appellate Body interpreted the phrase “prevailing market conditions” to consist of ‘generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices’.⁴⁰

19. Purporting to a strict connotation to the finding of the Appellate Body that the ‘benchmark’ corresponds to the market conditions ‘at the time’ of entering into the transaction⁴¹ defeats the essence of the benchmark analysis. The demand – supply interaction which manifests in the dynamicity and prospects of trade is given no consideration in the strict application of ‘benchmark’ analysis equating it to the market price of the good at the concerned point of time. Also, the Appellate Body did not intent to give a strict application to the principle and the same is evident from its finding that “the absence of due-diligence of current and future ‘economic conditions’ of a particular project before entering into the agreement is suggestive of ‘benefit’ and subsidisation”.⁴²

20. Hence, it is concluded, on the analysis of the market benchmark derived from the examination of the economic conditions prevailing, that as GRMM received the provision for a lesser price than that of market price, for a long period, thereby making it ‘better off’ has received a benefit within the meaning of Article 1. 1 (b).

1.3. The 20-year supply agreement is a prohibited subsidy within the meaning of Article 3. 1 (a) of the SCM Agreement as it is contingent on export performance.

³⁸ Moot Problem, Annex V 14.

³⁹ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, *supra* note 30, ¶ 975.

⁴⁰ Appellate Body Report, *US – Carbon Steel (India)*, *supra* note 2, ¶ 4. 151.

⁴¹ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, *supra* note 30, ¶ 706.

⁴² *Id.*

21. The granting of subsidy is not, in and of itself, prohibited under the SCM Agreement; only subsidies contingent upon export performance within the meaning of Article 3. 1 (a) are prohibited *per se*.⁴³ Pursuant to Article 3.1 (a), export subsidies, that are, subsidies contingent, in law or in fact, whether solely or as one of the several other conditions, upon export performance are prohibited subsidies. The Panel have found out that to prove the existence of an export subsidy within the meaning of Article 3. 1 (a), a Member must establish the existence of the subsidy within the meaning of Article 1 and contingency of that subsidy upon export performance.⁴⁴

22. The meaning of the word ‘contingent’ in this provision is ‘conditional’ or ‘dependent for its existence on something else’.⁴⁵ The relationship of conditionality or dependence, namely that the granting of a subsidy should be ‘tied to’⁴⁶ the export performance lies at the ‘very heart’ of the legal standard in Article 3. 1 (a) of the SCM Agreement.⁴⁷ In the present case, the terms of the Agreement does not reveal any express conditionality though there exists *de facto* export contingency. The standard is of “close connection” between the grant or maintenance of a subsidy and export performance in analysing *de facto* contingency.⁴⁸ This has to be inferred from the total configuration of facts constituting and surrounding the granting of subsidy.⁴⁹

23. The standard for determining *de facto* export contingency is an objective one where the design, structure, and modalities of operation of the measure granting the subsidy may form evidence.⁵⁰ This ‘export inducement test’ may be supplemented with the ‘ratio analysis’ which is a comparison of the export sales behaviour of a firm in the absence and presence of a subsidy.⁵¹ The perusal of such an analysis made on the presence of member’s knowledge of a subsidy’s term including its design and structure based on the information available to the

⁴³ Appellate Body Report, *United States — Conditional Tax Incentives for Large Civil Aircraft*, ¶ 5.6, WTO Doc. WT/DS487/AB/R (adopted Sep. 22, 2017) [hereinafter Appellate Body Report, *US – Tax Incentives*].

⁴⁴ Panel Report, *Canada — Export Credits and Loan Guarantees for Regional Aircraft*, ¶ 7.16, WTO Doc. WT/DS222/R (adopted Feb. 19, 2002) [hereinafter Panel Report, *Canada – Aircraft Credits and Guarantees*].

⁴⁵ Panel Report, *United States — Tax Treatment for “Foreign Sales Corporations”*, ¶ 8.54-8.55, WTO Doc. WT/DS108/R (adopted Jan. 29, 2002) [hereinafter Panel Report, *US – FSC (Article 21. 5 – EC)*].

⁴⁶ SCM Agreement, *supra* note 1 n.1.

⁴⁷ Appellate Body Report, *United States — Subsidies on Upland Cotton*, ¶ 572, WTO Doc. WT/DS267/AB/R (adopted Mar. 21, 2005) [hereinafter Appellate Body Report, *US – Upland Cotton*].

⁴⁸ Panel Report, *Australia — Subsidies Provided to Producers and Exporters of Automotive Leather*, ¶ 9.55, WTO Doc. WT/DS126/R (adopted Feb. 11, 2000) [hereinafter Panel Report, *Australia – Automotive Leather II*].

⁴⁹ Appellate Body Report, *Canada - Aircraft*, *supra* note 29, ¶ 167.

⁵⁰ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, *supra* note 30, ¶ 1046.

⁵¹ *Id.* at ¶ 1047.

granting authority at the time the subsidy is granted along with the analysis of the ratio of anticipated export and domestic sales of the subsidised product that would come in consequence of the granting of subsidy concludes that the supply agreement is a prohibited subsidy.

24. In the present case, there exists a close connection between the granting and enjoyment of subsidy. The agreement is intended to ensure supply of cobalt at fixed rates to GRMM which envisages an expectation of increased exports for GRMM as their production cost is indirectly reduced. Thus there exists an ‘anticipated exportation’ establishing the contingency. Where the granting of the subsidy is geared to induce the promotion of future export performance of the recipient, there exists a *de facto* conditionality.⁵² The supply agreement can be seen as an ‘export credit granted for the purpose of supporting and developing export trade’ of GRMM which is expressly contingent on export performance.⁵³

25. The report by Metallurgy International News⁵⁴ reveals the existed market trend and this information was available to the granting authority, GOO while granting this subsidy. The commercial unreasonableness reveals that the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy, and the same squarely falls within the ambit of *de facto* export contingency pursuant to Article 3. 1 (a) and footnote 4 of the SCM Agreement.

26. Hence it can be concluded that as there exists an actual granting of subsidy ‘tied to’ anticipatory exportation not reflective of market conditions, the 20-year supply agreement is a prohibited subsidy within the meaning of Article 3. 1 (a) of the SCM Agreement.

2. LOANS GIVEN BY IBD TO THE RARISIAN GOVERNMENT TO THE EXTENT IT WAS NOT REPAID BY RARISIA (UNREPAID LOAN) IS A PROHIBITED SUBSIDY WITHIN THE MEANING OF ARTICLE 3. 1 (a) OF THE SCM AGREEMENT.

⁵² *Id.* at ¶ 1050.

⁵³ Appellate Body Report, *Canada - Aircraft*, *supra* note 29, ¶ 9.230.

⁵⁴ Moot Problem 1 n.1.

2.1. The unrepaid loan given by IBD to the Rarisian Government is a financial contribution by a public body, namely, IBD, in the form of government payments to a funding mechanism (which, in this case, is MOC), within the meaning of Article 1. 1 (a) (1) (iv) of the SCM Agreement.

27. A measure to be a subsidy within the meaning of Article 1. 1 of the SCM Agreement, that measure must constitute a ‘financial contribution’. Article 1. 1 (a) (1) (iv) is an anti-circumvention provision that applies to situations where a government uses a private body as a proxy to provide financial contribution.⁵⁵ Here, it is respectfully maintained that the unrepaid loan is a financial contribution made by GOO through IBD which is a public body within the meaning of this provision.

2.1.1. IBD is a ‘public body’ within the meaning of Article 1. 1 (a) (1) of SCM Agreement.

28. For a financial contribution to a subsidy within the meaning of Article 1.1 of the SCM Agreement, the financial contribution must be made by a government or a public body, including regional and local authorities as well as state owned companies.⁵⁶

29. The dictionary definition suggests a rather broad range of potential meanings of the term ‘public body’, which encompasses a variety of entities, including both entities that are vested with or exercise governmental authority and entities belonging to the community or nation.⁵⁷ Thus the standard is not that of control by the government, but that the entity possess, exercise or are vested with governmental authority.

30. The mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority. In some instances, however, where there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority.⁵⁸ In the present, IBD, an international financial institution is a ‘public

⁵⁵ Appellate Body Report, *US- Countervailing Duty Investigation on DRAMs*, *supra* note 14, ¶ 115.

⁵⁶ PETER VAN DEN BOSSCHE, *supra* note 4, at 783.

⁵⁷ Appellate Body Report, *US – Anti-Dumping and countervailing Duties (China)*, *supra* note 19, ¶ 285-286.

⁵⁸ *Id.*

body' within the meaning of Article 1. 1 (a) (1) as GOO exercises a meaningful control over its functioning, and hence IBD is concerned in exercising governmental authority.

31. The GOO being the biggest shareholder (21%) in itself does not suggest that there is an effective control. But the working of the institution reveals that IBD exercises governmental control vested by GOO. Pursuant of being the founding member, Oxyonia retains the right to appoint one person to the Board of Executive, which is the deciding authority when it comes to decisions including that of granting of loans. Also, when there is a Joint Meeting, as the decisions are required to be made by a four-fifth majority determined in accordance with Member's vote shares in IBD, GOO enjoys apparent control over the decision-making. There also exists evidence to the exercise of the shareholder advantage by GOO in the past to exercise control over IBD's decisions in granting loans to its Members, specifically vetoing proposals to grant loans to Members it perceives to be hostile to its economic and political interests.

32. The question of whether conduct falling within the scope of Article 1. 1 (a) (1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense.⁵⁹ In the light of the above facts, on evaluation of core features of IBD, it is concluded that there exists a proximate relationship between IBD and GOO.

33. In some cases, when a statute or other legal instrument expressly vests authority in the entity concerned, determining such entity is a public body may be a straightforward exercise.⁶⁰ Article 210 of the Constitution of Oxyonia can be seen as an enabling provision that allow Oxyonia in having a direct control over IBD. Article 210 aims at economic security and enable GOO to make interventions to develop fruitful and mutually-beneficial relation with other nation and also to grant economic assistance to other nations in need. The functioning of IBD is also on similar lines. The fact that Oxyonia was instrumental in establishing IBD read along with its Constitutional provision and GOO's past interventions in IBD throws light to its control.

34. Hence it can be concluded that IBD is a public body within the meaning of Article 1. 1 (a) (1) of the SCM Agreement.

⁵⁹ *Id.* at ¶ 318.

⁶⁰ *Id.*

2.1.2. The unrepaid loan given by IBD to Rarisian Government is a financial contribution in the form of government payments to a funding mechanism.

35. Article 1. 1 (a) (1) (iv) refers to financial contributions where a ‘government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions’ illustrated in subparagraphs (i)-(iii), which would normally be vested in the government and the practice, in no real sense, differs from the practices normally followed by governments.⁶¹

36. In the present case, this provision can be attracted as GOO is using IBD as a proxy for making the payment. The details contained within the IBD documents and testimony of the representatives of MOC demonstrate that it was GOO who effectually carved out the loan terms.⁶²

37. In the present case, GOO is making a payment in the form of unrepaid loan pursuant to the loan-waiver clause to MOC, which is the funding mechanism here. MOC is a directly State-controlled company, under the control of MMO, exercising an exclusive right to engage in mining operations in Rarisia. Also, the Minister of Mining Operations is the *ex officio* head of MMO. A funding mechanism is a body that transfer funds or provide for the finance for a particular operation. It envisages flow of money or any other financial resources of value.⁶³ In the light of above facts and MOC being the body approaching IBD for loan, it can be concluded that MOC is a funding mechanism.

38. The dictionary meaning of the term ‘payment’ refers to ‘the performance of a duty, promise, or obligation, or discharge of a debt or liability, by the delivery of money or other value’.⁶⁴ ‘Payment made to a funding mechanism’ as given within Article 1. 1 (a) (1) (iv) of the SCM Agreement has not been subjected to much interpretation. It has been opined that in the case of multilateral climate financing, it might take the form of ‘payment to a funding mechanism’.⁶⁵ This finding can be applied in corollary to that of IBD. Multilateral climate financing refers to

⁶¹ PETER VAN DEN BOSSCHE, *supra* note 4, at 782.

⁶² Moot Problem 5, ¶ 4.

⁶³ Appellate Body Report, *Japan – DRAMS (Korea)* *supra* note 14, ¶ 250.

⁶⁴ BLACK’S LAW DICTIONARY 1285 (4th ed. 1968).

⁶⁵ BRADLY J. CONDON, TAPEN SINHA, THE ROLE OF CLIMATE CHANGE IN GLOBAL ECONOMIC GOVERNANCE 208 (2013).

international financing institutions making available financial resources to member States in the form of loans and grants. IDB's functioning is no different.

39. The elements to be satisfied are that such a payment confers a benefit and that it was made on an obligation. Also, this would require an affirmative demonstration of the link between the government and the specific conduct of the funding mechanism.⁶⁶ The unrepaid loan is a financial contribution pursuant to the loan-waiver clause. The clause provided that in the case where it is shown that the loan is facilitating the secure and stable supply of cobalt to members of IBD, the loan would be waived.⁶⁷ To the extent of the unrepaid loan, it forms a payment as this was a contribution pursuant to the satisfaction of the obligation upon the substantial increase of exports.⁶⁸

40. There existed a long-term supply agreement between GRMM and MOC, but MOC had the absolute discretion in deciding whether, and how much, to mine in Conda Mines.⁶⁹ The unrepaid loan in the form of payment reduced their production cost and lifted them out of their financial instability, which meant stable and continued mining and exports or supply. This demonstrates the link between the government and the conduct of the funding mechanism.

41. Hence, it can be concluded that the unrepaid loan is a financial contribution in the form of payment to a funding mechanism within the meaning of Article 1. 1 (a) (1) (iv) of the SCM Agreement.

2.2. The unrepaid loan confers a benefit within the meaning of Article 1. 1 (b) to, *inter alia*, GRMM in terms of increased supply of cobalt concentrates at fixed prices.

42. A financial contribution by a government or a public body is a subsidy within the meaning of Article 1. 1 of the SCM Agreement only if the financial contribution confers a benefit.⁷⁰ Article 1. 1 (b) though speaks of benefit, never defines it. The determination of 'benefit' under Article 1. 1 (b) of the SCM Agreement seeks to identify whether the financial contribution has made the 'recipient better off' than it would otherwise have been, absent that contribution.⁷¹

⁶⁶ *Id.*

⁶⁷ Moot Problem 5, ¶ 3.

⁶⁸ Moot Problem 5, ¶ 5.

⁶⁹ Moot Problem 4, ¶ 2.

⁷⁰ SCM Agreement, *supra* note 1, art. 1.1 (b).

⁷¹ Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, *supra* note 3, ¶ 690.

43. Thus, the test is that of a comparison with the prevailing market conditions analysing the circumstances in the presence and absence of the subsidy. In the present case, the unrepaid loan confers a benefit on GRMM in the form of increased supply of cobalt concentrates at a fixed price. This can be concluded on the following grounds.

44. In the present case, GRMM has a long-term supply agreement with MOC for the supply of cobalt at a fixed price.⁷² There also exists evidence as to the fact that upon disbursement of the loan amount, the exports of Rarisia increased by 75% and has stabilised since then.⁷³ This would mean that prior to 2037, hypothetically if MOC mined 15 units of cobalt, 5 units went to GRMM pursuant to the supply agreement; whereas, subsequent to 75% increase, 8.75 units would be supplied to GRMM from the total 26.25 units produced. In 2040, the loan is waived and a financial contribution is thus made.⁷⁴ As MOC need not repay the loan amount, additional financial stability is enjoyed by the funding mechanism. This ensures continued mining operations and increased exports. This can also be inferred from increased copper exports as cobalt was a by-product obtained from copper mining.⁷⁵

45. Though MOC retained the exclusive discretion in deciding whether, and how much, to mine in Conda Mines,⁷⁶ the financial stability enjoyed by MOC pursuant to waiving of loan and the favourable demand structure of copper⁷⁷ points to stable, uninterrupted and increased mining operations, thereby resulting in increased supply to GRMM.

46. The assessment of 'benefit' involves determination of a market benchmark. Article 14 (d) which provides that the provision of goods or services or the purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, uses the term 'benefit' in the same context⁷⁸ and hence comes in aid to determine the proper benchmark for assessment. This adequacy of remuneration has to be assessed in relation to the prevailing market conditions in the country of provision.⁷⁹

⁷² Moot Problem 4, ¶ 2.

⁷³ Moot Problem 5, ¶ 5.

⁷⁴ Moot Problem 5 n.9.

⁷⁵ Moot Problem 5, ¶ 5.

⁷⁶ Moot Problem 4, ¶ 2.

⁷⁷ Moot Problem 4 n.5.

⁷⁸ Appellate Body Report, *US – Carbon Steel (India)*, *supra* note 2, ¶ 7.32.

⁷⁹ *Id.* at ¶ 4.151-52.

47. The unrepaid loan includes that amount which is used by the recipient but which it need not repay. Therefore, the conditions at which the loan was granted form relevant evidence for determining relevant benchmark. In the present case, IBD granted the loan at an interest rate of 2% which is significantly low as compared to 5% in the market.⁸⁰ It is true that IBD provides loan at a lower rate as IBD manages to borrow loans at lower prices from the global market. But the management structure of IBD reveals that they provide loans at a rate which is 1% higher than the rate at which they borrow.⁸¹ This would mean that IBD in the present case received borrowed the loan amount from the market which offered it at 5% for 1% which is highly improbable. Moreover, none of the other financial institutions agreed to a loan-waiver clause.⁸² Hence, it is respectfully maintained that MOC received the loan at reduced remuneration, thereby conferring a benefit.

48. Hence, it can be concluded that the unrepaid loan confers a benefit to, *inter alia*, GRMM within the meaning of Article 1. 1 (b) of the SCM Agreement in the form of increased supply of cobalt concentrates at fixed price.

2.3. The unrepaid loan is a prohibited subsidy within the meaning of Article 3. 1 (a) of the SCM Agreement as it is contingent on the exports of cobalt concentrates from Rarisia to, *inter alia*, Oxyonia.

49. Article 3. 1 (a) of the SCM Agreement defines export subsidy as subsidies contingent upon export performance. The meaning of ‘contingent’ in this provision is ‘conditional’ or ‘dependent for its existence on something else’.⁸³ Thus, for a subsidy to be an export subsidy, the grant of subsidy must be conditional or dependent upon export performance.⁸⁴ This ‘contingency’ as given within the provision may be *de jure* or *de facto*. In the present case, it is humbly maintained that the terms under which the financial contribution of unrepaid loan was given, demonstrates *de jure* export contingency.

⁸⁰ Moot Problem 5 n.6.

⁸¹ Moot Problem, Annex I 10, ¶ 2.

⁸² Moot Problem 5 n.6.

⁸³ Panel Report, *Australia – Automotive Leather II*, *supra* note 47, ¶ 9.55.

⁸⁴ Panel Report, *US – FSC (Article 21. 5 – EC)*, *supra* note 44, ¶ 111.

50. While the legal standard expressed by the term ‘contingent’ is the same for both *de jure* and *de facto* contingency, there is an important difference in what evidence may be employed to demonstrate that a subsidy is export contingent.⁸⁵

51. The legal standard for *de jure* export contingency is the words of the relevant legislation, regulation or other legal instrument constituting the measure.⁸⁶ This does not mean that for a subsidy to be *de jure* export contingent, the underlying legal instrument always have to provide *express verbis* that the subsidy is available only upon fulfilment of the condition of export performance. Such conditionality can be derived by necessary implication from the words actually used in the measure.⁸⁷

52. In the present case, the loan waiver clause provided explicitly that IBD would be allowed to waive the loan if it was shown that the loan was facilitating the secure and stable supply of cobalt to members of IBD, thereby advancing IBD’s goals of “ensuring stability in international commerce” and “economic prosperity in Member countries”.⁸⁸ This essentially is a conditional clause with regard to export expectation geared to induce the promotion of future export performance of the recipient.⁸⁹ GOO being a member to IBD and GRMM having a long term supply agreement with MOC demonstrates the necessary implication of export contingency, from the words “facilitating the secure and stable supply of cobalt to members of IBD”, on the exports of cobalt concentrates from Rarisia to, *inter alia*, Oxyonia.

53. The insistence “to build an expressway from Conda Mines to the port of Randon”⁹⁰ and making it open only to vehicles transporting goods from Conda Mines to the Randon port⁹¹ in contrast to other export items also demonstrates *de jure* export contingency. The term that calls for Rarisian Government to rescind the decision to impose export duty of 100% on export of cobalt concentrates also envisages anticipated exportation as the direct effect of decreased export duty would be increased exports.

⁸⁵ Canada – Aircraft, *supra* note 29, ¶ 167.

⁸⁶ Appellate Body Report, *Canada — Certain Measures Affecting the Automotive Industry*, ¶ 100, WTO Doc. WT/DS139/AB/R (adopted June 19, 2000) [hereinafter Appellate Body Report, *Canada – Autos*]

⁸⁷ *Id.*

⁸⁸ Moot Problem 5, ¶ 3.

⁸⁹ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, *supra* note 30, ¶ 1102.

⁹⁰ Moot Problem 5, ¶ 1.

⁹¹ Moot Problem 5 n.7.

54. Also, in *US – Upland Cotton*, the Appellate Body observed that, where the situation is such that the ‘exporter will not receive payment unless proof of exportation is provided’, this in itself is sufficient to establish that the payment is conditional on export performance.⁹² In the present case too, the clause make essential for MOC to provide proof of increased exports to receive the payment in the form of unrepaid loan.

55. Hence, it is concluded that the unrepaid loan is a prohibited subsidy within the meaning of Article 3. 1 (a).

3. THE EXPORT DUTIES IMPOSED ON, *INTER ALIA*, BATTERY-GRADE COBALT EXPORTED FROM OXYONIA ARE PROHIBITED SUBSIDIES WITHIN THE MEANING OF ARTICLE 3. 1 (b).

3.1. The export duties imposed on exports of, *inter alia*, battery-grade cobalt exported from Oxyonia are a form of “income or price support in the sense of Article XVI of GATT 1994”.

56. In addition to financial contributions by a government within the meaning of Article 1. 1 (a) (1), SCM Agreement identifies ‘any form of income or price support in the sense of Article XVI of GATT 1994’, which may also qualify as a subsidy if it confers a benefit to a specific industry or enterprise, under Article 1. 1 (a) (2).⁹³ Thus in addition to the criteria for defining a financial contribution, the reference in Article 1.1(a) to ‘any form of income or price support in the sense of Article XVI of the GATT 1994’ merits further consideration.⁹⁴

57. A subsidy can exists not only when the government directly or indirectly provides a financial contribution but also when there is ‘any form of income or price support in the sense of Article XVI GATT 1994⁹⁵ (Article 1. 1 (a) (2) of the SCM Agreement). Article XVI GATT 1994 paragraph 1, spelling out the notification obligation, refers to “any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory”. Yet the notions of income and support are not defined by either the GATT or the SCM Agreement.

⁹² Appellate Body Report, *US – Upland Cotton*, *supra* note 42, ¶ 577.

⁹³ WORLD TRADE REPORT 2006, *Exploring the Links between Subsidies, Trade and the WTO* (World Trade Organization ed., 2006), https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report06_e.pdf

⁹⁴ *Id.* at 197.

⁹⁵ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1994].

58. The notion of ‘any form of income support’ would capture government measures that directly or indirectly have an impact on the income of the recipient, without involving a financial contribution.⁹⁶ In the present case, the export duties imposed act as an income support. The export duties imposed are essentially export restraints and as they have a direct effect on the reduced prices of cobalt in the domestic market, thereby supporting the income of companies like GreenO, it is an income support within the meaning of Article 1.1(a)(2) of the SCM Agreement.

59. Luengo holds that an export restraint on a certain product can be considered a subsidy in the sense of the SCM Agreement given that it provides an indirect income support to the domestic purchasers of the product in question, who can buy the product at a reduced price.⁹⁷ There is no disregard to the finding made by Luengo as well as the Panel in *US-GOES*⁹⁸ that the focus of ‘income or price support’ should be ‘on the nature of government action, rather than upon the effects of such action’.⁹⁹

60. The standard for the analysis of the ‘nature of government action’ is an objective one rather than a subjective one as understood from the analysis of same in the context of determination of ‘export contingency’.¹⁰⁰ Thus the nature, operation and modalities of granting subsidy may form evidence.

61. In the present case, the end users of cobalt concentrates approaches the GOO raising their concern over increasing cobalt prices, and this representation forms the seed for the export duties to germinate. Thus the circumstantial facts give the insight that the decision of the government was intended to better the position of the end users. Hence, the price depression cannot be seen as an indirect effect of the introduction of export duties, rather a planned and induced action. The export duties meant only one thing: higher negotiating power of end users in domestic market reducing the prices of cobalt in domestic market.

⁹⁶ Prof. Dr. Jan Wouters & Dominic Coppens, *An Overview of the Agreement on Subsidies and Countervailing Measures – Including a Discussion on the Agreement on Agriculture* (Institute for International Law Working Paper No. 104, 2007), <https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP104e.pdf>.

⁹⁷ G LEUNGO, REGULATION OF SUBSIDIES AND STATE AIDS IN WTO AND EC LAW 120 (2006).

⁹⁸ Appellate Body Report, *China – Countervailing and Anti – Dumping Duties on Grain Oriented Flat Rolled Electrical Steel from the United States*, ¶ 7.84, WTO Doc. WT/DS414/AB/R (adopted Nov. 16, 2012) [hereinafter, Appellate Body Report, *US – GOES*].

⁹⁹ *Id.* at ¶ 7.85.

¹⁰⁰ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, *supra* note 30, ¶ 1051-52.

62. Leungo attacked the effect based approach where the price depression could be an indirect impact of restraints. The expansion of this finding to artificial depression of prices would be doing foul to the legislative intent. In the present case, export restraints are being used as a sham and under this colour, domestic market conditions are artificially altered. In *US-Softwood Lumber IV*, the Appellate Body analysing the meaning of financial contribution under Article 1.1(a)(1)(iii), observed that a transaction having the potential to lower ‘artificially’ the cost of production falls within the ambit of the provision. Reading this into the circumstantial facts involved in here, GOO was artificially altering the market conditions in favour of end users like GreenO. The culmination of the agreement between GreenO and GRMM too can be identified as an impact of this. Also, this intervention cannot be seen as one to correct domestic market distortion. Domestic distortions in principle should be corrected by domestic instruments and not by trade instruments like export duties.¹⁰¹

63. Hence it can be concluded that the export restraints are a form of income or price support in the sense of Article XVI of GATT 1994 as the price depression in the domestic market is not a mere side effect rather a channelled impact pursuant to the restraints.

3.2. The export duties imposed on exports of, *inter alia*, battery-grade cobalt from Oxyonia confer a benefit to GreenO by depressing the price of this product in the domestic market.

64. The determination of ‘benefit’ under Article 1.1(b) of the SCM Agreement seeks to identify whether the financial contribution has made the recipient better off than it would otherwise have been, absent that contribution.¹⁰² The test is therefore that of a comparison with respect to the prevailing market conditions. Thus, it is the analysis of marketplace to determine the trade distorting potential of a financial contribution identifying whether the recipient has received a ‘financial contribution’ on terms more favourable than those available to the recipient in the market that forms evidence for conferment of benefit.¹⁰³

¹⁰¹ DOMINIC COPPENS, WTO DISCIPLINES ON SUBSIDIES AND COUNTERVAILING MEASURES: BALANCING POLICY SPACE AND LEGAL CONSTRAINTS 9 n.15 (2014) [hereinafter DOMINIC COPPENS].

¹⁰² Appellate Body Report, *US – Large Civil Aircraft (2nd Complainant)*, *supra* note 3, ¶ 626 - 666.

¹⁰³ Appellate Body Report, *Canada - Aircraft*, *supra* note 29, ¶ 157.

65. The imposition of export restrictions (in the present case in the form of export duties) lower the domestic prices¹⁰⁴ having a re-distributional effect on the welfare of the country giving an advantage to downstream consumers that are using the metal in question.¹⁰⁵ This theoretical explanation is confirmed by practical examples. In the article that describes the effects of the metal scrap restriction introduced by South Africa in 2013, it has been noted that South Africa's "downstream manufacturing, car parts, batteries, valves, pumps, taps and many more" will also benefit of this new measure.¹⁰⁶ The situation would be worse where the government consider that producing raw materials is less important priority than developing domestic downstream production. The export ban on aluminium and copper scrap leading to close down of raw material companies in Turkey in contrast to the smelters being able to gain due to excess to undistorted and cheap raw material can be seen as a manifestation of this argument.¹⁰⁷

66. Thus it is an established economic fact that export restrictions on metals can favour the production of downstream industries, particularly when the metal is rarely available and its input cannot be easily substituted.¹⁰⁸ The determination now involved is whether such an actual price depression has taken place in the present case, and the facts seems to be in affirmative.

67. Price depression is a directly observable phenomenon¹⁰⁹ which can be deciphered from the existing facts relating to market. The legal standard involved is a pre-requisite downward or flattened trend in prices as a result of an exogenous factor.¹¹⁰ In the present case, 90% of the total domestic sales of GRMM goes to GreenO and the prices paid by GreenO have come down significantly to the extent of 30-40% lower than what it used to pay prior to the imposition of import subsidies, thereby demonstrating price depression in the relevant domestic market.

68. In the present case, the imposition has resulted in the price depression of cobalt in the domestic market. The imposition of export duty of 50% has a direct impact on the foreign market of GRMM as this would mean increased competition for GRMM, thereby compelling

¹⁰⁴ Elena Vyboldina, Alexey Cherepoditsyn, Sergey Fedoseev & Pavel Tsvetkov, *Analysis of Export Restrictions and their Impact on Metals World Markets*, 9 (5) INDIAN JOURNAL OF SCIENCE AND TECHNOLOGY 5 (2016), <http://www.indjst.org/index.php/indjst/article/viewFile/87633/67274>.

¹⁰⁵ *Id.* at 5.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Appellate Body Report, *US – Upland Cotton*, *supra* note 46, ¶ 351.

¹¹⁰ Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, ¶ 7. 537, WTO Doc. WT/DS273/R (adopted Apr. 11, 2005) [hereinafter Panel Report, *Korea – Commercial Vessels*].

it to focus down on domestic market. As this situation creates an increased negotiating capacity for domestic players, the domestic prices would come down. GreenO in particular is “better off” than other similarly placed players as around 54% of the total production of GRMM is sold to them. Rescinding this sale bringing distortion for GRMM, they are effectively left with no option than agree to the low quoted prices of GreenO. Thus, GreenO is not only able to lobby the government to impose export duty thereby reducing the domestic prices, but also manages to get the product at comparatively lower prices than other players.

69. The data revealing that the prices paid by GreenO to GRMM after imposition of export duties being 30-40% lower as compared to payments made prior to imposition of exports form relevant evidence demonstrating ‘benefit’. The price depression is the direct result of export restraint and not the agreement entered into between GRMM and GreenO. This is because the agreement is a bilateral one having implications only on the price at which GreenO receives it and necessarily does not affect the domestic prices as such. Also, it does not have a price depressing effect in the absence of export duties as only an imposition of export duty resulting in placing GRMM in a difficult position in the global market would compel GRMM to focus down on domestic market and to agree to GreenO’s quoted lower prices.

70. Hence, as export duties imposed are directly resulting in depression of prices in domestic market conferring GreenO with a meaningful negotiating power enabling it to get cobalt concentrates, paying inadequate remuneration, a benefit within the meaning of Article 1. 1 (b) of the SCM Agreement.

3.3. The export duties are prohibited subsidies within the meaning of Article 3. 1 (b) of the SCM Agreement as the facts surrounding the grant of this subsidy show that this subsidy to GreenO was de facto contingent on the use of domestic over imported goods.

71. Article 3. 1 (b) of the SCM Agreement regulates import substitution subsidies or local content subsidies.¹¹¹ As defined in the provision, import substitution subsidies are subsidies contingent upon the use of domestic over imported goods.

¹¹¹ Appellate Body Report, *Canada — Certain Measures Affecting the Renewable Energy Generation Sector*, ¶ 5.6, WTO Doc. WT/DS412/AB/R (adopted May 24, 2013) [hereinafter Appellate Body Report, *Canada – Renewable Energy*].

72. Contrary to export subsidies, in the case of import subsidies, the type of conditionality is not explicitly prescribed. But the appellate body decided that it likewise covers not only de jure but also de facto contingency.¹¹² Moreover, the legal standard of contingency is considered similar to that under the export contingency standard.¹¹³ That is, the factors that are to be taken into account in determining the existence of de facto contingency under Article 3. 1 (a) are also relevant to determining de facto contingency under Article 3. 1 (b).

73. Subsidy would be contingent upon the use of domestic over imported goods, if the use of those goods were a condition, in the sense of a requirement, for receiving the subsidy.¹¹⁴ The relevant question in determining the existence of contingency under Article 3. 1 (b) is not whether the eligibility requirements under a subsidy may result in the use of more domestic and fewer imported goods. The question is whether a condition requiring the use of domestic over imported goods can be discerned from the terms of the measure itself, or inferred from its design, structure, modalities of operation, and the relevant factual circumstances constituting and surrounding the granting of the subsidy that provide context for understanding the operation of these factors.¹¹⁵

74. Hence, in the present case, the ‘geared to induce test’ holds good. In February, the GOO decides to impose export duties on refined cobalt, reacting to the lobbying of the end users including GreenO.¹¹⁶ This in itself establishes the contingency. The end users particularly GreenO approaches the GOO for imposition of export duties concerned about the increasing price of cobalt. This can be understood from the statement made by them in the public hearing.¹¹⁷ Also, it seems that GOO is more interested in GreenO as they generate more foreign exchange as compared to cobalt exports.¹¹⁸ The export duties imposed qualifies to be the manifestation of these interests.

75. As an export restraint would make it less feasible for the exporting company (in this case, GRMM) to profitably engage in international trade, more investment would be made on domestic sales. The factual circumstances constituting and surrounding the granting of subsidy

¹¹² Appellate Body Report, *Canada – Autos*, *supra* note 85, ¶ 135 - 43.

¹¹³ Appellate Body Report, *US – Tax Incentives*, *supra* note 42, ¶ 5.12 - 13.

¹¹⁴ *Id.* at ¶ 5.7.

¹¹⁵ *Id.* at ¶ 5.18.

¹¹⁶ Moot Problem 5, ¶ 7.

¹¹⁷ Moot Problem 6, ¶ 7.

¹¹⁸ Moot Problem 6, ¶ 6.

which includes the lobbying by GreenO, increased price levels of refined cobalt and GOO's interest in supporting GreenO's concern all can be seen as relevant evidence demonstrating the contingency of use of domestic product over imported product.

76. Article 3. 1 (b) prohibit the granting of subsidies contingent upon the "use", by the subsidy recipient, of domestic over imported goods where such subsidies can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, thereby increasing the use of goods downstream and adversely affecting imports, without necessarily requiring the use of domestic over imported goods as a condition for granting the subsidy.¹¹⁹

77. In the present case, the end users intend to get the exports to decrease so that the domestic market comes in favour of them. This would mean reduced domestic prices eventually eliminating imports to the country. The export duties have been employed as a means to realise this and hence it is contingent on use of domestic goods over imported goods.

78. Hence it is concluded that the export duties are prohibited subsidies within the meaning of Article 3. 1 (b) of the SCM Agreement.

¹¹⁹ Appellate Body Report, *US – Tax Incentives*, *supra* note 42, ¶ 5.15.

REQUEST FOR FINDINGS

Wherefore for the foregoing reasons, Climatia respectfully requests the Panel to find that:

1. The 20-year supply agreement between UMMC and GRMM is a prohibited subsidy, inconsistent with Article 3.1 (a) of SCM Agreement.
2. The loans given by IBD to the Rarisian Government to the extent it was not repaid by Rarisia is a prohibited subsidy, inconsistent with Article 3.1 (a) of SCM Agreement.
3. The export duties imposed on exports of, *inter alia*, battery-grade cobalt exported from Oxyonia are prohibited subsidies, inconsistent with Article 3.1 (b) of SCM Agreement.

Cimatia requests that the Panel recommend that Oxyonia immediately bring the relevant measures into conformity with its obligation under the SCM Agreement.

Respectfully Submitted

X

Agent(s) on behalf of the Complainant