Team Code: 124R

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 RESPONDENT-

TABLE OF CONTENTS

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
Id.	*Ibidem*
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.	*Versus*
VRA	Voluntary Restraint Agreement
WT/DS	World Trade/Dispute Settlement
WTO	World Trade Organisation

INDEX OF AUTHORITIES

AGREEMENTS

APPELLATE BODY REPORTS

ARTICLES, JOURNALS AND WORKING PAPERS

BOOKS AND TREATISES

PANEL REPORTS

REFERENCE MATERIALS

REPORTS, GUIDELINES AND OTHER DOCUMENTS

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 claims that 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 NOT AN EXPORT SUBSIDY PROHIBITED WITHIN THE MEANING OF ARTICLE 3. 1 (a).

1.1. The 20-year supply agreement between UMMC and GRMM is not 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 not a financial contribution within the meaning of Article 1. 1 (a) (1) (iii).

1.1.2. The supply agreement is not a financial contribution within the meaning of Article 1. 1 (a) (1) (iv).

1.2. The 20-year supply agreement does not confer a benefit to GRMM within the meaning of Article 1. 1 (b) of the SCM Agreement.

1.3. The 20-year supply agreement is not a prohibited subsidy within the meaning of Article 3. 1 (a) of the SCM Agreement as it is not contingent on export performance.

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

2.1. The unrepaid loan given by IBD to the Rarisian Government is not 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 not 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 not a financial contribution in the form of government payments to a funding mechanism.

2.2. The unrepaid loan does not confer 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 not a prohibited subsidy within the meaning of Article 3. 1 (a) of the SCM Agreement as it is not contingent on the exports of cobalt concentrates from Rarisia to, *inter alia*, Oxyonia.

3. THE EXPORT DUTIES IMPOSED ON BATTERY – GRADE COBALT EXPORTED FROM OXYONIA ARE NOT IMPORT SUBSTITUTION SUBSIDIES.

3.1. The export duties imposed on exports of, *inter alia*, battery-grade cobalt exported from Oxyonia are not 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 does not confer a benefit to GreenO by depressing the price of this product in the domestic market.

3.3. The export duties are not 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 not *de facto* contingent on the use of domestic over imported goods.

SUMMARY OF PLEADINGS

ARGUMENT 1

SCM Agreement stipulates that only a financial contribution by a government or a public body conferring a benefit qualifies as a subsidy. The 20-year supply agreement is not a prohibited subsidy under Article 3. 1 (a) of the SCM Agreement. This can be concluded on the basis of the following grounds:

Firstly, the supply agreement cannot be seen as a 'provided' by GOO or was culminated in response to an entrustment or direction, merely because of the fact that GOO is a minority shareholder in UMMC.

> In the present case, GOO is acting merely as a commercial player. The 'control test' and 'ownership test' substantially fails here. The concern of GOO is genuine rooted in the light of the recent developments in the innovation sector. The right exercised by GOO is guaranteed by the general notions of mercantile and company law.
>
> A demonstrable link between the government and the conduct of private party involved is absent here. UMMC enjoys financial stability as of 2037 and for this reason concluding that the minority investment by GOO is taking the form of a threat in shareholder's meeting to far-stretched.

Secondly, there is no benefit conferred on account of the supply agreement on GRMM within the meaning of Article 1. 1 (b) of the SCM Agreement. Analysis made on 'private benchmark' test defeats the claim of Climatia. The relevant benchmark is that market conditions as prevailing 'at the moment' in which transaction takes place. Article 14 (d) stipulates that the remuneration paid should not be below the remuneration as prevailing in the market. This condition is satisfied here as the price of cobalt concentrates in 2037 was 90000 USD.

Thirdly, mere fact that GRMM is an exporting company cannot be a ground to decide that there exists export contingency. The standard of proof is not that of expected exports, rather it is that of promotion of actual or anticipated exports. In the present case, this is absent as the ratio of export sales to domestic sales remains constant and also as supply agreement in itself does not ensure exports as there is no mention of the required quantity to be mined every month leaving the discretion to that effect to UMMC. Hence, no violation of Article 3. 1 (a).

ARGUMENT 2

The loans given to Rarisian Government to the extent of it is not paid (unrepaid loan) is not a prohibited subsidy within the meaning of Article 3. 1 (a) for the following reasons:

Firstly, the unrepaid loan is not a financial contribution within the meaning of article 1. 1 (a) (1) (iv) in the form of payments to a funding mechanism.

> IBD is an international financial institution carrying out the functions of akin to that of a banking corporate. IBD is not exercising nor is vested with any governmental authority. The granting of loans is purely a commercial function with no intention to create foreign ties but to maintain economic stability of its members, thereby is a closed corporate sharing the benefits received within the body itself. Hence, IBD is not a 'public body'.
>
> The term 'payment' in the legal parlance is an obligation. It is received as a remuneration as against satisfaction of a duty. The unrepaid loan is received not on account of this, but as a manifestation of 'waiving', hence essentially a 'privilege' and not a payment. Therefore, there is no financial contribution within the meaning of Article 1. 1.

Secondly, the unrepaid loan is not a benefit. The assessment of benefit focus on the moment in time. The loan was waived in 2040. The data shows no increase in the exports subsequent to this period. The exports of MOC was stable after the hike in 2037. If there had to be a benefit, there had to be an increase in response of the alleged subsidy.

Thirdly, the unrepaid loan is not an export subsidy as there exit no *de jure* export contingency. The existence of *de jure* export contingency s to be assessed from the 'necessary implication' of words of the agreement. The test has to be given a strict interpretation as to identify export contingency only where there exists a 'direct nexus' of the wordings to exportation including anticipated exportations. None of the terms of the loan agreement imply such a direct nexus. It is not the expressway or the non-imposition of export duties that essentially determine the amount of cobalt concentrates MOC produces, but the market of copper, over which IBD does not seem to have much control. Hence, no violation of Article 3. 1 (a) of the SCM Agreement.

ARGUMENT 3

The export duties imposed on, *inter alia,* battery-grade cobalt exported from Oxyonia along with the long-term supply agreement between GRMM and UMMC has no prejudicial effects within the scope of SCM Agreement. The exports duties are not prohibited subsidies within the meaning of Article 3. 1 (b) of the SCM Agreement. The argument is based on the following grounds:

Firstly, the export duties are no financial contribution. On the face, 'any form of income or price support' should suggest an all expansive interpretation covering any governmental measure leaving an effect on income or prices. Such an interpretation is inappropriate. A financial contribution in the form of 'income or price support' exists only when it is a 'direct effect' of the export duties. In the present case, price depression is only a side effect of export duties, which is essentially a positive government intervention based on 'market failure rationale' to prevent domestic trade distortion, hence not covered within Article 1. 1.

Secondly, the export duties confers no benefit within the meaning of Article 1. 1 (b). The test is that benefit is conferred only if it was a direct result of the 'exogenous factor' that is alleged to be a subsidy. GRMM's exports are not affected in spite of imposition of export duties. But the same is disturbed in furtherance of the agreement between GRMM and GreenO. Hence, not a benefit.

Thirdly, the export duties are not contingent on 'use of domestic goods over imported goods'. In economic terms, export duties are resorted to reduce imports. As SCM Agreement does not envisage to bring every governmental intervention under its scrutiny, '*de facto* contingency' calls for a strict connotation. Those acts which anticipate 'substantial elimination' of imported goods are only to be identified as having '*de facto* contingency'. In the present case, in the absence of the agreement between GRMM and GreenO, the imposition of export duty does not 'substantially eliminate' imports. Hence, not an import substitution subsidy within the meaning of Article 3. 1 (b) of the SCM Agreement.

In the present case, the supply agreement between GRMM and UMMC as well as the export duties are not subsidies within the meaning of Article 3. 1 of the SCM Agreement. Hence, there is no violation of SCM Agreement. An assessment of the combined effects of these measures is outside the scope of SCM Agreement for this reason.

LEGAL PLEADINGS

1. THE 20-YEAR SUPPLY AGREEMENT BETWEEN UMMC AND GRMM IS NOT AN EXPORT SUBSIDY PROHIBITED WITHIN THE MEANING OF ARTICLE 3. 1 (a).

1.1. The 20-year supply agreement between UMMC and GRMM is not 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. Pursuant to Article 1.1 of the SCM Agreement,[1] 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 sub-paragraphs (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]

3. The Government of Climatia, in the present case, claims that the 20-year supply agreement entered into between UMMC and GRMM is a financial contribution. It is hereby maintained that the supply agreement does not fall within the meaning of Article 1. 1 of the SCM Agreement for the following grounds.

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[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].

1.1.1. The supply agreement is not a financial contribution within the meaning of Article 1. 1 (a) (1) (iii).

4. Article 1. 1 (a) (1) (iii) covers financial contribution where a government provides goods or services other than the general infrastructure, or purchases goods. In the present case, there is no application for this provision as there is no governmental provision or purchase. The supply agreement is a commercial transaction between two private parties and attracting the control argument merely on the ground that GOO is a minority shareholder in one of the contracting entities is playing a sham on the provisions of SCM Agreement. The provision being dragged here is nothing but spurious.

5. In *US – Carbon Steel (India),* the Appellate Body clarified that not every government act, even if it could be argued to make available a particular good or service, or to put a particular good or service at the disposal of a beneficiary, will necessarily constitute a provision of that good or service.[5] That is, the standard is that of a reasonably proximate relationship between the action of the government providing the good or service on the one hand, and the use or enjoyment of the good or service by the recipient on the other.[6] Hence, the government must have some control over the availability of a specific thing being made available.

6. In the present case, there cannot be seen an effective control being exercised by GOO upon UMMC's decision to enter into the long term supply agreement with GRMM. GOO is a minority shareholder with only 25% stake in the company whereas Ensen Brothers have 51%[7] which leaves Ensen Brothers in an advantaged position and not vice-versa.

7. The evaluation of the existence of a financial contribution is to be made through an objective standard. The subjective standard of analysing the reasons for a governmental policy or the stand taken by them in a commercial transaction, not essentially in the capacity of a sovereign cannot be entered in or appreciated as evidence. The GOO is acting akin to any other commercial player and is rendering opinion as a concerned shareholder.

[5] Appellate Body Report, *US – Carbon Steel (India)*, *supra* note 2, ¶ 4. 91.
[6] Appellate Body Report, *United States -Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, ¶ 71, WTO Doc. WT/DS257/AB/R (adopted Feb. 17, 2004) [hereinafter Appellate Body Report, *US – Softwood Lumber IV*].
[7] Moot Problem 3, ¶ 2, 5.

8. GreenO and FutureZ accounts for about 70% of total global production of electric-powered cars.[8] This leaves the fact that they are the greatest purchasers of cobalt. Also there exists other companies in Climatia as well as Oxyonia in the relevant market. The countries being the centres of modern innovation with sixty of the hundred most innovative companies located in these two countries[9] read along with the efforts of major players in the relevant market to develop technology to extract cobalt from used lithium-ion batteries[10] points to expected prospective revolution in the market.

9. This is essentially reflected in the argument raised by GOO in the shareholder's meeting.[11] Mere policy pronouncements by a government would not by themselves be sufficient and the required nexus implies a more active role than mere acts of encouragement.[12] Hence, it is to be concluded that the argument was a commercial concern, not given in the sovereign capacity and had no proximate relationship with the granting of the product by UMMC by way of the agreement and therefore not a financial contribution within the meaning of Article 1. 1 (a) (1) (iii).

1.1.2. <u>The supply agreement is not a financial contribution within the meaning of Article 1. 1 (a) (1) (iv).</u>

10. 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 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).[13]

11. 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.[14] The test is a demonstrable link between the government and the conduct of the private body[15] which is absent in the present case. While

[8] Moot Problem 1, ¶ 2.
[9] Moot Problem 1, ¶ 7.
[10] Moot Problem 1, ¶ 4.
[11] Moot Problem, Annex II 11, ¶ 2.
[12] Appellate Body Report, *United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, ¶ 114, WTO Doc. WT/DS296/AB/R (adopted July. 20, 2005) [hereinafter Appellate Body Report, *US- Countervailing Duty Investigation on DRAMs*].
[13] *Id.* at 108.
[14] *Id.*
[15] *Id.* at 114.

'entrustment' refer to situations where the government gives responsibility to an 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;[16] the condition being that the public body itself possess such authority, or ability to compel or command.[17]

12. In the present case, GOO is only a minority shareholder[18] and hence does not exercise meaning authority over the actions of UMMC. GOO, in the present case does not in itself possess such authority, or ability to compel or command. The requisite attributes to be able to entrust or direct a private body, namely authority in the case of entrustment, are common characteristics of both government in the narrow sense and a public body.[19] The control argument as well as the ownership argument fails to prove this authority.

13. Identifying an entity which has the government as a shareholder to be carrying out essentially the government's wishes by applying the ownership test would be taking the meaning of 'public body' too far.[20] Government ownership of a company is per se insufficient to transform such company into part of the government or into public body. Companies which operate in the marketplace and set their own objectives independently of the government will not be part of the government or public body, even if the government is a shareholder.[21]

14. In the present case, GOO became a shareholder in UMMC in the year 2023.[22] All through these years UMMC had been mining from Adamtiuman mines and by 2037, it had become one of the most important sources of cobalt supplies for refineries.[23] Hence, it can be concluded that UMMC had a strong footing in the relevant market and a stable financial status by 2037. In the light of these facts, concluding that the minority investment by GOO, which came as a relief for UMMC while the negotiations with Government of Minera was moving against their

[16] 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)*].
[17] 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)*].
[18] Moot Problem 3, ¶ 2.
[19] Appellate Body Report, *US- Anti Dumping and Countervailing Duties (China)*, *supra* note 16, ¶ 294.
[20] Gregory Merseyer, *The Public - Private distinction at the World Trade Organisation: Fundamental Challenges to Determining the Meaning of "Public Body"*, 15 I.CON 60, 67 (2017), https://academic.oup.com/icon/article-pdf/15/1/60/10956536/mox001.pdf
[21] DISPUTE SETTLEMENT REPORTS 2001, 11 (World Trade Organization ed. 2004).
[22] Moot Problem 3, ¶ 2.
[23] Moot Problem 3, ¶ 3.

favour, was playing hardball in the form of a threat or inducement to agree to the terms of GRMM is far-stretched. Hence, it is concluded that the 20-year supply agreement is no entrustment or direction forming a financial contribution within the meaning of Article 1. 1 (a) (1) (iv).

1.2. The 20-year supply agreement does not confer a benefit to GRMM within the meaning of Article 1. 1 (b) of the SCM Agreement.

15. 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.[24] The Government of Climatia claims that the 20-year supply agreement between UMMC and GRMM confers a benefit on GRMM as the agreement ensures continued supply of cobalt fixed prices which is below the world prices for a long period.

16. 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.[25] That is, a benefit arises if the recipient has received a financial contribution on terms more favourable than those available to the recipient in the market.[26] This private market test[27] exactly fits the rationale behind the benefit element: 'it acts as a screen to filter out commercial conduct'.[28] Thus the test is whether the challenged act by a government is a commercial conduct or not and also that as given under Article 14 (d) of the SCM Agreement.

17. The analysis calls for the comparison of the amount the recipient pays to the provider with the amount payable to a comparable commercial provision that the recipient could actually obtain on in a market.[29] Article 14 (d) gives insight into comparative index and analysis as the term 'benefit' as used in the provision is used in the similar sense as in Article 1. 1 (b).[30] Pursuant to Article 14 (d), the provision of goods or services is made on beneficial terms if

[24] SCM Agreement, *supra* note 1, art. 1. 1 (b).
[25] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, *supra* note 3, ¶ 690.
[26] 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*].
[27] *Id.* at ¶ 156.
[28] Panel Report, *Korea — Measures Affecting Trade in Commercial Vessels*, ¶ 7. 28, WTO Doc. WT/DS273/R (adopted Apr. 11, 2005) [hereinafter Panel Report, *Korea – Commercial Vessels*].
[29] PETER VAN DEN BOSSCHE, *supra* note 4, at 789.
[30] Appellate Body Report, *US- Carbon Steel (India)*, *supra* note 2, ¶ 155.

obtained for less than adequate remuneration. This determination involves the selection of a comparator or a benchmark price.

18. The benchmark for adequate remuneration must be determined 'in relation to prevailing market conditions' and that the relevant conditions are those existing in the country of provision.[31] The prices at which the same or similar goods are sold by private suppliers in arm's length transactions constitute the primary benchmark.[32] Also, the comparison is to be performed as though the actual and benchmark were obtained at the same time. The assessment focuses on the moment in time when the parties commit to the transaction.[33]

19. In the present case, the transaction is taking place in the year 2037[34]. The data on world prices per metric ton of cobalt reveals that the price was 90000 USD at the time of entering the agreement which forms the appropriate benchmark. The comparison of the price paid with that of the benchmark concludes that the remuneration was adequate and hence no benefit. Also, if the government acts in a way similar to a commercial player, its action does not distort trade.[35] In the present case, the conduct of GOO is that of a commercial player, merely an encouragement, aimed at the entity's wellness of which it is also a part.

1.3. The 20-year supply agreement is not a prohibited subsidy within the meaning of Article 3. 1 (a) of the SCM Agreement as it is not contingent on export performance.

20. 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.[36] 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

[31] Panel Report, *United States – Anti – Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, ¶ 7. 32, WTO Doc. WT/DS491/R (adopted Jan. 12, 2018) [hereinafter Panel Report, *US – Coated Paper (Indonesia)*].

[32] WTO Analytical Index, *SCM Agreement – Article 14 (Jurisprudence)* (Dec. 23, 2018, 9:28 PM), https://www.wto.org/english/res_e/publications_e/ai17_e/subsidies_art14_jur.pdf

[33] Appellate Body Report, *European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft* , ¶ 835-36, WTO Doc. WT/DS316/AB/R (adopted Jun. 1, 2011) [hereinafter Appellate Body Report, *EC and certain member States – Large Civil Aircraft*].

[34] Moot Problem, Annex III 12.

[35] DOMINIC COPPENS, WTO DISCIPLINES ON SUBSIDIES AND COUNTERVAILING MEASURES: BALANCING POLICY SPACE AND LEGAL CONSTRAINTS 60 (2014) [hereinafter DOMINIC COPPENS].

[36] 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*].

of the subsidy within the meaning of Article 1 and contingency of that subsidy upon export performance.[37] In the present case, it is respectfully maintained that the 20-year supply agreement is not a prohibited subsidy within the meaning of Article 3. 1 (a) of the SCM Agreement as it is not contingent on export performance.

21. The meaning of 'contingent' in this provision is conditional or dependent for its existence on something else.[38] For a subsidy to be an export subsidy, the Appellate Body ruled in *US-FSC (Article 21.5 – EC) (2002)*[39] that 'the grant of the subsidy must be conditional or dependent upon export performance'. This relationship of conditionality or dependence, namely the granting of a subsidy should be 'tied to' the export performance, lies at the very heart of the legal standard in Article 3. 1 (a) of the SCM Agreement.[40].

22. With respect to *de facto* export contingency, footnote 4 of the SCM Agreement states that the standard 'in fact' contingency is met if the facts demonstrates that the subsidy is 'in fact tied to actual or anticipated exportation or export earnings'.[41] Subsidy to an export oriented company is nor per se an export subsidy. The second sentence of footnote 4 precludes a Panel from making a *de facto* export contingency for the sole reason that the subsidy is granted to an enterprise which exports. GRMM is a refinery company with global sales and therefore it is essentially an export-oriented company. This does not make a subsidy received by it an export company.

23. Moreover, the *de facto* export contingency is to be determined from the total configuration of the facts constituting and surrounding the granting of subsidy.[42] The satisfaction of the standard for determining *de facto* export contingency set out in footnote 4 requires proof of three different substantive elements: (1) The 'granting of subsidy'; (2) …tied to…; and (3) 'actual or anticipated exportation or export earnings'.[43] But, none of these facts on its own is

[37] Panel Report, *Canada — Export Credits and Loan Guarantees for Regional Aircraft*, ¶ 7.16, WTO Doc. WT/DS222/R (adopted Feb. 19, 2002) [hereinafter Canada – Panel Report, *Aircraft Credits and Guarantees*].
[38] Appellate Body Report, *Canada – Aircraft*, *supra* note 26, ¶ 166.
[39] Panel Report, *United States — Tax Treatment for "Foreign Sales Corporations"*, ¶ 8.54, WTO Doc. WT/DS108/R (adopted Jan. 29, 2002) [hereinafter Panel Report, *US – FSC (Article 21. 5 – EC)*].
[40] 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*].
[41] 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*].
[42] Appellate Body Report, *EC and certain other member States – Large Civil Aircraft*, *supra* note 33, ¶ 1051-52.
[43] Appellate Body Report, *Canada – Aircraft*, *supra* note 26, ¶ 169-172.

likely to be decisive. In combination, they may lead to the conclusion that there is de facto contingency in a case.[44]

24. In the present case, there is no granting of subsidy nor any conditional dependency on anticipated exportation. The standard of proof is not that of expected exports but that of promotion of actual or anticipated increase of exports distorting trade.[45]

25. In the present case, the supply agreement is only providing GRMM a position as to receive cobalt at a fixed rate of 90000 USD for 20 years.[46] This cannot be seen as tied to export performance. The benefit to recipient forms the relevant benchmark under the subsidy definition of Article 1 of the SCM Agreement[47]. Therefore, the assessment could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales of the subsidised product that would come about in consequence of granting of the subsidy, and, on the other hand, the situation in the absence of the subsidy[48] to see whether the subsidy induce promotion of future export performance by a recipient. The data on sales reveals that in spite of entering the agreement with UMMC, the ratio of export sales to domestic sales remained 2:3[49] which places the ratio analysis in favour of non-subsidisation.

26. Pursuant to supply agreement, UMMC is required to ship one-half of the cobalt concentrates sourced from the Adamtiuman Mines in a given month to GRMM.[50] The agreement stipulates no specific quantity of cobalt to be sourced from the mines or rather the contract gives UMMC the absolute discretion in deciding whether, and how much, to mine in Adamantium Mines. This right is conferred also by virtue of being the holder of the exclusive right to mine in the Adamantium region.[51] As the pre-requisite, that is, non-interfered supply of a specific increased quantity of cobalt, it is unlikely to control or induce future exports. Hence it is concluded that there exists no *de facto* contingency and that the 20-year supply agreement is not a prohibited subsidy within the meaning of Article 3. 1 (a).

[44] PETER VAN DEN BOSSCHE, *supra* note 4, at 804.
[45] Appellate Body Report, *Canada – Aircraft*, *supra* note 26, ¶ 9.346.
[46] Moot Problem, Annex III 12.
[47] Group of Negotiations on Goods (GATT), *Multinational Trade Negotiations: The Uruguay Round*, GATT Doc. MTN.GNG/NG10/W/39 (Sep. 27, 1990).
[48] Appellate Body Report, *EC and certain other member States – Large Civil Aircraft*, *supra* note 33, ¶ 1047.
[49] Moot Problem 5 n.10.
[50] Moot Problem 12 n.11.
[51] Moot Problem 2, ¶ 6.

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

2.1. The unrepaid loan given by IBD to the Rarisian Government is not 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) applies to situations where a government uses a private body as a proxy to provide financial contribution.[52] Here, it is respectfully maintained that the unrepaid loan is not a financial contribution made by a public body within the meaning of this provision.

2.1.1. <u>IBD is a not a 'public body' within the meaning of Article 1. 1 (a) (1) of SCM Agreement.</u>

28. The Appellate Body rejecting the Panel's finding that the term "public body" in Article 1. 1 (a) (1) of the SCM Agreement means 'any entity controlled by a government', found instead that the term encompasses only those entities that possesses, exercise or are vested with governmental authority.[53] The Appellate Body maintained that the legal standard is a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense.[54]

29. In the present case, an analysis of the core features of IBD reveal no exercise of governmental authority or function. IBD is essentially an international financial institution. Unlike that of a responsible government which is for the community, it functions for a closed group of interest-holding nations and functions akin to a corporate entity. The member countries are shareholders with voting rights. The primary function of the institution is that of a banking enterprise representing the business motives of the member states. The loans are given as a financial aid for "ensuring stability in international commerce, and increasing financial stability and economic prosperity in Member countries". Here the financial aid cannot

[52] Appellate Body Report, *US- Countervailing Duty Investigation on DRAMs*, *supra* note 12, ¶ 115.
[53] Appellate Body Report, *US- Anti-Dumping and Countervailing Duties (China)*, *supra* note 16, ¶ 317.
[54] *Id.*

be seen as to maintaining foreign relations, but only as a commercial function akin to that of a finance company.

30. Apart from an express delegation of authority in a legal instrument, the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority.[55] In the present case, Article 210 of the Constitution of Oxyonia cannot be seen as an enabling provision indirectly vesting authority on IBD as there exists a paramount functional difference between the constitutional provision and the core elements of IBD.

31. The constitutional provision envisages to grant assistance to other needy nations and create fruitful and mutually-beneficial relation with other nations, which falls within the ambit of foreign relations. The provision is open to all nations in contrast to IBDs functioning which is akin to that of a closed corporate.

32. Hence, it can be conclude that IBD is not a 'public body' within the meaning of Article 1. 1 (a) (1) of the SCM Agreement.

2.1.2. <u>The unrepaid loan given by IBD to Rarisian Government is not a financial contribution in the form of government payments to a funding mechanism.</u>

33. 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.[56]

34. The term 'payment' has not been expressly defined in SCM Agreement. 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'.[57] Thus the ingredient that makes a financial contribution a 'payment' is the element of obligation existing as identified from the nature of the payment.

[55] *Id.* at ¶ 319.
[56] PETER VAN DEN BOSSCHE, *supra* note 4, at 782.
[57] BLACK'S LAW DICTIONARY 1285 (4th ed. 1968).

35. An obligation is said to exist 'when the general demand for conformity is insistent and the social pressure brought to bear on those who deviate or threaten to deviate is great'.[58] In the present case the unrepaid loan is not conferred by virtue of an obligation, but by virtue of a 'privilege'.

36. Privileges refer to those occasions on which the law secures interests by leaving one to the free exercise of his natural faculties.[59] Applying the test of Hohfeld's privilege, privilege of doing a thing means to have no duty of doing a thing; to have no claim or right against others that they should refrain from interfering with my doing the thing and to be under no duty not to do the thing.[60] While obligations are essentially duties, privileges are benefits derives from the absence of legal duties.[61]

37. In the present case, waiving of loan is essentially a privilege as it dispense with MOC's liability to pay back the loan. This is essentially what confers the unrepaid loan on MOC. There exists no element of obligation rather the same is removed. As waiver act as one's freedom from a right or claim of another,[62] the unrepaid loan is a privilege. Hence it can be concluded that unrepaid loan is not a payment. Therefore, it is humbly maintained that unrepaid loan is not a financial contribution within the meaning of Article 1. 1 (a) (1) (iv) of the SCM Agreement.

2.2. The unrepaid loan does not confer 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.

38. 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.[63] 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.[64]

[58] RWM DIAS, JURISPRUDENCE 228 (1994).
[59] 4 ROSCOE POUND, JURISPRUDENCE 57 (2000).
[60] Issac Husik, *Hohfeld's Jurisprudence*, 72 U. PA. L. REV. 263, 267 (1924), https://scholarship.Law.upenn.edu/penn_law_review/vol72/iss3/3.
[61] PJ FITZGERALD, SALMOND ON JURISPRUDENCE 225 (12th ed. 2010).
[62] NK JAYAKUMAR, LECTURES IN JURISPRUDENCE 199 (2nd ed. 2010).
[63] SCM Agreement, *supra* note 1, art. 1.1 (b).
[64] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, *supra* note 3, ¶ 690.

39. 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 does not confer 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.

40. The assessment of conferment of 'benefit' focuses on the moment in time when the parties commit to the transaction.[65] The loan is waived in 2040 after repayment of 1 billion USD.[66] Therefore, the evidence as to the determination of existence of benefit is to be confined to the prevailing market conditions as on 2040.

41. It is true that, pursuant to the disbursal of loan amount in 2037, the exports have increased by 75% by the end of 2038.[67] But this market change subsequent to the enjoyment of loan amount cannot be identified as the manifestation of benefit, but as the relevant benchmark. This is for the reason that the challenged contribution is the 'unrepaid loan'. The question involved is whether GRMM has benefitted as MOC is conferred with an option not to repay the loan and not whether a benefit is conferred by virtue of enjoyment of loan amount. The assessment is to involve comparison of the prevailing conditions at the time of waiving and that followed the alleged 'benefit'. The relevant benchmark would be therefore that as existing in 2040 and not that as existed in 2037.

42. The data provides that since 2038, the exports had been stabilised at the level of 75%. If the unrepaid loan had to provide a benefit in the form of added financial stability, the exports had to rise further with favourable circumstances including modernised mines and expressway existing as opposed to earlier position. But there is no reflection as to this effect in the export data. Hence, it can be concluded that there was no benefit conferred to GRMM.

43. 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 context.[68] This adequacy of remuneration has to be assessed in relation to the prevailing market conditions in the country of provision.[69] The argument that the loan was given to MOC at less remuneration as compared to the market prices citing the loan-waiver clause and 2% interest rate holds no

[65] Appellate Body Report, *EC and certain member states- Large Civil Aircraft, supra* note 33, ¶ 835-36.
[66] Moot Problem 5 n.9.
[67] Moot Problem 5, ¶ 5.
[68] Appellate Body Report, *US-Copper Steel (India), supra* note 2, ¶ 4. 128.
[69] *Id.* at ¶ 4.151-4.152.

good as it does not take into consideration the founding objectives and the management structure of IBD. IBD was essentially founded as a financial institution to provide loans to developing country and LDC members for infrastructure projects. It is not unlikely or unusual that it provide loans at low interest charge and loan-waiver clause[70] rather it is its *modus operandi*.

44. Hence, it is concluded that the unrepaid loan does not confer 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 not a prohibited subsidy within the meaning of Article 3. 1 (a) of the SCM Agreement as it is not contingent on the exports of cobalt concentrates from Rarisia to, *inter alia*, Oxyonia.

45. The subsidies that are identified as contingent upon export performance is covered under Article 3. 1 (a) of the SCM Agreement export subsidies. The meaning of 'contingent' in this provision is 'conditional' or 'dependent for its existence on something else'.[71] Thus, for a subsidy to be an export subsidy, the grant of subsidy must be conditional or dependent upon export performance.[72] This 'contingency' as given within the provision may be *de jure* or *de facto.* In the present case, it is humbly maintained the unrepaid loan cannot be brought within the meaning of prohibited subsidy as identified under Article 3. 1 (b) as there exists no export contingency.

46. 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.[73]

47. The legal standard for *de jure* export contingency is the words of the relevant legislation, regulation or other legal instrument constituting the measure.[74] 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

[70] Moot Problem, ANNEX I, at 10, ¶ 2.
[71] Panel Report, *Australia – Automotive Leather II*, *supra* note 41, ¶ 9. 55.
[72] Panel Report, *US – FSC (Article 21.5 – EC)*, *supra* note 39, ¶ 111.
[73] Appellate Body Report, *Canada – Aircraft*, *supra* note 26, ¶ 167.
[74] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 100, WTO Doc. WT/DS139/AB/R (adopted Jun. 19, 2000) [hereinafter Appellate Body Report, *Canada - Autos*].

performance. Such conditionality can be derived by necessary implication from the words actually used in the measure.[75]

48. It is hereby humbly submitted that the test of 'necessary implication' cannot be given an expanded interpretation. Footnote 4 of the SCM Agreement provides that 'the mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision'. Giving an expanded interpretation to the test of 'necessary implication' would make footnote 4 redundant.

49. In the present case, it was the demand for increased financial resources arising from increased demand of copper supply that made MOC approach IBD. In the light of this peculiar situation and the fact that MOC is essentially surviving on export market as compared to its domestic market, an expanded interpretation would make any mention of exports in the legal instrument attracting 'export contingency'. The term 'necessary' mean 'essential, inevitable, or basic' and therefore the test should be that of a 'direct nexus of wordings to exportation including anticipated exportation'.

50. In the present case none of the terms of the agreement between IBD and MOC reveals such a direct nexus with anticipated or actual exportation. The insistence on building an expressway exclusively for the vehicles transporting goods from Conda Mines to Randon port and to rescind Rarisian Government's decision to impose 100% export duty on cobalt concentrates cannot be seen to have any direct nexus with anticipated exportation to GRMM.

51. As per the supply agreement with GRMM, MOC retains the absolute discretion to decide whether, and how much to mine in Conda Mines which leaves an apparent iota of doubt with regard to export contingency on cobalt exports, particularly as the factor affecting cobalt mining and exports is not the expressway nor export duties, rather the demand of copper in the market. Interpreting the terms to the effect that they anticipate exportation of cobalt as the same would follow copper exports, which would increase with reduced export duties and expressway, would be too remote as IBD does not exercise a control over demand of copper. Moreover, these two terms are only assisting conditions to the third term of the contract.

52. The term 'anticipated exportation' is not the expectation that exports will follow, rather it is the expectation of a hypothetical performance of the subsidy as an incentive to skew

[75] *Id.*

anticipated sales towards exports.[76] Thus the test is that of anticipated increase in exports. The third term in the contract only speaks about a secure and stable supply of cobalt to members of IBD. There exists no expectation of increase.

53. Hence, it is concluded that the unrepaid loan is not a prohibited subsidy within the meaning of Article 3. 1 (a) of the SCM Agreement.

3. THE EXPORT DUTIES IMPOSED ON BATTERY – GRADE COBALT EXPORTED FROM OXYONIA ARE NOT IMPORT SUBSTITUTION SUBSIDIES.

3.1. The export duties imposed on exports of, *inter alia*, battery-grade cobalt exported from Oxyonia are not a form of "income or price support in the sense of Article XVI of GATT 1994".

54. 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 1994[77] (Article 1. 1 (a) (2) of the SCM Agreement.[78] 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.[79]

55. 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".

56. The Appellate Body has observed that the range of government measures capable of providing subsidies 'is broadened still further by the concept of "income or price support", but has not shed any further light on how much broader the subsidy definition is cast as a result of this second alternative.[80] On the face, the term 'any form of income or price support' could suggest an all expansive interpretation covering any government measure having an effect on income or prices.[81]

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[76] Appellate Body Report, *EC and certain member states- Large Civil Aircraft, supra* note 33, ¶ 1047.
[77] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1994].
[78] Appellate Body Report, *US – FSC (Article 21.5 – EC), supra* note 39, ¶ 135.
[79] 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
[80] Appellate Body Report, *US – Softwood Lumber IV, supra* note 6, ¶ 52.
[81] DOMINIC COPPENS, *supra* note 35, at 57.

57. However, Leungo, rightly argued that this would capture government measures that directly or indirectly have an impact on the income of the recipient, without involving a financial contribution.[82] An expansive interpretation of 'income or price support in the sense of Article XVI GATT 1994', opines Leungo, would bring the definition of 'subsidy' close to an effect-based approach, covering virtually any government action that confers a benefit and causes trade distortion.[83] The Panel in *US-GOES*[84] also shared this concern raised by an effect-based approach.

58. The panel maintained that the focus of 'income or price support' should be 'on the nature of government action, rather than upon the effects of such action'.[85] That is, measures having only an indirect effect on prices or income do not fall within the scope of 'income or price support'. Turning to the facts of the case, the panel found out that the VRAs which restricted imports of steel into the US, did not constitute 'price support' to the US steel industry as any resulting higher domestic prices were only a side-effect.[86] This reasoning can be mutate mutandis applied to the notion of income support.

59. In the present case, the reduction of domestic price of battery-grade cobalt is an obvious effect of any export restriction and therefore cannot be seen as an income or price support. This would be the right approach to be taken as the requirement of 'financial contribution' into the definition of subsidy was precisely advocated by most countries to counter the purely effect-based definition of the US.[87] A 1960 Panel on Subsidies and State Trading also seems supportive to this view.[88]

60. The 'nature of the government action' in the present case as analysed from the circumstantial facts also reveals nothing as to identify the export duty as income or price support. The intervention can be seen as a positive act of the government as a preventive measure against the distortion of domestic market of players using cobalt as their raw materials. The market failure rationale holds good for valid subsidisation.[89] In the presence of market

[82] G LEUNGO, REGULATION OF SUBSIDIES AND STATE AIDS IN WTO AND EC LAW 120 (2006).
[83] Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, ¶ 8.74, WTO Doc. WT/DS194/R (adopted Aug. 23, 2001) [hereinafter Panel Report, *US – Export Restraints*].
[84] 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*].
[85] *Id.* at ¶ 7.85.
[86] *Id.* at ¶ 7.88.
[87] Panel Report, *US – Export Restraints*, *supra* note 83, ¶ 8.63-8.72.
[88] Panel on Subsidies and State Trading (GATT), *Report on Subsidies*, GATT Doc. L/1160 (Mar. 23, 1960).
[89] DOMINIC COPPENS, *supra* note 35, at 8.

failures, the Pareto-efficient outcome does not result from market forces but requires government intervention in the form of subsidy, tax or regulation.[90] Therefore the export duty imposition is a valid governmental intervention not forming income or price support.

61. The notion of income or price support in the sense of Article XVI of GATT 1994 should not be interpreted so broadly as to capture, for example, export restraints, which involve no cost to the government.[91] It is true that that the export duties imposed might bring costs to GOO due to reduced exports. But the market failure rationale provides that government interventions insofar as the benefits of correcting the market failure still outweigh the costs that results from the creation of new distortions in those other segments can be made.[92] In the present case, the exports of GreenO has increased and the prices of cobalt in the domestic market has come down significantly without causing any prejudice to other players.

62. Hence, it can be concluded that export restraints in the form of duties imposed on exports of, *inter alia*, battery-grade cobalt from Oxyonia cannot be considered as 'income or price support' in the sense of Article XVI of GATT 1994, given that any effect on domestic prices is only a side-effect.

3.2. The export duties imposed on exports of, *inter alia,* battery-grade cobalt from Oxyonia does not confer a benefit to GreenO by depressing the price of this product in the domestic market.

63. 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.[93] The test is therefore that of a comparison with respect to the prevailing market conditions to see the position of the recipient in the presence and absence of the alleged contribution. Therefore, for any contribution to fall within the meaning of 'benefit' as contemplated under Article 1. 1 (b) of the SCM Agreement, the claimed benefit must be an effect only pursuant to this contribution.

64. Price depression is a directly observable phenomenon[94] which can be deciphered from the existing facts relating to market. The legal standard involved is a pre-requisite downward or

[90] *Id.* at 8 n.13.
[91] 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.
[92] DOMINIC COPPENS, *supra* note 35, at 9 n.15.
[93] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, *supra* note 3, ¶ 626-66.
[94] Appellate Body Report, *US- Upland Cotton*, *supra* note 40, ¶

flattened trend in prices as a result of an exogenous factor.[95] In the present case, the export duty imposed by GOO would come within the meaning of 'benefit' only on the satisfaction of it being the 'exogenous factor' that resulted in the alleged price depression.

65. It is humbly maintained that the export duty does not confer a benefit to GreenO as it does not result in any price depression. In the present case GRMM is one of the biggest producers of refined cobalt in the world as on 2038, bolstered by being one of the few cobalt refineries with long-term supply agreements.[96] This along with the increased cobalt demand in the international market would enable GRMM to be profitable in the export market in spite of imposition of export duty. This had been the situation too.[97]

67. GreenO purchasing cobalt for a price 30-40% lower than what it used to pay prior to August 2038 reveals that GRMM was essentially selling cobalt at loss as compared to the price for it was bought by GRMM. But the fact that GRMM remained profitable in spite of this shows its steady and stabilised exports even then.

68. In the present case, the price depression is caused by the agreement between GRMM and GreenO and not by the imposition of export duty. Export duty depressing domestic prices of cobalt would have meant decreased exports which does not happen here. Since exports remain stable, it cannot be concluded that exporters turned to domestic market on imposition of export duty thereby creating a negotiating advantage for the end users, resulting in reduced prices.

69. GreenO being the largest domestic customer, losing them to its competitors would have been a loss to GRMM that it enter into negotiations with GreenO resulting in the agreement. The agreement calls for low prices. As GreenO is the biggest player in the relevant market, similar prices would be quoted by smaller players to remain in competition which in turn depressed the price in the domestic market.

70. Hence it can be concluded that it was not the imposed export duty that caused the depression of prices. As the exogenous factor involved in the alleged price depression if not export duties, it cannot be said to have conferred a benefit on GreenO within the meaning of Article 1. 1 (b).

3.3. The export duties are not 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

[95] Panel Report, *Korea – Commercial Vessels*, *supra* note 28, ¶
[96] Moot Problem 5, ¶ 6.
[97] Moot Problem 5, ¶ 5.

this subsidy to GreenO was not *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.[98] As defined in the provision, import substitution subsidies are subsidies contingent upon the use of domestic over imported goods.

72. The legal standard of contingency under Article 3. 1 (b) is considered similar to that under the export contingency standard.[99] 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.[100] 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.[101]

74. In the present case, export duty cannot be seen as an import subsidy as there exists no contingency of use of domestic goods over imported goods. The circumstances constituting and surrounding the granting of export duty is that of the lobbying done by the end users. This can only be seen as a move to bring in regulatory restrains upon exports. Essentially every form of export restraints aim at bringing down exports so that import comes down. This is the basic economic principle behind export restraints. Therefore, giving 'use' a meaning as to a situation where more domestic and fewer imports are used would bring in every form of governmental intervention in the form of export restraints as subsidies, which is not envisaged under SCM Agreement.

[98] 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*].
[99] Appellate Body Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, ¶ 5.12 - 13, WTO Doc. WT/DS487/AB/R (adopted Sep. 22, 2017) [hereinafter Appellate Body Report, *US – Tax Incentives*].
[100] *Id.* at ¶ 5.7.
[101] *Id.* at ¶ 5.18.

75. In the present case, the export restraints are employed as a measure against domestic market distortion. The market failure rationale holds good for imposition of governmental interventions, the only condition being that this must be in the form of a trade instrument rather than a domestic instrument. Export duties very well fall within the category of trade instruments.

76. Therefore the test involved shouldn't be that of increased use of domestic product as compared to reduced use of imported goods; but a 'substantial elimination' of imported goods. The prevailing market conditions surrounding the granting of alleged subsidy is favourable for exports by GRMM. As their exports would continue but might only get reduced is suggestive of the fact that all that is anticipated is only a decrease in the consumption of imported goods and not substantial elimination of the same.

77. The change in market structure whereby the imports are reduced to nil or eliminated is in furtherance of the agreement entered into between GRMM and GreenO which specifically contemplates purchase of cobalt by GreenO 'exclusively' from GRMM.

78. Hence, it can be concluded that as there exists no *de facto* contingency of use of domestic goods over imported goods, the export duties are not prohibited subsidies within the meaning of Article 3. 1 (b) of the SCM Agreement.

REQUEST FOR FINDINGS

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

1. The 20-year supply agreement between UMMC and GRMM is not 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 not 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 not prohibited subsidies, inconsistent with Article 3. 1 (b) of SCM Agreement.

Oxyonia requests that the Panel rejects Cliamtia's claims that Oxyonia has acted inconsistently with the SCM Agreement.

Respectfully Submitted

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Agent(s) on behalf of the Respondent