

**John H. Jackson Moot Court Competition 20<sup>th</sup> Edition**

**Alderaan – Measures Concerning Permanent Magnet Generators for  
Windmills**

**Coruscant  
(Complainant)**

**Vs**

**Alderaan  
(Respondent)**

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**Submission of the Respondent**

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## 2. List of references

### 2.1. Conventions and treaties

Short Titles	Full Titles and Citation
DSU	<i>Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes</i> , Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 4.1,33 I.L.M. 1226 (1994).
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i> , 1867 U.N.T.S. 187 (1994).
SCM Agreement	<i>Agreement on Subsidies and Countervailing Measures</i> , 1869 U.N.T.S. 187 (1994).
VCLT	United Nations, <i>Vienna Convention on the Law of Treaties</i> , 23 May 1969, 1155, U.N.T.S. 331.

### 2.2. Cases

#### 2.2.1. Appellate Body Reports

Short Titles	Full Titles and Citation
Argentina – Import Measures	Appellate Body Report, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS 445, adopted 26 January 2015.
Brazil – Retreated Tyres	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS 332, adopted 17 December 2007.
Canada – Aircraft	Appellate Body Report, <i>Canada – Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS 70, adopted 20 August 1999.
EC – Asbestos	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Products Containing Asbestos</i> , WT/DS 135, adopted 5 April 2001.
Japan – Alcoholic Beverages	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS 10, adopted 1 November 1996.
Japan – DRAMs (Korea)	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random-Access Memories from Korea</i> , WT/DS

Short Titles	Full Titles and Citation
	336, adopted 17 December 2007.
Korea – Various Measures on Beef	Appellate Body Report, <i>Republic of Korea – Measures Affecting Imports of Fresh, chilled and Frozen Beef</i> , WT/DS 169, adopted 10 January 2001.
US – Anti-dumping and Countervailing Duties (China)	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS 379, adopted 25 March 2011.
US – Carbon Steel (India)	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS 436, adopted 19 December 2014.
US – Countervailing Measures (China)	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS 379, adopted 25 March 2011.
US – Gasoline	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS 4, adopted 20 May 1996.
US – Large Civil Aircraft (2 <sup>nd</sup> Complainant)	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complainant)</i> , WT/DS 353, adopted 23 March 2012.
US – Shrimp	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS 58/R, adopted 6 November 1998.
US – Softwood Lumber IV	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS 257, adopted 19 January 2004.
US – Upland Cotton	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS 267, adopted 21 March 2015.

### 2.2.2. Panel Reports

Short Titles	Full Titles and Citation
Brazil – Aircraft	Panel Report, <i>Brazil – Export Financing Programme for</i>

Short Titles	Full Titles and Citation
	<i>Aircraft</i> , WT/DS 46, adopted 20 August 1999.
Brazil – Retreated Tyres	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS 332, adopted 17 December 2007.
Canada – Aircraft	Panel Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS 70, adopted 20 August 1999.
China – Rare Earths	Panel Report, <i>China – measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> WT/DS 431, 432, 433, adopted 2 September 2014.
China – Raw Materials	Panel Report, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS 394, adopted on 22 February 2012.
Colombia – Ports of Entry	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS 366/R and Corr. 1, adopted 20 May 2009.
EC – Countervailing Measures on DRAM Chips	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random-Access Memory Chips from Korea</i> , WT/DS 299, adopted 3 August 2005.
EC and Certain Member States – Large Civil Aircraft	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS 316, adopted 1 June 2011.
India – Quantitative Restrictions	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS 90, adopted 22 September 1999.
Korea – Commercial Vessels	Panel Report, <i>Republic of Korea – Measures Affecting Trade in Commercial Vessels</i> , WT/DS 273, adopted 11 April 2005.
Russia – Tariff Treatment	Panel Report, <i>Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products</i> , WT/DS 485, adopted 26 September 2016.
US – Automobiles	Panel Report, <i>United States – Taxes on Automobiles</i> , WT/DS 31/R, adopted 11 October 1994.
US – Imports of Tuna and	Panel Report, <i>United States – Measures Concerning the</i>

Short Titles	Full Titles and Citation
Tuna Products (Canada)	<i>Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS 381, adopted 13 June 2012.
US – Restrictions of Tuna	Panel Report, <i>United States – Restrictions on Imports of Tuna</i> , WT/DS 29/R, adopted 16 June 1994.

### 2.2.3. GATT Panel Reports

Short Titles	Full Title and Citation
Canada – Measures on Unprocessed Herring and Salmon	<i>Canada – Measures Affecting Exports of Unprocessed Herring and Salmon</i> , L/6268, adopted 22 March 1988.

### 2.3. Articles and contributions

Short Titles	Full Titles and Citation
Crochet & Hedge (2020)	V. Crochet, V. Hedge, <i>China's 'Going Global' Policy: Transnational Production Subsidies Under the WTO SCM Agreement</i> , Journal of International Economic Law, Volume 23, Issue 4, (2020).
D. Schuler (2011)	D. Schuler et al., <i>Study on Rare Earths and their Recycling</i> , January 2011, (Exhibit CHN-30).
P. Van den Bossche, W. Zdouc, (2017)	P. Van den Bossche, W. Zdouc, <i>The Law and the Policy of the World Trade Organization: Text, Cases and Materials</i> , Cambridge University Press, 4 <sup>th</sup> Ed., (2017), Chapter 12, Subsidies, Pp. 762-882.

### 2.4. Other material

Short Titles	Full Titles and Citation
Collins English Dictionary Online	Collins English Dictionary Online, <i>Definition of Significant in English</i> , 2022, retrievable at: <a href="https://www.collinsdictionary.com/dictionary/english/significant">https://www.collinsdictionary.com/dictionary/english/significant</a> .
Oxford English Dictionary Online	Oxford English Dictionary Online, <i>Definition of Significant in English</i> , 2022, retrievable at: <a href="https://www.oxfordlearnersdictionaries.com/definition/english/significant?q=significant">https://www.oxfordlearnersdictionaries.com/definition/english/significant?q=significant</a> .



**3. List of abbreviations**

<b>Abbreviations</b>	<b>Description</b>
AB	Appellate Body.
ABR	Appellate Body Report.
Art./Arts.	Article/Articles.
Co.	Corporation.
Doc.	Documents.
DSB	Dispute Settlement Body.
DSU	Dispute Settlement Understanding.
Export registration	Export Registration Requirement.
Export tax	Export Tax on Neodymium.
GATT/GATT 1994	General Agreement on Tariffs and Trade 1994.
Non-renewal of permits	Non-renewal of the mining permits and refusal to grant new mining permits to neodymium mining firms.
Pag.	Page/pages.
PMG/PMGs	Permanent Magnet Generator/Permanent Magnet Generators.
PR	Panel Report.
SCM	Agreement on Subsidies and Countervailing Measures.
SCM/SCM Agreement	Agreement on Subsidies and Countervailing Measures.
VCLT	Vienna Convention on the Law of Treaties.
WHO	World Health Organization.
WTO	World Trade Organization.

**4. Statement of facts**

1. Coruscant, Alderaan and Tatooine are Members of the WTO and the UN.
2. Alderaan is home of Special Electrix, a producer of PMGs. It has a subsidiary named Desertix under Tatooine law in January 2019. Coruscant is home of Magnetix, the main international rival of Special Electrix in PMGs' market.
3. In July 2016 Alderaan's Government published a strategy paper laying down an action plan covering all sectors of its economy and aiming to make Alderaan a world leader in sustainability. The Strategy writes down that Alderaan's industries should shift away from the extraction and export of basic commodities, in particular neodymium.
4. In September 2017, the Alderaan's Government introduce an export tax of 25% on all the neodymium extracted in Alderaan.
5. Around the same time, Alderaan introduce the export registration. In it an exporter must supply a form to be provided to Alderaan's customs authorities at the time of exportation showing information about the extraction of neodymium, in particular environmental information.
6. In late 2017, Special Electrix was able to replace neodymium with kyber on PMGs, it was named PMG SaberLite.
7. Tatooine, a least develop country, holds more than 95% of world's kyber reserves.
8. In June 2018, Alderaan and Tatooine reached an understanding whereby Tatooine would create a special development zone in the Jundland Wastes in full ownership of Investerix. These engagements were officially put in a Memorandum of Understanding.
9. In March 2019, Investerix agreed to sell a parcel of land in full ownership to Desertix and Zurix bank granted a ten-year loan to Desertix of USD 93 million at an interest rate of 4% per annum.
10. From January 2018 to December 2019, the Alderaan's Government renewed the permits of three mining firms under the Alderaan Mining Act of 2002.
11. In 2020, some of the neodymium mining firms applied anew for mining permits. Their requests were rejected on the same grounds as the first refusal to renew their permits.
12. In March 2020, Ventix Generatix, a windmill manufacturer found in Naboo, broke off negotiations with Magnetix. Ventix Generatix opted for the offer from Desertix, which offered lower price of its SaberLite PMGs.

## **5. Summary of arguments**

### **5.1. The provision of land made by Investrix to Desertix does not constitute a subsidy within the meaning of SCM Art. 1**

- (1) The provision of land made by Investrix to Desertix is not a financial contribution within the meaning of SCM Art. 1 since it is “general infrastructure”.
- (2) The provision of land made by Investrix to Desertix is not made by a public body within the meaning of SCM Art. 1 since Investrix performs and acts as a private in the market and does not exercise governmental authority.
- (3) The provision of land made by Investrix to Desertix does not confer a benefit within the meaning of SCM Art. 1 since the rest of companies could apply to full ownership rights and that the price paid by Desertix was far higher than the paid for the rest of companies.

### **5.2. The provision of land made by Investrix to Desertix is consistent with SCM Art. 3.1(a)**

- (1) The provision of land made by Investrix to Desertix is not a prohibited subsidy within the meaning of SCM Art. 3.1(a) since it is not contingent in fact upon the exportation.

### **5.3. The loan from Zurix Bank to Desertix does not constitute a subsidy within the meaning of SCM Art. 1**

- (1) The loan from Zurix Bank to Desertix was not made by a government or public body within the meaning of SCM Art. 1 since it does not have any relationship with governmental authorities or public functions and its operation only responds to the market and the merits of its customers.
- (2) The loan from Zurix Bank to Desertix does not confer a benefit within the meaning of SCM Art. 1 since Coruscant did not prove that the loan granted was the result of a government’s constraint rather than a commercial operation within the ordinary line of business.

### **5.4. The loan from Zurix Bank to Desertix does not cause serious prejudice to the interests of Coruscant within the meaning of SCM Art. 5(c) and GATT Art. XVI:1**

- (1) The loan from Zurix Bank to Desertix is not an actionable subsidy within the meaning of SCM Art. 5 since it does not cause an adverse effect within the meaning of SCM Art. 5.

(2) The loan from Zurix Bank to Desertix does not cause adverse effects within the meaning of SCM Art. 5 since it does not cause serious prejudice within the meaning of SCM Art. 5(c) and GATT Art. XVI:1.

(3) The loan from Zurix Bank to Desertix does not cause “significant” lost sale within the meaning of SCM Art. 6.3(c) since it does not follow the “causation” analysis and the lost sales are not significant.

**5.5. The non-renewal of permits, the export tax, and the export registration does not constitute an unwritten “overarching” measure**

(1) The non-renewal of permits, the export tax, and the export registration does not constitute an unwritten “overarching” measure since they do not work together for the achievement of a single goal.

**5.6. The measure at issue does not systematically restricts exports of neodymium within the scope of GATT Art. XI:1**

(1) The non-renewal of permits, the export tax, and the export registration has not systematic application since they have different goal.

**5.7. The measure at issue is not contrary to GATT Art. XI:1**

(1) The measure at issue does not “restricts” the export of neodymium within the meaning of GATT Art. XI:1 since it is not a total ban of products and does not have a limiting effect.

**5.8. The measure at issue is justified under GATT Art. XX**

(1) The measure at issue is justified under GATT Art. XX(b) since it is “necessary” for the reduction of risk to human, animal and plant life or health.

(2) The measure at issue is justified under GATT Art. XX(g) since it is “related to the conservation of exhaustible natural resources” and is applied “in conjunction with restrictions on domestic production or consumption”.

(3) The measure at issue follows the *chapeau* of GATT Art. XX since it is not applied in a manner that constitute a means of “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” and is not a “disguised restriction on international trade”.

## 6. Identification of the measures at issue

**Measure 1:** the Land Sale provision from Investerix to Desertix executed on 18 March 2019.

**Measure 2:** the ten-year loan granted of USD 93 million from Zurix Bank to Desertix.

**Measure 3:** the alleged unwritten “overarching” measure composed by the non-renewal of permits, the export tax, and the export registration.

## 7. Legal pleadings

**7.1. The provision of land made by Investerix to Desertix does not constitute a subsidy within the meaning of SCM Art. 1 and is consistent with SCM Art. 3.1(a)**

**7.1.1. The provision of land is not a subsidy within the meaning of SCM Art. 1**

**7.1.1.1. The provision of land is not a financial contribution within the meaning of SCM Art. 1:1**

1. Subparagraph three of SCM Art. 1:1(a) (1) sets forth that a financial contribution could be a provision of goods and services other than general infrastructure. Bringing up the reports from the AB and the Panel that, although are not binding, “*create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute*”<sup>1</sup>. The AB has concluded in several opportunities, such as *US – Softwood Lumber IV* that SCM Art. 1:1(a) (1) allows the financial contributions to be done in kind through governments supplying goods or services<sup>2</sup>.

2. Regarding the term “other than general infrastructure”, although there is not a unified interpretation, the AB has established that in determining whether the provision of the good or service in question is “general infrastructure” must be made on a case-by-case basis, considering the existence of *de jure* or *de facto* limitations that restricts its use to only a single entity or a limited group of entities<sup>3</sup>.

3. Accordingly, in this dispute the provision of land made by Investerix to Desertix falls within the meaning of “general infrastructure”, since Investerix has supplied access to several industrial companies, domestic as well as foreign, to the Jundland Special Development Zone<sup>4</sup>. Therefore, contrary to the claimant’s allegations, the provision of land to Desertix does not constitute limitations of any kind for other companies, since these companies have been able to access to the development zone to perform their industrial operations, before and after the celebration of the land sale contract with Desertix.

<sup>1</sup> ABR, Japan — Alcoholic Beverages, [107-8].

<sup>2</sup> ABR, US – Softwood Lumber IV, [52].

<sup>3</sup> PR, EC and Certain Member States – Large Civil Aircraft, [7.1036-7].

<sup>4</sup> Case, P. 4, [2].

4. Hence, the provision of land made by Investrix to Desertix, falls within the meaning of what is understood as “general infrastructure”, as it is granted to several companies, and does not constitute a financial contribution within the meaning of SCM Art. 1:1.

**7.1.1.2. Investrix is not a public body within the meaning of SCM Art. 1:1**

5. The AB has clarified that “a ‘government’ (in the narrow sense) and a ‘public body’ must share a ‘degree of commonality or overlap in their essential characteristics’ – i. e., they are both ‘governmental’ in nature”<sup>5</sup>. Additionally, the AB has said that the control factor of the organization is not decisive to prove that is a public body but is necessary to evaluate all its characteristics<sup>6</sup>. Likewise, the AB has concluded that, to decide the nature of public body, there must be a proper evaluation of the core features of the entity concerned, and its relationship with the government in the narrow sense<sup>7</sup>. In addition, the AB clarified that “all relevant characteristics of the entity” should be considered and, therefore, avoid focusing exclusively or unduly on any single characteristic without affording consideration to others that may be relevant<sup>8</sup>.

6. In the present dispute, Investrix is not a public body within the meaning of SCM Art. 1:1 since it (i) is not a governmental body and (ii) performs industrial and commercial functions rather than public functions<sup>9</sup>.

7. Regarding the nature of Investrix, even when it is a full state ownership enterprise, it is not part of the structure of the State of Alderaan and it has not been bestowed with “governmental authority”; thus, its acts could not be attributable to the government or the State of Alderaan. Concerning functions performed by Investrix, the development and operation of land is not a public or administrative function attributable to the State, but is an industrial and commercial activity, in which Investrix acts as a competitor in the market.

8. According to that, it could be concluded that even if Investrix is a fully state-owned enterprise, it performs and acts as a private in the market, and does not exercise governmental authority, therefore it could not be considered as a public body under SCM Art. 1:1.

**7.1.1.3. The provision of land does not confer a benefit to Desertix in the extraction of kyber under SCM Art. 1:1(b)**

9. SCM Art. 1:1(b) stipulates that a financial contribution must confer a benefit to be considered as a subsidy. There is a benefit when the government conduct made the recipient

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<sup>5</sup> ABR, US – Countervailing Measures (China), [5.100].

<sup>6</sup> Ibid.

<sup>7</sup> ABR, US – Carbon Steel (India), [4.43, 4.24].

<sup>8</sup> ABR, US – Anti-Dumping and Countervailing Duties (China), [319].

<sup>9</sup> Case, footnote six.

“better off” than it would otherwise have been<sup>10</sup>. Particularly, it must be verified that the financial contribution places the recipient in a more favourable position than the recipient could have obtained from the market<sup>11</sup>. To find the existence of a benefit, a comparison must be made between the financial contribution provided by a government and a market benchmark, as though the loans were obtained at the same time<sup>12</sup>.

10. The provision of land made by Investrix to Desertix does not confer a benefit since: (i) even when Investrix deviated from its standard commercial practice of selling land use rights, it could also made it with other companies<sup>13</sup>; (ii) Desertix must pay a price that costs more than the land use rights sold to other companies<sup>14</sup>; and (iii) other companies, domestic as well as foreign, have been beneficiated from the land development by Investrix in Tatooine<sup>15</sup>.

11. The Case evidence that the standard commercial practice of Investrix to provide land is selling land use rights to companies, creating an exception consisted of selling the full ownership, starting with Desertix but not limiting to continue these new commercial practices with other companies<sup>16</sup>.

12. Regarding the higher price, the Case shows that land use rights can be bought at USD 10 per square meter to 75 years<sup>17</sup>. However, as is provided in Annex 3, Investrix sold the full ownership rights to Desertix in USD 215 per square meter for a total purchase price of USD 39 153 220, paying a far higher price than the rest of companies so far. In fact, Desertix had to paid USD 38 971 040 more to access to the full ownership rights.

13. Furthermore, other companies, domestic as well as foreign, have received benefits from the development and management of the land in Tatooine. In fact, Investrix operations has guaranteed the security, viability, and infrastructure in the development zone, allowing all the interested companies to access to perform their industrial operations. Therefore, there could not be an advantage directed only to Desertix, when Investrix has developed the land in all the zone, regardless the company using each part, benefiting all companies.

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<sup>10</sup> ABR, US – Large Civil Aircraft (2<sup>nd</sup> complaint), [635-6, 662, 690].

<sup>11</sup> PR, Canada – Aircraft, [9.112] and Brazil – Aircraft, [7.24]; ABR, Canada – Aircraft, [154, 157]; PR, Korea – Commercial Vessels, [7.427]; and EC – Countervailing Measures on DRAM Chips, [7.176]; ABR, Japan – DRAMs (Korea), [225]; EC and Certain Member States – Large Civil Aircraft, [705]; and US – Large Civil Aircraft (2<sup>nd</sup> Complaint), [635-6].

<sup>12</sup> ABR, EC and Certain Member States – Large Civil Aircraft, [835-6].

<sup>13</sup> Case, P. 5, [1].

<sup>14</sup> Ibid., Annex 3.

<sup>15</sup> Ibid., P. 4, [2].

<sup>16</sup> Ibid., P. 4, [2], P. 5, [1]

<sup>17</sup> Ibid., P. 4, [2]

14. All this lead us to the conclusion that the provision of land made by Investrix to Desertix does not confer a benefit withing the meaning of SCM Art. 1 since does not place Desertix in a more favourable position than it could have obtained from the market, linked to the facts that the rest of companies could apply to full ownership rights and that the price paid by Desertix was far higher than the paid for the rest of companies.

**7.1.2. The provision of land is not a prohibited subsidy since it not contingent upon exportation within the sense of SCM Art. 3.1(a) (1)**

15. The Panel has clarified that “tied to” language of footnote four of SCM Art. 3.1(a), regarding the *de facto* contingency, is equivalent to a relationship of “conditionality” between the grant of a subsidy and the export performance<sup>18</sup>. Moreover, the AB concluded in *Canada – Aircraft* that regarding *de facto* export contingency, the existence of the relationship of contingency, between the subsidy and export performance, it must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy<sup>19</sup>. In the same report, the AB stated that the standard for determining *de facto* export contingency set forth in footnote four of SCM Art. 3.1(a) requires proof of three elements: (i) the granting of a subsidy, (ii) that is tied to (iii) actual or anticipated exportation or export earnings, meaning that the authority expects them to ensure or arise out of the granting<sup>20</sup>.

16. Accordingly, the provision of land is not contingent in fact upon the exportation, since in the land’s sale there is not any clause that obliges Desertix to export PMGs as a condition for the celebration of the contract. Specifically, clause four – about commercial obligations – only demands from Desertix the production of PMGs, but not including exportation, being possible to conduct the production in Tatooine without incurring in a default or resolution of the contract. Therefore, the execution of the contract neither is conditional to the export of kyber, nor the export of kyber is ensured to be raised by the provision of land, revealing the lack of the elements of the *de facto* contingency.

17. All this led us to the conclusion that the provision of land made by Investrix to Desertix is not an export subsidy since it is not contingent in fact upon the exportation. Therefore, is consistent with Art. 3.1(a).

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<sup>18</sup> PR, Canada – Aircraft, [9.331]

<sup>19</sup> ABR, Canada – Aircraft, [166-67].

<sup>20</sup> Ibid., [169-72].



**7.1.3. The provision of land does not constitute a specific subsidy within the meaning of SCM Art. 2**

18. The AB stated that the “starting point” of a specificity analysis is the measure that has been determined to constitute a subsidy under SCM Art. 1:1<sup>21</sup>. The AB added that subsidies which “*fall within the provisions of SCM Art. 3, are consequently found to be ‘specific’ subsidies within the meaning of SCM Art. 2.3*”<sup>22</sup>.

19. At this point, the prior claims led us to the conclusion that the provision of land is not a prohibited export subsidy under SCM Arts. 1:1 and 3.1(a) (1). Thereby, it could not be considered nor deemed to be specific under SCM Arts. 2.1. and 2.3.

**7.2. The loan from Zurix Bank to Desertix does not constitute a specific subsidy within the meaning of SCM Art. 1 and it does not cause serious prejudice to the interest of Coruscant within the meaning of SCM Art. 5(c) and GATT Art. XVI:1**

**7.2.1. The loan from Zurix Bank to Desertix does not constitute a subsidy within the meaning of GATT Art. 1**

20. According to the constituent elements of a subsidy under SCM Art. 1:1 abovementioned, Alderaan claims that the Zurix Bank’s loan is not a subsidy withing the meaning of SCM Art. 1:1.

**7.2.1.1. Zurix bank is not a public body under SCM Art. 1:1(a)**

21. SCM Art. 1:1(a) presents the types of transactions that constitute a financial contribution. The list focus primarily on conducts by the government or a public body related to the transference of economic resources<sup>23</sup>. Subparagraph (i) states that a financial contribution may be made through direct transfers of funds, such as loans, given by a government. On the other hand, subparagraph (iv) recognizes that paragraphs (i) – (iii) could be circumvented by a government making payments to a funding mechanism or entrusting or directing a private body to make a financial contribution.

22. The AB found that a public body, under the *SCM Agreement*, “*covers only the entities that possess, exercise or are vested with governmental authority*”<sup>24</sup>. Evidence that may work to prove such qualities is that a government exercises “meaningful control” over an entity<sup>25</sup>. Additionally, the AB also has clarified that “all relevant characteristics of the entity” should

<sup>21</sup> ABR, US – Countervailing Measures (China), [4.140]; ABR, US – Large Civil Aircraft (2<sup>nd</sup> complaint), [747]

<sup>22</sup> PR, Korea – Commercial Vessels, [7.514].

<sup>23</sup> ABR, US – Large Civil Aircraft (2<sup>nd</sup> Complaint), [614].

<sup>24</sup> ABR, US – Anti-Dumping and Countervailing Duties (China), [317-8].

<sup>25</sup> Ibid.

be considered to avoid focusing exclusively or unduly on any single characteristic without affording consideration to others that may be relevant<sup>26</sup>.

23. Consequently, Zurix Bank could not be considered as a public body, since (i) is not vested with governmental authority, (ii) is a fully private ownership entity, (iii) is run on a commercial basis insofar as each loan is granted based on the merits of the applicant, (iv) is governed by a board of directors appointed by the bank's shareholders, (v) the boards members are approved based on objective criteria regarding their qualifications, and (vi) the bank directors act in his or her independent capacity and only answers to the bank's shareholders<sup>27</sup>.

24. Therefore, Zurix Bank could not be considered as a public body since it does not have any relationship with governmental authorities or public functions. Neither the government has any control or authority over the bank's directors and their decisions, nor over its operation that only responds to the market and the merits of its customers.

**7.2.1.2. Zurix Bank was not entrusted by the government to conduct a financial contribution to Desertix**

25. According to subparagraph (iv) of the SCM Art. 1:1(a), a financial contribution may exist when there is an entrustment by the government to a private entity to conduct the direct transfer of funds<sup>28</sup>. The term "entrustment" refers to giving responsibility to a private body for a task and the AB found that "*entrustment implies a more active role than mere policy pronouncements o encouragement acts*"<sup>29</sup>.

26. Thus, Zurix Bank was not entrusted by Alderaan's government to grant the loan to Desertix, because (i) the loans are based on the merits of the applicant, and (ii) the bank has the autonomy to decide how to regard to the strategic policy priorities lay down by the Government.

27. Therefore, although the banks must invest in the government's policies, the loans are not the only way to follow such policies. Thus, Zurix Bank was not obliged to grant the Loan to Desertix, but the loan obeyed to the merits of Desertix as an applicant of a loan. Then, the Case does not provide with sufficient evidence that the loan was entrusted by the government's policies, rather than commercial factors which showed the profitability of such investment.

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<sup>26</sup> ABR, US – Anti-Dumping and Countervailing Duties (China), [319].

<sup>27</sup> Case, P. 6, [1]

<sup>28</sup> ABR, US – Countervailing Duty Investigation on DRAMs, [108].

<sup>29</sup> Ibid., [114].

28. Henceforth, the Claimant did not prove that the loan granting was the result of a government's constraint rather than a commercial operation within the ordinary line of business of the bank. Consequently, the loan does not fall within the scope of subparagraph (iv) of SCM Art. 1.1(a) (1).

**7.2.1.3. The Zurix Bank's loan does not confer a benefit under SCM Art. 1.1(b)**

29. SCM Art. 1.1(b) set forth that to constitute a subsidy "a benefit must be conferred". Thus, the government conduct must have made the recipient "better off" than it would otherwise have been in the market<sup>30</sup>. To determine the existence of a benefit, a comparison must be made between the financial contribution provided by a government and a market benchmark, as though the loans were obtained at the same time<sup>31</sup>.

30. However, in the present dispute Zurix Bank's loan does not confer a benefit to Desertix, since it was granted within a commercial basis that responds to the market bank operations. The Case<sup>32</sup> reveals that Zurix Banks only acts on a commercial basis as far as each loan is granted based on the merits of the applicant. Therefore, since the bank's operations are completely performed within the market and responds to the market itself, no loan can grant a benefit outside the market, neither the loan provided to Desertix. In this regard, other companies, domestic as well as foreign, can apply to similar loans.

31. Consequently, the granted loan does not fulfil the benefit requirement to be considered as a subsidy. Therefore, it is consistent with SCM Art. 1.1.(b).

**7.2.2. The loan from Zurix Bank is not a specific subsidy under SCM Art. 2**

32. According to SCM Art. 2.1 the specificity is a requirement that supposes the existence of a subsidy within the meaning of SCM Art. 1. Considering that the loan is not a subsidy under SCM Art. 1:1, it could not be considered as specific. However, even if the Panel found that the loan is a subsidy, it does not follow the specificity requirement.

33. In *US – Anti-Dumping and Countervailing Duties (China)*, the AB pointed out that the *chapeau* of Article 2.1 purpose is to determine whether a subsidy is (i) specific to "certain enterprises" and, (ii) within the jurisdiction of the granting authority<sup>33</sup>.

34. According to the Case<sup>34</sup>, Desertix is incorporated in Tatooine as a national company. Thus, it has to comply with Tatooine's laws as an incorporated company within the jurisdiction of Tatooine.

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<sup>30</sup> ABR, US – Large Civil Aircraft (2<sup>nd</sup> Complaint), [635-6, 662, 690].

<sup>31</sup> ABR, EC and Certain Member States – Large Civil Aircraft, [835-6].

<sup>32</sup> Case, P. 6, [2]

<sup>33</sup> ABR, US – Countervailing Measures (China), [4.123].

35. Consequently, since Desertix is not found in the same jurisdiction as Zurix Bank, the granted loan could not be considered as specific. Thereby, is consistent with SCM Art. 2.

36. Additionally, the AB in *US – Countervailing Measures (China)* stated that, regarding the *de jure* specificity, the language in subparagraphs (a) and (b) directs an analysis over any explicit limitation of access to a subsidy or look for the existence of objective conditions or criteria governing eligibility for a subsidy, spelled out in law, regulation, or another official document<sup>35</sup>.

37. On the other hand, the AB has said that a subsidy may nevertheless be found to be “in fact” specific<sup>36</sup>. The AB also stated that *de facto* specificity inquiry focuses on evidence that relates to factors, such as: the predominant use of a subsidy programme by a limited number of certain enterprises; the granting of disproportionately large amounts of subsidy to certain enterprises; and the discretionally that has been exercised by the granting authority.

38. However, as the Case reveals, there is not any law, regulation nor official document that explicit grants loans from Zurix Bank to Desertix. Moreover, there could not be considered as *de facto* specific since there is not any loan program discretionally exercised only to Desertix, but as the Case evidences<sup>37</sup>, the loans are not part of subsidy program, but they are granted in a commercial basis commercial basis insofar as each loan is granted based on the merits of the applicant, being possible to all industries in Tatooine to apply for them. Therefore, the provision of loans obeys to commercial, profitability and investments factors rather than subsidy reasons.

39. All this led us to the conclusion that the Loan does not fall within the scope of specificity of SCM Art. 2 since, was not granted in the same jurisdiction as Desertix, and is not directed only to certain enterprises. Therefore, the Loan is consistent with SCM Art. 2.

**7.2.3. The loan from Zurix Bank to Desertix does not cause serious prejudice to the interests of Coruscant within the meaning of SCM Art. 5(c) and GATT Art. XVI:1**

40. In the unlikely case that the Panel finds that the loan from Zurix Bank is a specific subsidy within the meaning of paragraphs 1 and 2 of SCM Art. 1, the loan from Zurix Bank to Desertix does not constitute an actionable subsidy because it does not cause adverse effects to the interests of another Member<sup>38</sup>.

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<sup>34</sup> Case, P. 5 [1].

<sup>35</sup> ABR, US – Countervailing Measures (China), [4.120].

<sup>36</sup> Ibid., [4.121].

<sup>37</sup> Case, P. 6, [1].

<sup>38</sup> P. Van den Bossche, W. Zdouc (2017), 567.

41. In assessing whether a subsidy causes an “adverse effect” within the meaning of SCM Art. 5(c) the complainant must demonstrate that the challenged subsidy falls within the meaning of SCM Art. 6.3<sup>39</sup>, in other words, that the measure at issue produces “serious prejudice”. A measure causes “serious prejudice” when it displaces or impedes exports or imports, causes a significant price suppression, depression, or lost sales, or have the effect of an increasing the work market share of the subsidizing Member in a particular primary product or commodity<sup>40</sup>.

42. Consequently, Coruscont contends that the measure at issue causes a significant lost sales within the meaning of SCM Art. 6.3(c).

#### **7.2.3.1. Analysis of “serious prejudice”**

43. In analysing whether the challenged subsidy causes a “serious prejudice” the AB and the Panel clarified that it has to comply with the “causation analysis”. The analysis of SCM Art. 6.3 has two types or methodologies: a two-step analysis or a unitary analysis<sup>41</sup>. In the present dispute, Alderaan, in line with the AB, considers preferable to conduct a unitary causation analysis, in finding if the phenomena have a causal relationship with the challenged subsidy. In this respect, there are four requirements in deciding whether the subsidy causes a “serious prejudice”: (i) that an “effect” exists, (ii) this effect must be “significant”, (iii) the effect must be consequence of the subsidy, and (iv) the effect must be upon products competing in the same market.

##### **7.2.3.1.1. “Significant lost sale in the same market”**

44. The precise meaning of “significant” under SCM Art. 6.3(c) has not been clarified by the DSB. Therefore, Alderaan will assess the meaning of “significant” following VCLT Art. 31, analysing the ordinary meaning considering the WTO principles and the precise context. Regarding the terms “lost sales” the AB has interpreted it as a “failed to obtain”. However, the AB clarified that the fail to obtain in the sense of SCM Art. 6.3 only occurs when the subsidized firm(s) have won the sales that the competing firm(s) has lose<sup>42</sup>. Furthermore, the term “in the same market” means, for the AB, all those situations where the products are in actual or potential competition in that market<sup>43</sup>, in the present dispute Naboo market.

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<sup>39</sup> P. Van den Bossche, W. Zdouc (2017), 567.

<sup>40</sup> SCM Agreement, Art. 6.3(a), (b), (c), (d).

<sup>41</sup> ABR, EC and Certain Member States – Large Civil Aircraft, [1107].

<sup>42</sup> Ibid., [1214].

<sup>43</sup> ABR, US – Upland Cotton, [408].

45. The *Oxford Dictionary Online* defines “significant” as follows: “*large or important enough to have an effect or to be notice*”<sup>44</sup>. Furthermore, the *Collins English Dictionary* defines the term as: “*a significant amount or effect is large enough to be important or affect a situation to a noticeable degree*”<sup>45</sup>. In conclusion, a subsidy causes a “significant lost sale” when the sales lost are a large enough amount to be important or to be notice.

46. In the present dispute, the Ventix Generatix’s decision is not a “significant lost sale” to Coruscant but is just an isolated lost sale and product of the natural dynamics of Naboo’s market. Considering that this decision is not enough to affect the PMGs market of Coruscant to a noticeable degree.

#### **7.2.3.1.2. Causation analysis**

47. The causation analysis must be assessed through a *ex ante* or counterfactual analysis in which the firms would not have received the challenged subsidy<sup>46</sup>. The aim of this analysis is to find whether the effect in SCM Art. 6.3(c) (“lost sales”) is a consequence of the subsidy.

48. After the loan, the PMGs SaberLite price was higher than the traditional PMGs<sup>47</sup>. However, the decision of Ventix Generatix was based in the lower price of PMGs SaberLite. Therefore, if Zurix Bank had never given the loan at issue, the decision of Ventix Generatix would not change, considering that the loan from Zurix Bank does not influence the PMGs SaberLite’s price. The alleged lost sale is just a natural risk of PMG’s market, a natural decision based on a better offer.

49. The loan from Zurix Bank to Desertix is not an specify subsidy within the meaning of SCM Arts. 1 and 2. Furthermore, the measure at issue is not an actionable subsidy within the scope of SCM Art. 5 and it does not cause a significant lost sale within the meaning of SCM Art. 6.3(c).

### **7.3. The non-renewal of permits, the export tax and the export registration do not constitute an unwritten “overarching” measure that systematically restricts the exports of neodymium contrary to GATT Art. XI:1**

50. The three measures challenged by Coruscant as components of an “overarching” measure that systematically restricts the export of neodymium does not comply the requirements for constitute this kind of measure. Furthermore, even if the Panel considered that there exists an “overarching” measure, it does not contrary GATT Art. XI:1 for the following reasons.

<sup>44</sup> Oxford English Dictionary Online, definition of “significant”.

<sup>45</sup> Collins English Dictionary Online, definition of “significant”.

<sup>46</sup> ABR, EC and Certain Member States – Large Civil Aircraft, [1216].

<sup>47</sup> Case, P. 6, [13-14].

**7.3.1. The non-renewal of permits, the export tax and the export registration do not have a common goal**

51. In analysing the existence of an unwritten “overarching” measure at issue the complainant must prove that the components have a common policy goal and have functional life on its own<sup>48</sup>. Furthermore, in showing the existence of a systematic application, the complainant party must find that a measure is applied following an “organized method” in support of a particular aim<sup>49</sup>. The application of those measures has not to be repetitive or reiterative for showing the existence of systematic application.

52. On the contrary, the challenged measures have different goals. On the one hand, the non-renewal of permits aims to reduce the amount of mining firms running on Alderaan. On the other hand, the export tax and the export registration aim to reduce the export of neodymium in Alderaan. There is not synergic application between the first measures mentioned and the others, although they can contribute indirectly to the goals of other measures.

53. In this regard, the measures abovementioned does not constitute an unwritten “overarching” measure and has not systematic application since the measures has not the same goal.

**7.3.2. The measure at issue is not contrary to GATT Art. XI:1**

54. The term “restriction” in GATT Art. XI:1 means to the Panel a limitation or limiting effect in the international market that may affect the investment or result in an impossibility of access to the market<sup>50</sup>. In this regard, the quantitative restrictions are significant prohibitions in access to the market or a total ban of the products in dispute. However, in the present dispute, the measure at issue does not produces the latter effects in the market since it is not a total ban of neodymium. The challenged measure diminishes the exports of neodymium in an aggressive manner, but it does not create a limiting effect in the international market, does not affect the investment plans and does not result in an impossibility of access to the market. Even if their trade-restiveness is higher, the measure at issue cannot be catalogued as a quantitative restriction within the meaning of GATT Art. XI:1.

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<sup>48</sup> ABR, Argentina – Import Measures, [5.108].

<sup>49</sup> PR, Russia – Tariff Treatment, [7.309].

<sup>50</sup> PR, Colombia – Ports of Entry, [7.240]; India – Quantitative Restrictions, [5.128].

#### **7.4. The measure at issue is justified pursuant to General Exceptions of GATT Art. XX(b) and (g)**

##### **7.4.1. The measure at issue is justified pursuant to GATT Art. XX(b)**

55. To contemplate a defence within GATT Art. XX(b) the respondent must supply evidence that a risk for human, animal and plant life or health exists, that the challenged measure achieves the necessity test, and that the measure follows the *chapeau* of GATT Art. XX<sup>51</sup>. In the first analysis, the respondent must demonstrate that: “(i) *there is a risk to human, animal, or plant life or health* [7.4.1.1.1]; and (ii) *the underlying objective of the measure is to reduce the risk*”<sup>52</sup> (7.4.1.1.2). In the second evaluation the respondent must prove: (i) the importance of the interests or values at stake (7.4.1.2.1), (ii) the extent of the contribution of the measure (7.4.1.2.2), and (iii) the trade-restrictiveness of the measure<sup>53</sup> (7.4.1.2.3). In the third part must prove that the available alternative measures proposed by the complainant are not “reasonably available”<sup>54</sup> or does not contribute in the same manner<sup>55</sup> (7.4.1.3). Finally, in analysing under the *chapeau* of GATT Art. XX, the respondent must prove that the measure allegedly justified within one of the paragraphs of GATT Art. XX:

“(i) *must not be applied in a manner that would constitute ‘arbitrary or unjustifiable discrimination’ between countries where the same conditions prevail* [7.4.3.1]; and (ii) *must not be applied in a manner that would constitute ‘a disguised restriction on international trade’*”<sup>56</sup> (7.4.3.2).

##### **7.4.1.1. The existence of a risk to human, animal and plant life or health**

56. In *EC – Asbestos* the AB clarified that it does not exist any requirement under GATT Art. XX(b) to quantify the risk to human, animal or plant life or health<sup>57</sup> and explained that “*a risk may be evaluated either in quantitative or qualitative terms*”<sup>58</sup>. The Panel in *China – Rare Earths* explained that the DSB has examined the design and structure of a measure in deciding whether the measure have the goal needed under GATT Art. XX(b)<sup>59</sup>.

##### **7.4.1.1.1. Harm arising from the extraction and mining of neodymium**

57. The harm arising from the mining of rare earths is recorded in the report *China – Rare Earths*, where the Panel analysed certain measures applied in rare earths and explain the

<sup>51</sup> PR, China – Rare Earths, [7.145-7].

<sup>52</sup> PR, China – Raw Materials, [7.476].

<sup>53</sup> Ibid., [7.474].

<sup>54</sup> PR, China – Rare Earths, [7.147].

<sup>55</sup> ABR, Brazil – Retreaded Tyres, [156].

<sup>56</sup> Ibid., [215].

<sup>57</sup> ABR, EC – Asbestos, [167].

<sup>58</sup> Ibid.

<sup>59</sup> PR, China – Rare Earths, [7.145].



multiple environmental and sanitary effects of their extraction. Furthermore, the harm arising from the mining of neodymium, which is a rare earth, is documented in the Case in: (i) the WHO's report and (ii) the Doc. C4PO.

58. In 2015 the WHO published a report in which it highlights the significant health risks for human, animals, and plants alike that neodymium's extraction produces<sup>60</sup>. In this Report, the WHO explains that the mining of neodymium creates dust and toxic waste, which spread into the air and leaks into soil and rivers. In the humans this dust or toxic waste produces lung embolisms and liver failure, in animals produces damage in cell membranes, and in plant produces land desertification.

59. Similarly, in June 2016, the Alderaan's Ministry of Mining and Industrial Development conducted one scientific research. The study finds that the neodymium extraction produces desertification and raises human and animal health risk. Furthermore, these findings, recorded in the Doc. C4PO, were the reason argued by the Ministry for the non-renewal of permits, documented in Decision 42 of 2019; based on the Mining Act 002.

60. Additionally, the harm arising from the mining of rare earths is proved in detail in a Study conduct by The Greens/EFA Group in the European Parliament and the United States' Environmental Protection Agency. The mining of rare earths produces large waste streams, called "tailings". These tailings have toxic and radioactive substances, fluorides, sulphites, acids, and heavy metals<sup>61</sup>, which form a major environmental health risk<sup>62</sup>.

61. For those reasons and considering that Alderaan is home of 60% of world's neodymium reserves<sup>63</sup>, Alderaan submits that the extraction of neodymium poses a risk to human, animal and plant life or health within the meaning of GATT Art. XX(b).

#### **7.4.1.1.2. The underlaying aim of the measure is to reduce the risk**

62. The paper "A Green Hope" writes down that the aim of "Green Hope" strategy plan is to shift away the Alderaan's industry of the export and extraction of neodymium. This aim has the underlaying purpose to reduce the risk that the mining of neodymium produces, diminishing the amount of neodymium extracted by mining firms and reducing the incentives for the extraction.

63. Alderaan's Environment Minister, Leia Groundrunner, declared the latter aim in August 2018. In that statement the Minister said that the export tax "(...) *will bring a considerable additional benefit*", among these benefits the Minister declared that "*it will encourage the*

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<sup>60</sup> Case, P. 1.

<sup>61</sup> D. Schuler (2011), 42-3.

<sup>62</sup> PR, China – Rare Earths, [7.151].

<sup>63</sup> Case, P. 1.

*windmill industry worldwide to reduce their reliance on unsustainable and damaging raw materials such as neodymium”.*

64. Same row, the Minister of Mining and Industrial Development, Mr. Corn Windu, sustain that the non-renewal of permits was in line with the Government’s “Green Hope” strategy. In the same statement, the Minister declared that the decision of non-renewal of permits was based on environmental and sanitary reasons, as it was recorded in Decision 42 of 2019.

65. Thereupon, Alderaan contends that the measure at issue has the underlaying goal to reduce the export and extraction of neodymium to protect the human, animal and plant life or health that such activity jeopardized.

#### **7.4.1.2. The necessity of the measure at issue**

66. Standing for the existence of a *General Exception* based on GATT Art. XX(b), the DSB has clarified that the measure at issue must be necessary. The AB in *Korea – Various Measures on Beef* explained that “*the word ‘necessary’ is not limited to that which is ‘indispensable’*”<sup>64</sup>. In this regard, in analysing whether a measure is necessary the DSB has crafted three requirements mentioned above.

##### **7.4.1.2.1. Protection to (relative) important interests or values**

67. The AB clarified that “*few interests are more ‘vital’ and ‘important’ than protecting human being from health risks (...)*”<sup>65</sup> and the environment. These values are vital in the highest degree<sup>66</sup>.

68. Considering the aim of the challenged measure evidenced above, Alderaan argues that the protection of human, animal and plant life or health are (relative) important interests or values.

##### **7.4.1.2.2. The extent of the material contribution of the measure to the achievement of its objective**

69. In assessing the extent of the material contribution, the DSB has considered a two-tiered analysis. The first part examines whether the measure “*contributes to the realization of the policy pursued (...)*”<sup>67</sup>. The second part studies whether the realization of the policy pursued “*(...) contributes to the reduction of the risk to human, animal, and plant life or health*”<sup>68</sup>.

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<sup>64</sup> ABR, Korea – Various Measures on Beef, [161].

<sup>65</sup> ABR, Brazil – Retreaded Tyres, [144].

<sup>66</sup> Ibid., [179].

<sup>67</sup> PR, Brazil – Retreaded Tyres, [7.115].

<sup>68</sup> Ibid., [7.122].

Additionally, the Panel and the AB clarified that a material contribution is one which is “*not merely marginal or insignificant*”<sup>69</sup>.

70. The measure at issue has a material contribution since it reduces the amount of neodymium extracted and contributes reducing the economic agents that supply neodymium to foreign countries. The *Table: Number of Neodymium Mining Firms Operating in Alderaan*, provided in the Case, shows that since 2018 to 2020 the number of mining firms has diminished since twenty-eight to six. Furthermore, the Annex 6 illustrates that the domestic production of neodymium has decreased since 35.1 metric tons in 2018 to 7.9 in 2020. In the same regard, the neodymium exports and domestic sales has decreased similarly. This datum supplied above proves that the measure at issue has contributed to the realization of the policy pursued.

71. Furthermore, the realization of the policy pursued contributes to the reduction of risk to human, animal and plant life or health because it reduces the adverse effects that the neodymium extraction produces. On the one hand, the reduction of mining firms and domestic production control the amount of neodymium extracted, therefore controlling the harm that it causes. On the other hand, the reduction of neodymium exports and domestic sales control the harm arising from the extraction diminishing the incentives for it.

72. Hence, Alderaan submits that the measure at issue has a material contribution for the achievement of its aim and the aim pursued contributes to the reduction of risk to human, animal and plant life or health.

#### **7.4.1.2.3. The trade-restrictiveness of the measure**

73. Considering that the Panel found the measure at issue as a quantitative restriction within the meaning of GATT Art. XI:1, the quantitative restrictions are “*(...) by design as trade-restrictive as can be*”<sup>70</sup>. However, the AB has clarified that “*(...) certain complex public health or environmental problems [as the present dispute] may be tackled only with a comprehensive policy comprising a multiplicity of interacting measure*”<sup>71</sup>. In assessing whether a comprehensive policy is “necessary” the Panel must examine if the challenged measure is apt to produce a material contribution for the achievement of its goal<sup>72</sup>; considering that the “necessity” test is a process of weighting and balancing.

74. In this regard, Alderaan considers that the measure at issue is a comprehensive policy necessary for tackled a complex public health or environmental issue because is apt to

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<sup>69</sup> ABR, Brazil – Retreaded Tyres, [210].

<sup>70</sup> Ibid., [150].

<sup>71</sup> Ibid.

<sup>72</sup> Ibid., [151].

produce a material contribution, as was found above. Therefore, the measure at issue is necessary within the meaning of GATT Art. XX(b).

**7.4.1.3. The alternatives measures are not available or do not make the same contribution**

75. The AB supported that an available alternative measure, presented by the complainant, must supply an equivalent contribution and be less trade-restrictive than the challenged measure<sup>73</sup>. In the present dispute, Alderaan considers that there exists a complex public health and environmental issue and contends that the measures proposed by the complainant does not supply and equivalent contribution or not are reasonably, considering that Alderaan aim to control the total extraction and exports of neodymium in a manner that it cannot harm the human, animal and plant life or health.

76. In the case that the Complainant propose a different measure, e. g. technical regulations, a transition regime, among others, Alderaan submits that those alternative measure do not make the same contribution since it led the mining firms to continue the extraction of neodymium producing environmental and sanitary damages. Furthermore, the harm arising from the mining of neodymium is an urgent issue that needed Alderaan's at once consideration. Furthermore, the extraction of rare earths is a global issue that are recorded in section 7.3.2.2.2.1. of the PR *China – Rare Earths* were the Panel considered as a primary environmental problem the mining of rare earths after an analysis of the scientific findings about the harm that such activity produces<sup>74</sup>.

77. Hence, Alderaan asserts that the alternatives measures are not available or do not make the same contribution. Therefore, the measure at issue follows the analysis of GATT Art. XX(b).

**7.4.2. The measure at issue is justified pursuant to GATT Art. XX (g)**

78. For a measure to be justified under GATT Art. XX(g) it must be related to the conservation of exhaustible natural resources and be applied in conjunction with restriction on domestic production or consumption<sup>75</sup>. The AB clarified that the measure needs to be (i) “related to”, (ii) being applied in conjunction with restriction on domestic production or consumption – that have inherent the “even-handedness requirement”<sup>76</sup> –, and (iii) applied upon exhaustible natural resources.

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<sup>73</sup> ABR, Brazil – Retreaded Tyres, [156].

<sup>74</sup> PR, China – Rare Earths, [7.150].

<sup>75</sup> GATT 1994, Art. XX(g).

<sup>76</sup> PR, China – Rare Earths, [7.331].

#### 7.4.2.1. “Relating to”

79. For a measure to be related to within the meaning of GATT Art. XX(g) the Panel clarified that it must evidence the relationship between the challenged measure and the legitimate policy of conserving exhaustible natural resources<sup>77</sup>. The relationship is analysed through the structure and design of the measure<sup>78</sup>, in finding whether the relation between it and policy is observably a close and real one<sup>79</sup>, in other words, is “primarily aim at”<sup>80</sup>. Furthermore, in *China – Rare Earths* the Panel clarified that the “relating to” test must be examine considering the policy and regulatory context<sup>81</sup>.

#### 7.4.2.2. “Exhaustible natural resources”

80. The Panel clarified that there is no international agreed definition of the terms “exhaustible natural resources”<sup>82</sup>. However, the panels have considered which products are “exhaustible natural resources” in multiple instances. In *US – Imports of Tuna and Tuna Products* the Panel found the tuna stocks an exhaustible resource<sup>83</sup>. In *Canada – Measure on Unprocessed Herring and Salmon* the Panel found the salmon and herring stocks as exhaustible resources<sup>84</sup>. In the same regard the Panel found exhaustible natural resources in *US – Restrictions on Tuna*<sup>85</sup> and *US – Automobiles*<sup>86</sup>. Thereby, Alderaan considers that the environment could be understand as an exhaustible natural resource within the meaning of GATT Art. XX(g).

#### 7.4.2.3. “Conservation”

81. In *Korea – Rare Earths*, the Panel clarified that the meaning of “conservation” is the preservation of the environment, the existing conditions, the action of keeping from harm, decay, loss or waste or careful preservation, with a view to later use<sup>87</sup>. In the same dispute, the Panel explained that the sustainable development is relevant for the interpretation of the term “conservation”<sup>88</sup>. In this regard, the Panel said that the principles of sovereignty over natural resources and sustainable development are not exclusive, but they can work in

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<sup>77</sup> ABR, *US – Shrimp*, [135].

<sup>78</sup> *Ibid.*, [137].

<sup>79</sup> *Ibid.*, [141].

<sup>80</sup> PR, *China – Raw Materials*, [7.369].

<sup>81</sup> PR, *China – Rare Earths*, [7.289].

<sup>82</sup> *Ibid.*, [7.246].

<sup>83</sup> PR, *US – Imports of Tuna and Tuna Products*, [4.9].

<sup>84</sup> PR, *Canada – Measures on Unprocessed Herring and Salmon*, [4.4].

<sup>85</sup> PR, *US – Restrictions of Tuna*, [5.13-20].

<sup>86</sup> PR, *US – Automobiles*, [5.57].

<sup>87</sup> PR, *China – Rare Earths*, [7.258].

<sup>88</sup> *Ibid.*, [7.261].

harmony<sup>89</sup>. The Panel concluded that“(…) *WTO Members are entitled to develop conservation on the basis of (...) a full range of policy considerations and goals, including the need to preserve in their current state as well as the need to use them in a sustainable manner*”<sup>90</sup>, for this purpose, a member has entirely discretion to decrease the absolute quantity of materials extracted or control the speed of such extraction<sup>91</sup>.

**7.4.2.3.1. Evidencing the “related to the conservation of exhaustible natural resources”**

82. The measure at issue pursues the conservation of environment through a policy that control the speed of the extraction of neodymium to use it in a sustainable manner. Considering the Panel interpretation of the term “conservation”, the measure at issue is related to the conservation because it aims to preserve the environment protecting it from the land desertification that causes the neodymium’s extraction, as was explained above.

83. Furthermore, the challenged measure is “related to” the conservation of the environment because it is “primarily aim at” the conservation of environment. In this regard, the measure at issue is part of a comprehensive policy, named the “Green Hope” strategy. The Government’s paper “A Green Hope” set forth that the aim of the measures taken is to make Alderaan a world leader in sustainability<sup>92</sup>. Thus, the primarily aim of the measures taken, as part of the “Green Hope” strategy, is the conservation of environment in the manner that was explained 7.4.2.1, and within the Panel’s definition of the term “conservation”.

**7.4.2.4. “Made effective in conjunction with restriction on domestic production or consumption”**

84. The AB explained that the terms “made effective in conjunction with” means that the measure at issue “work together” with restrictions on domestic production or consumption related to conservation of exhaustible natural resources<sup>93</sup>. The Panel in *China – Rare Earths* suggested that the “*requirement looks to both the procedural and the substantive connections*”<sup>94</sup> between the challenged measure and the domestic restrictions. Also, the AB in *US – Gasoline* sustained that the term at examination needs that the measure is applied “together with” measures “in force”<sup>95</sup>.

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<sup>89</sup> PR, China – Rare Earths, [7.265].

<sup>90</sup> PR, China – Rare Earths, [7.266].

<sup>91</sup> Ibid.

<sup>92</sup> Case, P. 1, [3].

<sup>93</sup> ABR, China – Raw Materials, [360].

<sup>94</sup> PR, China – Rare Earths, [7.299].

<sup>95</sup> Ibid., [7.300].

85. The statement of Alderaan's Environment Minister, Leia Groundrunner, evidence that the measure at issue is applied in restrictions on production or consumption as the circular economy, zero waste initiatives and the banning of single use-plastics<sup>96</sup>. Furthermore, the non-renewal of permits, the export tax and export registration are applied in domestic production or consumption of neodymium in view to protect the environment, as was argued above. The mentioned measure is applied together with because they are in force is in force at the same that the measure at issue.

86. In conclusion, Alderaan contends that the measure at issue is made effective in conjunction with restrictions on domestic production or consumption.

#### **7.4.2.4.1. The “even-handedness” requirement**

87. The Panel and the AB have analysed the term “even-handedness” in *US – Gasoline*, *US – Shrimp*, *China – Raw Materials* and *China – Rare Earths*. In the latter, the Panel considered that the “even-handedness” test is “a synonym for the second part of subparagraph (g) of Art. XX”<sup>97</sup>, in the way that the measure must be “made effective in conjunction with restrictions on domestic production or consumption” for being applied in an even-handed manner<sup>98</sup>. In *China – Raw Materials* the Panel explained that this is “(...) the very essence of the conservation objective set forth in Art. XX(g) (...)”<sup>99</sup>.

88. In the present dispute, the measure at issue is applied on domestic production or consumption, there is not restrictions made effective upon the foreign countries. The measure under analysis achieves the “even-handedness” requirement considering that is applied only on domestic production or consumption and do not discriminate or is not applied in a partiality manner upon the foreign countries or other members.

89. Thereby, Alderaan argues that the measure at issue is made effective in conjunction with restrictions on domestic productions or consumption.

#### **7.4.3. The analysis under the *chapeau* of GATT Art. XX**

90. In *Brazil – Retreaded Tyres* the AB clarified that “the focus of the *chapeau*, by its express terms, is on the application of a measure already found to be inconsistent with an obligation of GATT 1994 but falling within one of the paragraphs of Article XX”<sup>100</sup>. For a measure to follow the *chapeau* of GATT Art. XX it must not be applied in a manner that would constitute “arbitrary or unjustifiable discrimination between countries where the same

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<sup>96</sup> Case, P. 2.

<sup>97</sup> PR, China – Rare Earths, [7.331].

<sup>98</sup> Ibid., [7.331].

<sup>99</sup> PR, China – Raw Materials, [7.406].

<sup>100</sup> ABR, Brazil – Retreaded Tyres, [215].

conditions prevail” or not be applied in a manner that would constitute “a disguised restriction on international trade”<sup>101</sup>.

**7.4.3.1. Arbitrary or unjustifiable discrimination between countries where the same conditions prevail**

91. In *US – Shrimp* the AB crafted three conditions in assessing an “arbitrary or unjustifiable discrimination”<sup>102</sup>. First, the discrimination, which is different from the discrimination in the treatment of products<sup>103</sup>. Second, the arbitrary or unjustifiable character. Third, the discrimination must occur between countries where the same conditions prevail<sup>104</sup>. In this regard, the AB clarified that GATT Art. XX needs to support a balance between rights (market access) and obligations (GATT Art. XI:1)<sup>105</sup>.

92. A discrimination under the *chapeau* of GATT Art. XX may exist when there is not a rational connection between the reasons argued for the discrimination of the measure at issue and the goal of a paragraph of GATT Art. XX or when it goes against that aim<sup>106</sup> – current dispute (b) and (g) –. Similarly, a discrimination may occur when there exist alternative measures (less restrictive and reasonable) that might be imposed instead of the challenged measure<sup>107</sup>. Those discriminations have been assessed in chapters 7.4.1.1 and 7.4.1.3.

93. Furthermore, the discrimination may be arbitrary when the rationale underlying the challenged measure is a “capricious” or “random” decision<sup>108</sup>. The discrimination may be unjustifiable when the decision to introduce the measure at issue is adopted in a unilateral manner, without considering other Member’s rights<sup>109</sup>.

94. Regarding the term “arbitrary”, in the present dispute, the measure taken by Alderaan’s Government is not “capricious” or “random”. The decision to non-renew the permits is based on Alderaan Mining Act, which entered into force in 2002<sup>110</sup>, approximately 16 years before the non-renewal of permits. Concerning the export tax and export registration, they were measures taken as part of a policy (Green Hope) taken one year before. In conclusion, the measure at issue would not be an arbitrary discrimination.

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<sup>101</sup> ABR, Brazil – Retreaded Tyres, [215].

<sup>102</sup> PR, China – Rare Earths, [7.350].

<sup>103</sup> Ibid.

<sup>104</sup> ABR, US – Shrimp, [150].

<sup>105</sup> Ibid., [156].

<sup>106</sup> ABR, Brazil – Retreaded Tyres, [227].

<sup>107</sup> ABR, US – Gasoline, [28-9].

<sup>108</sup> ABR, Brazil – Retreaded Tyres. [232].

<sup>109</sup> ABR, US – Shrimp, [172].

<sup>110</sup> Case, P. 6, [16].



95. Regarding the term “unjustifiable”, the decision of introduce the measure at issue was not taken without considering the Member’s rights. On the contrary, the measure at issue composed by the three above mentioned measures was taken through a premeditated strategy that consider the rights of the Members since it aims to diminish the harm arising from the exportation of neodymium to foreign countries. In this respect, the measure at issue not only protects the environment of Alderaan, but it protects the environment and sanitary situations of other Members.

96. In conclusion, Alderaan argues that the measure at issue is not applied in a manner that would constitute an arbitrary or unjustifiable discrimination between countries where the same conditions prevail since the decision of tacking it is not “capricious” or “random” and the measure consider the other Member’s rights.

#### **7.4.3.2. A disguised restriction on international trade**

97. In *US – Imports of Tuna and Tuna products* the Panel found that an action should be a disguised restriction on international trade when it has not been taken as a trade measure and publicity announced as such<sup>111</sup>. The AB added that there exists a disguised restriction on international trade when the measure at issue publicity does not show the actual trade-restrictive aims<sup>112</sup>.

98. The export tax and the export registration were published as a measure in force since 1 September 2018 and was announced by the Minister Groundrunner in a statement. The Minister declared the actual effects that it would have on the market, and the aim to shift-away Alderaan industry from the extraction and exports of neodymium. In the same regard, the Minister Windu in a statement and through the Decisions present the decision to non-renewal of permits.

99. Furthermore, in *US – Gasoline* the AB explained that “disguised restrictions consider restrictions taken under the guise of a measure formally within the terms of an exception listed in GATT Art. XX<sup>113</sup>. Thereby, the “arbitrary or unjustifiable discrimination” above explained may be considered in finding the presence of a “disguised restriction”<sup>114</sup>.

100. In conclusion, Alderaan contends that the measure at issue is not applied in a manner that would constate a disguised restriction on international trade.

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<sup>111</sup> PR, *US – Imports of Tuna and Tuna Products*, [4.8].

<sup>112</sup> ABR; *Brazil – Retreaded Tyres*, [239].

<sup>113</sup> ABR, *US – Gasoline*, P. 25.

<sup>114</sup> *Ibid.*, P. 25.

**8. Request for findings**

Considering the above, Coruscant requests the Panel to find:

1. That the provision of land by Investrix to Desertix does not constitute a specific subsidy within the meaning of SCM Art. 1.
2. That the provision of land by Investrix to Desertix is consistent with SCM Art. 3.1 (a).
3. That the loan from Zurix Bank to Desertix does not constitute a specific subsidy within the meaning of SCM Art. 1.
4. That the loan from Zurix Bank to Desertix does not cause serious prejudice to the interests of Coruscant within the meaning of SCM Art. 5 (c) and GATT Art. XVI:1.
5. That the non-renewal of permits, the export tax and the export registration does not constitute an unwritten “overarching” measure and does not systematically restrict the exports of neodymium contrary to GATT Art. XI:1.
6. That the unwritten “overarching” measure is justified pursuant to GATT Art. XX (b).
7. That the unwritten “overarching” measure is justified pursuant to GATT Art. XX (g).