

11th GNLU INTERNATIONAL MOOT COURT COMPETITION, 2018

**GOVERNMENT OF CLIAMTIA
COMPLAINANT**

-v-

**GOVERNMENT OF OXYONIA
RESPONDENT**



MEMORIAL FOR THE RESPONDENT

**IN THE MATTER OF
OXYONIA – TRANSNATIONAL SUBSIDIES ON STRATEGIC
MINERALS**

**PLEADINGS IN THE WORLD TRADE ORGANISATION DISPUTE
SETTLEMENT BODY**

BEFORE THE ERUDITE PANEL

TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....4
INDEX OF AUTHORITIES.....5, 6, 7
STATEMENT OF FACTS.....8, 9
MEASURES AT ISSUE.....10
SUMMARY OF PLEADINGS.....11,12
LEADING PLEADINGS.....13

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

- A. Oxyonia does not attract the provision of nullification and impairment under GATT
- B. The formation of panel was not done in good faith

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

- A. The 20-year supply agreement is not a financial contribution
- B. The 20-year supply agreement didn't confer a benefit
- C. The 20-year supply agreement is not a prohibited subsidy

3. LOANS GIVEN BY IDB TO THE RARISIAN GOVERNMENT TO THE EXTENT IT WAS NOT REPAID BY RARISIA (UNREPAID LOAN)

- A. The unrepaid loan is not a financial contribution by IDB to Rarisian government
- B. The unrepaid loan didn't confer a benefit

C. The unrepaid loan is not a prohibited subsidy

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?

A. The export duties are not a form of income or price support

B. The export duties did not confer a benefit to Green O

C. The export duties are not a prohibited subsidy

Request for findings.....32

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 Organization

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).
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- Appellate Body Report, *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).
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Countervailing Duties (China), para. 350). WT/DS379/12/Add.7 (adopted 25 March 201)

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STATEMENT OF FACTS

Prologue: Green O Motor Company (“Green O”) and Futur Z Cars (“Futur Z”), 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 Futur Z 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: Futur Z 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 Futur Z. 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 ARE 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 Agents on behalf of Oxyonia contend that it has not violated the provisions of any international agreements. The agreements are the result of private party transactions and the government has not influenced any agreement. The Agreements does not take away the rights that are entrusted to Climatia. Climatia has not filed this request in good faith. Oxyonia contends that no international obligations under the WTO SCM Agreement has been violated hence the request for panel by the Government of Climatia is invalid.

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 agents appearing on behalf of Government of Oxyonia humbly submits that 20-year supply agreement between UMMC and GRMM is not a financial contribution within the meaning of Article 1.1(a) (iv) and Article 1.1(a) (iii) of the SCM Agreement in the form of government entrustment or direction to a private body to provide goods and doesn't confers a benefit to GRMM within the meaning of Article 1.1(b) of the SCM Agreement and is not a prohibited subsidy within the meaning of Article 3.1(a) of the 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?

The agents appearing on behalf of Government of Oxyonia humbly submits that The unrepaid loan given by IDB to the Rarisian Government is not 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 and 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 and 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.

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 agents appearing on behalf of Government of Oxyonia humbly submits that the export duties imposed on exports of, inter alia, battery-grade cobalt exported from Oxyonia are not in the form of “income or price support” in the sense of Article XVI of GATT 1994” and doesn’t confer a benefit to Green O. And are not prohibited subsidies within the meaning of Article 3.1(b) of the SCM Agreement.

LEGAL PLEADINGS

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

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

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A. OXYONIA DOES NOT ATTRACT 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. Oxyonian companies were in shortage of required minerals for production of Battery driven cars thus were trying to achieve better supply of the same, for which the agreements were entered by them as private parties.

It has been traditionally held that the burden of proof lies with the party asserting a fact,¹ in the instant case being Climatia, has not bought any substantive point before the panel. Oxyonia has enhanced its trade obligations and ensured the overall objective of the Agreement is met.

¹United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India, ¶ 12-16, WTO Doc. WT/DS33/AB/R (adopted Apr. 25, 1997).

It did not take away any benefit that was guaranteed to any of the trading members² and hence the request for the formation of the panel by the Climatia is invalid.

It has been agreed that if there is a clear infringement of provisions of the General Agreement, or in other words, where measures are applied in conflict with the 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.³ It is humbly submitted that Oxyonia has not infringed its obligations under its international obligations and this measure only helped in facilitation of world trade. The climatia or any other members were not affected by any of the measures that that were taken in Oxyonia hence a panel should not be formed.

B. THE FORMATION OF PANEL WAS NOT DONE IN GOOD FAITH.

It is submitted by Oxyonia that Climatia does not requested for the formation of the panel in good faith. A member must request for the formation of the panel in good faith 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.⁴ 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.⁵ Oxyonia had to first give importance to the domestic interests rather than interests of Climatia which irked Climatia. Oxyonia had initiated a mediation talk with Climatia as required under SCM Agreement but that has not ended fruitfully as Oxyonia cannot forgo its domestic needs⁶. The member must engage in procedures of dispute settlement in good faith and an effort must to initiated resolve the dispute.⁷ climatia has been trying to prolong the dispute but is not ready to find a mutually acceptable solution. Oxyonia has complied with its international obligations. A Member must respect the principles set forth in Articles 3.7 and 3.10 of the DSU, namely,

² General Agreement on Tariffs and Trade art. XXIII, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT].

³ Report of the Panel, Uruguayan Recourse to Article XXIII, para. 15, 9L/1923 (Nov. 16, 1962), GATT BISD (11th Supp.), at 95 (1962).

⁴ DSU Art. 3.7.

⁵ 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).

⁶ Moot proposition

⁷ DSU art. 3.10.

to exercise their judgement as to whether action under these procedures would be fruitful and to engage in dispute settlement in good faith.⁸ Climatia has not initiated this measure in good faith but rather to take advantage out of Oxyonia's domestic interests. Oxyonia contends that the request be rejected as the essential requirements are not met by the Climatia.

2. Whether the 20-year supply agreement between UMMC and GRMM A) is a financial contribution within the meaning of Article 1.1(a) (iv) and Article 1.1(a) (iii) of the SCM Agreement in the form of government entrustment or direction to a private body to provide goods B) confers a benefit to GRMM within the meaning of Article 1.1(b) of the SCM Agreement C) prohibited subsidy within the meaning of Article 3.1(a) of the SCM Agreement.

The agents appearing on behalf of Government of Oxyonia humbly submits that 20-year supply agreement between UMMC and GRMM is not a financial contribution within the meaning of Article 1.1(a) (iv) and Article 1.1(a) (iii) of the SCM Agreement and doesn't confers a benefit to GRMM within the meaning of Article 1.1(b) of the SCM Agreement and is not a prohibited subsidy within the meaning of Article 3.1(a) of the SCM Agreement.

A. 20-year supply agreement between UMMC and GRMM is not a financial contribution.

The agents appearing on behalf of Government of Oxyonia humbly submits that the 20-year supply agreement between UMMC and GRMM is not a financial contribution within the meaning of Article 1.1(a) (iv) and Article 1.1(a) (iii) of the SCM Agreement.

Financial Contribution is defined by the nature of the contribution from the government or a public body to the recipient that might involve subsidization. "Article 1.1(a)(1) is a definitional provision that sets forth an exhaustive, closed list of the types of transactions that constitute financial contributions under the SCM Agreement".⁹ Neither the GATT nor the SCM Agreement attempts to articulate rules that prescribe the legal limits of incentives of every imaginable stripe.¹⁰

⁸United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, ¶ 89, WTO Doc. WT/DS213/AB/R (adopted Nov. 28, 2002).

⁹US – Large Civil Aircraft (2nd complaint), para. 7.955. WT/DS353/29 (adopted 23 March 2012)

¹⁰Rex J. Zedalis, Subcentral Governmental Investment Incentives - Assessing Their Lawfulness under the GATT and the SCM Agreement, 8 J. World Investment & Trade 85 (2007)

A consideration of negotiating history of Article would show that the inclusion of "financial contribution" in the text of the provision was meant to guarantee that not all government measures that confer benefits would be considered to be subsidies ¹¹

The definition of financial contribution under Art. 1.1(1)(a)(iv) contains 5 req.

1. A government entrusts or directs
2. A private body
3. To carry out one or more of the type of functions, illustrated in sub paras I to iii of the article
 - 1.1. (a) (1)
4. Which would be normally be vested with the government.
5. The practice in no real sense differs from practices normally followed by the government.

THERE IS NO ENTRUSTMENT OR DIRECTION BY THE GOVERNMENT:

'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 body¹². The term 'entrusts' connotes the action of giving responsibility to someone for a task or an object¹³. As for the term 'directs' it means 'to carry out' a function underscores the notion of authority.¹⁴ There must be a demonstrable link between the government and the conduct of the private body and "mere policy pronouncements" are insufficient to prove any kind of entrustment or direction and that "entrustment and direction" "imply a more active role than mere acts of encouragement" and cannot be "inadvertent or a mere by product of government regulation"¹⁵ The terms entrustment and direction do not cover the situation in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market. Instead it covers the situations where the government uses the private body as a proxy¹⁶ There are 3 necessary elements, which are 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

¹¹US – Exports Restraints, paras. 8.65 and 8.73. WT/DS194/4 (adopted 23 August 2001.)

¹² US – Countervailing Duty Investigation on DRAMs, appellate body report, WT/DS296/11 (adopted 20 July 2005)

¹³ Supra note 12

¹⁴ Supra note 12

¹⁵ Supra note 12

¹⁶ Supra note 12

(ii) Addressed to a particular part

iii) The object of which is a particular task or duty. *US- Export retainment*¹⁷ and *japan DRAM's case*.¹⁸

In the instant case, the private bodies UMMC and GRMM as individual market actors have entered into a long-term agreement. Just because Oxyonian government is a shareholder in UMMC, the act of the company cannot be attributed to an entrustment or direction by the government. As a shareholder the Government of Oxyonia ascertained its interest and the same is not an act of government but a shareholder. Further the requirements as specified under US- Export retainment and japan DRAM's case, has not been fulfilled, there is no delegation or any sort of affirmative action over performing any task by UMMC on command of the Oxyonian Government.

THE AGREEMENT WAS FORMED BY PRIVATE PARTIES AND WAS NOT AN ACT OF GOVERNMENT PRACTICE:

It is asserted that UMMC and GRMM as two individual private bodies framed and signed an Agreement and as stated by the Appellate Body in **U.S. – DRAMS CVD Investigation**, that the “situations involving exclusively private conduct—that is, conduct that is not in some way attributable to a government or public body” fall outside the scope of the SCM Agreement.¹⁹ In the case at hand the Oxyonian government is one of the shareholders of UMMC and the negotiations to enter into an agreement with GRMM has to happened amongst the shareholders of the company where all the shareholders have the right to keep their views, UMMC was not entrusted with or directed by the Oxyonian government for any task and the Agreement was purely a private action without any government interference. The company UMMC entered into an agreement with GRMM as the company found the agreement reasonable.

GOVERNMENT OF OXYONIA HAS NOT PROVIDED COBALT TO GRMM:

Article 1.1(a)(1)(iii) of SCM Agreement contemplates two distinct types of transactions: the first is where a government "provides goods or services other than general infrastructure"; and

¹⁷ Supra note 11

¹⁸ Japan – DRAMS, appellate body report, WTO Doc., WT/DS336/23 (adopted 17th December 2007)

¹⁹ Supra note 12

the second relates to situations in which a government "purchases goods" from an enterprise.²⁰ Definition of the term "provides", is to "supply or furnish for use; make available."²¹ For the government to provide any good it must have some control over the availability of a specific thing being made available. In the case at hand the agreement between UMMC and GRMM for the supply of cobalt for 20 years at the cost of 90,000 USD was entered by two distinct private bodies and thus there is no provision of goods or service by any government. The Appellate Body confirmed that "when a good or service has not been provided by a government, there cannot be a financial contribution cognizable under Article 1.1(a)(1)(iii)".²² Hence it is humbly submitted that the 20-year supply agreement between UMMC and GRMM is not a financial contribution within the meaning of Article 1.1(a) (iv) and Article 1.1(a) (iii) of the SCM Agreement.

B. It didn't confer a benefit to GRMM within the meaning of Article 1.1(b) of the SCM Agreement

BENEFIT ALONE CANNOT FORM SUBSIDY:

The essential requirements of subsidy is mentioned in "Article 1.1 of the SCM Agreement which stipulates that a 'subsidy' shall be deemed to exist if there is a 'financial contribution by a government or any public body' and 'a benefit is thereby conferred'"²³

In the **Brazil – Aircraft case, the Appellate Body** emphasized that "a 'financial contribution' and a 'benefit' are two separate legal elements in Article 1.1 of the SCM Agreement, which together determine whether a subsidy exists".²⁴

The issue to be resolved under Article 1.1(b) is to ascertain whether a 'financial contribution' or 'any form of income or price support' has conferred a benefit to the recipient.²⁵

THE GOVERNMENT DID NOT CONFER BENEFIT:

Benefit can be as "one that is financial in nature and in which the behaviour of the grantor and recipient of the alleged subsidy at issue are assessed against the behaviour of commercial actors

²⁰ Supra note 9

²¹ The New Shorter Oxford English Dictionary, supra, Vol. II, p. 2393.

²² EC and certain member States – Large Civil Aircraft, para. 964. WT/DS316/40/Rev.1 (adopted 1 June 2011)

²³ US – Carbon Steel (India), para. 4.8. WT/DS436/20 (adopted 19 December 2014)

²⁴ Brazil – Aircraft, para. 157. WT/DS46/29 (adopted 23 August 2001)

²⁵ Canada – Renewable Energy, para. 5.130. WT/DS412/19 WT/DS426/19 (adopted 24 May 2013)

in the market"; and one that requires an examination of "the terms and conditions that would have been offered in the market at that time."²⁶ (**referring to Appellate Body Report, EC and certain member States – Large Civil Aircraft**),²⁷ The price benchmark for the determination of the “prevailing market conditions” should be set according to a market where there is effective and unconstrained competition.²⁸

It has been already submitted that the 20-year supply agreement between UMMC and GRMM is not a financial contribution, thus the conferring of benefit is irrelevant., but it is further submitted that there is no benefit conferred by the government of Oxyonia through the Agreement between UMMC and GRMM. The Panel in **US – Large Civil Aircraft (2nd complaint)** observed that it is now "well established" that a financial contribution confers a benefit within the meaning of Article 1.1(b) of the SCM Agreement if the terms of the financial contribution are more favourable than the terms available to the recipient in the market²⁹.

In the case at hand there is no such favourable term created by the government. Both the companies made negotiations and entered the agreement and this option is available to all the members of the market. The word 'benefit', as used in Article 1.1(b), implies some kind of comparison, 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. The Appellate Body concluded that 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.”³⁰ Yet, the Appellate Body stressed that this possibility is “very limited” and must be made on a “case-by-case basis”. The companies UMMC and GRMM have entered into a long-term agreement and the government is not involved in the purchase of goods which is claimed to give benefit to GRMM. A measure will constitute a financial contribution only if it takes one of the forms listed in the SCM Agreement. If the measure does not take one of these forms, then even if it confers a measurable benefit to a company or a sector of the economy, it is not a subsidy and thus cannot be subject to the disciplines of the SCM Agreement.

²⁶ Supra note 20

²⁷ Supra note 22

²⁸ Volume I, Markus W. Gehring and Jarrod, Climate Change: International Law and Global Governance, Climate, Trade and Investment Law in the Global Green Economy Legal Responses and Global Responsibility. (2013) Oliver C. Ruppel, Christian Roschmann, Katharina Ruppel-Schlichting, Nomos Verlagsgesellschaft mbH

²⁹ Supra note 20

³⁰ U.S. – Lumber CVDs Final, WT/DS257/AB/R (adopted 19 January 2004) (para. 103)

C. It is not a prohibited subsidy within the meaning of Article 3.1(a) of the SCM Agreement.

To "prove the existence of an export subsidy within the meaning of this provision, one must establish (i) the existence of a subsidy within the meaning of Article 1 of the SCM and (ii) contingency of that subsidy upon export performance. ³¹Interpreting it in the **US – Tax Incentives, the Appellate Body** elaborated on the role of Article 3 of the SCM Agreement. It clarified that the "granting of subsidies is not, in and of itself, prohibited under the SCM Agreement; nor does the granting of subsidies constitute, without more, an inconsistency with that Agreement. ³²

THE AGREEMENT IS NOT CONTINGENT IN EXPORT PERFORMANCE:

"Contingent" means "conditional" or "dependent for its existence on something else" and said that the grant of the subsidy must be conditional or dependent upon export performance. ³³A subsidy is contingent 'in law' upon export performance when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure.³⁴

The interpretation of the term "contingent in fact", the Panel in **Australia – Automotive Leather II** established a standard of "close connection" between the grant or maintenance of a subsidy and export performance. It added that a subsidy, in order to be export contingent in fact, must be "conditioned" upon export performance. ³⁵ "The nature of the required conditionality is that 'one of the conditions for the grant of the subsidy is the expectation that exports will flow thereby'" ³⁶ Even if a Member was to anticipate that exports would result from the grant of a subsidy, such anticipation "alone is not proof that the granting of the subsidy is tied to the anticipation of exportation" within the meaning of the footnote 4 to Article 3.1(a).³⁷ While determining subsidy expectations must be formed in the presence of meaningful knowledge of a subsidy's terms including its design and structure (or perhaps

³¹*Canada – Aircraft Credits and Guarantees*, para. 7.16. WT/DS222/10 (adopted 19 February 2002)

³²*US – Tax Incentives*, para. 5.6 WT/DS70/15 (adopted 4 August 2000)

³³*US – FSC (Article 21.5 – EC)*, paras. 8.54-8.55 WT/DS108/AB/RW2 (adopted 13 February 2006)

³⁴*Canada – Autos*, para. 100 WT/DS139/12 WT/DS142/12 (adopted 19 June 2000),

³⁵*Australia – Automotive Leather II*, para. 9.55. G/SCM/D20/2 WT/DS126/11

³⁶*Canada – Aircraft*, para. 9.326. WTO Doc. WT/DS70/15 (adopted 4th august 2000)

³⁷*Supra* note 31

demonstrated expectations of such aspects that ultimately prove accurate), or else it appears difficult to discern any meaningful manner in which a Ratios Analysis could assist in detecting whether that subsidy is export contingent.³⁸

In the instant case, the agreement between UMCC and GRMM was signed in August 2037 and February 2038, the Government of Oxyonia proposed the imposition of 50% export duties on exports of refined cobalt, including battery-grade cobalt and from 1 August 2038, the export duties on exports of refined cobalt went into effect. and GRMM is producer of refined cobalt. Thus, it is clearly proved that there was no anticipation or expectation of any export performance from GRMM and the Agreement was not contingent in export performance.

3. Whether 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) B) confers a benefit within the meaning of Article 1.1(b) (C) prohibited subsidy within the meaning of Article 3.1(a) of the SCM Agreement?

The agents appearing on behalf of Government of Oxyonia humbly submits that The unrepaid loan given by IDB to the Rarisian Government is not 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 and 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 and 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.

A. The Unrepaid loan given by IDB is not a financial contribution

IDB provides loans to developing-country and LDC Members by borrowing from international markets, and then loaning out that amount to such Members. IDB is able to borrow from these markets at lower rates than developing-country and LDC Members. IDB typically lends to

³⁸ Supra note 22

borrowing Members at rates that are one percentage point higher than the rate at which it borrows money from international markets. Oxyonia and Climatia are founding Members of the IDB, which is an international financial institution with 10 Members, headquartered in Hali, the capital of Oxyonia. 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 IDB (21%).

It is submitted that IDB is not a public body acting under the control of oxyonia's government in granting loan to Rarisian government.

PUBLIC BODY – DEFINITION

“Public Body” is an entity controlled by the government.³⁹ Government ownership and control does not make an entity a “public body,” but that an entity must possess, exercise, or be vested with “governmental authority” and be performing a “governmental function”⁴⁰

IDB IS NOT CONSTRUED AS PUBLIC BODY:

The mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority.⁴¹

The fact that Oxyonia is the biggest individual shareholder of IDB (21%) doesn't establish that IDB is performing government functions and acting under the control of oxyonia's government.

In determining an entity as a public body one cannot rely exclusively on a single aspect of an entity's relationship with the government, namely whether an entity is controlled by the government in the sense that chief executives of an entity are “government appointed”⁴²

The facts of the case at hand clearly shows that the Executive board comprising of 3 individuals appointed by different members of IDB and Oxyonia has right to appoint only one individual in the Executive board. The Technical Team and the Board of Executives are generally

³⁹ Korea – Commercial Vessels WTO Doc. WT/DS273/8 (adopted 11 April 2005)

⁴⁰ United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, report of the appellate body (WT/DS379/AB/R)

⁴¹ US – Anti-Dumping and Countervailing Duties (China), (paras. 317-318) WT/DS379/12/Add.7 (25 March 2011)

⁴² US – Carbon Steel (India), para. 4.45 WT/DS436/20 (adopted 19 December 2014) para. 7.85, See also US – Anti-Dumping and Countervailing Duties (China), para. 350). WT/DS379/12/Add.7 (adopted 25 March 2011)

involved in the process of approving loan requests. Loan had been approved by such Board basing on consensus. If a decision to approve a specific loan proposal cannot be based on consensus, the Board of Executives is required to refer the proposal to the Joint Meeting of Members, scheduled in August every year. The Joint Meeting of Members is an annual meeting of Finance Ministers. Pursuant to the Bank's rules, participating Members are encouraged to take all decisions at the Meeting by consensus, including those involving loan proposals referred by the Board of Executives. If a decision cannot be taken by consensus, decisions are required to be made by a four-fifth majority, determined in accordance with Members' vote shares in IDB. This shows that the decision taken by Executive board to grant loan is not solely taken by the Oxyonian government but it is taken basing on consensus.⁴³

Thus IDB is not a public body as it has not acted under the control of Oxyonian government in granting loan.

Article 1.1 of the SCM Agreement stipulates that the definition of a subsidy has two distinct elements (i) a financial contribution (or income or price support), (ii) which confers a benefit and it shall be deemed to exist if there is a 'financial contribution by a government or any public body' and 'a benefit is thereby conferred.'⁴⁴

THE UNREPAID LOAN IS NOT A FINANCIAL CONTRIBUTION:

Article 1.1(a)(1) defines and identifies the government conduct that constitutes a financial contribution for purposes of the SCM Agreement. Subparagraphs (i)- (iv) exhaust the types of government conduct deemed to constitute a financial contribution.⁴⁵

"An evaluation of the existence of a financial contribution involves consideration of the nature of the transaction through which something of economic value is transferred by a government to the advantage of a recipient."⁴⁶

While 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 characteristics. Having

⁴³ annex i – management structure of IDB

⁴⁴ Supra note 23 para. 4.8.

⁴⁵ Supra note 9

⁴⁶ US – Softwood Lumber IV, para. 52. G/L/539/Add.2 G/SCM/D45/2/Add.1 WT/DS257/26/Add.1 (adopted 17 February 2004) para. 51.

done so, the transaction may naturally fit into one of the types of financial contributions listed in Article 1.1(a)(1)".⁴⁷

In order for a financial contribution to be a subsidy, it must be made by or at the direction of a government or any public body within the territory of a Member.

In the instant case there is no such financial contribution made by the government or any public body. As loan was granted by IDB which is not a public body and not acting under the control of Oxyonian government. Loan given by IDB to Rarisian government doesn't constitute a financial contribution under this SCM agreement.

B. It didn't confer a benefit within the meaning of Article 1.1(b)

It is humbly submitted that that the Unrepaid loan doesn't confer a benefit within the meaning of article 1.1(b) of SCM agreement

BENEFIT: DEFINED

It is now well established that` the concept of benefit is defined by reference to the market, such that a financial contribution confers a 'benefit' within the meaning of Article 1.1(b) of the SCM Agreement when it is made available on terms that are more favourable than the recipient could have obtained on the market. While an investigating authority must apply this standard on the basis of relevant evidence, there are no provisions in the SCM Agreement regarding the precise nature of the evidence on which an investigating authority must rely. Depending on the particular circumstances of a case, an investigating authority might also rely on other types of evidence that could be equally relevant.⁴⁸

THE UNREPAID LOAN DOESN'T CONFER A BENEFIT:

It is established that subsidy exists if there is a financial contribution by a government or any public body' under Article 1.1(a) of SCM agreement and 'a benefit is thereby conferred out of that financial contribution by the government or public body under Article 1.1(b) of SCM agreement.

⁴⁷ Supra note 25 para. 5.120

⁴⁸ Supra note 18, paras. 7.275 and 7.276

“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.”⁴⁹

If the measure does not take one of these forms, then even if it confers a measurable benefit to a company or a sector of the economy, it is not a subsidy and thus cannot be subject to the disciplines of the SCM Agreement.

In the case at hand Rarisia is a LDC and because of increase in increased demand for the outcomes of Conda mine it needed financial resources for the development of Conda mines. As IDB provides loans to developing-country and LDC Members. The low interest rate charged by IDB makes it an important source of financial assistance for infrastructure projects in developing-country and LDC Members. Thus Rarisia being an LDC it approached IDB and thus IDB has given loan for the development of Conda mines. The unrepaid loan given by IDB to the Rarisian government for the development of Conda mines is not in any of the forms of financial contribution mentioned in SCM agreement and thus doesn't confer a benefit under Article 1.1(b) of SCM agreement.

C. It is not a prohibited subsidy within the meaning of Article 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. It is proved that in the instant case there is no financial contribution by the Oxyonian government. The unrepaid loan doesn't 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.

Now it is submitted that 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.

In the text of Article 3.1(a) it is well established that to prove the existence of an export subsidy within the meaning of this provision, a Member must establish (i) the existence of a subsidy

⁴⁹ Supra note 25 para. 5.120

within the meaning of Article 1 of the SCM and (ii) contingency of that subsidy upon export performance"⁵⁰

It is already proved in the previous issue that the unrepaid loan is not a financial contribution under SCM agreement and it doesn't confer benefit under the same thus there is no subsidy within the meaning of Article 1 of SCM agreement. Now it is submitted that the unrepaid loan is not contingent upon export performance.

Even if a Member was to anticipate that exports would result from the grant of a subsidy, such anticipation "alone is not proof that the granting of the subsidy is tied to the anticipation of exportation" within the meaning of the footnote 4 to Article 3.1(a).⁵¹

The fact of expectation cannot be the sole determinative fact on the evaluation. circumstances surrounding a loan contract can be facts on the basis of which the determination of an export contingent subsidy can be made.⁵²

The facts which are relevant to the consideration of the nature of the loan contract in the case at hand are, the significance of exports in MOC's business, and the fact that loan was part of the overall 'assistance package' given to MOC

In the instant case IDB has achieved its goals of "ensuring stability in international commerce" and "economic prosperity in Member countries" by providing loan to Rarisian government. And loan was a part of overall assistance package given to MOC as a financial resource that MOC needed to devote to the Conda Mines because of increasing demand on outcomes of cobalt. Despite the announcement of imposing 100% export duties on battery graded cobalt in Rarisia, the supply of cobalt concentrates from the Conda Mines was on a year-on-year upward trajectory from 2035-2037. This shows the significance of exports in MOC's business.

In the instant case there is nothing in the terms of the loan contract itself which suggests a specific link to actual or anticipated exportation or export earnings. These factors persuade us that there is not a sufficiently close tie between the loan and anticipated exportation or export earnings. There is nothing in the loan contract that explicitly links the loan to MOC's production

⁵⁰ Supra note 31 para. 7.16.

⁵¹ Supra note 25 paras. 7.370-7.376

⁵² Supra note 35 para. 9.66.

or sales, and therefore nothing in its terms, the design of the loan payment, or the repayment provisions that would tie the loan directly to export performance, or even sales performance.

Thus it is proved that the unrepaid loan is not a prohibited subsidy within the meaning of Article 3.1(a) of the SCM Agreement and it is not contingent upon export performance.

4. **Whether the export duties imposed on exports of, inter alia, battery-grade cobalt exported from Oxyonia are a form of A) "income or price support in the sense of Article XVI of GATT 1994" B) confer a benefit to Green O by depressing the price of this product in the domestic market. C) prohibited subsidies within the meaning of Article 3.1(b) of the SCM Agreement.**

The agents appearing on behalf of Government of Oxyonia humbly submits that the export duties imposed on exports of, inter alia, battery-grade cobalt exported from Oxyonia are not in the form of "income or price support" in the sense of Article XVI of GATT 1994" and doesn't confer a benefit to Green O. And are not prohibited subsidies within the meaning of Article 3.1(b) of the SCM Agreement.

A. It is not an income or price support in the sense of Article XVI of GATT

By 2038, GRMM had become one of the biggest producers of refined cobalt in the world It produced refined cobalt, including battery-grade cobalt for end users. GRMM exported 40% of the refined cobalt that it produced¹⁰, and was a major supplier of battery-grade cobalt to Green O as well as Futur Z. More than 90% of domestic sales were to Green O.

In February 2038, the Government of Oxyonia reacting to lobbying by end users of refined cobalt in Oxyonia, proposed the imposition of 50% export duties on exports of refined cobalt, including battery-grade cobalt. The duties were scheduled to go into effect on 1 August 2038. GREENO and GRMM approached financial minister. GREEN O had put up an offer to have a long term supply agreement with GRMM to purchase their entire supply of battery-grade cobalt, at market prices. GRMM and Green O entered into a long-term supply arrangement considering both of their interests. 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. In particular, 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. On 1 August 2038, the export duties on exports of refined cobalt went into effect.

A subsidy is deemed to exist where two distinct elements are present. First, there must be a financial contribution by a government, or income or price support. Secondly, any financial contribution, or income or price support, must confer a benefit.⁵³

INCOME SUPPORT DEFINED:

The notion of ‘any form of income support’ would capture government measures that directly or indirectly have an impact on the income of the recipient, without involving a financial contribution. 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. as states by is an acceptable interpretation of the term.⁵⁴

In the instant case government is not involved in the agreement made between GRMM and GREENO. The agreement is a private party transaction between GREENO and GRMM. Government has not influenced GRMM and GREENO to get into an agreement by posing 50% export duties on battery-grade cobalt. 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. This practice of right is usual in normal market.

The agreement did not provide income support to the domestic purchasers of the product in question. the agreement did not state that GRMM would provide battery graded cobalt at a particular minimum price to GREENO. Rather agreement had stated that prices will be negotiated every month. GRMM did not give any assurance that it will give battery grade cobalt in lower prices compared to the actual market price.

⁵³ Supra note 46

⁵⁴ G. Luengo, Regulation of Subsidies and State Aids in WTO and EC Law (The Netherlands, Kluwer Law International, 2006), 586 pp., 122,

Thus it is submitted that the export duties imposed on exports of battery-grade cobalt exported from Oxyonia are not in the form of "income or price support in the sense of Article XVI of GATT 1994.

B. Doesn't confer a benefit to Green O under SCM agreement

In order to be labelled a subsidy under the SCM Agreement, the financial contribution or income or price support provided by the government should confer a benefit (Article 1.1(a)(2))

"Benefit" - General

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."⁵⁵

The characterization of a transaction under Article 1.1(a) of the SCM Agreement may have implications for the manner in which the assessment of whether a benefit is conferred is to be conducted.⁵⁶

'Benefit' is linked to the concepts of 'financial contribution' and 'income or price support' and its existence requires a comparison in the marketplace⁵⁷.

In case at hand the Government has not influenced GRMM and GREEN O to get into an agreement. Government had imposed 50% export duties in reaction to lobbying by end users of refined cobalt in Oxyonia and to protect its internal market. Oxyonian Government moto was not to give any kind of price or income support which results in increase in exports or decrease in imports.

GRMM had not mentioned anything in the agreement that it will provide battery graded cobalt at a particular minimum price for 10 years. In fact, prices were negotiated on monthly basis. Green O had retained its right to get battery grade cobalt from outside Oxyonia if in case the price is lower than the price that GRMM offers. The agreement is between private parties and government had not involved in this.

⁵⁵ Supra note 9 para. 51.

⁵⁶ Supra note 25 para. 5.130.

⁵⁷ Supra note 25 para. 5.130.

Thus, export duties on battery grade cobalt doesn't confer a benefit to GREEN O by depressing the price of battery graded cobalt in the market.

C. It is not a prohibited subsidy within the meaning of Article 3.1(b) of the SCM agreement

In the instant case export duties has not been imposed with a condition to use domestic goods over imported goods by the government. GREEN O had put up an offer to have a long term supply agreement with GRMM to purchase their entire supply of battery-grade cobalt, at market prices. This says that government has not put any condition that GREEN O has to use domestic good over imported goods. The agreement between GRMM and GREEN O is a private party transaction and government has nothing to do with it.

A 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".⁵⁸

In the instant case using domestic goods from GRMM over Imported goods is not a requirement for imposing export duties by the Oxyonian government.

THERE IS NO DE FACTO CONTINGENCY:

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):

The 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 In **EC and certain member States – Large Civil Aircraft**, 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)."⁵⁹

In the instant case Oxyonian government has not put any contingency on GREEN O in imposing exports duties on battery grade cobalt. Government has imposed export duties for

⁵⁸United States – Tax Incentives, para. 5.7. WT/DS487/11 (adopted 22 September 2017.)

⁵⁹Supra note 58 para. 5.12

reducing the lobbying by the end users of cobalt. Government has not influenced GREEN O and GRMM to get into a long supply agreement.

In the case at hand the factors surrounding the granting of subsidy does not determine the existence of De facto contingency under article 3.1(b) and 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 following reasons, Government of Oxyonia respectfully request the panel to adjudge and declare:

1. That the 20 years supply agreement is not a financial contribution within the meaning of article 1.1(a) (iv), article 1.1(a) (iii) of the SCM agreement and it doesn't confer a benefit within the meaning of article 1.1(b) of the SCM agreement and it is not a prohibited subsidy within the meaning of article 3.1(a) of the SCM agreement.
2. That the unrepaid loan is not a financial contribution by public body within the meaning of article 1.1(a) (1) (iv) of the SCM agreement, it doesn't confer a benefit within the meaning of article 1.1 (b) and it is not a prohibited subsidy within the meaning of article 3.1(a)
3. That the export duties imposed on batter graded cobalt are not in a form of income or price support within the meaning of article XVI of GATT 1994, the export duties don't confer a benefit to Green O and the export duties are not a prohibited subsidy.

Respectfully submitted

Delegates for the Government of Oxyonia