TC-157

11th GNLU INTENRATIONAL MOOT COURT COMPETITION, 2018

GOVERNMENT OF CLIAMTIA

COMPLAINANT

-V-

GOVERNMENT OF OXYONIA

RESPONDENT

MEMORIAL FOR THE COMPLAINANT

IN THE MATTER OF

OXYONIA – TRANSNATIONAL SUBSIDIES ON STRATEGIC MINERALS

PLEADINGS IN THE WORLD TRADE ORGANISATION DISPUTE SETTLEMENT BODY

BEFORE THE ERUDITE PANEL

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LIST OF ABBREVIATIONS

Art.	Article
DS	Dispute Settlement
DSB	Dispute Settlement Body
DSU	Dispute settlement Understanding
GATT	General Agreement on Tariffs and Trade
GRMM	Global Refineries of Metal and Minerals
IBD	International Bank for Development
SCM	Subsidies and countervailing measures
UMMC	Ultron Metals Mining Company
US	United States
VCLT	Vienna Convention Law on Treaties
WTO	World Trade Organisation

INDEX OF AUTHORITIES

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- Agreement on subsidies and countervailing measures Art. 1.1(a) (iv), Art. 1.1(a) (iii), Art. 1.1(b), Art. 3.1(b), Art.1.1(a)(1) (iv), Article 3.1(a).
- Dispute Settlement Understanding.
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STATEMENT OF FACTS

Prologue: Green O Motor Company ("Green O") and FuturZ Cars ("FuturZ"), headquartered in Oxyonia and Climatia respectively, are two of the biggest electric car manufacturers in the world, However, neither Oxyonia nor Climatia have any reserves of cobalt, which is required for battery for electric vehicles. Green O and FuturZ have been working hard to develop an international network of reliable suppliers of battery-grade cobalt.

The tale of two countries: Oxyonia and Climatia are also important members of the United Nations and the World Trade Organization (WTO), playing a leadership role. One example of Oxyonia and Climatia role in international economic cooperation is their involvement in setting up the International Bank for Development ("IBD") headquartered in Hali, the capital of Oxyonia. The IDB was created in the year 2018 to give loans for development projects exclusively to developing and least-developed countries (LDCs) that are its Members. Oxyonia is the biggest individual shareholder of IBD (21%).

Business of cobalt in Minera: Minera possessed 15% of cobalt reserves in the world. UMMC was given the exclusive mining right for a period of 15 years from the date of discovery of minerals on payment of pre-agreed amount of royalty per metric ton of cobalt concentrate sourced from the mines. The mining rights could be renewed at least twice, for 15 years each time, on mutually agreeable terms. By 2023, UMMC was on the verge of financial collapse. This had changed the balance of negotiations between the two parties. The Minera Government was of the view that it was too risky to renew the contract. GOO, through its sovereign investment fund, decided to acquire a 25% minority stake in the company for 25 billion US Dollars (USD). Global Refineries of Metal and Minerals ("GRMM"), a company headquartered in Oxyonia, which owned refineries in various parts of Oxyonia, but none abroad. GRMM was searching for one or more suppliers willing to enter into a long-term supply agreement. GRMM had started negotiations with UMMC in December 2036. GOO persuaded the Ensen Brothers and other shareholders to agree to a long-term agreement with GRMM to export cobalt concentrates to its refineries in Oxyonia at a fixed price of 90000 USD per metric ton.

The business of cobalt in Rarisia: Rarisia possessed 50% of cobalt in the world. The Ministry of Mining Operations (MMO) has given Mining Operations Company ("MOC") the exclusive right to engage in mining activities in Rarisia. MOC and GRMM entered into a long-term

supply contract in 2030 for the supply of cobalt concentrates. Pursuant to the contract, MOC is required to supply at least one-third of cobalt concentrates sourced from the Conda Mines to GRMM at a fixed price of 90000 USD per metric ton, excluding applicable taxes and duties. In 2035, the Government of Rarisia, announced its decision to impose an ad valorem export duty of 100% on exports of certain minerals, including copper and cobalt. MOC along with the Rarisian Government approached IDB for a loan in 2036 as the financial resources that MOC needed to devote to the Conda Mines increased and It needed help. IDB would grant a loan of 5 billion USD at an interest rate of 2% to MOC for modernization of Conda Mine. The Rarisian Government would rescind its decision to impose an export duty of 100% on export of cobalt concentrates, for 20 yrs. The contract would include a loan-waiver clause, allowing IDB to waive the loan if (i) repayment created substantial economic burden for Rarisia; and (ii) it was shown that the loan was facilitating the secure and stable supply of cobalt to members of IDB. Pursuant to this clause, the loan to Rarisia was waived in 2040, after repayment of 1 billion USD.

Cobalt refining in Oxyonia: In February 2038, proposed the imposition of 50% export duties on exports of refined cobalt, including battery-grade cobalt. On 1 August 2038, the export duties on exports of refined cobalt went into effect. Meanwhile GRMM requested the Oxyonian Government to hold a public hearing before these duties went into effect. As a result, On 29 June 2038, Green O and GRMM had entered into an agreement for supply of battery-grade cobalt, valid for 10 years. Per the terms of the contract, Green O committed to purchase battery-grade cobalt exclusively from GRMM at prices to be negotiated on a monthly basis. But Green O retained the right to purchase battery-grade cobalt from foreign suppliers if the prices quoted by these suppliers were lower than that quoted by GRMM.

Pushback: FuturZ has found its supply chains for cobalt substantially disrupted. The increased demand and reduced supply of cobalt concentrates in world markets has led to an increase in its prices in these markets, increased input costs for cobalt refineries outside Oxyonia, and also increased the price of battery-grade cobalt required by companies like FuturZ. the Government of Climatia decided to bring a complaint against Oxyonia at the WTO. The consultations in Geneva between the Governments of Climatia and Oxyonia were cordial, but unfruitful. The Dispute Settlement Body established a panel after the second request for panel establishment by Climatia, and the Panel was composed by the WTO Director General at its request.

MEASURES AT ISSUE

1. WHETHER THE DISPUTE SETTLEMENT BODY OF WTO HAS JURISDICTION TO SETTLE THE DISPUTE?
2. WHETHER THE 20 YEAR SUPPLY AGREEMENT BETWEEN GRMM AND UMMC IS IN THE FORM OF ARTICLE 1.1(a) (iv), ARTICLE 1.1 (a) (iii), ARTICLE 1.1 (b) AND ARTICLE 3.1 OF SCM AGREEMENT?
3. WHETHER THE UNREPAID LOAN GIVEN BY IDB TO RARISIA IS WITHIN THE FORM OF ARTICLE 1.1(a) (1) (iv), ARTICLE 1.1 (b) AND ARTICLE 3.1(a) OF THE SCM AGREEMENT?
4. WHETHER THE EXPORT DUTIES IMPOSED ON BATTERY GRADED COBALT IS IN THE SENSE OF ARTICLE XVI OF GATT 1994 AND WHETHER IT CONFERS A BENEFIT AND WHETHER THE EXPORT DUTIES RE WITHIN THE MEANING OF 3.1(b) OF SCM AGREEMENT?

SUMMARY OF PLEADINGS

1. **WHETHER THE DISPUTE SETTLEMENT BODY OF WTO HAS JURISDICTION TO SETTLE THE DISPUTE?**

The Complainant humbly submits before this Panel that Oxyonia has violated its commitments under the provisions of GATT and the SCM agreement by providing prohibited subsidy through the medium of agreements and involving private parties. The objectives of the SCM agreement is defeated by the Agreements. Hence a request was placed for the establishment of this panel by Government of Climatia in good faith. There were consultations between the countries but it was not fruitful, so we have filed this dispute before this panel. The respondent has violated the provisions of SCM agreement and GATT by their actions and agreements. The Government of rarisia has requested for this panel in good faith as per Article 3.7 and 3.10 of the DSU, as many members are affected by the said measure, hence the request for panel be upheld.

2. **WHETHER THE 20 YEAR SUPPLY AGREEMENT BETWEEN GRMM AND UMMC IS IN THE FORM OF ARTICLE 1.1(a) (iv), ARTICLE 1.1 (a) (iii), ARTICLE 1.1 (b) AND ARTICLE 3.1(a) OF SCM AGREEMENT?**

The 20 year supply agreement between GRMM and UMMC for the supply of battery graded cobalt at an fixed price of 90,000 USD per metric ton provides financial contribution within the meaning of Article 1.1(a) (iv) of SCM agreement, the agreement also confers benefit to GRMM within the meaning of article 1.1(a) (iii) by providing the cobalt at fixed and below current world market prices and also this agreement is a prohibited subsidy within the meaning of Article 3.1(a) of SCM agreement as it is contingent on export performance.

3. **WHETHER THE UNREPAID LOAN GIVEN BY IDB TO RARISIA IS WITHIN THE FORM OF ARTICLE 1.1(a) (1) (iv), ARTICLE 1.1 (b) AND ARTICLE 3.1(a) OF THE SCM AGREEMENT**?

The unrepaid loan which is given by IDB to rarisia is a financial contribution by a public body within the meaning of Article 1.1(a) (1) (iv) of the SCM agreement and the unrepaid loan confers a benefit to GRMM in terms of increased supply within the meaning of article 1.1(b)

and the unrepaid loan is a prohibited subsidy within the meaning of article 3.1(a) as it is contingent on export of cobalts to rarisia.

4. **WHETHER THE EXPORT DUTIES IMPOSED ON BATTERY GRADED COBALT IS IN THE SENSE OF ARTICLE XVI OF GATT 1994 AND WHETHER IT CONFERS A BENEFIT AND WHETHER THE EXPORT DUTIES ARE WITHIN THE MEANING OF 3.1(b) OF SCM AGREEMENT?**

The export duties imposed on the battery graded cobalt is in the sense of article XVI of GATT 1994 as it provides income or price support which is exported from oxyonia, the export duties imposed also confers a benefit to GreenO by depressing the price of the product in the domestic market and the export duties are prohibited subsidies within the meaning of article 3.1(b) of SCM agreement as it was defacto contingent on use of domestic over imported goods.

LEGAL PLEADINGS

1. WHETHER THE DISPUTE SETTLEMENT BODY OF WTO HAS JURISDICTION TO SETTLE THE DISPUTE?

The Complainant humbly submits before this Panel that Oxyonia has violated its commitments under the provisions of GATT and the SCM agreement by providing prohibited subsidy through the medium of agreements and involving private parties. The objectives of the SCM agreement is defeated by the Agreements. Hence a request was placed for the establishment of this panel by Government of Climatia in good faith.

A. OXYONIA ATTRACTS PROVISIONS OF NULLIFICATION AND IMPAIRMENT UNDER THE GATT.

Both Oxyonia and Climatia are signatories to the SCM agreement, wherein they are committed to achieving specific binding commitments in the areas such as rules governing the use of and disciplines on subsidies, and disciplines on the use of countervailing measures. It is humbly submitted that Oxyonia has failed in achieving its obligations under the Agreement, thereby disabling Climatia from carrying on its trade obligations and its actions resulting in the destruction of the overall objective of the Agreement[1]. SCM Agreement is one of the agreements that is covered under the DSU Agreement[2]. The SCM Agreement states the Articles XXII and XXIII of GATT shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided (Article 30). The Prohibited subsidy given by Oxyonia is inconsistent with its commitments to the WTO and its members. Government of Climatia has requested for a panel to ensure a prompt settlement of dispute and effective functioning of WTO. It is submitted that the interest of Government of Climatia has been impaired to a great extent hence it is contended that this measure adopted by Oxyonia has to be removed[3]. It has been agreed that if there is a clear infringement of the provisions of the General Agreement, or in other words, where measures are applied in conflict with the

[1] General Agreement on Tariffs and Trade art. XXIII, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT]

[2] Understanding on rules and procedures governing the settlement of disputes 356, n. 4, Apr. 15, 1994, 1869 U.N.T.S 401 [hereinafter DSU].

[3] Understanding on rules and procedures governing the settlement of disputes 356, n. 4, Apr. 15, 1994, 1869 U.N.T.S 401 [hereinafter DSU].

provisions of GATT and are not permitted under the terms of the relevant protocol under which the GATT is applied by the contracting party, the action would, prima facie, constitute a case of nullification or impairment and would ipso facto require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations[4]. A State is obliged to refrain from acts which would defeat the objectives of the treaty which it has signed[5]. When there is sufficient proof given by the complaining party as to affirm a fact, then the burden shifts from the complaining party to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption[6]. Here is a presumption that a breach of the rules has an adverse impact on other contracting parties, and in such cases, it is up to the contracting parties against whom the complaint has been brought to rebut the charge[7].

B. CLIMATIA HAS MADE THE REQUEST IN GOOD FAITH FOR THE FORMATION OF PANEL.

The Agent representing Government of Climatia humbly state that, the member country has requested for the formation of the panel in good faith and based on the principle of pacta sunt servanda as per Article 3.7 and 3.10 of the DSU. A member who approaches for the settlement of a dispute must do so only when he knows that his actions under the procedure would be fruitful[8]. This Article follows the basic principle that members should have recourse to WTO dispute settlement in good faith, and not frivolously set in motion the procedures contemplated in the DSU[9]. The principle of pacta sunt servanda follows from this article, the principle says agreements of the parties must be observed[10]. Members must perform its obligations in a treaty in good faith[11]. The principle forms the basis of good faith that a party cannot take exemption from its international obligations citing domestic law as a justification[12]. It is the duty of the parties of a treaty to perform the obligations under the treaty in good faith[13]. It is submitted

[4] Report of the Panel, Uruguayan Recourse to Article XXIII, para. 15, 9L/1923 (Nov. 16, 1962), GATT BISD (11th Supp.), at 95 (1962).
[5] Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331. [hereinafter VCLT]
[6] M.N. Howard, P. Crane and D.A. Hochberg, Phipson On Evidence 52, (Sweet & Maxwell.eds., 14th ed. 1990).
[7] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, para 5, WTO Doc. L/4907, (Nov. 28, 1979).
[8] Understanding on rules and procedures governing the settlement of disputes 356, n. 4, Apr. 15, 1994, 1869 U.N.T.S 401 [hereinafter DSU].
[9] Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, ¶ 73, WTO Doc. WT/DS132/AB/RW (adopted Oct. 22, 2001)
[10] Pacta Sunt Servanda, Black's Law Dictionary (5th ed. 1981).
[11] Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331. [hereinafter VCLT]
[12] Pacta Sunt Servanda, US Legal, https://definitions.uslegal.com/p/pacta-sunt-servanda/ (last visited January 12, 2018).
[13] Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331. [hereinafter VCLT]

before the Panel that the Government of Climatia was affected by the Agreements made by Oxyonia, there was a bilateral working group formed but there has been no solution[14]. It is not required that member must have its legal interest infringed to invoke a dispute settlement[15]. Government of Climatia participated in this working group only with the intention that a possible solution could be reached. The member must engage in procedures of dispute settlement in good faith and an effort to resolve the dispute[16]. A member who engages in a procedure in good faith is entitled to request a panel to examine measures that the Member considers nullify or impair its benefits[17]. Climatia first had consultations with Oxyonia and only after its failure, Climatia requested for a panel to resolve the dispute with a mutually acceptable solution.

2. **WHETHER THE 20 YEAR SUPPLY AGREEMENT BETWEEN GRMM AND UMMC IS IN THE FORM OF ARTICLE 1.1(a) (iv), ARTICLE 1.1 (a) (iii), ARTICLE 1.1 (b) AND ARTICLE 3.1 OF SCM AGREEMENT**?

The agents appearing on behalf of Government of Climatia humbly submits that the 20 year supply agreement between GRMM and UMMC is a form of financial contribution given by UMMC as directed by government of Oxyonia, to GRMM and the agreement confers a benefit to GRMM by reducing the price of the cobalt as compared to the prevailing price in the market and the supply agreement is a prohibited subsidy as mentioned in article 3.1 of SCM agreement.

The 20-year supply agreement is a financial contribution

There was a 20-year long supply agreement between GRMM and UMMC for supply of cobalt concentrates at a fixed price of 90,000USD per metric ton[18]. The term subsidy has been defined in article 1 of SCM agreement. In **Canada- Renewable Energy[19]**, the Appellate Body lays the following guidance on how to make the proper legal characterization of a transaction under Article 1.1(a)(1), that is: "When determining the proper legal characterization of a measure under Article 1.1(a)(1) of the SCM Agreement, a panel must assess whether the measure may fall within any of the types of financial contributions set out in that provision. In doing so, a panel should scrutinize the measure both as to its design and operation and identify its principal

[14] supra note 9.
[15] European Communities – Regime for the Importation, Sale and Distribution of Bananas, ¶ 132, WTO Doc. WT/DS27/AB/RW2/ECU (adopted Nov. 26, 2008).
[16] DSU, art. 3.10.
[17] United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, ¶ 89, WTO Doc. WT/DS213/AB/R (adopted Nov. 28, 2002).
[18] Moot proposition
[19] Canada- Renewable energy, Appellate body report, WTO Doc. WT/DS/412-19 (adopted 6th May 2013)

characteristics. Having done so, the transaction may naturally fit into one of the types of financial contributions listed in Article 1.1(a)(1)".

COBALT IS A GOOD PROVIDED BY OXYONIA TO GRMM THROUGH UMMC

In determining the term good, in **Black's Law Dictionary**[20] defines the term 'goods' as includes 'tangible or movable personal property other than money' and **US – Softwood Lumber IV**[21] panel contemplates that the term 'goods' could include 'growing crops, and other identified things to be severed from real property'.and the terms goods or services other than general infrastructure as used in 1.1(a)(1)(iii) of the SCM Agreement confirms the broader meaning associated with the term, and include imported goods''. **The Shorter Oxford English Dictionary**[22] offers a more general definition of the term 'goods' as including 'property or possessions' especially—but not exclusively—'movable property'. In the dispute of **Softwood Lumber IV (AB)**[23], Canada argued that the term "goods" was limited to tradable items with an actual or potential tariff classification, examining dictionary definitions of the term "goods," the Appellate Body agreed with the Panel that the ordinary meaning of the term as used in Article 1.1(a)(1)(iii) includes items that are tangible and capable of being possessed." Nonetheless, the Appellate Body also noted that dictionary definitions have their limitations in revealing the ordinary meaning of a term, especially where the meanings of terms used in the different authentic texts of the WTO Agreement are susceptible to differences in scope.

It is in furtherance of this object and purpose that Article 1.1(a)(1)(iii) recognizes that subsidies may be conferred, not only through monetary transfers, but also by the provision of non-monetary inputs. Thus, to interpret the term 'goods' in Article 1.1(a)(1)(iii) narrowly, would permit the circumvention of subsidy disciplines in cases of financial contributions granted in a form other than money, such as through the provision of Cobalt for the sole purpose of severing it from land and processing it. Further in **US – Large Civil Aircraft (2nd complaint)[24]**, case of the providing of goods or services, subparagraph (iii) does not specify whether the goods or services are provided gratuitously or in exchange for money or other goods or services. Thus, the provision of goods or services may include transactions in which the recipient is not

[20] Black's Law Dictionary, 7th ed., B.A. Garner (ed.) (West Group, 1999), pp. 701–702.

[21] US – Softwood lumber IV, Appellate body report, WTO Doc. G/L/539/Add.2.G/SCM/D45/2/Add.1 WT/DS257/26/Add.1 (adopted 17th February 2004)

[22] Shorter Oxford English Dictionary, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. I, p. 1125.

[23] Supra note 21

[24] US – Large Civil Aircraft (2nd complaint)*,* Appellate body report, WTO Doc. WT/DS/353/29 (adopted 23rd March 2012)

required to make any form of payment, as well as transactions in which the recipient pays for the goods or services

Thus it is submitted that cobalt is good under SCM Agreement and the same is being provided by the Oxyonian government to GRMM through a private party, UMMC.

THERE IS AN ENTRUSTMENT OR DIRECTION TO PRIVATE BODY

The 20-year long supply agreement provides financial contribution to GRMM by by directing a private body to act as a proxy for the government to provide goods other than general infrastructure, as mentioned in article 1.1 (a) (iv) of the SCM agreement. Entrustment or direction in sub para 4 refers to a situation in which, the government executes a particular policy by operating through a private body. The concise oxford dictionary gives as a meaning to ‘’give formal order or command to’’ as thus is the construction precisely used in sub para (iv) of article 1.1(a)(1).

'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.[25]

As stated in **US- Export restrainment**[26] and **japan DRAM’s**[27] case, there are 3 necessary elements, which is required for any entrustment or direction for the 1.1(a)(1)(iv), which include, i) An explicit or affirmative action, be it delegation or command, ii) Addressed to a particular party, iii) The object of which is a particular task or duty.

Entrustment not only cover acts of delegation but occurs more broadly where a government gives responsibility to the private body, similarly direction is not limited to act of command but covers, all situations that the government exercises its authority over a private body and in most cases involve some form of threat. As it is an indirect process and the individual pieces of circumstantial evidences are unlikely to establish entrustment or direction, all such pieces should be put together to determine whether on the bases of the totality of evidence entrustment or direction might be reasonably inferred – first indication is thereof present if the private actor act against its commercial intent, second element factor is the degree of government ownership

[25] US – Countervailing Duty Investigation on DRAMs, paras. 108, 110, 111 and 116.
[26] U.S – Export retainment, *Panel report*, WTO Doc. WT/DS194/4, (adopted 23rd august 2001)
[27] Japan - DRAM (Korea) Appellate body report, WTO Doc. WT/DS336/23, (adopted 17th December 2007)

of private body. [28] Further in **Japan – DRAM's (Korea)**, [29] 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).

In the instant case a clear connection of direction by Oxyonian government to UMMC can be shown through the transcript of shareholders' meeting of UMMC 10 August 2037[30] where the Oxyonian representative threatened the other shareholders and compelled them to enter into an 20 year supply agreement with GRMM and further as the global price for Cobalt was reported to be constantly on rise thus UMMC was acting against its own interest and was commercially unreasonable.

OXYONIAN GOVERNMENT WAS INVOLVED IN PROVIDING COBALT TO GRMM AND THE ACT WAS NO DIFFERENT THAT THAT NORMALLY VESTED WITH GOVERNMENT

Government under SCM Agreement "encompasses both the government in the 'narrow sense' and 'any public body within the territory of a Member'[31]The Panel in **Korea – Commercial Vessels**[32] concluded that the phrase "government practice" is used to denote the author of the action, rather than the nature of the action and that 'government practice' therefore covers all acts of governments or public bodies, irrespective of whether or not they involve the exercise of regulatory powers or taxation authority". Further in **US – Anti-Dumping and Countervailing Duties (China)**[33], the Appellate Body also considered the phrase "which would normally be vested in the government" in Article 1.1(a)(1)(iv): "This brings us to the next contextual element, namely, the phrase 'which would normally be vested in the government' in subparagraph (iv). The next part of that provision, which refers to a practice that, 'in no real sense, differs from practices normally followed by governments', further suggests that the classification and functions of entities within WTO Members generally may also bear on the question of what features are normally exhibited by public bodies".

[28] US – Countervailing Duty Investigation on DRAMs, para. 108.WTO Doc. WT/DS296/11 (adopted 20 July 2005)

[29] Japan – DRAMs (Korea*)*, para. 138. WTO Doc. WT/DS336/23 17 December 2007
[30] Moot proposition
[31] US – Countervailing Measures (china*)*, WTO Doc. WT/DS437/26, (adopted 16th January 2015)
[32] *Korea – Commercial Vess*els Panel report, WTO Doc. WT/DS273/8, (adopted 11th April 2005)
[33] US – Anti-Dumping and Countervailing Duties (China*)* Appellate body report, WTO Doc. WT/DS379/12/Add.7 (adopted 25th march 2011)

There is an explicit action by oxyonian government representative in commanding the UMMC partners to act in accordance to their object, to enter in to an agreement with GRMM and, with respect to the DRAM's case, yes, the UMMC as a private body has acted against its own benefits and it is owned to a certain degree i.e. 25% of the stakes of UMMC is owned by the oxyonian government, which has threatened the UMMC's other owners to act according to their own policy. In the instant case, it is clearly established that the Oxyonian government has directed the private body i.e. UMMC to act in a manner as stated under Article 1.1(a)(1)(iv) and Article 1.1(a)(1)(iii) and hence the agreement between UMMC and GRMM is a Financial Contribution as state in Article 1.1(a)(1) of SCM agreement.

A. The 20-year supply agreement confers a benefit to GRMM within the meaning of Article 1.1(b) of the SCM Agreement

It is humbly submitted that the 20-year long term supply agreement confers a benefit to GRMM within the meaning of article 1.1(b) of the SCM agreement as it has put the company in a advantageous position in the market. The supply agreement has helped the GRMM to purchase cobalt concentrates at low price than the current price prevailing in the market. The 20 year supply provides that GRMM will purchase cobalt concentrates from UMMC at an fixed price which is below the current market price. The 20-year supply agreement has conferred a benefit under article 1.1(b) of the SCM agreement.

"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"[34]. In the instant case the 20 year supply agreement has provided benefit to the GRMM company as the company is in better position in world market by buying of cobalt concentrates at a fixed price. The prices of cobalt concentrates have been increasing in the world market. As of 2048, the price of cobalt has been 11,000 USD per metric ton[35]. Where as the price paid by GRMM to UMMC as per agreement to buy cobalt concentrates is 90,000 USD per metric ton[36]. In **Canada – Renewable Energy**[37], the Appellate Body noted the implications of the characterization of a transaction under Article 1.1(a) of the SCM Agreement for the determination of whether a benefit has been conferred: "The characterization of a transaction under Article 1.1(a) of the SCM Agreement may have implications for the manner

[34]US – Large Civil Aircraft (2nd complaint) Appellate body report, WTO Doc. WT/DS353/29 (adopted 23rd march 2012)
[35] Moot proposition Annex V
[36] Moot proposition
[37] Supra note 19

in which the assessment of whether a benefit is conferred is to be conducted. For instance, the context provided by Article 14 of the SCM Agreement presents different methods for calculating the amount of a subsidy in terms of benefit to the recipient depending on the type of financial contribution at issue. However, although different characterizations of a measure may lead to different methods for determining whether a benefit has been conferred, the issue to be resolved under Article 1.1(b) remains to ascertain whether a 'financial contribution' or 'any form of income or price support' has conferred a benefit to the recipient. Export subsidies that place the products benefiting from them in an artificially improved competitive position vis-a-vis like products in the country to which they are shipped, so domestic subsidies can disadvantage like imported products competing in the country to which they are shipped.[38]

ADVANTAGEOUS IN MARKET:

The Panel in **Canada – Aircraft[39]** stated that financial contribution will only confer a 'benefit', i.e., an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market. Further in **Canada – Renewable Energy[40]**, The Appellate Body upheld the Panel's finding that "benefit" must be established by determining whether the financial contribution makes the recipient better off vis-à-vis the market than it would have been absent that financial contribution, the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market. So, in this dispute by receiving the benefit, GRMM has been placed in a better position in market than the benefit is absent.

COST TO GOVERNMENT IS IRRELEVANT:

"Benefit" does not include any notion of net "cost to the government"[41]. Other than private prices in the country of provision may be used as a benchmark "when it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods" [42]. **Panel on United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel**

[38] Rex J. Zedalis, Subcentral Governmental Investment Incentives - Assessing Their Lawfulness under the GATT and the SCM Agreement, 8 J. World Investment & Trade 85 (2007)
[39] *Canada – Aircraft*, Panel report, WTO Doc. WT/DS70/15, (adopted 20th august 1999)
[40] Supra note 19
[41] Supra note 28
[42] Supra note 19

Products Originating in the United Kingdom[43], in its interpretation of the term "benefit", subsequently upheld by the Appellate Body, considered that the existence or lack thereof of benefits has to be decided by drawing a comparison with the other potential recipients or beneficiaries and whether the beneficiary in question has received it on more favourable terms. "the recipient of a financial contribution need not be the same as the recipient of the benefit conferred thereby, as long as the required causal relationship between the contribution and the benefit is established”. So, from this we say that the 20-year long term supply agreement confers benefit to GRMM as said in article 1.1 (b) of the SCM agreement.

B. The 20-year supply agreement is a prohibited subsidy within the meaning of Article 3.1 (a) of SCM agreement

The definition of an export subsidy under the SCM Agreement contains three elements: a financial contribution is made by a government; a benefit conferred on the recipient of the financial contribution; and the financial contribution must be contingent upon export performance. The meaning of the first 2 of these elements is examined already. And it has been already proved that in the instant case there is a financial contribution by the oxyonian government made out by directing UMMC to enter into an Agreement with GRMM for 20 years which is conferring benefit upon GRMM, now, it is submitted that the agreement between UMMC and GRMM is contingent on export performance and thus a prohibited agreement within in the meaning of Art. 3.1(a). The definition of an export subsidy under the SCM Agreement contains three elements: a financial contribution is made by a government; a benefit is conferred on the recipient of the financial contribution; and the financial contribution must be contingent upon export performance. The meaning of the first 2 of these elements is examined already. And it has been already proved that in the instant case there is a financial contribution by the oxyonian government made out by directing UMMC to enter into an Agreement with GRMM for 20 years which is conferring benefit upon GRMM, now, it is submitted that the agreement between UMMC and GRMM is contingent on export performance and thus a prohibited agreement within in the meaning of Art. 3.1(a).

[43] United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom Appellate body report, WTO Doc. WT/DS138/9/corr.1 (adopted on 7th June 2000)

THE SUBSIDY IS CONTINGENT UPON EXPORT PERFORMANCE IN FACT:

A subsidy that meets the definition of "export subsidy" under the SCM Agreement will be contingent upon export performance. This contingency can be either in law or in fact. The first is demonstrated on the basis of the law or other relevant legal instrument, without reference to external factual elements. Contingency "in law" can either be stated expressly or implicitly in the law. The DSB has confirmed that a subsidy is contingent in law if it is conditional or dependent for its existence upon export performance. The DSB has also confirmed that it is not necessary to prove actual distortion of trade in order to prove export contingency. The only legal test remains whether the subsidy is conditional or dependent for its existence upon export performance. The DSB has determined that a subsidy is contingent "in fact" upon export performance if there is a relationship of conditionality or dependence between the grant of the subsidy and the anticipated exportation or export earnings". Contingency 'in fact' is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. "The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters". [44]

REQUIREMENT:

Under Article 3.1(a), when there is evidence demonstrating the existence of three distinct elements, (i) the granting of a subsidy; (ii) that is tied to; (iii) anticipated exportation or export earnings. [45]At the heart of this legal standard is the second element, which reflects the notion of contingency set out in Article 3.1(a). The meaning of 'contingent' in Article 3.1(a) is 'conditional' or 'dependent for its existence upon'. Appellate Body in **EC - AIRCRAFT**[46] Case said the standard should involve looking at whether the subsidy creates an incentive to

[44] Australia– Automotive Leather II, Panel report, WTO Doc. G/SCM/D20/2WT/DS126/11, (adopted 11th February 2000)
[45] *EC and Certain member states – Large Civil aircraft*, Panel report, WTO Doc. WT/DS316/40/Rev.1, (adopted June 11, 2011)
[46] Id at 45

export as compared to selling domestically: Where the evidence shows, all other things being equal, that the granting of the subsidy provides an incentive to skew anticipated sales towards exports. Thus, in order to qualify as a prohibited export subsidy, the grant of the subsidy must be conditional or dependent upon actual or anticipated export performance; or as we have put it above, a subsidy must be granted because of actual or anticipated export performance. But as the existence of contingency in fact cannot be proved directly, especially when the export performance is indirect, the Appellate Body in, **Canada – Aircraft**[47] case, gave that the existence of this relationship of contingency, between the subsidy and export performance, must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy.

In the instant case, the subsidy granted is contingent in fact on export performance indirectly, as the subsidy to GRMM is granted in august 2037, By 2038, GRMM had become one of the biggest producers of refined cobalt in the world, In February 2038, the Government of Oxyonia through its policy measures was to introduce an increase in export duty by 50%, but not wanting to sacrifice the interests of GRMM and Green O, made them to enter into an long term agreement, which would eventually lead to dramatic increase in exports from Green O and not from GRMM. This was a planned action to escape the provisions of Art. 3 of SCM by using the loophole that the export performance of the recipient does not increase at the same time the grant of subsidies actually eventually leads to increase in exports indirectly. Thus, as given in **Canada – Aircraft**[48], total configuration of the facts constituting and surrounding the granting of the subsidy should be taken into consideration. And the fact that the recipient did not got a better export performance should not be given importance instead the fact that Oxyonian government used an indirect method to anticipate future exports should be taken into consideration, and thus 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.

[47] Supra note 28
[48] Supra note 28

3. WHETHER THE UNREPAID LOAN GIVEN BY IDB TO RARISIA IS WITHIN THE FORM OF ARTICLE 1.1(a) (1) (iv), ARTICLE 1.1 (b) AND ARTICLE 3.1(a) OF THE SCM AGREEMENT?

It is humbly submitted by the agents that the loan given by IDB to Rarisian government is a financial contribution within the meaning of article 1.1 (a) (1) (iv) and the unrepaid loan confers benefit to GRMM within the meaning of article 1.1 (b) and the unrepaid loan is a prohibited subsidy.

A. The unrepaid loan given by IDB to the Rarisian Government is a financial contribution by a public body, namely, IDB, 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

Article 1.1 of SCM agreements defines subsidy as:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where: (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) (iii) a government provides goods or services other than general infrastructure, or purchases goods; (iv) 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 (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

IDB IS A PUBLIC BODY: The term public body has been defined in the case of **Korea – Commercial Vessels**[49], where it was held that if "An entity will constitute a 'public body' if it is controlled by the government (or other public bodies). If an entity is controlled by the government (or other public bodies), then any action by that entity is attributable to the government, and should therefore fall within the scope of Article 1.1(a)(1) of the SCM Agreement. The International Law Commission's Articles on State Responsibility[50] provide for a two-step analysis: (1) An entity will be a public body if it "is empowered by the law of the State to exercise elements of the governmental authority". (2) The acts in question will be

[49] Supra note 21
[50] Yearbook of the International Law Commission, 2001, vol. II, Part Two

considered acts of state only if such entities are acting pursuant to such authority in the particular instance. In the instant case, International Bank for Development ("IBD"), headquartered in Hali, the capital of Oxyonia and Oxyonia being biggest individual shareholder of IBD (21%), used this position to exercise some degree of control over IDB's decisions in granting loans to its members, Oxyonia has the right to appoint one person to the Board of Executive. IDB uses funds from the Executive Reserve to run day-to-day operations of the Bank, specifically its administrative functions. IDB documents and testimony from representatives of MOC show that the representative of Oxyonia on IDB's Board of Executives insisted that the loan amount given to MOC be partially used for the development of an expressway to Randon port, and that the Rarisian Government rescind its decision to impose 100% export duty otherwise it will not approve of it[51]. Hence, it is submitted that, IBD is a public body.

THE UNREPAID LOAN IS A FINANCIAL CONTRIBUTION THROUGH A FUNDING MECHANISM:

The phrase "entrusts or directs" in Article 1.1(a)(1)(iv) is immediately preceded by the phrase "a government makes payments to a funding mechanism or" and considered that: These two phrases are aimed at capturing equivalent government actions. Both are government actions that substitute an intermediary (whether a funding mechanism or a private body) to make a financial contribution that otherwise would be made directly by the government. In other words, that action of a government making payments to a funding mechanism and that of it entrusting or directing a private body to carry out the functions listed in subparagraphs (i)-(iii) are equivalent government actions. This is further contextual support for our view that entrustment or direction constitutes an explicit and affirmative action, comparable to the making of payments to a funding mechanism. Thus, it is very clear that a financial contribution can be made by a public body.[52]

THE FINANCIAL CONTRIBUTION IS NOT COVERED UNDER THE EXCEPTION OF GENERAL INFRASTRUCTURE: The term 'general infrastructure', taken in its ordinary and natural meaning, refers to infrastructure that is not provided to or for the advantage of only a single entity or limited group of entities, but rather is available to all or nearly all entities, this interpretation is consistent with the ordinary meaning of the term 'general' when used to modify

[51] Moot proposition
[52] Supra note 24

the word 'infrastructure.' Additional factors could include, inter alia, the circumstances under which the infrastructure in question was created and the nature and type of infrastructure in question. Thus, a case to case analysis is essential. In **Korean vessels** [53]case also it was put forward that definition of general infrastructure, namely which "is generally accessible by or provides benefit to the general public". In the instant case, IDB granted a loan of 5 billion USD at an interest rate of 2% to MOC for modernization of Conda Mines in order to increase production, and to build an expressway from Conda Mines to the port of Randon, on the southern coast of Rarisia, The Rarisian Government had approached various other financial institutions for loans for modernization of Conda Mines, none of which agreed to lend to it at rates lower than 5%. None of them agreed to a loan-waiver clause. The expressway was open only to vehicles transporting goods from Conda Mines which was mined exclusively by MOC to the Randon port. Passenger vehicles were not allowed on the expressway. Randon is the only major port in Rarisia, and minerals, including cobalt, are exported from this port. the loan to Rarisia was waived in 2040, after repayment of 1 billion USD. Thus, in the instant case, it is submitted that the loan that was granted by IBD to MOC of the restructuring and road building has conferred a financial contribution in the sense as covered by Art. 1.1(a)(1)(iii), (iv).

B. 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

IDB documents and testimony from representatives of MOC show that the representative of Oxyonia on IDB's Board of Executives insisted that the loan amount be partially used for the development of an expressway to Randon port, and that the Rarisian Government rescind its decision to impose 100% export duty. He conveyed to the other two Executives on the Board that he would not agree to approve the loan proposal unless these two conditions were met. As rarisian government has accepted to rescinded its decision to impose an export duty of 100% on exports of cobalt concentrates, and accepted to provide GRMM with cobalt concentrates excluding applicable taxes and duties at fixed price. The entire loan amount was transferred to MOC in January 2037. By These factual aspects we can say that the unrepaid loan has provided increased supply of cobalt concentrates at fixed prices to GRMM which is conferred as benefit within the meaning of Article 1.1(b) as it has put GRMM in a better position in the Market.

[53] Supra note 22

UNREPAID LOAN CONFERS BENEFIT: It is submitted that the unrepaid loan confers a benefit within the meaning of Article 1.1(b) to GRMM. Article 1.1(b) ("benefit is thereby conferred")

<u>Meaning of benefit</u>:

The ordinary meaning of "benefit" clearly encompasses some form of advantage. We do not consider that the ordinary meaning of "benefit" per se includes any notion of net cost to the government. Article 14(b) government loans shall not be considered as conferring benefits unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on the comparable commercial loan which the firm could actually obtain on the market. [54] In the Instant case, the unrepaid loan given by IDB to the Rarisian Government is a financial contribution by IDB, in the form of government payments to a funding mechanism which, in this case, is MOC to carry out 1.1 (a) (i) which provided benefit to the recipient which, in this case, is GRMM by increasing the supply of cobalt concentrates at fixed price. In the dispute **U.S lead and bismuth 2**[55] the Appellate Body believed that: "The word "benefit", as used in Art. 1.1(b), implies some kind of comparison. This must be so, for there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient "better off" than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", because the trade distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market. In the instant case GRMM has acquired Benefit of getting Cobalt concentrates from MOC at fixed price which means GRMM, a recipient has received a on terms more favourable than those available to the recipient in the market.

C. **<u>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.</u>**

The definition of an export subsidy under the SCM Agreement contains three elements: a financial contribution is made by a government; a benefit is conferred on the recipient of the financial contribution; and the financial contribution must be contingent upon export

[54] <u>Supra</u> note 28
[55] <u>Supra</u> note 33

performance. The meaning of the first 2 of these elements is examined already. And it has been already proved that in the instant case there is a financial contribution by the rarisian government made out by crediting MOC (funding mechanism) to carry out function mentioned in Art. 1.1(1)(a)(iii) which gives benefit to GRMM. Now it is submitted that The unrepaid loan is a prohibited subsidy within the meaning of Art. 3.1(a) of the SCM Agreement as it is contingent on the exports of cobalt concentrates from Rarisia to, inter alia, Oxyonia.

ARTICLE 3.1: Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I; (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods. The WTO Appellate Body has provided the following elucidation of the provision on export subsidies in the ASCM: 'In our view, the legal standard expressed by the word "contingent" is the same for both de jure and de facto contingency. There is a difference, however, in what evidence may be employed to prove that a subsidy is export contingent. De jure export contingency is demonstrated on the basis of the words of the relevant legislation, regulation or legal instrument. Proving de facto export contingency is a much more difficult task. There is no single legal document which will demonstrate, on its face, that a subsidy is "contingent...in fact...upon export performance". Instead, the existence of this relationship of contingency, between the subsidy and export performance, must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case. We note that satisfaction of the standard for determining de facto export contingency set out in footnote 4 requires proof of three different substantive elements: first, "the granting of a subsidy"; second, "is...tied to..."; and third, "actual or anticipated exportation or export earnings. In **Council Regulation (EC) No 2603/2000**[56] of 27 November 2000 it is explained that If the credit is given at rates that are lower than the rates on international capital markets, the practice becomes an export subsidy. Payment by governments or special institutions of all or part of the costs incurred by exporters or financing institutions in obtaining credit is also an export subsidy if such payment gives a "material advantage in the field of export credit terms". Here in the instant case IDB a public body granted loan to MOC which is an export credit at rates below as one of the conditions put forth by IDB is to take off export

[56] Official Journal L 301 30/11/2000 P. 0001 - 0020

duty of 100% on export of cobalt concentrates and stable supply of cobalt to members of IDB, particularly to increase supply of cobalt at fixed prices to GRMM.

EXPORT SUBSIDY DEFENITION:

A subsidy that meets the definition of "export subsidy" under the SCM Agreement will be contingent upon export performance. This contingency can be either in law or in fact. The first is demonstrated on the basis of the law or other relevant legal instrument, without reference to external factual elements. Contingency "in law" can either be stated expressly or implicitly in the law. The DSB has confirmed that a subsidy is contingent in law if it is conditional or dependent for its existence upon export performance. The DSB has also confirmed that it is not necessary to prove actual distortion of trade in order to prove export contingency. The only legal test remains whether the subsidy is conditional or dependent for its existence upon export performance. [57] Thus, in this instant case, from the above explanation it is been concluded that the unrepaid loan is prohibited subsidy under article 3.1(a) of SCM agreement and it is contingent upon export performance of MOC. This contingency is "in law" as it is conditional or dependent for its existence upon export performance of MOC. Thus in this instant case, from the above explanation it is been concluded that the unrepaid loan is prohibited subsidy under article 3.1(a) of SCM agreement and it is contingent upon export performance of MOC. This contingency is "in law" as it is conditional or dependent for its existence upon export performance of MOC.

4. WHETHER THE EXPORT DUTIES IMPOSED ON BATTERY GRADED COBALT IS IN THE SENSE OF ARTICLE XVI OF GATT 1994 AND WHETHER IT CONFERS A BENEFIT AND WHETHER THE EXPORT DUTIES ARE WITHIN THE MEANING OF 3.1(b) OF SCM AGREEMENT?

It is humbly submitted by the agents representing the Govt. of Rarisia that the export duties imposed on the battery graded cobalt are a form of income or price support mentioned in GATT 1994 and it is also submitted that the export duties also confer a benefit to Green O by depressing the price in market and the export duties are a prohibited subsidy within the meaning of Art. 3.1(b) of SCM agreement.

[57] Supra note 34

A. The export duties imposed on battery graded cobalt are a form of income or price support mentioned in Art. XVI of GATT 1994.

It is humbly submitted that export duties imposed on exports of, battery graded cobalt exported from oxyonia are a form of income or price support in the sense of Article XVI of GATT 1994. Article XVI of GATT defines subsides. The first part of article XVI of GATT 1994 says that "If any contracting party grants or maintains 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". The term any form of income or price support "would capture government measures that directly or indirectly have an impact on the income of the recipient, without involving a financial contribution. For example, 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[58]". In this instant dispute the export duties imposed is in form of income or price support which makes Green O to buy battery graded cobalt at a reduced price from GRMM. In **Canada – Renewable energy**[59] case, it was stated that government interventions in existing markets amount to subsidies when they take the form of a financial contribution, or income or price support, and confer a benefit to specific enterprises or industries. Thus, in the instant case the export duty increase on cobalt including battery graded cobalt has led to reduction in its export but domestic market for the same has been built at a lower price which has in turn increased the export of battery run vehicles by Green O. Also, The **New York Report notes**, with regard to the draft Charter provision corresponding to Article XVI:1, "It will be observed that the provision in this sentence as now drafted applies to cases in which the subsidy operates, 'directly or indirectly', to increase exports or reduce imports of any product and can thus not be interpreted as being confined to subsidies operating directly to affect trade in the product under consideration". The Panel considers it fair to assume that a subsidy which provides an incentive to increased production will, in the absence of offsetting measures, e.g., a consumption subsidy, either increase exports or reduce imports. In the instant dispute it is given that the prices paid by Green O to GRMM is 30 to 40% less than the prevailing market price and the subsidy here is the fixed price to be paid by Green O to GRMM and the government of oxyonia have introduced this export duties to increase the exports of battery graded cobalt and reduce the imports in to their country. The

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[58] G. Luengo, Regulation of Subsidies and State Aids in WTO and EC Law (The Netherlands, Kluwer Law International, 2006), 586 pp., 122
[59] Supra note 19

second half of the Art. XVI of GATT 1994 says that "In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the contracting parties, the possibility of limiting the subsidization". The term serious prejudice means "subsidies cause artificial price suppression in violation of Articles 5 and 6.3 of the SCM Agreement. For a challenging nation to prevail on this claim, a WTO panel must first find that the challenged measures constitute subsidies within the definition of SCM Agreement Articles 1 and 2, and then determine that those subsidies cause "serious prejudice" per SCM Article 6.3. If the panel finds serious prejudice, then SCM Article 5, which forbids Members from causing "adverse effects" to other Members, has been violated. If "significant price suppression," within the meaning of SCM Article 6.3(c), is shown, then SCM Article 5 has been violated, violators must remove the adverse effects or face sanctions. "Price suppression" requires an examination of "price," so first the market and market price must be identified. The unspecified "market" for the purposes of Article 6.3(c) includes the "world market". In the instant case, The government intention to put up 50% increase in Export duty is taken after lobbying by companies including Green O which is one of the 2 major battery car producing companies and as GRMM is the only major world supplier of battery graded cobalt, and the cunning planning of the Oxyonian government has led to a long term agreement between GRMM and Green o by which GRMM has to supply to Green o, battery graded cobalt at a price lower than the world market price, which has led to a drastic increase in exports of green o as no other company has to afford to sell cobalt as GRMM and thus this indirect price control has adversely affected FuturZ and has caused serious prejudice.

B. <u>The export duties confer a benefit to Green O by depressing the price in market</u>

In the previous issue, it is proved that the export duties imposed on the imports of battery graded cobalt from oxyonia is a form of income or price support in the sense of article XVI of GATT 1994 and also drawn from the cases used that 1.1(a)(2) of SCMA clarifies that income or price support, where applicable, could replace a financial contribution as its alternative. Thus, the benefit conferred by from the export duties imposed on exports of inter alia, battery-grade cobalt from oxyonia is by depressing the price in the domestic market which is called price support which replaced a financial contribution as its alternative. In the instant dispute we will prove that the export duties which was imposed on the exports of battery graded cobalt

from oxyonia confer a benefit to Green O by depressing the price of this product in the domestic market. The term benefit means any financial contribution which keeps the recipient in a better position if not it has been granted. It is also said that benefit is linked to the concept of "financial contribution" and income or price support and its existence requires a comparison in the market place. To establish the existence of that advantage, it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution". "A 'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a 'benefit' can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. The term 'benefit', therefore, implies that there must be a recipient. The ordinary meaning of the word 'confers', as used in Article 1.1(b), bears this out. 'Confer' means, inter alia, 'give', 'grant' or 'bestow'. [60] In the case of **Canada – Renewable energy**[61], it was decided that government interventions in existing market may amount to subsidies when they take form of a financial contribution, or income or price support and confer a benefit to specific enterprises or industries. To determine whether such a recipient has received a benefit, the Appellate Body developed what could be labelled the private market test. A benefit arises if 'the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market'. Thus, if private actors would have provided the financial contribution on the same conditions, the government's action would not confer a benefit on the recipient. This private market test exactly fits the rationale behind the 'benefit' element: it 'acts as a screen to filter out commercial conduct' contextual guidance in Article 14 of the SCM Agreement, which sets guidelines for the calculation by the **CVD-investigating authority**[62] of the amount 'of a subsidy in terms of the benefit to the recipient'. In the instant dispute the export duties imposed on the exports of battery graded cobalt from oxyonia confer a benefit to Green O by depressing the price in the domestic market. The Green O company is in better position in the market by receiving the benefit than it would have been otherwise in market. The benefit given is the price support provided by the oxyonian government to Green O. By receiving the benefit, Green O has been placed in a better position in the market if it has not received the benefit.

[60] Supra note 11
[61] Supra note 2
[62] Canada- Aircraft, paras 155 WTO Doc. WT/DS70/15, (adopted 20th august 1999)

C. The export duties are a prohibited one within the meaning of Art. XVI of GATT 1994 and the subsidy was de facto contingent on the use of domestic over imported goods

Article 3 of SCM agreement defines about prohibition. It says that except subsidies which are given to agriculture any other subsidies which is contingent in law or in facts whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I5 and subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods[63]. Moreover, the members are also prohibited from granting or maintaining those subsidies which are given in the paragraph. Based on the Appellate Body's prior findings, the Panel in **EC and certain member States – Large Civil Aircraft**[64] (Article 21.5 – US) articulated the legal test under Article 3.1(b): "Like Article 3.1(a), Article 3.1(b) sets forth a single legal standard. That is, a subsidy must be 'contingent, whether solely or as one of several other considerations, upon the use of domestic over imported goods.' The Appellate Body has further explained that the word 'contingent' means 'conditional' or 'dependent for its existence on something else'. Unlike Article 3.1(a), however, Article 3.1(b) contains no reference to contingency 'in law or in fact'. Nevertheless, the Appellate Body has found that Article 3.1(b)'s scope covers both de jure and de facto contingency. The evidence used to demonstrate de jure and de facto contingency may differ. Contingency '"in law" is demonstrated "on the basis of the words of the relevant legislation, regulation or other legal instrument."' The Appellate Body has also explained that 'such conditionality can be derived by necessary implication from the words actually used in the measure.' Consistent with the Appellate Body's guidance regarding evaluations of de facto contingency under Article 3.1(a), we feel it appears reasonable to conclude that an evaluation of de facto contingency under Article 3.1(b) should be objectively assessed with respect to the total configuration of facts constituting and surrounding the granting of the subsidy which include (i) the design and structure of the measure granting the subsidy; (ii) the modalities of operation set out in such a measure; and (iii) the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation.

[63] Article 3, Subsidies and countervailing measures agreement
[64] Supra note 33

<u>Use</u>: The Appellate Body added, in **US – Tax Incentives**[65], that the meaning of this term would vary depending on the particular circumstances: "Article 3.1(b) does not elaborate on what constitutes 'use of … goods'; nor do other provisions of the SCM Agreement or other covered agreements define this term. In the absence of any further guidance, the term 'use' may, depending on the particular circumstances, refer to consuming a good in the process of manufacturing, but may also refer to, for instance, incorporating a component into a separate good, or serving as a tool in the production of a good. In the instant case there is a use of domestic goods over imported goods. Following the imposition of these export duties, Green O sourced its entire requirement of battery-grade cobalt from GRMM. This trend continued till the end of 2042 (the latest period for which data were collected) which says that there is a use of domestic goods by Green O as it sourced its entire requirement of battery grade cobalt from GRMM which is a cobalt refining company in same country in which Green O is existing.

<u>Contingency</u>: Referring to its findings in **Canada – Aircraft**[66] where it had held that "the ordinary connotation of 'contingent' is 'conditional' or 'dependent for its existence on something else', the Appellate Body in **Canada – Autos**[67] opined that "this legal standard applies not only to 'contingency' under Article 3.1(a), but also to 'contingency' under Article 3.1(b). In **US – Tax Incentives**[68], the Appellate Body stated that "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. Rather, 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". In the instant case the subsidy, which is an export duty on battery-grade cobalt given by the oxyonian government to Green O is contingent upon the use of domestic over imported goods. this can be proved with a fact that Green O and GRMM communicated to the Finance Ministry that they had entered into an agreement for supply of battery-grade cobalt, valid for 10 years. Per the terms of the contract, Green O committed, subject to the conditions set out in the contract, to purchase battery-grade cobalt exclusively from GRMM at prices to be negotiated on a monthly basis.

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[65] <u>US – Tax Incentives,</u> appellate body report, WTO Doc. WT/DS487/11, (adopted 22nd September 2017)
[66] <u>Supra</u> note 62
[67] <u>Canada – autos</u>, appellate body report, WTO Doc. WT/DS139/12 WT/DS142/12
[68] <u>Supra</u> note 56

De facto: The Appellate Body in **US – Tax Incentives**[69] stated that 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). In **EC and certain member States – Large Civil Aircraft**[70], the Appellate Body referred to a number of factors that may be relevant in this regard, including the design and structure of the measure granting the subsidy, the modalities of operation set out in such a measure, and the relevant factual circumstances surrounding the granting of the subsidy, that provide the context for understanding the measure's design, structure, and modalities of operation. While the Appellate Body has relied on these factors in addressing de facto contingency under Article 3.1(a), we consider that they are also relevant to a de facto contingency analysis under Article 3.1(b). In the instant case the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation. Are: 1) On 29 June 2038, Green O and GRMM communicated to the Finance Ministry that they had entered into an agreement for supply of battery-grade cobalt, valid for 10 years. Per the terms of the contract, Green O committed, subject to the conditions set out in the contract, to purchase battery-grade cobalt exclusively from GRMM at prices to be negotiated on a monthly basis 2) On 1 August 2038, the export duties on exports of refined cobalt went into effect. Following the imposition of these export duties, Green O sourced its entire requirement of battery-grade cobalt from GRMM. This trend continued till the end of 2042 (the latest period for which data were collected) 3) Imports of battery-grade cobalt into Oxyonia have stopped since end of 2038 as foreign suppliers have been unable to match the prices quoted by GRMM to Green O. Despite selling to Green O at lower prices, GRMM has remained profitable, in part because its fixed-term supply agreements with MOC and UMMC ensure that it obtains cobalt concentrates at prices that are generally below world market prices. Hence in the instant case 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 Green O was de facto contingent on the use of domestic over imported goods.

[69] Supra note 56
[70] Supra note 45

REQUEST FOR FINDINGS

Wherefore for the following reasons, Government of Rarisia respectfully request the panel to adjudge and declare:

1. That the 20-year supply agreement is a financial contribution within the meaning of article 1.1(a) (iv), article 1.1(a) (iii) of the SCM agreement and it confers a benefit within the meaning of article 1.1(b) of the SCM agreement and it is a prohibited subsidy within the meaning of article 3.1(a) of the SCM agreement.
2. That the unrepaid loan is a financial contribution by public body within the meaning of article 1.1(a) (1) (iv) of the SCM agreement, it confers a benefit within the meaning of article 1.1 (b) and it is a prohibited subsidy within the meaning of article 3.1(a)
3. That the export duties imposed on batter graded cobalt are a form of income or price support within the meaning of article XVI of GATT 1994, the export duties confer a benefit to Green O and the export duties are prohibited subsidy.

Respectfully submitted
Agents for the Government of Climatia.