ALDERAAN – MEASURES CONCERNING PERMANENT MAGNET GENERATORS FOR WINDMILLS

FOR THE 20TH EDITION OF THE JOHN H. JACKSON MOOT COURT COMPETITION

BENCH MEMORANDUM

Victor Crochet
Associate, Van Bael & Bellis; PhD student, Cambridge University

Marcus Gustafsson
Member of the Legal Service, European Commission

The information and views set out in this text are those of the authors and do not reflect the official opinion of the European Commission or that of Van Bael & Bellis.

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This memorandum is designed to provide background information and guidance to those serving as panelists for the written submissions and/or the Regional or Final Oral Rounds. The memorandum highlights existing case law or theories on the relevant provisions as well as the expected arguments of each party. It is not meant to provide a definitive answer to any of the legal questions posed.

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ABBREVIATIONS USED IN THIS BENCH MEMORANDUM

Abbreviation	Description
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
GATT 1994	General Agreement on Tariffs and Trade 1994
ILA	Agreement on Import Licensing Procedures
MOU	Memorandum of Understanding
PMGs	Permanent magnet generators
SCM Agreement	Agreement on Subsidies and Countervailing Measures
US	United States of America
VCLT	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WHO	World Health Organization
WTO	World Trade Organization

TIMELINE OF THE DISPUTE

Date	Event
2015	WHO report regarding the danger of neodymium mining
June 2016	Ministry report regarding the danger of neodymium mining
July 2016	A Green Hope Strategy
September 2017	Registration of exports of neodymium and enactment of export tax
December 2017	Invention of the SaberLite PMG
January 2018	Start of non-renewal of mining permits
June 2018	Memorandum of Understanding between Alderaan and Tatooine
September 2018	Entry into force of export tax on neodymium
January 2019	Incorporation of Desertix

March 2019	Land purchase by Desertix from Investerix
March 2019	Loan from Zurix Bank to Desertix
January 2020	Commercialisation of SaberLite
March 2020	Ventix Generatix breaks off negotiations with Magnetix

1 FACTUAL ASPECTS

1.1. The case focuses on the rivalry of two WTO Members home to the world's largest producers of permanent magnet generators (PMGs), used in windmills to generate electricity from the rotation of the blades. The complainant, *Coruscant*, home to producer *Magnetix*, has brought an action against *Alderaan*, home to *Special Electrix.* Alderaan also boasts the majority of the world's *neodymium* reserves. Neodymium is a key input in PMGs, but there is evidence that neodymium extraction is hazardous to human health and the environment. Alderaan has therefore encouraged its domestic industry to move away from neodymium extraction and has implemented both a neodymium export tax and an export registration requirement.

1.2. Special Electrix recently discovered that it could replace neodymium with *kyber*, a less hazardous and more efficient material. Ninety-five percent of the world reserves of kyber are located in *Tatooine*, a least-developed country Member of the WTO. Alderaan therefore negotiated the creation of the *Jundland Special Development Zone* in Tatooine to support the production of kyber PMGs by Special Electrix's Tatooine subsidiary, *Desertix*. The Jundland Special Development Zone is owned and operated by Alderaan's state-owned land development corporation *Investerix*.

1.3. Given that Desertix has purchased land from Investerix, Coruscant is alleging that the **land sale is a subsidy for Desertix's PMG production**. Moreover, because Desertix undertakes to supply half of its PMGs to a windmill producer in Alderaan, the subsidy is allegedly export-contingent. However, since Desertix is located in Tatooine, Alderaan has responded that such "cross-border subsidies" do not fall within the scope of the SCM Agreement.

1.4. In addition, **Zurix Bank, a private bank located in Alderaan, has provided a loan to Desertix**. Coruscant considers that Zurix Bank is entrusted and directed by Alderaan, and therefore that the loan to Desertix is a subsidy. Coruscant also complains that Magnetix, which still produces neodymium PMGs, recently lost a major contract to Desertix to supply PMGs to a windmill producer in *Naboo*. Coruscant therefore claims that the loan has resulted in lost sales and caused it serious prejudice.

1.5. Finally, Alderaan has begun to refuse to renew the mining licenses of most of its neodymium mines for health and environmental reasons. This has led to a global shortage of neodymium and a price spike. Coruscant is alleging that this refusal, together with the export tax and registration, constitutes a **"single overarching measure" that "systematically restricts exports"**.

2 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

2.1. Coruscant submitted the following claims in a request for the establishment of a WTO panel:

- Coruscant considers that the provision of land by Investerix to Desertix constitutes a specific subsidy within the meaning of Article 1 of the SCM Agreement, and that it is inconsistent with Article 3.1(a) of the SCM Agreement because it is contingent in fact upon the export of the SaberLite PMGs;

- Coruscant considers that the loan from Zurix Bank to Desertix constitutes a specific subsidy within the meaning of Article 1 of the SCM Agreement and that it causes serious prejudice to the interests of Coruscant within the meaning of Article 5(c) of the SCM Agreement and Article XVI:1 of the GATT 1994, as it has resulted in lost sales of PMGs in the market of Naboo within the meaning of Article 6.3(c) of the SCM Agreement;

- Coruscant considers that the Government of Alderaan's non-renewal of the mining permits and refusal to grant new mining permits to neodymium mining firms, together with the export tax on neodymium and export registration requirement, constitute an overarching measure that systematically restricts exports of neodymium contrary to Article XI:1 of the GATT 1994.

2.2. Alderaan requests that the Panel reject Coruscant's claims in this dispute in their entirety.

3 SCM AGREEMENT AND ARTICLE XVI OF THE GATT 1994

3.1 The issue of cross-border subsidies

3.1.1 Relevance of the issue

3.1. One of the core issues of this case is how to treat cross-border subsidies (i.e., subsidies granted by the government of one WTO Member to a recipient located in the territory of another WTO Member) under the SCM Agreement. This issue has not been addressed by prior WTO panels or the Appellate Body. The cross-border element of the subsidies raises the question whether these subsidies fall within the definition of "a subsidy" under Article 1.1 of the SCM Agreement. If they do, the question then arises if cross-border subsidies can be found to be specific within the meaning of Article 2 of the SCM Agreement.

3.2. Students may decide to address these issues as a separate matter before turning to the specific claims. They may also decide to address this issue under each claim separately. As there is no case law on this issue, students are encouraged to be creative and should not be penalized for not addressing all the points discussed below as long as their arguments are coherent.

3.1.2 Relevant legal provisions

3.3. Article 1.1 of the SCM Agreement provides as follows:

For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government") […]

and

(b) a benefit is thereby conferred.

3.4. Article 1.2 of the SCM Agreement states:

A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

3.5. Article 2(1) of the SCM Agreement provides:

In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply: […]

3.1.3 Legal issues

3.1.3.1 Cross-border subsidies and the definition of "a subsidy" under Article 1.1 of the SCM Agreement

3.6. The first question that arises with regard to cross-border subsidies is whether such subsidies fall within the definition of "subsidies" in Article 1.1 of the SCM Agreement.

3.7. Article 1.1 of the SCM Agreement provides that "a subsidy is deemed to exist" if "there is a financial contribution by a government or any public body *within the territory of a Member* (referred to in this Agreement as 'government') […] and a benefit is thereby conferred". Students could thus discuss whether a financial contribution by a government to an entity which is *not* located within the territory of the subsidizing Member, is a subsidy within the meaning of this provision.

3.9. The panel in *US – Anti-Dumping and Countervailing Duties (China)* held that the qualifier term "**within the territory of a Member**" in Article 1.1(a)(1) refers to "government or any public body", without discussing whether it could alternatively be understood to concern the term "financial contribution". The placement of the parenthetical "(referred to in this Agreement as 'government')" after, rather than before, the phrase "within the territory of a Member" could be read to support the conclusion that "within the territory of a Member" is meant to qualify the location of the "government" conferring the financial contribution rather than the location of the financial contribution. On this understanding, it can be argued that Article 1.1(a)(1) does not

indicate where the recipient of the financial contribution must be located.[1] This was also the understanding of the parties in the *Brazil – Aircraft* dispute, where Brazil and Canada agreed that export financing payments were a financial contribution by the Brazilian Government to foreign aircraft buyers, which then conferred a benefit onto Brazilian aircraft producers.[2] Thus, it can be argued that a financial contribution to an entity located outside the territory of the subsidizing Member constitutes a financial contribution by a government within the territory of a Member under Article 1.1 of the SCM Agreement.

3.10. Horlick, however, recalls that the term "within the territory" in Article 1.1 of the SCM Agreement was added following the US negotiators' concerns arising from cases filed in the US in the 1980s, where complainants claimed that World Bank loans to Brazil, war reparations to Korea by Japan, the Marshall Plan aid, or aid to West Berlin from West Germany should be countervailed. He explains that the negotiators added this term to avoid these forms of support being treated as subsidies.[3] While students could rely on this statement, they should be mindful of the hierarchy of interpretative methodology set forth in Articles 31 and 32 of the VCLT and of the case law discussed above. In particular, preparatory work is only a supplementary means of interpretation pursuant to Article 32 VCLT which *may* be taken into account by the treaty interpreter, while Article 31 VCLT sets out the principal means of treaty interpretation which must be considered in all cases (i.e., ordinary meaning, context of the provision and object/purpose of the treaty).

3.11. With regard to whether a benefit is thereby conferred, Article 1.1(a)(2) of the SCM Agreement simply indicates that "a benefit is thereby conferred". As such, it does not seem to impose any territorial limitation regarding the location of the recipient of the benefit.

3.12. Several other provisions of the SCM Agreement may be of assistance to students in arguing that cross-border subsidies do not fall under the definition of "a subsidy" under Article 1.1 of the SCM Agreement as **relevant context** within the meaning of Article 31 of the VCLT. First, as discussed further in the next subsection, Article 2.1 provides that a specific subsidy is a subsidy granted to "an enterprise or industry or group of enterprises or […] within the jurisdiction of the granting authority". Second, footnote 63 to paragraph 2 of Annex IV to the SCM Agreement, which concerns the calculation of the amount of the subsidy to the recipient with regard to actionable subsidies, indicates that "[t]he recipient firm is a firm in the territory of the subsidizing Member". Third, Article 25.2 of the SCM Agreement provides that WTO Members must only notify subsidies which are specific and "granted or maintained within their territories". Finally, under Part V of the SCM Agreement, which concerns countervailing measures, procedural rights are only granted to the government of the exporting country. Thus, if the exporting government and the subsidizing government were not the same, the subsidizing government would not be entitled to any procedural rights.[4]

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1 Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para 8.67.

2 See Panel Report, *Brazil – Aircraft*, paras. 2.1-2.6 and 4.19-4.20 referring to the parties' agreement on this issue.

3 Gary Horlick, An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures, 8(9) Global Trade and Customs Journal (2013), 297.

4 See Articles 13 and 18 of the SCM Agreement requiring the investigating authority to invite for consultations the Member "the products of which may be subject to such investigation" and envisaging the possibility that the "government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects".

3.13. Students may also rely on the **object and purpose** of the SCM Agreement within the meaning of Article 31 of the VCLT to support their arguments. As first clarified by the panel in *Brazil – Aircraft*, "the object and purpose of the SCM Agreement is to impose multilateral disciplines on subsidies which distort international trade",[5] even though not every government action or intervention should be considered as a subsidy that may distort trade.[6] In this sense, students could argue that the disciplines of the SCM Agreement should not be allowed to be circumvented simply because the *recipient* of the subsidy is not located in the territory of the subsidizing Member.

3.14. It follows from the above that the question whether cross-border subsidies fall under the definition of a subsidy in Article 1.1 of the SCM Agreement is not clear-cut. The ordinary meaning of the provision, the relevant context of that provision and the object and purpose of the SCM Agreement do not all point in the same direction.

3.1.3.2 Cross-border subsidies and specificity

3.15. The second question that may be discussed with regard to cross-border subsidies in this case (in particular with regard to the second measure at issue) is whether cross-border subsidies can meet the requirement of specificity to be subject to a WTO challenge under Article 1.2 of the SCM Agreement. As further discussed below, for a subsidy to be challengeable before the WTO, the subsidy must either be specific within the meaning of Articles 2.1 and 2.2 of the SCM Agreement, or be a prohibited subsidy within the meaning of Article 3.[7]

3.16. Article 2.1 provides that a "subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry […] within the jurisdiction of the granting authority" while Article 2.2 provides that "[a] subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific".

3.17. Students must address the meaning of the terms "**jurisdiction of the granting authority**", which according to the Appellate Body, requires an analysis of both the "granting authority" and its "jurisdiction" in a conjunctive manner.[8]

3.18. The use of the term "**granting authority**" in Article 2, instead of "government" as defined in Article 1, suggests that "the granting authority" might differ from the central government of the subsidizing Member.[9] "Authority" is defined as "a person or (esp.) body having political or administrative power and control in a particular sphere; the body or bodies held responsible for enforcing law and order, providing public services, etc., in a country or region".[10] However, not all financial contributions are performed by bodies which hold the power to regulate.[11] In situations where a body that does not have regulatory powers grants a subsidy, it is necessary

5 Panel Report, *Brazil – Aircraft*, para. 7.26.
6 Panel Report, *US - Export Restraints*, paras. 8.62-8.63.
7 SCM Agreement, Article 2.3.
8 Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.168.
9 Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, paras. 750-756 and fn. 1570; Panel Report, *US — Anti-Dumping and Countervailing Duties (China)*, para. 7.247.
10 Oxford English Dictionary, definition of "Authority" https://www.oed.com/start;jsessionid=CD3EB7B59F69FD2A97FD60813BD3FF29?authRejection=true&url=%2Fview%2FEntry%2F13349%3FredirectedFrom%3Dauthority#eid.
11 Appellate Body Report, *US — Carbon Steel (India)*, para. 4.17.

to assess which governmental authority is behind that body to determine the granting authority for the purposes of Article 2. Where a private body is entrusted or directed, it will generally be the government or public body that gives responsibility to or exercises its authority over this private body.[12]

3.19. The traditional understanding of **State jurisdiction** is, as explained in the *Lotus* case, "certainly territorial; it cannot be exercised by a State outside its territory".[13] This reading seems to be in line with the findings of the Panel in *US – Countervailing Measures (China)* which stated that "the ordinary meaning and context of the chapeau, as well as the negotiating history of Article 2, suggest that the reference to 'within the jurisdiction of the granting authority' firstly indicates that specificity may only exist within the territory of a Member".[14] Similarly, in the same case, the Appellate Body stated that "[i]n situations where the granting authority is the central government, the scope of the jurisdiction is usually the entire territory of the relevant Member. Conversely, in a situation where the granting authority is a regional or local government, the scope of the jurisdiction is usually limited to the territory of that regional or local government".[15] This reading also seems to reflect the meaning intended by the drafters of the SCM Agreement.[16]

3.20. Another potential interpretation of "jurisdiction" under Article 2 of the SCM Agreement would be to interpret it as **the limit to the granting authority's power in light of the financial contribution granted**. According to the Appellate Body, the assessment of "jurisdiction" and "granting authority" involves a holistic analysis and must be done in a conjunctive manner with the determination of the financial contribution at issue as these are interlinked.[17] In *US – FSC (Article 21.5 DSU)*, the US argued that "[i]n the case of an alleged subsidy taking the form of a tax measure, it would seem appropriate to interpret the term 'jurisdiction' as referring to the taxing jurisdiction of the Member in question".[18] This would also be in line with the rationale of Article 2.1 which aims to ascertain whether access to the subsidy in question is limited to a particular class of eligible recipients.[19] In this sense, students could argue that the concept of jurisdiction will depend on the limits of the granting authority's ability to provide the financial contribution.

3.21. The concept of State jurisdiction has significantly evolved since the *Lotus* case. In **international investment arbitration**,[20] **anti-bribery rules**,[21] and **corporate responsibility**,[22] it is now commonplace to accept that a State may have jurisdiction over companies located abroad whose shareholders have this State's nationality. Similarly, a State may have jurisdiction over part of another State's territory if that State has effectively acquired

12 Appellate Body Report, *US — Countervailing Duty Investigation on DRAMs*, para. 116.
13 S.S. "Lotus", France v. Turkey, Judgment, (1927), para. 45, PCIJ Series A no 10, ICGJ 248 (PCIJ 1927), 7th September 1927.
14 Panel Report, *US - Countervailing Measures (China)*, para. 7.247.
15 Appellate Body Report, *US - Countervailing Measures (China)*, para. 4.165. See also Panel Report, *US – Coated Paper (Indonesia)*, para. 7.148.
16 Trade Negotiations Committee: Thirty-Third Meeting, para. 25, MTN.TNC/37 (29 November 1993).
17 Appellate Body Report, *US - Countervailing Measures (China)*, para. 4.167.
18 Panel Report, *US – FSC (Article 21.5 DSU)*, Annex F-3, para. 108.
19 Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 756.
20 For example, Franz Sedelmayer v. The Russian Federation, SCC Award, 7 July 1998.
21 The US Securities and Exchange Commission v. Siemens Aktiengesellschaft, 1:08-cv-02167 (DDC 15 December 2008).
22 Koibel v. Shell, NL:RBDHA:2019:4233, District Court of The Hague (01 May 2019).

the right to make its laws applicable and to enforce them within the other State's territory.[23] In this sense, students are encouraged to make creative arguments regarding jurisdiction and how it could be considered as other than purely territorial.

3.1.3.3 Other issues relating to cross-border subsidies

3.22. Less important issues arising throughout the case with regard to cross-border subsidies are introduced here and further discussed in relation to each claim.

3.23. With regard to the first measure, the provision of land by Investerix to Desertix, the question arises as to whether a cross-border subsidy **contingent upon export performance within the meaning of Article 3.1(a)** of the SCM Agreement may be exempted from prohibition if they are granted to an entity established in a **least-developed country** Member of the WTO in accordance with Article 27.2 and Annex VII of the SCM Agreement. This is further discussed in Section **Error! Reference source not found.**below.

3.24. With regard to the second measure, the loan from Zurix Bank to Desertix, the question of which market is the **relevant market** for the establishment of the **benchmark** for the benefit analysis under Article 1.2 and Article 14(b) of the SCM Agreement arises: is it the market where the entity is established or the market of the bank providing the loan? This question is further discussed in Section 3.3.3.3 below.

3.1.3.4 Arguments of the parties

3.25. **Coruscant** may argue that cross-border subsidies fall under the definition of "a subsidy" within the meaning of Article 1.1 of the SCM Agreement as the term "within the territory of a Member" in Article 1.1(a) solely qualifies the term "a government or any public body", so that a financial contribution granted to an entity in a third country meets the definition of "a subsidy".

3.26. Coruscant may add that cross-border subsidies can be found to have been granted to an entity "within the jurisdiction of the granting authority" under Articles 2.1 and 2.2 of the SCM Agreement and thus be considered specific. In this regard, Coruscant could argue that "jurisdiction" must not be understood as being strictly "territorial" so that the granting authority's jurisdiction may be considered to extend outside a Member's territory. Coruscant could do so by either arguing that jurisdiction extends through ownership of a company (ownership of Desertix) or through acquired jurisdictional power over another Member's territory (the Jundland Development Zone). Coruscant could also do so by arguing that the concept of jurisdiction should be seen in light of the financial contribution and the granting authority, so that it is the limit of *where the granting authority could provide* the financial contribution which should limit the concept of jurisdiction under Articles 2.1 and 2.2 of the SCM Agreement.

3.27. Coruscant should argue that cross-border subsidies which are found to be prohibited subsidies under Article 3 of the SCM Agreement are deemed to be specific by virtue of Article

[23] For examples of scenarios where one State was found to have jurisdiction over another State's territory, please see Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland concerning a Scottish trial in the Netherlands, 38(4) ILM 926-936 (1999); Right of Passage over Indian Territory, Portugal v. India, Judgment, Preliminary Objections, [1957] ICJ Rep 125, ICGJ 173 (ICJ 1957), 26th November 1957.

2.3 of the SCM Agreement so that there is no need to demonstrate that they are granted to an entity "within the jurisdiction of the granting authority".

3.28. **Alderaan** may respond that cross-border subsidies do not fall under the definition of "a subsidy" within the meaning of Article 1.1 of the SCM Agreement as the phrase "within the territory of a Member" in Article 1.1(a) qualifies both the financial contribution element as well as the government element. Although this line of argument should address the tension with the panel's reasoning in *US – Anti-Dumping and Countervailing Duties (China),*[24] Alderaan can rely on several provisions of the SCM Agreement such as Articles 2.1 and 25.2 as well as footnote 63 to paragraph 2 of Annex IV, which indicates that the recipient of the subsidy must be within the territory of the subsidizing Member, as relevant context to support this argument.

3.29. Alderaan may add that cross-border subsidies which are not prohibited subsidies within the meaning of Article 3 of the SCM Agreement cannot be specific as they are not granted to an entity "within the jurisdiction of the granting authority" under Articles 2.1 and 2.2. Alderaan should argue that the concept of "jurisdiction" is strictly territorial.

Suggested Questions to the Parties	
Coruscant	**Alderaan**
Does the term "within the territory of a Member" in Article 1.1(a) solely qualify the term "a government or any public body" and not the term "a financial contribution"? If so, why?	How can other provisions of the SCM Agreement help in interpreting whether the term "within the territory of a Member" in Article 1.1(a) qualifies the term "a government or any public body" as well as the term "a financial contribution"?
How has the concept of "jurisdiction of the granting authority" in Article 2 of the SCM Agreement been interpreted by previous panels and the Appellate Body?	How is jurisdiction traditionally defined under public international law?
Must it be demonstrated that prohibited export subsidies under Article 3 of the SCM Agreement are granted to enterprises "within the jurisdiction of the granting authority" within the meaning of Article 2?	Is the concept of jurisdiction under public international law still strictly territorial? If not, on what basis may jurisdiction be extended extraterritorially?

[24] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para 8.67.

3.2 Whether the provision of land by Investerix to Desertix constitutes a specific subsidy contingent in fact upon the export of SaberLite PMGs inconsistent with Article 3.1(a) of the SCM Agreement

3.2.1 Introduction

3.30. The first measure being challenged in this case is the provision of land by Investerix to Desertix. Coruscant claims that the provision of land by Investerix to Desertix constitutes a subsidy within the meaning of Article 1.1 of the SCM Agreement which is contingent upon export performance under Article 3.1(a).

3.31. The complainant has a strong case to argue that the provision of land by Investerix to Desertix is a "financial contribution" by "a public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement. Thus, the students are not expected to devote much time to elaborating on the elements of "financial contribution" and "public body". This claim is instead meant to encourage students to delve into the concept of "benefit". Students may also spend some time arguing whether the provision of land by Investerix to Desertix is an export contingent subsidy on the basis of the land purchase contract between Investerix and Desertix in Annex 3 and other relevant facts. Students may also consider whether the provision of land falls outside the purview of Article 3.1(a) since Tatooine, where Desertix is located, is a least-developed country Member of the WTO.

3.2.2 Measure at issue

3.32. The first measure at issue consists of the sale of a parcel of land by Investerix to Desertix.

3.33. Investerix is the largest industrial land developer in Alderaan. It is a fully State-owned enterprise established by Alderaan's Ministry of Mining and Industrial Development and has close links with the government of Alderaan (Case, fn. 6). The parcel of land was sold at a price of USD 215 per square meter (Case, Annex 3, clause 1). As part of the contract, Desertix agreed to endeavour to supply half of the PMGs produced every six months to Windmix's windmill production facilities located in Alderaan (Case, Annex 3, clause 4).

3.2.3 Does the provision of land constitute a subsidy within the meaning of Article 1.1 of the SCM Agreement?

3.2.3.1 Relevant legal provisions

3.34. Article 1.1 of the SCM Agreement provides as follows:

For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where: […]

(iii) a government provides goods or services other than general infrastructure, or purchases goods; […]

and

(b) a benefit is thereby conferred.

3.35. With regard to the provision of land by Investerix to Desertix, the complainant must thus demonstrate that: (i) there is a financial contribution in the form of the provision of land; (ii) Investerix is a public body; and (iii) a benefit is conferred on Desertix.

3.2.3.2 Financial contribution

3.36. Article 1.1(a)(1)(iii) covers financial contributions where "a government **provides goods or services** other than general infrastructure". As explained by the Appellate Body, this does not specify whether the goods are provided gratuitously or in exchange for money or other goods or services. Hence, the provision of goods or services may include transactions in which the recipient is not required to make any form of payment, as well as transactions in which the recipient pays for the goods.[25]

3.37. Investerix sold a parcel of land to Desertix in March 2019 (Case, para. 10 and Annex 3).

3.38. It is relatively clear that the provision of land from Investerix to Desertix constitutes a financial contribution in the form of a provision of goods other than general infrastructure. While the complainant still needs to establish that this requirement is met, the respondent is not expected to contest this point and should not be penalized for not doing so.

3.2.3.3 By a public body

3.39. Article 1.1(a)(1) of the SCM Agreement includes under the definition of "a subsidy" financial contributions granted by governments as well as public bodies. As explained by the Appellate Body, a "public body within the meaning of Article 1.1.(a)(1) of the SCM Agreement must be an entity that possesses, exercises or is **vested with governmental authority**".[26] The Appellate Body added that this determination may be based on different evidence such as state ownership,[27] an express statutory delegation of governmental authority,[28] or a government's exercise of meaningful control over an entity and its conduct.[29]

3.40. Investerix is a fully State-owned enterprise established by Alderaan's Ministry of Mining and Industrial Development and members of that ministry form 80% of its board of directors. It develops and operates most industrial parks throughout Alderaan and holds the ownership of the land within these parks. It must report yearly to the Alderaan government as regards the status and development of Alderaan's industrial parks (Case, fn. 6). Investerix also agreed to sell a parcel of land in full ownership to Desertix after consulting with the government of Alderaan in March 2019 (Case, para. 10).

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25 Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 618.
26 Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.
27 Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 310.
28 Appellate Body Report, *US - Carbon Steel (India)*, para. 4.9; *US – Anti-Dumping and Countervailing Duties (China)*, para. 318. See also Panel Report, *US – Carbon Steel (India)*, para. 7.20.
29 Appellate Body Report, *US - Carbon Steel (India)*, para. 4.29.

3.41. Based on these facts, Coruscant has a strong claim that Investerix possesses, exercises or is vested with governmental authority, so that it qualifies as a public body. Alderaan should not be penalized for not contesting this point.

3.2.3.4 Which confers a benefit

3.2.3.4.1 Summary of relevant jurisprudence

3.42. Article 1.1(b) of the SCM Agreement provides that for a financial contribution by a public body to constitute a subsidy, it must confer a "benefit".

3.43. The Appellate Body has determined that the assessment of a "benefit" involves a comparison with the marketplace. Such an assessment is intended to identify whether the recipient of the financial contribution is "**better off**" than it would otherwise have been, absent the financial contribution.[30] This means that a "benefit" is a relative notion so that a **benchmark** for determining whether the recipient is better off thanks to the financial contribution must be established.[31] This benchmark must then be compared to the terms of the financial contribution to establish whether a benefit exists.[32] It is for the complainant to identify a suitable benchmark in making a *prima facie* case.[33]

3.44. Article 14 of the SCM Agreement provides relevant context to the benefit analysis.[34] In particular, with regard to the provision of goods, **Article 14(d)** of the SCM Agreement states that:

the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

3.45. Thus, Article 14(d) of the SCM Agreement provides that prevailing market conditions in the country of provision is the standard for assessing the adequacy of remuneration.[35] The last sentence of Article 14(d) sets out an illustrative list of prevailing market conditions which may be relevant in undertaking the necessary comparison between the terms on which the good was provided by the government and the benchmark used by the authority, "including price, quality, availability, marketability, transportation and other conditions of purchase or sale" for the goods in question.[36] The "prevailing market conditions" do not refer to a theoretical market free of government interference (i.e., an undistorted or perfectly competitive market), they refer to the existing market conditions.[37] However, the Panel in *US – Softwood Lumber IV* explained that it may not be appropriate to determine whether a particular financial

30 Appellate Body Report, *EC and Certain Member States – Large Civil Aircraft*, para. 873.
31 Panel Report, *EC - Countervailing Measures on DRAM Chips*, para. 7.173.
32 Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, para. 4.147.
33 Appellate Body Report, *Canada – Renewable Energy*, para. 5.216.
34 Ibid., para. 5.130.
35 Panel Report, *US – Coated Paper (Indonesia)*, para. 7.32.
36 Panel Report, *US – Carbon Steel (India)*, para. 7.110.
37 Panel Report, *US – Softwood Lumber III*, para. 7.50.

contribution conferred a benefit by comparing the terms of that financial contribution with those of other financial contributions by a government.[38]

3.46. In case the market conditions are the same throughout the country of provision, a benchmark from anywhere in that country can be used. However, when it can be demonstrated that the market conditions differ throughout the country of provision, a **benchmark from a different region** than that of provision should be adjusted to reflect these differences.[39]

3.2.3.4.2 Arguments of the parties

3.47. There are several layers of arguments the students may put forward. These are discussed in order of difficulty below. Students attempting to argue the more difficult points should be accorded higher grades.

3.48. In order to make a *prima facie* case of benefit, **Coruscant** could first claim that Investerix sold the parcel of land in full ownership to Desertix while it does not agree to do so with regard to other investors (Case, para. 10). As such, there would be a benefit insofar as Desertix received an advantage over other investors similarly placed in the market. **Alderaan** could respond that land can be purchased in full ownership in other industrial zones on Tatooine, so that there is no benefit if the relevant market is defined as the land market in Tatooine.[40] Under this line of argument, students are expected to debate which is the relevant market to determine the benefit in this case (i.e., the Jundland Special Development Zone's land market or the Tatooine land market).

3.49. **Coruscant** could also argue that there is a benefit because Investerix was able to purchase land in full ownership at a price lower (USD 215 per m^2)[41] than that available in the Mos Eisley Industrial Zone (USD 235 per m^2).[42] Coruscant should explain why prices in another industrial zone constitute an appropriate benchmark. Coruscant could argue that there are no regional differences in market conditions or could argue that although there are some differences (for example, the Mos Eisley Industrial Zone has better transport access as it is near a large port), these are offset by the fact that the Jundland Special Development Zone is located closer to the supply of raw materials needed by the firms in the zone.

3.50. In response, **Alderaan** is expected to argue that prices in the Mos Eisley Industrial Zone do not constitute an adequate benchmark as there are regional differences in market conditions so that if prices in that zone are used as a benchmark, they should be adjusted downwards to reflect these differences (better connectivity, safer conditions, etc.).

3.51. In addition, Alderaan could rebut Coruscant's claim by arguing that the relevant market for the determination of the benefit should be the normal price of land in the Jundland Special Development Zone. Land in this zone is usually sold only as land use rights granted for a period of 75 years for a rent of USD 10 per m^2 per year (Case, para. 9). It is possible to

38 Panel Report, *US – Softwood Lumber IV*, para. 7.55.
39 Panel Report, *US – Softwood Lumber VII*, paras. 7.24-7.28.
40 Case, para. 10.
41 Case, Annex 3.
42 Case, para. 10.

compare the payment of a fixed sum of money with a yearly payment by calculating the present value of the yearly payment taking into account that, due to inflation, the future value of a fixed yearly payment will diminish. A yearly payment of a rent under a land use contract can be simplified as a "perpetuity", i.e., a constant stream of identical cash payments with no end. It is generally acknowledged that the value of the perpetuity of a land use right is equal to the value of the full ownership. The value of a perpetuity is calculated by using the discounted cash flow method, which is a valuation method that determines the profitability of an investment by examining its projected future income or projected cash flow from the investment, and then by discounting that cash flow to arrive at an estimated current value of the investment. In other words, this method values an asset based on projections of how much money it will generate in the future. A discount rate is used to derive the value of the expected future cash flows. For the valuation of real estate investments, such as a land use, the discount rate is commonly the expected annual rate of return of a land investor.[43] The formula to calculate the value of the full ownership of a parcel of land granted as a land use right is thus as follows:[44]

$$\mathrm{PV} = \frac{C}{(1+r)^1} + \frac{C}{(1+r)^2} + \frac{C}{(1+r)^3} \cdots = \frac{C}{r}$$

where:

$\mathrm{PV} = \text{present value}$

$C = \text{cash flow}$

$r = \text{discount rate}$

3.52. In this case, the discount rate can be estimated at 5%[45] as this is the average expected annual profit of a land developer in Tatooine.[46] Hence, a cash flow of USD 10 divided by a discount rate of 5% gives a price of USD 200 per m^2. This is lower than the price paid by Desertix of USD 215 per m^2. Hence there is no resulting benefit as this price is lower by USD 15 per m^2.

3.53. **Coruscant** could potentially rebut this argument by arguing that it is not appropriate to determine whether a particular financial contribution conferred a benefit by comparing the terms of that financial contribution with those of another government financial contribution (given that the land use rights normally sold by Investerix are also a financial contribution by a government).

43 See Investopedia, *How to Use DCF in Real Estate Valuation*, available at https://www.investopedia.com/ask/answers/010715/how-do-you-use-dcf-real-estate-valuation.asp.
44 Ibid.
45 Case, para. 8.
46 Case, fn. 7.

Suggested Questions to the Parties	
Coruscant	**Alderaan**
What types of evidence should be taken into account by the Panel in determining whether Investerix is a public body?	Is the relevant market for the benefit analysis the land market in the Jundland Special Development Zone or in Tatooine as a whole?
Can Article 14(d) of the SCM Agreement be used by the Panel in determining the existence of a benefit under Article 1.2? If so, how?	Should prices in the Mos Eisley Industrial Zone be adjusted to be compared with the purchase of land by Desertix? If so, how?
Can a yearly rent payment for a land use right be compared to a lump sum payment for purchase of land in full ownership?	Can the benchmark to determine whether a benefit exists be defined based on another government financial contribution?

3.2.4 Does the provision of land constitute an export subsidy within the meaning of Article 3.1(a) of the SCM Agreement?

3.2.4.1 Relevant legal provisions

3.54. Article 3.1(a) of the SCM Agreement provides that:

Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact[4], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I

[4] This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

3.55. Hence, in order to demonstrate that the provision of land by Investerix to Desertix constitutes a prohibited export subsidy, Coruscant must demonstrate it is contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance.

3.56. Summary of relevant jurisprudence

3.57. Article 3.1(a) provides that a subsidy is prohibited if it is **contingent**, whether solely or as one of several other conditions, upon **export performance**.[47] Article 3.1(a) thus prohibits subsidies that are conditional upon export performance or are dependent for their existence on export performance.[48] A relationship of conditionality or dependence, namely that the

47 Panel Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 7.1569.
48 Appellate Body Report, *Canada – Aircraft*, para. 166.

granting of a subsidy should be "tied to" the export performance, lies at the "very heart" of the legal standard in Article 3.1(a).[49]

3.58. This standard applies to both ***de jure* and *de facto*** export contingency but the evidence to prove each type of contingency is different.[50] Whereas ***de jure* export contingency** is established on the basis of the terms of the relevant instrument, proof of ***de facto* export contingency** is "a much more difficult task". A 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 legal instrument constituting the measure, even if implicitly.[51] Indeed, for a subsidy to be *de jure* export contingent the underlying legal instrument does not always have to provide *expressis verbis* that the subsidy is available only upon fulfilment of the condition of export performance. Such conditionality can also be derived by necessary implication from the words actually used in the instrument.[52]

3.59. The standard for ***de facto* export contingency** under Article 3.1(a) and footnote 4 is met when the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy.[53] *De facto* export contingency must be inferred from the "total configuration of facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any case".[54] A government's motivation for granting a particular subsidy is relevant when evaluating whether a subsidy has been granted contingent in fact upon export performance.[55] Similarly, the export-orientation of the recipient could be considered as a relevant fact, but could not be the sole fact supporting a finding of export contingency.[56]

3.60. **Article 27.2** of the SCM Agreement further provides that:

The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII

3.61. **Annex VII** then indicates that:

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:

(a) Least-developed countries designated as such by the United Nations which are Members of the WTO.

3.62. In other words, by virtue of these provisions, **least-developed country Members** of the WTO are not subject to the disciplines of Article 3.1(a) of the SCM Agreement.

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49 Ibid., para. 47.
50 Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 1038.
51 Appellate Body Report, *US – FSC*, para. 112.
52 Appellate Body Report, *Canada – Autos*, para. 100.
53 Appellate Body Report, *EC and Certain Member States – Large Civil Aircraft*, para. 1045.
54 Ibid., para. 1038.
55 Panel Report, *EC and Certain Member States – Large Civil Aircraft*, para. 7.675.
56 Panel Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 7.1518.

3.2.4.2 Arguments of the parties

3.63. **Coruscant** could first attempt arguing that the provision of land by Investerix to Desertix is *de jure* export contingent based on Clause 4 of the Land Sale Contract, which provides that "Buyer shall endeavour to supply half of the PMGs produced every six months at its plant in the Development Zone to Windmix's windmill production facilities located in the Kaamos territory of Alderaan" (Annex 3). Indeed, this provision means that Desertix should export half of the PMGs it produces to Alderaan. Alternatively, since the wording of Clause 4 of the Land Sale Contract may not be sufficient to demonstrate *de jure* export contingency, Coruscant could instead argue that the provision of land by Investerix to Desertix is *de facto* export contingent. Coruscant can rely on Clause 4 of the Land Sale Contract as well as other factors such as Mr Jabba's statement (Case, para. 10) or the fact that there is no domestic demand for PMGs in Tatooine.

3.64. **Alderaan** could first contest that the provision of land by Investerix to Desertix is export contingent. Alderaan could point out that Clause 4 of the Land Sale Contract does not contain a binding legal obligation as the term "shall endeavour" is used. Furthermore, Clause 8 of the Land Sale Contract regarding dispute resolution indicates that a matter to be resolved pursuant to Clause 4 cannot be settled before a court. Alternatively, Alderaan could argue that Article 3 of the SCM Agreement does not cover subsidies granted to an entity abroad which are conditioned upon the exportation of goods back to the subsidizing Member. Alderaan could base its argument on the context of that provision, namely that prohibited subsidies are more prone to cause adverse effects within the meaning of Articles 5 and 6 of the SCM Agreement. This is because they are likely to lead to increased exports from the subsidizing WTO Member to third countries, thereby causing adverse effects to these countries' industries.[57] Articles 5 and 6 also reflect the object and purpose of the SCM Agreement to discipline, not all subsidies, but only those "that distort trade".[58] Finally, Alderaan could attempt to argue that, since Tatooine is a least-developed country Member and the subsidy is granted to an entity in Tatooine, the disciplines of Article 3.1(a) of the SCM Agreement do not apply by virtue of Article 27.2(a) and Annex VII of the SCM Agreement. In that case, students are expected to argue that Article 27.2(a) applies not only when a least-developed country Member *grants* a subsidy but also when the recipient of the subsidy is located in a least-developed country Member.

57 Decision by the Arbitrator, *US – FSC (Article 22.6 DSU)*, para. 5.35.
58 Panel Report, *US – Export Restraints*, para. 8.63.

Suggested Questions to the Parties	
Coruscant	**Alderaan**
What is the difference between *de jure* and *de facto* export contingency?	How should Clause 4 of the Land Sales Contract be understood?
What factors can be taken into account in establishing *de facto* export contingency?	Is there domestic demand for PMGs in Tatooine? If not, what implications should the Panel draw from this fact?
What is the value of Mr. Jabba's statement in establishing *de facto* export contingency? (Case, para. 10)	Does Article 27.2(a) of the SCM Agreement apply not only when a least-developed country Member *grants* a subsidy? Or also when the *recipient* of the subsidy is *located* in a least-developed country Member?

3.3 Whether the loan from Zurix Bank to Desertix constitutes a specific subsidy that causes serious prejudice to the interests of Coruscant inconsistent with Article 5(c) of the SCM Agreement and Article XVI:1 of the GATT 1994

3.3.1 Introduction

3.65. The second measure being challenged in this case is the loan by Zurix Bank to Desertix. Coruscant's claim can be divided into three components. Coruscant claims that the loan by Zurix Bank to Desertix: (i) constitutes a subsidy within the meaning of Article 1.1 of the SCM Agreement; (ii) which is specific; and (iii) causes serious prejudice to the interests of Coruscant inconsistent with Article 5(c) of the SCM Agreement and Article XVI:1 of the GATT 1994 as it has resulted in lost sales of PMGs in the market of Naboo within the meaning of Article 6.3(c) of the SCM Agreement.

3.66. With regard to the first element, the complainant has a strong case to argue that the provision of Zurix Bank's loan to Desertix is a "financial contribution" within the meaning of Article 1.1(a)(1) of the SCM Agreement. Thus, students are not expected to discuss the element of "financial contribution" in great detail. This claim is instead meant to encourage students to explore the concept of a "private body entrusted or directed" and to encourage discussion as to whether Zurix Bank is acting on behalf of the Government of Alderaan. Students may also spend some time discussing whether the loan by Zurix Bank confers a benefit, in particular whether the relevant market to establish the benefit benchmark is that of Alderaan or Tatooine.

3.67. With regard to establishing that the loan from Zurix Bank constitutes an actionable subsidy, students will have to discuss whether the loan can be found to be specific insofar as Desertix is not located in Alderaan. In this regard, it could be argued that Desertix is not "within the jurisdiction of the granting authority" under Article 2 of the SCM Agreement.

3.68. While students are invited to discuss the issue of serious prejudice resulting from lost sales of PMGs in the market of Naboo, this should not be the main point of discussion as few facts are provided on this issue.

3.3.2 Measure at issue

3.69. As mentioned, the second measure at issue consists of a loan provided by Zurix Bank to Desertix.

3.70. Zurix Bank is a private bank established in Alderaan. While Zurix Bank is run on a commercial basis, all banks in Alderaan must have "regard to the strategic policy priorities established by the Government of Alderaan". Banks must submit yearly reports to the Alderaan Finance Ministry as to how investments made during the year advanced Alderaan's strategic policy priorities. Failure to submit such reports may lead to fines (Case, para. 12). Zurix Bank granted the loan with an interest rate of 4% per annum, which is higher than average long-term interest rates available in Alderaan (2%), but lower than those available in Tatooine (10%) (see Case, Annex 4).

3.71. In March 2020, Ventix Generatix, a windmill manufacturer, broke off negotiations with Magnetix, a PMG manufacturer established in Coruscant, to opt for a rival offer from Desertix. Desertix had offered to lower the price of its SaberLite PMGs so as to match the price of Magnetix's PMGs (Case, para. 23).

3.3.3 Does the loan from Zurix Bank constitute a subsidy within the meaning of Article 1.1 of the SCM Agreement?

3.3.3.1 Relevant legal provisions

3.72. Pursuant to Article 1.1 of the SCM Agreement, "a subsidy shall be deemed to exist if […] there is a financial contribution by a government or any public body within the territory of a Member" and "a benefit is thereby conferred".

3.73. Pursuant to Article 1.1(a)(1)(i) of the SCM Agreement, a financial contribution exists, *inter alia*, where "a government practice involves a direct transfer of funds (e.g., grants, loans, and equity infusion)".

3.74. Furthermore, pursuant to Article 1.1(a)(1)(iv) of the SCM Agreement, a financial contribution exists where "a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in [subparagraphs] (i) to (iii) [of Article 1.1(a)(1)] which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments".

3.75. Accordingly, to demonstrate that the loan from Zurix Bank to Desertix constitutes a subsidy, it has to be established that: (i) the loan represents a financial contribution within the meaning of Article 1.1(a); and (ii) that a benefit is thereby conferred under Article 1.1(b) of the SCM Agreement.

3.3.3.2 Financial contribution by a private body entrusted or directed by a government

3.3.3.2.1 Summary of relevant jurisprudence

3.76. In the present case, Coruscant should seek to establish the existence of a financial contribution under subparagraphs (i) and (iv) of Article 1.1(a)(1) of the SCM Agreement. The structure of Article 1.1(a)(1) does not preclude a transaction from being covered by more than one subparagraph of that provision.[59]

3.77. Paragraph (iv) of Article 1.1(a)(1) covers situations where a private body is being used as a proxy by the government to carry out one of the types of functions listed in paragraphs (i) through (iii) of that provision. The terms “entrusts” and “directs” in paragraph (iv) identify the instances where seemingly private conduct may be attributable to a government for the purposes of determining whether there has been a financial contribution within the meaning of the SCM Agreement.[60]

3.3.3.2.2 Arguments of the parties

3.78. **Coruscant** should argue that a ten-year loan of USD 93 million granted by Zurix Bank to Desertix constitutes a financial contribution in the form of a direct transfer of funds under Article 1.1(a)(1). Furthermore, since Zurix Bank is fully owned by private investors (Case, footnote 8), Coruscant should argue that Zurix Bank is a private entity entrusted or directed by the government of Alderaan to provide a direct transfer of funds within the meaning of Article 1.1(a)(1)(i)-(iv).

3.79. To demonstrate entrustment or direction, Coruscant should argue that Alderaan uses Zurix Bank as a proxy, and that seemingly private conduct of the bank should, in fact, be attributed to the government of Alderaan.[61] In support of its position, Coruscant could point out that, although Zurix Bank is governed by a board of directors appointed by the bank’s shareholders, in Alderaan, all bank directors have to be approved by the Alderaan Finance Ministry (Case, para. 12). Furthermore, Coruscant could refer to the fact that, according to Alderaan’s finance law, all banks within its territory must have “regard to the strategic policy priorities established by the Government of Alderaan” and have to report to the Alderaan Finance Ministry about the investments that advance Alderaan's strategic policy priorities, or otherwise potentially face a fine (Case, para. 12). Moreover, Ms Groundrunner supported the loan and indicated that it did support one of Alderaan’s policy priorities (Case, para. 13). Indeed, while mere acts of encouragement may not constitute “entrustment or direction” by themselves, they are a factor to consider in assessing whether a private body is entrusted or directed.[62] On the basis of this evidence, Coruscant can argue that, through Zurix Bank, the government of Alderaan finances projects that align with its strategic priorities.

3.80. It will be difficult for **Alderaan** to demonstrate that the loan from Zurix Bank to Desertix is not a financial contribution within the meaning of Article 1.1(a)(1)(i).

59 Panel Report, *US – Softwood Lumber VII*, para. 7.692.
60 Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 108.
61 Ibid.
62 Ibid., para. 114.

3.81. However, Alderaan should argue that Zurix Bank is not entrusted or directed by Alderaan within the meaning of Article 1.1(a)(1)(iv). In this regard, Alderaan should point out that, although bank directors are approved by the Ministry of Finance, such approval is based on objective criteria, which minimizes the risk of government interference in the board's decisions. Furthermore, Alderaan should stress that "[e]ach bank director acts in his or her independent capacity and only answers to the bank's shareholders", and not to the government (Case, para. 12).

3.82. In addition, Alderaan could argue that, even though banks must submit yearly reports to the Finance Ministry indicating the investments which advanced Alderaan's strategic policy priorities, this does not amount to a direction to banks to finance only those projects that achieve Alderaan's strategic priorities. In particular, there is nothing to suggest that only those projects that achieve Alderaan's strategic priorities can be financed by Zurix Bank. In this regard, Alderaan could refer to the Appellate Body's observation in *US – Countervailing Duty Investigation on DRAMs* that "[i]n most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction".[63] Alderaan could point out that the law does not require banks in Alderaan to finance only those projects that advance the State's strategic objectives, but instead to submit a report and indicate any such projects. This means that, in principle, a report may not contain information about projects that achieve Alderaan's strategic priorities if no such projects were undertaken.

3.83. Alderaan could further point to the fact that Zurix Bank is run on a commercial basis as each loan is granted based on the merits of the application (Case, para. 12). This weighs in favour of a finding that there is no entrustment or direction. As the Appellate Body in *US – DRAMs* stated in this regard, "commercial unreasonableness of the financial transactions is a relevant factor in determining government entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement".[64]

3.84. Finally, in support of its position, Alderaan could note that, although Ms Groundrunner expressly supported the loan in a public statement, she also stressed that she had not been involved in Zurix Bank's decision (Case, para. 13). Alderaan could argue that this serves as additional evidence that the government does not entrust or direct Zurix Bank.

3.3.3.3 Benefit

3.3.3.3.1 Summary of relevant jurisprudence

3.85. As explained in Section 3.2.3.4 above, a financial contribution will only confer a "benefit", i.e., an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market.[65] To perform such an analysis,

63 Ibid., para. 116.
64 Appellate Body Report, *Japan – DRAMs (Korea)*, para. 138. At the same time, the Appellate Body warned that "this does not mean that a finding of entrustment or direction can never be made unless it is established that the financial transactions were on non-commercial terms". (Ibid.)
65 Panel Report, *Canada – Aircraft*, para. 9.112.

a market benchmark has to be selected.[66] A market benchmark should approximate as closely as possible lending on the same, or similar, terms and conditions to the particular recipient.[67]

3.86. Article 14 of the SCM Agreement provides relevant context for interpreting Article 1.1(b) of that Agreement.[68] In particular, Article 14(b) provides that "a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market".

3.87. In the present case, the issue arises whether the "**market**" within the meaning of Article 14(b) is the market of the country in which the **grantor or the recipient is located**. Although previous panels and the Appellate Body have not addressed this question, teams may rely on some statements from previous reports in developing their arguments.

3.88. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body noted that "something can be considered 'comparable', when there are sufficient similarities between the things that are compared as to make that comparison worthy or meaningful."[69] Thus, according to the Appellate Body, "a benchmark loan under Article 14(b) should have as many elements as possible in common with the investigated loan to be comparable".[70] The Appellate Body endorsed the panel's observation that "ideally, an investigating authority should use as a benchmark a loan to the same borrower that has been established around the same time, has the same structure as, and similar maturity to, the government loan, is about the same size, and is denominated in the same currency".[71] At the same time, both the panel and the Appellate Body cautioned that "in practice, the existence of such an ideal benchmark loan would be extremely rare, and that a comparison should also be possible with other loans that present a lesser degree of similarity".[72] In this regard, the Appellate Body did not preclude the possibility of using as benchmarks the interest rates on loans denominated in currencies other than the currency of the investigated loan, or using proxies instead of the observed interest rate.[73]

3.89. Importantly, the Appellate Body observed that "[i]n contrast to Article 14(d), which clearly connects the relevant 'market' to 'the country of provision or purchase', Article 14(b) does not specify expressly any geographical or national scope for what is the relevant 'market' within which a comparable commercial loan should be identified".[74]

66 Appellate Body Report, *EC and Certain Member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 5.119-5.120.
67 Panel Report, *EC and Certain Member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.362.
68 Appellate Body Report, *Canada – Aircraft*, para. 158.
69 Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 476.
70 Ibid.
71 Ibid.
72 Ibid.
73 Ibid., para. 487.
74 Ibid., para. 482.

3.3.3.3.2 Arguments of the parties

3.90. It is expected that the main point of contention between the parties will be the choice of market benchmark for determining the existence of benefit. The relevant facts are provided in Annex 4 to the Case, which summarizes the average 2019 interest rates for loans per country.

3.91. **Coruscant** could argue that, pursuant to Article 14(b), interest rates on commercial loans "in the market where the firm is located" must be used as a benchmark, unless the market is distorted or does not offer commercial loans.[75] Thus, Coruscant should maintain that the relevant market for determining the existence of a benefit is the market of Tatooine since this is the market in which Desertix is established and operates. Coruscant could also submit that the focus of the benefit analysis is on the recipient, and hence the marketplace should be determined by where the recipient operates.

3.92. Coruscant should thus point out that the long-term interest rate in Tatooine of 10% is significantly higher than the 4% interest rate offered to Desertix by Zurix Bank (Case, para. 13 and Annex 4). Coruscant can therefore argue that the Zurix Bank loan made Desertix better off than it would have been, had it obtained a loan from a Tatooine bank. Indeed, since Desertix is located in Tatooine it could be argued that the relevant benchmark should be a loan granted by a bank in Tatooine. Thus, Coruscant could argue that a benefit exists within the meaning of Article 1.1(b) of the SCM Agreement.

3.93. For its part, **Alderaan** could argue that the relevant benchmark for the benefit analysis should be the market for commercial loans in Alderaan. Relying on previous jurisprudence, Alderaan could argue that Article 14(b) does not specify any geographical or national restrictions on the definition of the relevant "market" within which a comparable commercial loan should be identified.[76] Alderaan could point out that the purpose of an inquiry under Article 14(b) is to determine a benchmark that is closest to the loan at issue and that, in the present dispute, the closest benchmark would be the interest rates for similar commercial loans in Alderaan where Zurix Bank is located. Alderaan could point out that Desertix, as a subsidiary of Special Electrix, could obtain a loan from any other bank in Alderaan.

3.94. Alderaan should thus point out that the long-term interest rates for loans in Alderaan (2%) are lower than the 4% interest rate provided by Zurix Bank to Desertix. On this basis, Alderaan can argue that the loan does not confer a benefit on Desertix.

75 Ibid., para. 480.
76 Ibid., para. 482.

Suggested Questions to the Parties	
Coruscant	**Alderaan**
What is the legal standard to establish whether a private body has been entrusted or directed within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement? Which factors should be taken into account in this assessment?	Is there any penalty for those banks submitting a yearly report to the Finance Ministry indicating that no investment advanced Alderaan's strategic policy priorities?
Does the loan provided by Zurix Bank constitute a short term or a long-term loan?	Why should the Panel use the interest rate for loans in Alderaan as the benchmark for the benefit analysis for a loan granted to an entity established in another country?
What is the relevant market for determining the benchmark to assess whether a benefit is conferred by the loan?	Assuming that the Panel agrees to use the interest rate for loans in Alderaan as the benchmark for the benefit analysis, why should this rate not be adjusted upwards to take into account the differences between the credit ratings of a company established in Alderaan and those of a company established in Tatooine?

3.3.4 Does the loan from Zurix Bank constitute an actionable subsidy within the meaning of Article 1.2 and Part III of the SCM Agreement?

3.3.4.1 Relevant provisions

3.95. Article 1.2 of the SCM Agreement provides:

A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

3.96. Article 2(1) of the SCM Agreement provides that in order to determine whether a subsidy is "specific to an enterprise or industry or group of enterprises or industries […] the following principles shall apply: (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific".

Article 5 of the SCM Agreement states:

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.: […]

(c) serious prejudice to the interests of another Member. […]

3.97. Finally, Article 6.3 of the SCM Agreement provides:

Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply: […]

(c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market; […]

3.98. In other words, for the loan from Zurix Bank to Desertix to constitute an actionable subsidy, it must be established that this subsidy (i) is specific and (ii) causes serious prejudice to the interest of Coruscant.

3.3.4.2 Specificity

3.3.4.2.1 Summary of relevant jurisprudence

3.99. As a preliminary note, with regard to the question of whether cross-border subsidies can be found to be specific in light of the terms "within the jurisdiction of the granting authority", we refer the reader to Section 3.1.3.2 above.

3.100. A specific subsidy is, by definition, a subsidy that is only granted to a specific enterprise or industry or a group of enterprises or industries.[77] The specificity requirement is concerned with the potential for governments to distort trade through interference in the allocation of resources. Subsidies that are generally available are not specific because, being available to all operators, they do not distort the allocation of resources among those operators.[78] In this regard, although determining whether a subsidy is specific within the meaning of Article 2.1 involves a case-by-case assessment, to the extent that a subsidy may be characterised as a one-off subsidy instead of a subsidy program, it would generally be found to be specific within the meaning of Article 2.1(a) of the SCM Agreement, rendering an assessment of specificity under Article 2.1(c) unnecessary.[79]

3.3.4.2.2 Arguments of the parties

3.101. The main hurdle for **Coruscant** is to demonstrate that the loan from Zurix Bank to Desertix is specific to an enterprise "within the jurisdiction of the granting authority" within the meaning of Article 2.1 of the SCM Agreement. Once this hurdle has been passed, since the loan from Zurix Bank constitutes a one-off subsidy instead of a subsidy program, it should be considered as specific within the meaning of Article 2.1(a) of the SCM Agreement.

3.102. With regard to establishing that Desertix is within the jurisdiction of the granting authority, Coruscant should first establish who the granting authority is. In this case, since the entity providing the subsidy is a private bank (Zurix Bank) being entrusted or directed by the Government of Alderaan, Coruscant should argue that the granting authority is the Government of Alderaan, as it is the Government of Alderaan which entrusted or directed Zurix Bank (see Section 3.3.3.2 above). Coruscant should then argue that the "jurisdiction of the granting authority" in Article 2.1 of the SCM Agreement is not purely territorial (as

77 Panel Report, *US - FSC (Article 21.5 – EC)*, para. 8.66.
78 Panel Report, *US - Washing Machines*, para. 7.273.
79 Panel Report, *EC and Certain Member States – Large Civil Aircraft*, para. 3741.

discussed in Section 3.1.3.4 above) so it can extend outside the territory of the WTO Member granting the subsidy. In order to do so, Coruscant could claim that, when it comes to the provision of loans by banks, Alderaan's jurisdiction to provide these loans extends outside Alderaan's borders to any entity in the world, so that this should be the scope of Alderaan's jurisdiction to assess specificity. [80] Alternatively, Coruscant could claim that since Desertix is fully owned by Alderaan shareholders (Case, para. 10), Alderaan's jurisdiction extends over Desertix. Finally, Coruscant could claim that Tatooine has effectively granted jurisdiction to Alderaan over the Jundland Special Development Zone since Investerix is responsible for ensuring security within the zone (Case, para. 8 and Annex 2).

3.103. In response, **Aldeeran** should first argue that the "jurisdiction of the granting authority" in Article 2.1 of the SCM Agreement is purely territorial as discussed in Section 3.1.3.4 above. Thus, it cannot extend outside the territory of the WTO Member granting the subsidy. With regard to Coruscant's potential argument that Alderaan has jurisdiction over Desertix through its shareholders, Alderaan could argue that a State's jurisdiction through a company's shareholders was expressly discarded by the International Court of Justice in *Barcelona Traction*.[81] With regard to Coruscant's claim that Tatooine has granted jurisdiction to Alderaan over the Jundland Special Development Zone, Alderaan could respond that it has not effectively acquired the right to make its laws applicable and to enforce them within the zone. The acquisition of such rights is normally required for a finding that a State's jurisdiction extends over another State's territory (explained at para. 3.21. above).[82] However, Tatooine law remains applicable in the zone and Tatooine's courts remain competent to adjudicate any disputes. As a result, even though Investerix ensures security in the zone, it cannot be said that Tatooine has granted jurisdiction to Alderaan.

3.104. Students are not expected to bring all these arguments forward and should not be penalised for not doing so. They should also be rewarded for creative arguments not mentioned above.

3.3.4.3 Adverse effects

3.3.4.3.1 Summary of relevant jurisprudence

3.105. As stated by the Appellate Body in *US – Large Civil Aircraft (2nd complaint)*, "in disputes involving claims under Part III of the SCM Agreement, a complainant must demonstrate not only the existence of the relevant subsidies and the adverse effects to its interests, but also that the subsidies at issue have ***caused*** **such effects**".[83]

80 This would, for example, contrast with the jurisdiction for the purposes of tax deductions, which are clearly limited in terms of territorial jurisdiction.

81 Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) Second Phase, International Court of Justice (ICJ), 5 February 1970.

82 Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland concerning a Scottish trial in the Netherlands, 38(4) ILM 926-936 (1999); Right of Passage over Indian Territory, Portugal v. India, Judgment, Preliminary Objections, [1957] ICJ Rep 125, ICGJ 173 (ICJ 1957), 26 November 1957.

83 Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 913. (emphasis original)

3.106. The Appellate Body has "consistently articulated the causal link required as 'a genuine and substantial relationship of cause and effect'".[84] Determining whether the link in question meets the requisite standard of a "genuine and substantial" causal relationship is a "fact-intensive exercise" that should take into account other causal factors.[85] While a panel need not determine the subsidy to be the sole or the only substantial cause of the adverse effects, the panel should be careful not to attribute other causal factors to the subsidy at issue.[86]

3.107. Pursuant to Article 6.3(c), serious prejudice within the meaning of Article 5(c) may arise where the effect of a subsidy is **significant price suppression** in the same market. The term "significant" means "important, notable or consequential" and has both quantitative and qualitative dimensions.[87] A sale that is "**lost**" is one that a supplier "failed to obtain".[88] To be "**in the same market**", the subsidized product and the like product of the complaining Member should be "engaged in actual or potential competition in that market".[89]

3.108. To determine whether lost sales are the effect of the challenged subsidy, the Appellate Body has recommended using a **counterfactual analysis**. This would involve a comparison of the sales actually made by the competing firm(s) of the complainant with a counterfactual scenario in which the firm(s) of the respondent would not have received the challenged subsidies.[90]

3.3.4.3.2 Arguments of the parties

3.109. **Coruscant** should argue that Ventix Generatix's decision to grant the contract for the exclusive supply of PMGs for its windmill production to Desertix instead of Magnetix constitutes significant lost sales within the meaning of Article 6.3(c) in the market of Naboo, and thus serious prejudice under Article 5(c) of the SCM Agreement. Coruscant may argue that, due to the subsidy in the form of a loan that Desertix received from Zurix Bank, Desertix was able to scale up production in Tatooine and fully replace neodymium with kyber in its PMGs. This gave Desertix a competitive advantage over Magnetix in the negotiations with Ventix Generatix.

3.110. Furthermore, Coruscant could argue that, absent the loan from Zurix Bank, Desertix would not have been able to lower the price of its PMGs to match the price of Magnetix's PMGs, because it would have needed to have a higher profit margin to pay off a loan provided on commercial terms.

3.111. Coruscant should also argue that the lost sales were "significant" since the contract concerned "the exclusive supply of PMGs for Ventix Generatix's windmill production over the next five years". In this regard, Coruscant should also point out that Ventix Generatix is a "large windmill manufacturer" (Case, para. 23).

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84 Ibid. (referring to Appellate Body Reports, *US – Upland Cotton*, para. 438; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 374; and *EC and certain member States – Large Civil Aircraft*, para. 1232).
85 Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 915.
86 Ibid., para. 914.
87 Ibid., para. 1052 (referring to Appellate Body Reports, *US – Upland Cotton*, para. 426; and *EC and Certain Member States – Large Civil Aircraft*, para. 1218).
88 Appellate Body Report, *EC and Certain Member States – Large Civil Aircraft*, para. 1214.
89 Ibid.
90 Ibid., para. 1216.

3.112. For its part **Alderaan** should argue that Coruscant failed to establish the existence of a causal link between the loan and Ventix Generatix's decision to purchase Desertix's PMGs. Alderaan could submit that, the price of two products being equal, it would be reasonable for a consumer to opt for a more efficient and less environmentally harmful product. Thus, Alderaan could submit that the real cause of Ventix Generatix's choice to give the contract to Desertix is the inefficiency and low environmental standards of Magnetix's products, and not the subsidy at issue. Moreover, Alderaan could argue that there is no direct evidence on the record that would link Alderaan's ability to lower the price of its products and the loan.

3.113. It will be difficult for Alderaan to challenge Coruscant's position that the sales in question were "significant". In the absence of specific data, it can be presumed that a contract for the exclusive supply of PMGs for five years would be significant.

Suggested Questions to the Parties	
Coruscant	**Alderaan**
Is there any good reason for this Panel to depart from the understanding that jurisdiction is purely territorial? If so, on what bases could Alderaan's jurisdiction extend to Desertix?	Why should this Panel consider that "jurisdiction" under the SCM Agreement is purely territorial?
How should the Panel assess who the granting authority of a subsidy is?	*If students rely on the legislative history of the SCM Agreement to respond to the above question:* What is the value of the preparatory works of a treaty and the circumstances of its conclusion in interpreting a treaty provision?
What is the legal test to establish that a subsidy resulted in significant lost sales?	Is there any evidence that Ventix Generatix's choice to give the contract to Desertix is based on factors other than price?

4 ARTICLES XI:1 AND XX OF THE GATT 1994

4.1 Measures at issue

4.1. Coruscant has invoked the following three measures in its panel request as constituting an "overarching measure which systematically restricts exports" of neodymium:

- Neodymium **export tax** of 25% (Case, para. 4).
- Neodymium **export registration**, which can result in a fine of 15% of the shipment if correct details are not supplied (Case, para. 5).
- Non-renewal of a majority of neodymium **mining permits,** due to environmental and health reasons pursuant to Article 4 of the Mining Act of 2002 (Case, paras. 16-21 and Annex 5).

4.2. Coruscant may also rely on the **statistics** concerning neodymium production, sales and prices (Annex 6).

4.2 Unwritten measures: whether Alderaan has imposed an "overarching measure" that "systematically restricts exports" contrary to Article XI:1 of the GATT 1994?

4.2.1 Introduction

4.3. Article 3.3 of the Dispute Settlement Understanding affirms that a dispute can be brought before the DSB whenever a Member considers that "any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member". Such "measures" can be "any act or omission attributable to a WTO Member", which in "the usual case" means "the acts or omissions of the organs of the state, including those of the executive branch". [91]

4.4. At times, trade-restrictive practices may not take the form of formally enacted measures, but can be ascertained from consistent administrative practice, official statements and documents, or sometimes mere informal understandings. Panels and the Appellate Body have recognised several different ways in which a complainant may challenge such types of "unwritten measures". For instance, although not mandated by law, the United States' consistent administrative practice of using "zeroing" in anti-dumping investigations was successfully challenged as a "rule or norm" of "general and prospective application".[92] This also meant that the zeroing practice could be challenged as being "as such" inconsistent with the Anti-dumping Agreement, rather than only "as applied" in particular investigations.

4.5. This case concerns a slightly different type of unwritten measure, first discussed in *Argentina – Import Measures*. In that case, a wide range of import restrictions were challenged as a single "overarching measure" which "systematically restricted" imports. The Appellate Body clarified that "the specific measure challenged and how it is **described or characterized by a complainant**" will determine the elements that the complainant must prove in order to establish the existence of an unwritten measure.[93] In the present case, Coruscant will thus focus primarily on establishing the existence of a separate overarching measure which is applied (i) "systematically" to (ii) "restrict exports" of neodymium. If Coruscant can manage to establish such facts, it follows that the measure will violate Article XI:1 of the GATT 1994.

4.6. In terms of **evidence,** Coruscant will "need to provide evidence of how the **different components operate together** as part of a single measure and how a single measure exists as distinct from its components".[94] Here, Coruscant may have recourse to **circumstantial** evidence.[95]

4.7. The challenge for Coruscant will thus be to establish the existence of an overarching measure of a systematic nature, that is separate from the three measures composing it (see next subsection). In other words, the overarching systematic measure has to be "greater than

91 Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.
92 Appellate Body Report, *US – Zeroing (EC)*, paras. 198, 201-205.
93 Appellate Body Report, *Argentina – Import Measures*, para. 5.110.
94 Ibid., para. 5.108.
95 Appellate Body Report, *Russia – Railway Equipment*, para. 5.234.

the sum of its parts".[96] Coruscant will have to rely on statements, export statistics and other relevant facts to establish this. However, Alderaan can point out that in contrast to *Argentina – Import Measures*, neither of the three measures invoked by Coruscant are by themselves clearly WTO-inconsistent. Nevertheless, the case law concerning these three types of export restrictions is not fully settled, opening up avenues for debate. In particular, in the case of the non-renewal of mining permits, students will have to address the threshold issue of whether these non-renewals are purely internal measures.

4.8. After having established the existence of an overarching measure which systematically restricts exports as per the panel request, Coruscant is also obliged to show that the measure violates Article XI:1 of the GATT 1994. However, a violation of Article XI:1 of the GATT 1994 should follow from the terms of the overarching measure thus established. The focus of Coruscant's intervention will therefore not be on Article XI:1 as such.

4.9. In contrast, as mentioned above, Alderaan may try to disprove the existence of an overarching measure by showing that each of three individual measures are in themselves consistent with Article XI:1. Alderaan may thus spend more time establishing the elements of Article XI:1 of the GATT 1994 and showing that none of the three separate measures violate it.

4.2.2 Summary of relevant jurisprudence

4.2.2.1 Overarching measure that is being systematically applied

4.10. In *Argentina – Import Measures*, the complainant **successfully** demonstrated that five types of requirements imposed on firms as a condition for importing into Argentina (commitments to invest in Argentina; to export from Argentina; to incorporate local content; not to expatriate funds; or to limit the volume and/or price of imports), constituted **an "unwritten" and "overarching single measure"** inconsistent with Article XI:1 of the GATT 1994. The panel first established the separate existence of each of the five types of requirements, and then found that they constituted a single overarching measure since they contributed "in different combinations and degrees" towards "the realization of common policy objectives that guide Argentina's 'managed trade' policy".[97] The findings concerning the existence of the unwritten measure as well as Argentina's "managed trade" policy were based on extensive **evidence** from *inter alia*: regulations and policy documents; official statements; company statements and communications; news articles; and industry surveys and reports.[98]

4.11. In its analysis under Article XI:1 of the GATT 1994, the panel found that each of the five requirements restricted imports, and also that the overarching measure was "characterized by a **lack of transparency and predictability**, which further discourages imports". Therefore, as upheld by the Appellate Body, the overarching measure violated Article XI:1.[99]

4.12. In *Russia – Tariff Treatment*, the EU **unsuccessfully** sought to challenge an unwritten measure described as a "general practice" which resulted in "the systematic application of

96 See Panel Report, *Russia – Tariff Treatment*, para. 7.389.
97 Panel Report, *Argentina – Import Measures*, para. 6.228.
98 Ibid., para. 6.64.
99 Ibid., para. 6.265; Appellate Body Report, *Argentina – Import Measures*, paras. 5.148-5.150.

particular types of tariff treatment" to a "significant amount of tariff lines", with the effect that these tariff lines exceeded Russia's bound rates under Article II of the GATT 1994.[100] The Panel found that the **meaning of "systematic"** implied that the EU needed to prove that "the identified instances of relevant tariff treatment […] form part of an **underlying system, plan or organized method or effort"**.[101] According to the Panel, the systematic nature of the unwritten measure can be inferred if the **observed repetition** of a certain tariff treatment is so substantial as to render it more likely than not that an underlying system exists.[102] Since the EU had only proven 23 instances of relevant tariff treatment in the case, the EU failed to establish the inference.[103] The Panel then turned to assess whether these 23 instances were nevertheless "connected or related" in such a way as to evidence "an underlying system, plan or organized method or effort", which may also be found to apply to other tariff lines.[104] However, the EU failed to articulate how these individual applications were connected and formed part of such a system.[105] Importantly, the Panel also claimed that this analysis was not "subjective", but instead based on the demonstration "that there exists some objective connection or relationship between the identified instances of relevant tariff treatment".[106]

4.13. Likewise, in *Russia – Railway Equipment*, Ukraine **unsuccessfully** sought to challenge the "systematic prevention" of imports of Ukrainian railway parts by: (i) suspending; (ii) refusing to issue; and (iii) refusing to recognize product certificates issued by authorities in other countries. As upheld by the Appellate Body, the Panel was unable to find that these three measures "**operated in combination**" or formed "part of a **plan or coordinated effort**" so as to constitute a separate measure.[107] In particular, only the refusal to recognize product certificates issued by other national authorities had been found to be inconsistent with the TBT Agreement, whereas the other two measures could be independently justified.[108] Moreover, although Ukrainian exports had lost significant **market share** in Russia, there was also evidence of decreased exports to other countries, problems with Ukrainian production, and at least one Ukrainian producer had maintained exports to Russia for some time.[109]

4.14. Similarly, in *Indonesia – Chicken*, Brazil was also **unsuccessful** in proving the existence of an overarching unwritten measure. In particular, Brazil failed to show that the individual measures were "**dependent on each other**" and **operated together**.[110] Moreover, the documents submitted by Brazil did not demonstrate that there was a link between the alleged **policy objective** of "self-sufficiency" and the trade-restrictive measures.[111]

4.15. Lastly, the Panel in *Indonesia – Import Licensing Regimes* found that while eight different import licenses were trade-restrictive in their own right, they could also be challenged

100 Panel Report, *Russia – Tariff Treatment*, paras. 7.282, 7.291-7.292, 7.336.
101 Ibid., para. 7.383
102 Ibid., paras. 7.374, 7.381.
103 ibid., para. 7.382.
104 Ibid., para. 7.383.
105 Ibid., paras. 7.360, 7.389.
106 Ibid., para. 7.383.
107 Panel Report, *Russia – Railway Equipment,* paras. 7.990-7.991; Appellate Body Report, *Russia – Railway Equipment*, para. 5.240.
108 Panel Report, *Russia – Railway Equipment*, paras. 7.964-7.965. Russia had successfully argued that due to the ongoing conflict, its inspectors could not safely carry out product inspections in Ukraine.
109 Panel Report, *Russia – Railway Equipment*, paras. 7.966, 7.983-7.984.
110 Panel Report, *Indonesia – Chicken*, paras. 7.669-7.760.
111 Ibid., para. 7.683.

as part of a "licensing regime". "[T]he restrictive effects of each measure are **compounded** once they are seen as part of a system because they are interrelated and do not work in isolation".[112]

4.2.2.2 Export restriction contrary to Article XI:1 of the GATT 1994

4.16. Article XI of the GATT 1994, entitled "General Elimination of Quantitative Restrictions" provides in its first paragraph:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

4.17. The terms "restrictions" and "other measures" in Article XI:1 demonstrate the broad scope of this provision. The Appellate Body has clarified that "**restrictions**" refers to any measures with a "**limiting effect**" on the quantities imported or exported.[113] The limiting effect "can be demonstrated through the **design, architecture, and revealing structure** of the measure", and does not require quantitative evidence.[114]

4.18. In this regard, Article XI:1 has been said to also apply to ***de facto*** quantitative restrictions.[115] In *China – Raw Materials*, the panel considered that a minimum export price "inherently" constituted a restrictive measure, and that "the very potential to limit trade is sufficient" to constitute a restriction under Article XI:1.[116] It agreed with the Panel in *Colombia – Ports of Entry* "that any measure that creates uncertainty as to the ability to import/export, and otherwise 'compete' in the marketplace, violates Article XI:1".[117] In *Brazil – Retreaded Tyres*, fines for importation, which were twice the average price of a retreaded tyre, were held to constitute an import restriction because of their prohibitively restrictive effect, despite not being administered at the border,[118] and despite the exclusion of "duties, taxes or other charges" in the text of Article XI:1.

4.19. Nevertheless, the Appellate Body has emphasized that Article XI does not cover "**simply *any* restriction**" but only those "on the importation […] or exportation or sale for export".[119] Indeed, restrictions of a **purely internal nature** lacking any border element would logically not fall under the scope of Article XI. In terms of import restrictions, the Ad Note to Article III of the GATT 1994 specifies that charges or regulations which apply to both imports and like domestic products but are applied at the border, are nevertheless subject to Article III. However, Article III only concerns discrimination between domestic and imported products, and even in this instance the precise boundary between the two provisions remains unclear.

112 Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.266.
113 Appellate Body Report, *China – Raw Materials*, para. 319-320.
114 Appellate Body Report, *Argentina – Import Measures,* para. 5.217.
115 Panel Reports, *Argentina – Hides and Leather*, para. 11.17.
116 Panel Report, *China – Raw Materials*, paras. 7.1081.
117 Ibid., referring to Panel Report, *Colombia – Ports of Entry*, para. 7.240.
118 Panel Report, *Brazil – Retreaded Tyres*, para. 7.372.
119 Appellate Body Report, *Argentina – Import Measures,* para. 5.217. See also Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.261 (remarking that only "those measures which affect the opportunities for importation itself" are covered by Article XI:1).

The Panel in *Indonesia – Autos*, for instance, opined that different aspects of the same measure may fall under Articles III and XI respectively, and considered that "perhaps", in "exceptional situations", there may be an overlap between the two Articles.[120] For the purposes of export restrictions, the exact scope of Article XI:1 with regard to measures also affecting like domestic products therefore similarly remains in need of further clarification.

4.20. The language of Article XI:1 also clarifies that it applies to **licenses**. Licenses which are "designed to gather statistical information or for monitoring purposes", and which are not "discretionary", are permitted.[121] Requiring the satisfaction of "certain prerequisites" before granting a license, such as the submission of documents, may also be permissible.[122]

4.21. The students may also invoke the **ILA** as relevant context or as evidence of practice under Article 31 of the VCLT. Moreover, Article 1.2 of the ILA states that Members shall ensure that import licensing regimes are in conformity with the GATT 1994 "as interpreted by this Agreement". The Panel in *China – Raw Materials* therefore considered that, in line with the findings in *Argentina – Import Measures*,[123] the ILA could inform the interpretation of Article XI:1. Yet the Panel noted that its relevance was limited with regard to *export* licenses.[124] In the present case, the most relevant provisions are Articles 2.1 and 2.2, which state that "[a]utomatic import licensing is defined as import licensing where approval of the application is granted in all cases" and which shall not be administered to restrict imports. Furthermore, "[a]utomatic licensing procedures shall be deemed to have trade-restricting effects" unless they are approved "within a maximum of 10 working days".[125] On the other hand, for *non-automatic* import licenses, Article 3.5(f) states that applications shall be processed within 30 days.

4.2.3 Arguments of the parties

4.2.3.1 Overarching measure that is being systematically applied

4.22. As indicated above, **Coruscant** must demonstrate the existence of a separate overarching measure which is applied: (i) "systematically" to (ii) "restrict exports" of neodymium. In other words, Coruscant must show that the three measures, namely the neodymium export tax of 25%, the neodymium export registration and the non-renewal of a majority of neodymium mining permits, due to environmental and health reasons pursuant to Article 4 of the Mining Act of 2002, "operate in combination" and as part of "a plan". Coruscant can rely on evidence such as the Green Hope Strategy (Case, para. 3), the statements by Alderaan's Environment and Mining and Industrial Development Ministers (Case, paras. 4, 18), and the closure of the neodymium mines. Coruscant can emphasize that only the neodymium mines have been closed, despite the fact that Alderaan's mining companies are "well diversified" (Case, para. 18) and active in other mining sectors, at a time when Alderaan's need for neodymium has dropped sharply due to the move from neodymium PMGs to kyber PMGs.

120 Panel Report, *India – Autos*, para. 7.224.
121 Panel Report, *China – Raw Materials*, paras. 7.916, 7.921.
122 Ibid., para. 7.197.
123 Appellate Body Report, *Argentina – Import Measures*, fn. 598.
124 Panel Report, *China – Raw Materials*, para. 7.19
125 Article 2.2(a)(iii) of the ILA.

4.23. **Alderaan** has three primary lines of defence. First, Alderaan may point out that in *Argentina – Import Measures*, each of the five types of measures were found to be restricting imports in addition to the finding that they formed an overarching measure/policy of "managed trade". Likewise, in *Russia – Railway Equipment*, Ukraine failed to show the existence of an overarching measure because two out of the three measures invoked could be legally justified. Alderaan could therefore emphasize that each of its measures are: (i) WTO-consistent (see further next section); and (ii) have rationales other than the restriction of exports of neodymium (e.g., protecting public health/environment, raising revenue, enforcement/preventing fraud).

4.24. Second, Alderaan can try to refute that the evidence relied on by Coruscant is sufficient to establish that the three measures operate in combination or as part of "a plan". Alderaan can emphasize that its decision to move away from neodymium and the enactment of its export measures preceded the kyber discovery by *General Electrix* (Case, paras. 2-6), and that the export registration requirement is never invoked by any of Alderaan's officials or in the Green Hope Strategy. Furthermore, there is record evidence that neodymium mining gives rise to environment and health risks (Case, para. 2).

4.25. Third, Alderaan may point out that it did renew the licenses of three mines in 2020 (Case, para. 20). Therefore, Coruscant cannot demonstrate that there is a sufficiently "observed repetition" to evidence the systematic application of an overarching, unwritten measure as part of a governmental plan or effort, as per the Panel in *Russia – Tariff Treatment*.[126] Moreover, exports have in fact continued and are therefore not systematically restricted, and even increased somewhat in 2020, compared to domestic sales (Annex 6).

4.26. **Coruscant** can respond to or anticipate these arguments by highlighting that it was not the consistency of the measures as such that was at issue in *Russia – Railway Equipment*. Rather Ukraine failed to demonstrate a "common plan". In this case, there is evidence of such a plan based on all the available evidence, including a steady escalation of restrictive measures. Coruscant could also argue that the interest in challenging an unwritten overarching measure is precisely because it is distinct from its component parts, and the unwritten measure may thus be WTO-inconsistent, even if its individual components are not.

4.27. Coruscant can also attempt to argue that the renewed mining licenses were granted to allow for domestic production as per the statement of Minister Windu (Case, para. 18). Moreover, Coruscant can argue that there can still be a systematic application of the restrictive measures even if small volumes of exports nevertheless occur.

126 Panel Report, *Russia – Tariff Treatment*, paras. 7.374, 7.381, 7.389.

Suggested Questions to the Parties	
Coruscant	**Alderaan**
Is it necessary for the Panel to first find that the individual measures are WTO-inconsistent, before the Panel can examine the existence and WTO-consistency of the alleged overarching measure?	Given that an overarching measure is distinct from the individual measures constituting it, does it matter whether the underlying measures are in themselves WTO-inconsistent when viewed in isolation?
What types of evidence should the Panel have regard to when determining whether an overarching unwritten measure exists?	Given that the Green Hope Strategy calls for a shift away from extraction and export of, in particular, neodymium mining, does this demonstrate that the measures taken by Alderaan pursue a common plan or policy objective?
Is there any evidence showing that there is a common plan or policy objective underlying the three measures being challenged?	Does the Panel have to find that the overarching measure exists on the basis of all three individual measures invoked by the complainant, or would two of the three measures be sufficient?
Have the alleged export restrictions been "systematically applied" in this case, as Coruscant alleges? *Potential follow up:* What about the fact that Alderaan has continued to issue certain mining licenses (Case, para. 20), and some exports have taken place?	

4.2.3.2 Export restrictive nature of the measure in violation of Article XI:1 of the GATT

4.28. As mentioned above, if **Coruscant** can successfully demonstrate the existence of the overarching measure and that it is systematically applied to restrict exports, then it should follow that the measure violates Article XI:1 of the GATT. Thus, having already argued about the existence of the overarching measure, Coruscant must still demonstrate that the overarching measure has a "limiting effect" on exports. In this regard, Coruscant should argue that the overarching measure is systematically applied to restrict exports as demonstrated by the fact that two of its three elements, namely the export tax and the export registration requirement, are export measures. In the latter case, Coruscant can seek to invoke the 10-day requirement in Article 2.2(a)(iii) of the ILA concerning automatic licenses, and therefore argue that the measure is restrictive. The facts suggest that the licensing regime is indeed automatic (Case, para. 6).

4.29. Coruscant should add that although the non-renewal of the mining permits may be an internal measure, when seen as part of the overarching measure it is clearly intended to further limit exports. Coruscant may find additional support in *Brazil – Retreaded Tyres*[127] to argue that certain types of internal measure, if they have a clear effect on exports, have been found

[127] Panel Report, *Brazil – Retreaded Tyres*, para. 7.372.

to fall within the ambit of Article XI:1. Coruscant may also argue that the overarching measure has led to a sharp drop in exports (Annex 6).

4.30. As discussed in the previous section, **Alderaan** can seek to demonstrate that each of the measures, individually, are outside the scope of or consistent with Article XI:1. In this regard, Alderaan may first argue that in the case of the export tax, Article XI:1 does not apply to "duties, taxes or other charges". Second, concerning the export registration, Alderaan can argue that the ILA is not applicable to export licenses and that in any event two to three weeks' delay is reasonable, having regard to the 30-day requirement in Article 3.5(f) of the ILA. Alderaan can also recall that the ILA applies to how import licenses are *administered*, not to the rules of the licensing itself.[128] There are no indications that the administrative procedure has not been fair and equitable. Moreover, as per the Panel in *China – Raw Materials*, non-discretionary licensing for monitoring or enforcement purposes is permitted.[129]

4.31. Third, concerning the closure of the mines, Alderaan should argue that those measures are not border measures and affect domestic and export sales in equal measure. They are thus not applied "on exportation". In this regard, Alderaan may add that the fact that the non-renewal of the mining licenses is clearly an internal measure which falls outside the scope of Article XI:1, shows that it cannot form part of an overarching measure which is deemed to restrict exports.

128 Appellate Body Report, *EC – Bananas III*, paras. 197-198.
129 Panel Report, *China – Raw Materials*, paras. 7.916, 7.921.

Suggested Questions to the Parties	
Coruscant	**Alderaan**
Can the non-renewal of mining permits be considered to have a limiting effect on exportation, given that it does not appear to be applied in direct connection with exportation?	Is it not a fact that exports to Coruscant have dropped dramatically, suggesting that the measures put in place by Alderaan has had a clear limiting effect on exports?
Can the export tax as part of the overarching measure be deemed inconsistent with Article XI:1 of the GATT 1994, given that "duties" fall outside the scope of Article XI:1?	Would the prohibition on export restrictions under Article XI:1 of the GATT 1994 not be easy to circumvent if it did not apply to measures which are designed to limit exportation, but which are not applied at the border or in connection with exportation?
If Coruscant invokes the ILA: Is the ILA applicable to export licensing as well as import licensing? And if so, does Article 3.5(f) of the ILA suggest that Members can take up to 30 days to process a licensing request?	Is Alderaan's export licensing system automatic or discretionary? *Potential follow up*: On what basis could the licensing system be considered discretionary, and would a discretionary licensing regime be justified in the present case?
	If students discuss the ILA: Article 2.2(a)(iii) of the ILA states that automatic licensing procedures shall be deemed to have trade-restricting effects unless they are approved within a maximum of 10 working days. Is this requirement relevant for the Panel to take into account in this dispute?

4.3 Whether Alderaan's overarching measure that systematically restricts neodymium is justified under Article XX of the GATT 1994?

4.32. Alderaan may choose to avail itself of an exception under Article XX of the GATT 1994 (and, if so, bear the initial burden of proof).[130] However, Alderaan may also choose not to present such a defence if it believes this would undermine its claim that there is no overarching measure. Alderaan thus should not be penalized for not invoking Article XX (although this will have been necessary in order to receive full marks on the written submissions). The best fit with facts is with Article XX(b). Article XX(g) may potentially be raised, but during the consultations the representative of Alderaan did state that the measures at issue were taken for health and environmental rather than conservation reasons (Case, para. 26).

4.33. Coruscant may seek to anticipate an Article XX defence in its main pleadings but should not be penalized if it chooses not to. However, if Article XX is invoked by the respondent, then Coruscant should respond in its rebuttal.

130 Appellate Body Report, *US – Gambling*, para. 309.

4.34. Panelists should keep in mind that a defence under Article XX of the GATT 1994 would be premised on the finding of the overarching measure challenged by Coruscant being deemed to exist. Therefore, although Alderaan has an interest in justifying each of three measures separately, the discussion should mainly revolve around how the three measures can be justified when looked at jointly as a single measure.

4.35. An interesting issue to consider in this section is the abovementioned tension for the respondent between denying the existence of a measure, while also, in the alternative, seeking to justify it based on an affirmative defence. Other issues include whether there is discrimination in the present case within the meaning of the *chapeau*, and if not, whether the measures may nevertheless be caught by the "disguised restriction on international trade" standard, and what this standard entails. Questions may also arise as to whether the due process or sound administration requirements under the *chapeau*, which traditionally have been found to apply to exporting producers in other countries, also apply to domestic producers seeking to export.

4.3.1 Relevant legal provisions

4.36. The relevant parts of Article XX of the GATT 1994 provide as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: […]

(b) necessary to protect human, animal or plant life or health; […]

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; […]

4.3.2 Summary of relevant jurisprudence

4.37. A measure violating one or several provisions of the GATT may nevertheless be found to be GATT-consistent if it meets the requirements of Article XX. The measure must first be provisionally justified under one of the subparagraphs, and, if so, is then analysed in relation to the *chapeau*.[131]

4.38. Theoretically, Alderaan could seek to invoke subparagraphs (a) (public morals) or, in the case of the non-renewal of the mining permits and the export registration, (d) (necessary to secure compliance with GATT-consistent laws or regulations). Although creativity should never be penalized, these are generally sub-optimal choices in view of the facts and are thus not further addressed here. Instead, we focus the explanations below on Articles XX(b) and XX(g) of the GATT 1994.

131 Appellate Body Report, *US – Gasoline*, page 22.

4.3.2.2 Article XX(b)

4.39. To fall under Article XX(b), the measure must be (i) "designed" and (ii) "necessary" to protect human, animal or plant life or health.[132]

4.40. To determine which policy objective a measure has been **designed to meet**, a panel should take account of the invoking Member's own articulation of the policy but is not bound by it. Instead, the panel should have regard to all relevant evidence, including the text and structure of the statute and its legislative history.[133] Moreover, the invoking Member must identify specifically a risk to animal or plant "health", and not just a risk to the environment generally.[134] The Appellate Body has also clarified that a measure cannot have been designed to meet a public policy objective if the measure is "incapable of protecting" that objective.[135]

4.41. Preventing imports of asbestos or measures to reduce the risks arising from the accumulation of used tyres has been found to be provisionally justified under Article XX(b).[136] In *China – Rare Earths*, the Panel agreed that "mining and production of rare earths […] have caused great harm to the environment and to the life and health of humans, animals and plants", however, "[n]one of the cited elements of China's comprehensive environmental policy shows a link between export duties and a pollution reduction objective". Rather, "the export duties at issue are designed and structured to promote increased domestic production".[137]

4.42. The Appellate Body in *Brazil – Retreaded Tyres* clarified that in order to assess the **necessity** of the measure, the panel must assess and balance: (i) the interests or values at stake; (ii) the contribution of the measure to its objective; and (iii) its trade-restrictiveness. This analysis must be informed by a comparison with potentially less trade-restrictive and equivalent **alternative measures**.[138] Such measures must be reasonably available to the invoking Member, including in terms of cost.[139] In *China – Raw Materials*, the Panel rejected China's argument that export restrictions were necessary in addition to domestic measures to reduce pollution, since "export restrictions reduce the domestic price" and therefore stimulate further consumption.[140]

4.3.2.3 Article XX(g)

4.43. To fall under Article **XX(g)**, the measure must (i) "relate to" (ii) "the conservation of exhaustible natural resources" and (iii) be "made effective in conjunction with restrictions on domestic production or consumption".

4.44. In *China – Rare Earths*, the Appellate Body held that the term "**relating to**" requires that a measure has "a close and genuine relationship of ends and means" to the objective of conservation, which can be discerned by examining the "design and structure" of the

132 See, e.g., Panel Report, *China – Raw Materials*, paras. 7.379-7.380.
133 Appellate Body Report, *EC – Seal Products,* para. 5.144.
134 Panel Report, *Brazil – Retreaded Tyres*, para. 7.46.
135 Appellate Body Report, *Colombia – Textiles*, para. 5.68.
136 See Panel Report, *EC – Asbestos* and *Brazil – Retreaded Tyres*.
137 Panel Report, *China – Rare Earths*, paras. 7.156, 7.159, 7.169.
138 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156; *EC – Seal Products*, paras. 5.214-5.215.
139 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.
140 Panel Report, *China – Raw Materials*, para. 7.585.

measure.[141] In that case, as well as in *China – Raw Materials*, China failed to demonstrate on the basis of its policy documents that there was any "real" or "clear" link between its export duties and quotas, and a conservation objective.[142]

4.45. With regard to the meaning of "**conservation**", the Appellate Body stated in *China – Raw Materials* that it means "preservation of the environment, especially of natural resources",[143] and the Panel in *China – Rare Earths* considered it to include "measures that regulate and control […] exploitation in accordance with a Member's development and conservation objectives".[144] The Panel in *US – Gasoline* famously considered "clean air" to be an exhaustible natural resource.[145]

4.46. In *US – Gasoline*, the Appellate Body described the term "**measures made effective in conjunction with**" as a "requirement of even-handedness in the imposition of restrictions".[146] Nevertheless, in *China – Rare Earths*, the Appellate Body clarified that there is no requirement that "the burden of conservation be evenly distributed, for instance, in the case of export quotas between foreign consumers" and domestic consumers, but noted that "it would be difficult to conceive of a measure that would impose a significantly more onerous burden on foreign consumers or producers and that could still be shown to satisfy all of the requirements of Article XX(g)".[147]

4.3.2.4 *Chapeau* of Article XX

4.47. Whereas the subparagraphs are about what types of policy objectives measures may pursue, the *chapeau* contains two requirements seeking to limit abuse of those exceptions. The *chapeau* provides that measures may not constitute a means of (i) arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or (ii) a disguised restriction on international trade.

4.48. Whether a discrimination can be characterized as "**arbitrary or unjustifiable**" has received the most attention. Although the analysis is complex and case-specific,[148] the Appellate Body has explained that this question generally turns on "whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified".[149] Furthermore, some "**due process**" requirements have been found to be inherent in the *chapeau*, such as "minimum standards for transparency and procedural fairness", and avoiding "significant ambiguities" and "broad discretion" in the application of the measures towards exporters in other countries.[150]

141 Appellate Body Report, *China – Rare Earths,* paras. 5.94, 5.96.
142 Panel Report, *China – Rare Earths,* paras. 7.378-7.448; *China – Raw Materials*, paras. 7.419, 7.430-7.434.
143 Appellate Body Report, *China – Raw Materials*, para. 355.
144 Panel Report, *China – Rare Earths,* para. 7.266.
145 Panel Report, *US – Gasoline,* para. 6.37.
146 Appellate Body Report, *US – Gasoline*, p. 20.
147 Appellate Body Report, *China – Rare Earths,* para. 5.134.
148 Panel Report, *Brazil – Retreaded Tyres*, para. 7.262; Appellate Body Report, *EC – Seal Products*, para. 5.321.
149 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 230.
150 Appellate Body Report, *US – Shrimp*, para. 183; *EC – Seal Products*, para. 5.326.

4.49. The Appellate Body in *US – Gasoline* found that the term "**disguised restriction**", in addition to "whatever else", may be read to cover "arbitrary and unjustified discrimination". The notions are thus related and the "fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to the substantive rules" of the GATT.[151] On this basis, the Panel in *China – Rare Earths* found that "a disguised restriction on trade may exist even if there is no discrimination".[152] Similarly, the Panel in *EC – Asbestos* stated that "a restriction that formally meets the requirements of Article XX(b) will constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives".[153] Given that the "disguised restriction" has hitherto received less attention, that could be an aspect of the *chapeau* for the teams to further explore.

4.3.3 Arguments of the parties

4.50. Pursuant to **Article XX(b)**, **Alderaan** could seek to argue that on the basis of the Green Hope Strategy (Case, para. 2), which is implemented through the export tax (Case, para. 4) and which is also invoked in its decisions suspending the mining licenses (Annex 5), the alleged overarching measure is clearly designed to pursue the objective of protecting human, plant and animal health. There are clear health and environmental effects as described by the WHO and in the government's own study (Case, para. 2).

4.51. Alderaan can rely on similar arguments under **Article XX(g)** to show that there is a genuine link between the structure of the measures and the objective of "conservation", given that *China – Raw Materials* found conservation included preserving minerals etc. Alderaan can also point to domestic measures being undertaken and point out that the burden on foreign as well domestic operators need not be identical. However, it is problematic that the policy documents refer to protection of health and the environment and not conservation. Note also that Alderaan rejected conservation as an objective during the consultations (Case, para. 26).

4.52. **Coruscant** can raise these latter points concerning **Article XX(g)**. Coruscant should also emphasize that the unwritten measure it has invoked consists of two export measures, which means that the measure is not even-handed. Moreover, Coruscant can point out that these measures, and especially the registration, does not appear to have any policy justification linked to either Articles XX(g) or **XX(b)**. Statements of Alderaan's officials show that the actual objective of the export tax and refusal of permits are trade-restrictive (Case, para. 18). In particular, Coruscant may be able to suggest **less trade-restrictive alternative measures**, such as a less onerous registration requirement or heightened requirements among mines to improve health and environmental safeguards in accordance with what seems to be contained in Articles 2 and 3 of the Mining Act of 2002, with which firms have been complying (Case, paras. 17, 19).

4.53. With regard to the ***chapeau***, **Coruscant** can point out that the presence of the export measures means the measure is not rationally related to its objective and thus constitutes arbitrary and unjustified discrimination. Coruscant may also argue that Alderaan is seeking to make "illegitimate use" of the Article XX exception by: (i) focusing on reducing exports while protecting its domestic industry needs, and (ii) by doing so at a time when Alderaan and other

151 Appellate Body Report, *US – Gasoline*, p. 25.
152 Panel Report, *China – Rare Earths*, para. 7.826.
153 Panel Report, *EC- Asbestos*, para. 8.236.

PMG producers remain reliant on neodymium, in order to grant Special Electrix an unfair advantage. Consequently, the measure should be deemed a disguised restriction on international trade. Finally, Coruscant can try to argue that relying on the largely discretionary power not to renew licenses in Article 4 of the Mining Act (Case, para. 16 and Annex 5), means that the measure is non-transparent and ambiguous.

4.54. **Alderaan** may respond to or anticipate these arguments by pointing out that the closing of the mines are purely internal matters which do not fall within the purview of the rules of the *chapeau* or any procedural rights that Members may otherwise enjoy in the context of measures with extraterritorial scope. On the issue of **alternative measures** under Article XX(b), Alderaan should emphasize that alternative measures would be more burdensome and that they would not offer Alderaan its desired level of protection, which is cessation of mining activities at most of its mines.

Suggested Questions to the Parties	
Coruscant	**Alderaan**
How should the Panel determine which policy objective is being pursued by the measure at issue?	*If Alderaan invokes the environmental objectives of the Green Hope Strategy:* If Alderaan considers its measures to be justified by the objectives set forth in the Green Hope Strategy, does that mean that Alderaan also concedes that the three individual measures constitute an unwritten measure, and are part of an overall plan and objective, which includes the need to shift away from the export of neodymium? (Case, para. 3)
If Alderaan invokes Article XX(b): Is Alderaan not entitled to cease its mining operations if Alderaan considers that to be the best way to protect human health and the environment?	*If Alderaan invokes Article XX(b):* Are the export restrictions necessary to protect health and the environment? Moreover, are there no less trade-restrictive alternative measures Alderaan could have taken, such as enhancing the environmental and health safeguards already contained in Articles 2 and 3 of the Mining Act?
If Alderaan invokes Article XX(g): Even though overall exports have dropped, exports in Q2-Q4 of 2020 continue to be somewhat higher than domestic sales. Is this not evidence of an even-handed application of the policies?	*If Alderaan invokes Article XX(g):* Given that two of the measures which form part of the alleged overarching measure only affect exports, can the measure be considered even-handed?
Are the requirements under the *chapeau* of Article XX applicable to measures which appear to be internal matters, such as the closing of mines, and which do not	*If Alderaan invokes Article XX(g):* What evidence is there that Alderaan's measures were taken for the purpose of "conserving" a natural resource?

discriminate in their application between other WTO Members?	

ROADMAP TO KEY ISSUES

This roadmap provides a short-hand reference to the main issues under each claim. It presumes familiarity with the provisions and case-law discussed in the rest of this bench memorandum. Although the main issues are presented as questions, these should not be directly put to the participants. Instead, sample questions for the participants are presented in the main section corresponding to each claim.

SCM AGREEMENT AND ARTICLE XVI OF THE GATT 1994

Cross-border subsidies

"Cross-border subsidies" are subsidies granted by the government of a WTO Member to a recipient located in the territory of another WTO Member. Threshold issues are whether such subsidies (1) fall under the definition of "subsidies" under Article 1 of the SCM Agreement, and (2) if they are specific under Article 2 of the SCM Agreement. This issue has not been addressed by prior WTO panels or the Appellate Body. Teams may address these issues separately or in relation to each of the claims.

Key issues include:

- Does the phrase "within the territory of a Member" in Article 1.1(a)(1) of the SCM Agreement refer to "financial contribution" or to "the government"?
- Does the phrase "within the jurisdiction of the granting territory" in Article 2 of the SCM Agreement refer exclusively to the territory of the WTO Member providing the subsidy, or can the notion of "jurisdiction" extend more widely?

Whether the provision of land by Investerix to Desertix constitutes a specific subsidy contingent in fact upon the export of SaberLite PMGs inconsistent with Article 3.1(a) of the SCM Agreement

Investerix, a state-owned land developer in Alderaan and which operates the Jundland Special Development Zone in Tatooine, has sold land to Desertix within that zone. Desertix is the Tatooine subsidiary of Alderaan PMG manufacturer Special Electrix.

Key issues include:

- Did the provision of land confer a benefit on Desertix and what is the most appropriate benchmark for conducting this benefit analysis?
- Is the subsidy *de jure* or *de facto* export-contingent in light of Clause 4 of the Land Sales Contract (Annex 3)?
- Does Article 27.2(a) of the SCM Agreement apply not only when a least-developed country Member *grants* a subsidy, but also when the *recipient* of the subsidy is *located* in a least-developed country Member?

Whether the loan from Zurix Bank to Desertix constitutes a specific subsidy that causes serious prejudice to the interests of Coruscant inconsistent with Article 5(c) of the SCM Agreement and Article XVI:1 of the GATT 1994

Zurix Bank is a privately owned commercial bank located in Alderaan. Zurix Bank has granted Desertix a loan at an interest rate of 4%. In 2020, Desertix won a contract from Coruscant PMG producer Magnetix to supply PMGs to a windmill producer in a third country (Naboo).

Key issues include:

- Is Zurix Bank entrusted or directed by the government of Alderaan?
- Did the provision of the loan confer a benefit on Desertix and what is the most appropriate benchmark for conducting the benefit analysis?
- Can the Jundland Special Development Zone be considered to be "within the jurisdiction of the granting authority" in light of Investerix's ownership of the land, Alderaan's control of Investerix, and the MOU between Alderaan and Tatooine (Annex 2)?

ARTICLES XI AND XX OF THE GATT 1994

The existence of an unwritten overarching measure that is being systematically applied

Coruscant has challenged three individual measures as together constituting an "overarching measure which systematically restricts exports" of neodymium. These are a 25% export tax, an export registration requirement, and the non-renewal of most mining permits for Alderaan's neodymium mines. Teams would first be expected to debate the existence of the alleged overarching measure, before turning in greater detail to debate its export-restrictive effects.

Key issues include:

- On what basis may an unwritten measure be shown to exist?
- Do the three individual measures operate together, and in combination, as part of a plan and pursuant to a common policy objective?
- Can the overarching measure be shown to be WTO-inconsistent even though one or several of its individual measures are WTO-consistent when viewed in isolation?
- Can the measures be said to have been systematically applied?

Whether the unwritten overarching measure restricts exports

Key issues include:

- Does the export prohibition under Article XI:1 of the GATT 1994 apply to purely internal measures, such as the non-renewal of mining permits?
- Is the export registration equivalent to a quantitative restriction under Article XI:1 of the GATT 1994?
- Is the 2-3 week delay trade restrictive in light of Articles 2.2(a)(ii) and/or 3.5(f) of the ILA?

Whether the unwritten overarching measure can be justified under Article XX of the GATT 1994

Alderaan may choose to seek to justify its overarching measure under Article XX of the GATT 1994, and in particular Article XX(b) or XX(g). However, Alderaan may choose to forego this claim in order to not inadvertently have to concede that an overarching measure exists.

Key issues include:

- What policy objective does the measure pursue and on which basis?
- Under Article XX(b), is the measure necessary to protect human health and the environment, and do reasonably available alternatives exist?
- Under Article XX(g), does the measure relate to conservation and is it applied in an even-handed manner?
- Under the *chapeau*, can it be shown that any discrimination arising from the measure is rationally related to the stated policy objectives, or that the policy objectives are not abused as a disguised restriction on trade?
- What is the scope of the requirements under the *chapeau* in relation to internal measures which affect exports?

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