

ANNEX C

WRITTEN SUBMISSIONS AND ORAL STATEMENTS OF THE THIRD PARTIES

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ANNEX C-1

EXECUTIVE SUMMARY OF THE WRITTEN SUBMISSION OF CHINA

(16 February 2004)

1. INTRODUCTION

1.1 In its third party submission, China focuses on the following key points:

- (1) Mandatory/discretionary distinction in the context of Articles 3.1(a) and 3.2 of *the SCM Agreement*;
- (2) Establishment of a benefit;
- (3) Causation analysis in the context of Article 6.3(c) of *the SCM Agreement*.

2. NON-MANDATORY LEGISLATION IN THE CONTEXT OF ARTICLE 3 OF THE SCM AGREEMENT

2.1 On the basis of the Panel report in *US – Section 301*, the mandatory/discretionary nature of a piece of legislation is not exclusively decisive on whether it can violate a WTO agreement. Such a determination depends on, most importantly, the particular obligations imposed by a WTO agreement at issue. The Appellate Body in *US – Sunset Review* stated that “the import of the ‘mandatory/discretionary distinction’ may vary from case to case”.

2.2 Panels in previous proceedings have already ruled that the mandatory/discretionary distinction shall be applied in the context of Article 3.1(a) of *the SCM Agreement*, and that in order to establish that a piece of legislation, as such, violates Article 3 of *the SCM Agreement*, such legislation must mandate the grant of prohibited subsidies that are inconsistent with Article 3.

2.3 China is of the view that the mandatory/discretionary distinction should be applied in the context of Articles 3.1(a) and 3.2 of *the SCM Agreement*, and therefore, non-mandatory legislation cannot *per se* violate these provisions.

3. ESTABLISHMENT OF A BENEFIT

3.1 It has been ruled by the Panel and upheld by the Appellate Body in *Canada – Aircraft* that in establishing the existence of a benefit, the focus should be placed on the recipient of a subsidy instead of the granting authority.

3.2 China takes note that in establishing a benefit conferred by the KEXIM legal framework and the workout plan of Daewoo-HI/Daewoo-SME respectively, the European Communities attaches much of its emphasis on the granting authorities at issue and thus fails to comply with the interpretation made by the Appellate Body in *Canada – Aircraft*. Therefore, the evidence and arguments presented by the European Communities in its submission do not persuasively prove that there is a benefit in each of the instances.

3.3 In *Canada – Aircraft*, the Appellate Body interpreted that a financial contribution will only confer a benefit if it is provided on terms that are more favourable than those available in the market. In China's view, in the process of conducting such comparison with commercial terms, all pertinent factors that have a bearing on the comparison must be taken into account properly and comprehensively. China finds supports of its view from Article 14 of *the SCM Agreement* and a statement by the Panel in *Canada – Aircraft*.

3.4 In China's view, the European Communities fails to consider certain pertinent factors when assessing whether the KEXIM legal framework and the workout program applied to Daewoo-HI respectively confer a benefit. In the former instance, the European Communities does not take note of the underlying reason why other commercial banks do not provide loans or guarantees similar to those provided by KEXIM. In the latter case, the European Communities takes the action of foreign financial institutions as a benchmark without regard to factors that may affect the comparability of such a "benchmark".

4. CAUSATION ANALYSIS IN THE CONTEXT OF ARTICLE 6.3(C) OF THE SCM AGREEMENT

4.1 China is of the opinion that the phrase "*the effect of the subsidy*" in Article 6.3(c) of *the SCM Agreement* requires that the subsidy, *independent from other factors*, must have caused significant price suppression or depression. In this respect, China shares the same view with Korea.

4.2 China thinks that the European Communities fails to correctly consider the implicit meaning of Article 15.5 of *the SCM Agreement* and the GATT Panel report in *US – Norwegian Salmon CVD*, and such failure leads to no evaluation of "the effect of the subsidy" in isolation of other factors that were affecting the price of commercial vessels.

4.3 China is of the view that, in order to establish a causal relationship between the subsidy and price suppression or depression of the like product in the same market, two inter-related causal relationships should be established: first, the subsidy *causes* the subsidized company to suppress or depress the price of its own product; second, such suppressed or depressed product price *causes* the suppression or depression of the price of like product in the same market. Establishment of these two causal relationships calls for assessment of three factors: (1) the magnitude of the subsidy; (2) the effect of the subsidy upon the price of the product supplied by the subsidy recipient; (3) the suppression or depression effect of the price of the recipient's product upon that of the like product in the same market. China thinks these three factors should be collectively and consecutively considered in the causation analysis.

4.4 In China's view, the word "significant" used in Article 6.3(c) of *the SCM Agreement* calls for quantitative examination in the analysis on causal relationship. It should be shown that the subsidy causes *significant* price suppression or depression to the recipient's product price and thereby causes *significant* price suppression or depression of the like product in the same market. China considers that the requirement of "significant" should be considered and satisfied throughout the entire process of causation analysis.

4.5 China considers that, the European Communities, without presenting any actual figures to support its argument of quantitative effect of the subsidy measures at issue, fails to establish that the subsidy causes *significant* price suppression or depression.

5. CONCLUSION

5.1 In conclusion, China is of the view that,

- (1) Non-mandatory legislation cannot, as such, violate Articles 3.1(a) and 3.2 of *the SCM Agreement*;
- (2) When establishing a benefit, focus should be placed on the recipient of the subsidy, and proper and comprehensive consideration must be given to all pertinent factors that affect the comparison with commercial terms.
- (3) Article 6.3(c) of *the SCM Agreement* requires that in order to find a causal relationship between the subsidy and the significant price suppression or depression of the like product, it should be established that the subsidy, independent from other factors, and through the suppressed or depressed price of the product of the subsidy recipient, causes significant price suppression or depression of the like product in the same market; the term “significant” should be taken into account in the entire process of causation analysis.

ANNEX C-2

ORAL STATEMENT OF CHINA

(9 March 2004)

1. Thank you, Mr. Chairman, and members of the Panel. It is a pleasure to appear before you today to present the views of China in this proceeding. I wish to highlight certain aspects of the issues addressed in our written submission.

I. NON-MANDATORY LEGISLATION IN THE CONTEXT OF ARTICLE 3 OF THE SCM AGREEMENT

2. One of the key issues in this dispute is whether non-mandatory legislation can as such violate Article 3 of *the SCM Agreement*. In its written submission, China submits that the mandatory/discretionary distinction should be applied in the context of Articles 3.1(a) and 3.2 of *the SCM Agreement*, and therefore, non-mandatory legislation cannot *per se* violate these provisions.

3. First, the Panel in *US – Section 301* stated that, the mandatory/discretionary nature of a piece of legislation is not exclusively decisive on whether it can violate a WTO agreement. That Panel believed that the most important point under consideration should be the precise obligations contained in the particular WTO provision at issue. The Appellate Body in *US – Sunset Review* also had the view that “the import of the ‘mandatory/discretionary distinction’ may vary from case to case”.

4. Second, WTO precedents show that, in order to establish that a piece of legislation, as such, violates Article 3 of *the SCM Agreement*, such legislation must mandate the grant of prohibited subsidies that are inconsistent with Article 3.

5. Third, China does not agree with the European Communities that the word “shall” in Article 3.1(a) of *the SCM Agreement* should be understood as prohibiting non-mandatory legislation providing for the grant of export subsidy. The Appellate Body in *United States – Section 211* held that it cannot be assumed that a WTO member will fail to implement its obligations under the WTO Agreement in good faith. Accordingly, it may not be appropriate to assume that KEXIM will act, under the legal framework of the KEXIM Act, inconsistently with the SCM Agreement. In addition, China believes that in the case of non-mandatory legislation where the grant of export subsidy and its export contingency may still be pending on the exercise of discretion enjoyed by the government, it is not reasonable to come to a conclusion that the legislation *per se* constitutes an export subsidy and hence should be prohibited.

6. Nor does China agree with the European Communities that the term “not maintain” used in Article 3.2 of *the SCM Agreement* should be interpreted as “prevent”. The European Communities also submits that the ordinary meaning of “maintain” is to cause something to continue. Logically, the term “maintain” only points to existing things while “prevent” is used to address something that does not exist but may occur in the future. Therefore, to interpret “not maintain” as “prevent” would expand the obligation imposed by *the SCM Agreement* and thus fails to comply with Article 3.2 of the DSU.

II. ESTABLISHMENT OF A BENEFIT

7. The second key issue China would like to address is establishment of a benefit. In this dispute, the European Communities challenges certain Korean measures as constituting export subsidy and actionable subsidy. In demonstrating the existence of a subsidy, the element of a benefit is of great importance.

8. In this respect, China firstly submits that, in establishing the existence of a benefit, the focus should be placed on the recipient of a subsidy instead of the granting authority. This point has been made by the Panel and upheld by the Appellate Body in *Canada – Aircraft*.

9. China notices that in establishing a benefit conferred respectively by the KEXIM legal framework and the workout plan of Daewoo-HI/Daewoo-SME, the European Communities attaches much of its emphasis on the granting authorities at issue and thus fails to comply with the interpretation made by the Appellate Body in *Canada - Aircraft*. For this reason, China thinks that the evidence and arguments presented by the European Communities in its submission do not persuasively prove that there is a benefit in each of the instances.

10. Secondly, China believes that, in the process of making comparison between the terms on which financial contribution is made to the recipient and those available on the market, all pertinent factors that have a bearing on the comparison must be taken into account properly and comprehensively. China finds supports of its view from Article 14 of *the SCM Agreement* and a statement by the Panel in *Canada – Aircraft*.

11. In China's view, the European Communities seems to neglect certain pertinent factors when assessing whether the KEXIM legal framework or the workout program applied to Daewoo-HI confer a benefit. In the former instance, the European Communities does not take note of the underlying reason why other commercial banks do not provide loans or guarantees similar to those provided by KEXIM. In the latter case, the European Communities takes the action of foreign financial institutions as a benchmark without regard to factors that may affect the comparability of such a "benchmark".

III. CAUSATION ANALYSIS IN THE CONTEXT OF ARTICLE 6.3(C) OF THE SCM AGREEMENT

12. The third key issue China would like to highlight is causation analysis in the context of Article 6.3(c) of *the SCM Agreement*.

13. First, China believes that the phrase "*the effect of the subsidy*" in Article 6.3(c) of *the SCM Agreement* requires that the subsidy, *independent from other factors*, must have caused significant price suppression or depression. In this respect, China shares the same view with Korea.

14. China thinks that the European Communities fails to correctly and properly consider the implicit meaning of Article 15.5 of *the SCM Agreement* and the GATT Panel report in *US – Norwegian Salmon CVD*, and such failure leads to no evaluation of "the effect of the subsidy" in isolation of other factors that were affecting the price of commercial vessels.

15. Second, China also submits that, in order to establish a causal relationship between the subsidy and price suppression or depression of the like product in the same market, two inter-related causal relationships should be established: first, the subsidy *causes* the subsidized company to suppress or depress the price of its own product; second, such suppressed or depressed product price *causes* the suppression or depression of the price of like product in the same market.

16. China thinks that these two inter-related causal relationships link three factors that should be considered in the causation analysis: (1) the magnitude of the subsidy; (2) the effect of the subsidy upon the price of the product supplied by the subsidy recipient; (3) the suppression or depression effect of the price of the recipient's product upon that of the like product in the same market. China thinks these three factors should be collectively and consecutively considered in the causation analysis.

17. Third, in China's view, the word "significant" used in Article 6.3(c) of *the SCM Agreement* calls for quantitative examination in the analysis on causal relationship. It should be shown that the subsidy causes *significant* price suppression or depression to the recipient's product price and thereby causes *significant* price suppression or depression of the like product in the same market. China thinks that the requirement of "significant" should be considered and satisfied throughout the entire process of causation analysis. In China's view, the European Communities in its first written submission, appears to have not presented any actual figures to support its argument of quantitative effect of the subsidy measures at issue, and thus fails to establish that the subsidy causes *significant* price suppression or depression.

IV. CONCLUSION

18. This concludes my presentation. Thank you again for this opportunity to express China's views.

ANNEX C-3

EXECUTIVE SUMMARY OF THE WRITTEN SUBMISSION OF JAPAN

(9 February 2004)

1. Japan makes this third party submission to comment on certain aspects of this case. For the sake of convenience, this submission uses the same abbreviations as used in the EC First Submission.
2. First, Japan would like to emphasize that, as the EC argues, the market for commercial shipbuilding is generally considered to be a global market. Shipowners can virtually register their vessels in the shipping register of any country, and also operate them anywhere in the world, not just in the country where they are registered. National boundaries and laws hardly have any effect on the shipbuilding business, and traditional tariff and non-tariff barriers also have a limited effect. This “global” nature of the shipbuilding market emasculates the traditional antidumping and countervailing duty laws.
3. Thus, Japan has great interest in this case as it relates to the question of whether and to what extent subsidies in the shipbuilding sector can be effectively controlled under the WTO Agreement.
4. Second, with respect to the EC’s claims that certain Korean laws and regulations, and certain financial programs by the KEXIM are in violation of the SCM Agreement *as such*, Japan would like to urge this Panel to appropriately elaborate on the findings of the Appellate Body in *US - Sunset Review (Japan)* on the issue of the mandatory law doctrine and properly determine the extent of the applicability of this decisions to this case.
5. Third, in Japan’s view, the set of facts alleged by the EC indicate that the Korean shipbuilding companies were subsidized by financial contributions provided by their Korean creditor banks in connection with their restructuring plans, tax concessions granted in relation to the restructuring and export credit programs provided by the KEXIM for the shipbuilding companies. Given the facts alleged by the EC, Japan’s position is that KAMCO, KDIC, BOK, KDB, IBK and KEXIM should be found to be “public bodies”, as the EC claims. Thus, financial contribution provided by these institutions can be considered as a “subsidy” under the SCM Agreement. Also, Japan’s position is that the set of facts alleged by the EC indicates that the Korean government granted a subsidy to its shipbuilding industry by directing or entrusting non-public Korean banks to make contributions to the industry. Japan agrees with the EC that the complaining party does not have to show a formal or official command by the government in order to prove “direction or entrustment”.
6. Furthermore, given the facts alleged by the EC, in particular the fact that the government of Korea has a strong control over the creditor banks of the Korean shipbuilding companies, Japan considers plausible the EC argument that financial contributions (e.g. debt and interest forgiveness and debt-for-equity swap) that were made by creditor banks of the Korean shipbuilding companies in their restructuring plans have conferred a benefit to the Korean shipbuilding companies.

7. Japan considers that it is important whether or not Panel supports the EC argument that the scope of the relevant “market” should not be geographically limited under Article 6.3(c) of the SCM Agreement. Furthermore, Japan concerns the EC argument that the market for commercial vessels is indeed a global market, as mentioned above, and that “any assessment of price suppression, price depression, or lost sales must be conducted with respect to the world market.”

8. Japan is also aware that despite the increase in demand, following 2000 the price of commercial vessels has been staying low or even falling. It seems to support the EC argument that the subsidy provided by the Korean government to its shipbuilding industry has resulted in “serious prejudice” to the EC’s interests.

9. Japan’s position is that the Japanese shipbuilding industry has been also adversely affected by the subsidies at issue. In addition, Japan would like to point out that during the period from 1997 to 2001, Japanese shipbuilders experienced a number of lost sales of LNG carriers in competition with offers made by Korean shipbuilders at the prices that were 10 to 27 per cent lower. During the same period, it was reported that Japanese shipbuilders also lost sales of some container vessels, since the prices offered by Korean competitors were 15 to 17 per cent lower.

10. Finally, Japan agrees with the EC’s recognition that overcapacity in global shipbuilding would no longer exist if the Korean government had not subsidized its shipbuilding industry. Japan deems it reasonable to consider that the subsidy granted to the Korean shipbuilding industry, combined with the overcapacity maintained as a result of the subsidy, caused price suppression and depression in the global shipbuilding market.

11. As stated in the foregoing, Japan supports the EC’s position in regard to its claim that it has been seriously prejudiced by the subsidies granted to the Korean shipbuilding companies.

ANNEX C-4

ORAL STATEMENT OF JAPAN

(9 March 2004)

1. Mr. Chairman and distinguished Members of the panel, on behalf of the Government of Japan, I thank you for your attention to this matter. Japan joined this proceeding as a third party to address its substantial trade interest in the matter before this Panel. We would like to focus on four points presented by other parties regarding the EC claims on the actionable subsidy provided to the Korean shipbuilding industry.

2. Japan would like to discuss the following four points:

- (a) Firstly, Japan will emphasize that the proceeding of this dispute should take place, taking due account of the nature of the globalized shipbuilding market.
- (b) Secondly, Japan will demonstrate that Korea is erroneously dividing the shipbuilding market by overly emphasizing differences in the size of commercial vessels and downplaying the fact that the end-uses for those vessels are exactly the same.
- (c) Thirdly, Japan will demonstrate that the EC is not arguing that debt forgiveness provided in bankruptcy proceedings is an illegal subsidy for bankrupt companies.
- (d) Fourthly, Japan will refute Korea's apparent claim that the Japanese shipbuilding industry is responsible for the alleged injury to the EC shipbuilding industry.

I will now discuss each point in greater detail.

3. First of all, as stated in its third party submission, Japan emphasizes that the shipbuilding market is indeed globalized. We have to keep this fact in mind in order to discuss this dispute in a proper manner. The globalized nature of the market renders virtually meaningless to the Members' right under GATT Article VI of taking antidumping or countervailing duty measures in order to protect domestic shipbuilding industries from foreign competitors' dumped or subsidized exports. Japan urges the Panel to keep this in mind when examining the EC claims.

4. Furthermore, Japan disagrees with Korea's argument that the Panel should examine whether the subsidies at issue are causing "serious prejudice" to the EC industry based on national markets rather than the single globalized market. National boundaries and laws hardly have any effect on the shipbuilding business. By ignoring this reality of the shipbuilding market, no analysis could produce a satisfactory result in this dispute.

5. Also, in footnote 272 of its First Submission, Korea refers to an EC paper which argues that the Japanese market is isolated. In Japan's view, this statement should simply be disregarded as one example of the lingering prejudice about the Japanese market. More importantly, this is particularly untrue because the market is truly globalized. As Japan repeatedly stated, national boundaries and laws hardly have any effect on the shipbuilding business. Consequently, there is virtually nothing in the market that prevents the effects of a subsidy to a particular country's shipbuilding industry from

expanding its activities worldwide. Thus, considering the subsidy measures at issue, Japan believes that it would be unreasonable to conclude that the subsidy measures have not produced obvious negative effects on the competitors of the Korean shipbuilders which receive actionable subsidies.

6. Secondly, Japan submits that Korea is also erroneously dividing the shipbuilding market in terms of products. In the “like product” analysis, Korea overly emphasizes the differences in the size of commercial vessels, while illegitimately downplaying the significance of the fact that the end-uses are exactly the same. As long as the end-use of these two products is same, they are normally regarded as competing with each other. Further more, it is generally considered in the shipbuilding market that a lower-priced offer for a type of vessel will generate an immediate market effect on the market price of any other type of vessel. Cost factors are largely common for most types of vessels if it’s not for all, and by this point of view, maritime transport companies usually consider that when a shipbuilder offered a lower price for a type of vessel, the shipbuilder can offer a lower price for all other types of vessel as well. Following this reasoning, maritime transport companies, then, increasingly demand a discount for any type of vessel vis-à-vis all other shipbuilders, and consequently, a low price prevails throughout the market for all types of vessels.

7. Thirdly, Japan does not see the relevance of Korea’s argument that debt forgiveness provided in bankruptcy proceedings must not be found to be an illegal subsidy for bankrupt enterprises. Our understanding is that the EC is not arguing that debt forgiveness provided by banks to certain Korean shipbuilders in their restructuring proceedings *per se* impermissibly grants a benefit under the Subsidy Agreement. Rather, Japan understands that the EC’s argument involves three steps: First, domestic banks that were under the control of the Government of Korea provided debt forgiveness to the Korean shipbuilding companies on more favourable terms than foreign banks which were not under the control of the Government of Korea; second, such foreign banks should be deemed to behave in accordance with market terms; and, as a result, third, the debt forgiveness provided by the domestic banks granted a “benefit” within the meaning of Article 1.1(b) of the Subsidy Agreement. Korea’s argument in this regard to this issue misrepresents the EC claim.

8. In Japan’s view, this issue also raises questions regarding Korea’s rebuttal on the issue of specificity. The statutory framework for corporate restructuring may generally be applicable to any enterprise. In addition to the limited availability of this framework, however, Japan would like to remind the panel of how the EC defines “subsidy” measures. The issue is whether certain domestic banks granted debt forgiveness to the Korean shipbuilding producers on more favourable conditions than the market terms, pursuant to the direction or entrustment of the Government of Korea. Again, our understanding is that the EC is not challenging the corporate restructuring framework *per se*.

9. Fourthly, Japan would like to point out that Korea’s First Submission attempts to shift responsibility for the alleged injury to the EC shipbuilding industry on to the Japanese industry. This claim is another attempt to divert the attention of the Panel from the focus of this case. Our understanding is that the primary issue is not whether the subsidy to the Korean shipbuilding industry caused the price decline for commercial vessels from 1997 to 1999, but whether such subsidy caused price suppression after the decline—and specifically, whether the subsidy caused the market price to remain at the declined level from 2000 to 2003 despite the increase in demand and cost. We note that Korea itself argues that the focus should be on the current situation. Furthermore, Korea’s claim concerning the Japanese industry is unreliable. The complexity of the actual market mechanism requires the analysis of many transactions and relevant factors such as negotiation process, in order to conclude which market participant or participants caused a price effect on the market. Therefore, Japan is of the view that the EC’s analysis which refers to many transactions is more plausible than Korea’s rebuttal. Rather, as stated in our third party submission, the Japanese industry has also been negatively affected by the aggressive pricing of the Korean shipbuilders. Also, Japan notes that

market share does not necessarily determine who is a price leader in the market. Heavily subsidized enterprises can lead price competition, especially with a considerable production capacity.

10. Thank you, Mr. Chairman and distinguished Members of the panel.

ANNEX C-5

RESPONSES OF JAPAN TO QUESTIONS FROM THE EUROPEAN COMMUNITIES AND KOREA

(22 March 2004)

Questions by the European Communities

Question 1: Japan considers in para. 10 of its Third Party Submission that on the basis of the facts alleged by the EC, KAMCO, KDIC, BOK, KDB, FFIK and KEXIM should be found "public bodies". In Japan's view, what factors should the Panel consider when determining whether an entity is a "public body"?

Answer

1. Japan is of the view that there is no single controlling factor; the comprehensive and case-by-case evaluation of all relevant factors may warrant a proper determination as to whether an institution is a "public body" within the meaning of Article 1.1(a)(1) of the Subsidy Agreement. Relevant factors include, but are not limited to, whether and what public policy objective the institution has, whether and to what degree the government has control over the appointment of management or budget, whether and to what degree the government owns shares in that institution, and whether and to what degree the government has supervisory power over operational planning.

Question 2: Japan considers in para. 12 of its Third Party Submission that the facts alleged by the EC indicate that the Korean government entrusted and directed non-public Korean banks to make contributions to the industry. Does Japan therefore also agree that circumstantial and secondary evidence is sufficient to proof entrustment and direction on a case to case basis?

Answer

2. First, as stated in paragraph 13 of its third party submission, Japan agrees with the EC that the complaining party does not have to show formal or official command by a government in order to prove "direction or entrustment". Second, Japan would like to point out that no provision in the Subsidy Agreement or the WTO Agreement sets forth that circumstantial or secondary evidence is inadmissible as proof for "direction or entrustment".

Question 3: In Japan' view, in the context of price suppression or depression claims in Article 6.3c), what is the geographic scope of the phrase "in the same market"? Please describe the geographic scope of the market for LNGs, product and chemical tankers, and containerships.

Answer

3. Japan is of the view that the “same market” under Article 6.3(c) of the Subsidy Agreement should mean, in terms of the shipbuilding business, the single global market for the same type of commercial vessels. It is widely recognized that the shipbuilding market is globalized. In our view, this recognition is based on the following two characteristics of the market:

4. First, shipowners can virtually register their vessels in the shipping register of any country, and also operate them for transportation anywhere in the world, not just in the country where they are registered. Thus, geographical elements are of little significance, in particular, for commercial vessels that are operated and, accordingly, compete with one another in the overseas transportation market.

5. Second, our observation is that shipowners have no particular preference in the nationality of shipbuilders. Japanese shipowners may procure vessels from abroad, and Japanese shipbuilders may export a number of vessels abroad. As indicated in Exhibit JPN-1 attached hereto, Japanese, European and Korean shipbuilders have competed one another in the LNG carrier market since the mid-1990s, when the Korean shipbuilders newly entered into this market. For product tankers and container carriers, as indicated in Exhibit JPN-2 also attached hereto, a number of shipbuilders, including those from Japan, Europe, Korea, and China, have been competing one another since the beginning of 1990s.

Question 4: Japan considers in para. 18 of its Third Party Submission despite the increase in demand following 2000 the prices of commercial vessels has been staying low or even falling. What evidence does Japan have concerning the price trends in world shipbuilding market? Do these trends reflect the demand and supply of vessels?

Answer

6. See the chart contained in Exhibit JPN-3, which indicates the relationship between the price of commercial vessels, and the aggregate amount of orderbook. This chart was prepared by the OECD.

7. This chart shows that the price and the aggregate amount of orderbook correlated with each other until 1996, when Korean shipbuilders increased their production capacity on a large scale, thus generating overcapacity in the shipbuilding market, and further, witnessing a significant price decrease. Since then, no such correlation can be found; rather, despite the increase in the aggregate orderbook, the price of commercial vessels has been staying low or even decreasing. Japan is of the view that the subsidy provided to some Korean shipbuilders has prevented the market mechanisms from dealing with this overcapacity problem by keeping those companies that were on the verge of bankruptcy in business as a result of the aforesaid aggressive capacity increase and resulting price decrease. Those companies would probably have been forced out of the market in the absence of the subsidy at issue.

Question 5: In Japan's view, the Japanese shipbuilding industry has been also adversely affected by the subsidies at issue. Why couldn't the Japanese shipbuilding industry match the Korean prices for LNGs and Containerships? Did such a situation prevail before 1997?

Answer

8. As noted in paragraph 18 of its third party submission, the prices offered by Korean competitors were 15 to 17 per cent lower than those offered by Japanese shipbuilders. These prices

were much lower than that the Japanese shipbuilders expected from the market situation before 1997, and thus, they could not keep up with the pricing practices of Korean competitors.

Question 6: Japan in para.16 of its Third Party Submission supported the EC argument that the subsidy provided by the Korean government to its shipbuilding industry has resulted in "serious prejudice" to the EC's interest. Does Japan therefore agree that there were no other relevant factors that disturb the causal link between the Korean subsidies and the price depression and suppression?

Answer

9. See the Answer to EC Question 4. Japan's view is that the subsidy granted to certain Korean shipbuilders has maintained the overcapacity in the shipbuilding market, and thus, is the primary cause of the continued low prices despite the demand increase after 2000, i.e. price suppression.

Exhibit JPN – 1

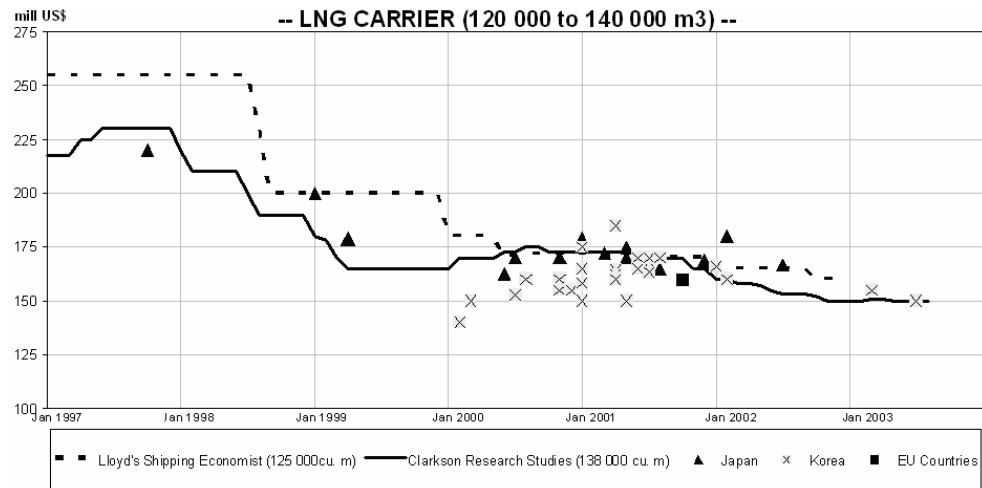


Exhibit JPN – 2

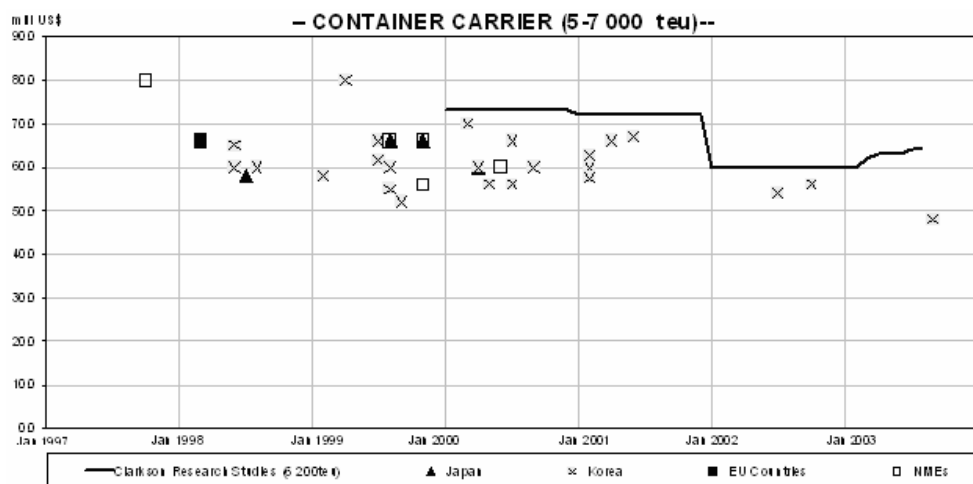
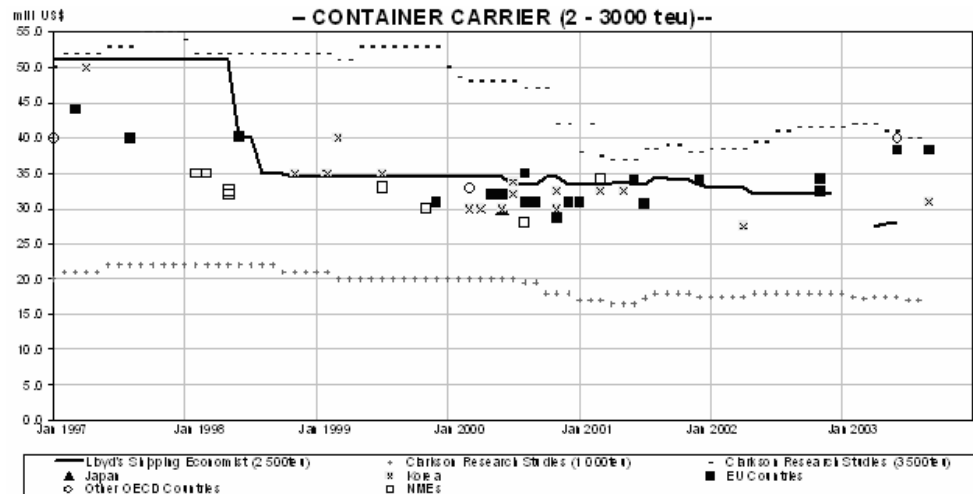
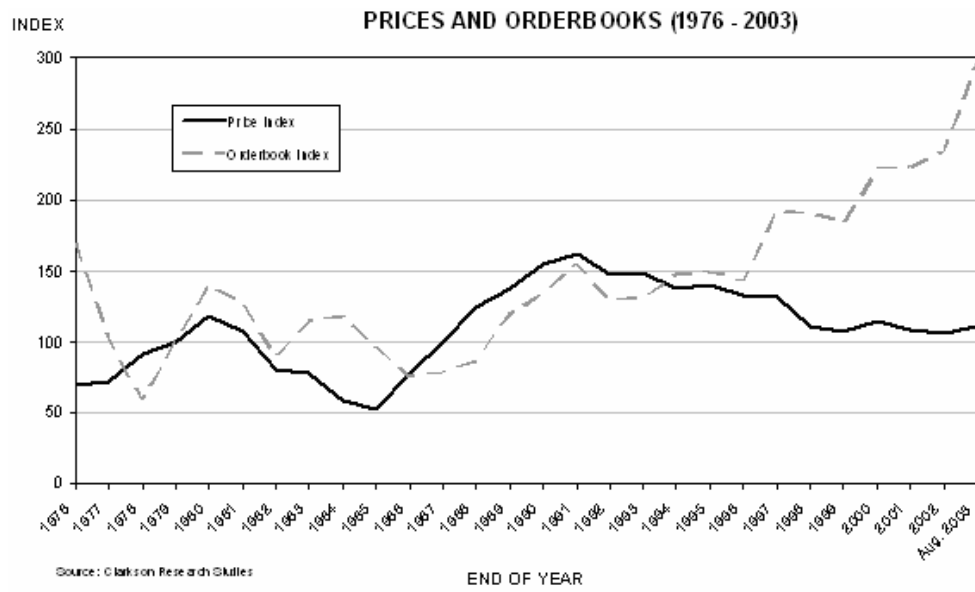


Exhibit JPN - 3



Questions by Korea

Question 1: The EC has indicated in the Sixth Report from the Commission to the Council on the situation in world shipbuilding¹ that order intake in Japan comes from domestic demand and that “[t]hese orders by Japanese shipowners are almost inaccessible to other shipbuilding countries and therefore provide a captive market for Japanese yards”.

Did foreign builders participate in bids by Japanese shipowners for the building of LNGs or other vessels? If not, how does this affect the definition of the geographical market and the causation analysis submitted by the EC in its first submission?

Answer

1. This is simply another example of the lingering prejudice about the Japanese market. It is erroneous to consider that the Japanese market is a captive market for Japanese yards. First, nothing in Japan prevents foreign shipbuilders from participating in bids by Japanese shipowners. Further, there is no trade barrier (*de jure* or *de facto*) against imports of commercial vessels in Japan.

2. Second, the reality is that Japanese shipowners may procure commercial vessels from abroad. For example, the data compiled by Clarkson indicates that even referring only to current order stock for Korean shipbuilders, with respect to LNG carriers, at least Mitsui O.S.K. Lines, Nippon Yusen and Kawasaki Kisen have placed several orders in total; with respect to container ships, Nippon Yusen and Kawasaki Kisen have placed more than 10 orders in total.

3. Again, we would like to reiterate that it is widely recognized that the shipbuilding market is globalized. Shipowners can virtually register their vessels in the shipping register of any country, and also operate them for transportation anywhere in the world, not just in the country where they are registered. Thus, the shipbuilding market is not divided geographically.

Question 2: Japan claims that prices for Korean vessels were below prices for Japanese vessels (paragraph 18 of Japan’s written submission) but the EC has not made a claim on price undercutting. What is the relevance then of Japan’s claim?

Answer

4. Japan provided examples of lower priced offers by Korean shipbuilders in support of the EC argument for price depression or suppression caused by subsidies granted to Korean shipbuilders. Our understanding is that Korean shipbuilders offered and continue to offer lower prices than Japanese and other competitors, i.e. price undercutting, resulting in price depression or suppression in the global shipbuilding market.

Question 3: Can Japan provide the criteria on the basis of which it would propose to determine the like product for the vessels subject to this dispute?

Answer

5. Japan’s view is that the type of vessels (e.g. LNG carriers, product tankers and container carriers) is a controlling factor in determining the scope of “like product” for commercial vessels. The term “like product”, under GATT Article III or other WTO provisions, has taken into

¹ COM(2002)622 final, 13 November 2002, Section 2.2.3, page 8. See also Seventh Report from the Commission to the Council on the Situation in World Shipbuilding, COM(2003)232 final, 6 May 2003, Section 2.1.1, page 5.

consideration, on a case-by-case basis, such as (i) product properties, (ii) end-uses, (iii) consumers' preference, and less importantly, (iv) tariff classifications, of subject products. As Japan stated at the third party session, it is obvious that the type of vessels is closely connected to their end-use; the same types of vessels are competing with one another in the overseas transportation market.

Question 4: Does Japan consider that for the purpose of demonstrating that the effect of the subsidy concerned is significant price depression or suppression, the subsidy must be quantified. If so, what is the basis for such quantification?

Answer

6. Indeed, it would be easier to evaluate precisely whether a subject subsidy has caused price depression or suppression, if the amount of the subsidy is quantified. However, even if it is not quantified, Japan believes that it is still possible to find such a causal nexus between a subsidy and price depression or suppression. For example, assume, as the EC claims in this dispute, that certain producers would have been forced out of the market in the absence of a subject subsidy, and consequently, the lingering overcapacity problem would have ceased to exist. In this situation, given that the market price is also staying low despite the demand increase, it is reasonable to find that the demand increase should have elevated the market price in the absence of the subsidy. In other words, the subsidy caused price suppression.

ANNEX C-6

WRITTEN SUBMISSION OF NORWAY

(9 February 2004)

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A. INTRODUCTION

1. The present case concerns whether the rules set out in the Kexim Act, Kexim Decree and Kexim Interest Rate Guidelines establishing the Korean Export Import Bank (hereinafter referred to as KEXIM) and the rules concerning some of the programmes implemented by KEXIM violate Korea's obligations under the WTO Agreement on Subsidies and Countervailing Measures (hereinafter referred to as the SCM Agreement).

2. The case has been brought by the European Communities (hereinafter referred to as the EC), which asks the Panel to find that Korea has granted subsidies that are inconsistent with its obligations under the SCM Agreement, because:

- Through the KEXIM Act, KEXIM Decree and Interest Rate Guidelines, Korea grants prohibited subsidies that are inconsistent with Article 3.1 and 3.2 of the SCM Agreement;
- Through the establishment and maintenance of Advance Payment Refund Guarantees (hereinafter referred to as APRGs) and Pre-shipment Loan Programmes, Korea grants prohibited subsidies that are inconsistent with Article 3.1 and 3.2 of the SCM Agreement;
- Through individual APRGs and pre-shipment loans, Korea grants prohibited subsidies that are inconsistent with Article 3.1 and 3.2 of the SCM Agreement;
- By granting subsidies to Daewoo-SME/Daewoo-HI, Samho-HI/Halla-HI, and STX/Daedong through (i) workout plans and restructuring plans; (ii) tax concessions to Daewoo-HI/Daewoo-SME; and (iii) KEXIM APRGs and pre-shipment loans, Korea has caused serious prejudice to the interests of the EC in violation of Articles 5(c) and 6.3(c) of the SCM Agreement.

3. Norway has systemic interests as regards the interpretation and application of the SCM Agreement, and has thus reserved the right to participate as a third party in the present dispute. Norway will not address all the issues that are raised in the submissions by the two parties to the dispute, but will concentrate on certain issues of law and legal interpretation that are of importance to Norway.

1. Introductory comments

4. Norway's point of departure is that the existence of national guarantee institutions, and the guarantees and loans provided by such institutions, do not necessarily constitute a *prima facie* case of prohibited or actionable subsidisation under the SCM Agreement. Most countries have such institutions and arrangements in the field of shipbuilding.

5. However, Norway is of the opinion that the services provided by such institutions should be provided on market terms. The price of the services offered should not contain any elements of subsidisation. Where the price of the services offered are not offered on market terms, then there may be a *prima facie* case of prohibited or actionable subsidisation provided that the relevant conditions of Articles 1 and 2 of the *SCM Agreement* are met. Due regard must be given in this respect to the qualifications contained in Annex I to the *SCM Agreement*, paras. "j" and "k", to the effect that not all practices by such institutions are considered prohibited export subsidies. In our opinion the rules governing the Advance Payment Refund Guarantee (hereinafter the APRG) and the Pre-shipment Loan programmes (administered by KEXIM) as set out in the Kexim Act, Kexim Decree and Kexim Interest Rate Guidelines would seem to go beyond what is a normal market practice. KEXIM by granting loans under these programmes may thereby have violated the *SCM Agreement*. Whether,

and to what extent, there is subsidisation in respect of a particular ship or contract will depend on the specifics of each case.

2. General interpretative issues in Article 1 of the SCM Agreement

6. The assessment of whether there are actionable or prohibited subsidies in the present case raises certain issues of interpretation related to Article 1 of the SCM Agreement. These are concerned in particular with whether KEXIM falls within the definition of a “public body”, whether there is “a financial contribution” and whether “a benefit is thereby conferred”.

(a) A financial contribution

7. It does not seem to be in dispute that loans and grants have been provided by KEXIM, and that they may constitute “a financial contribution” within the meaning of Article 1.1(a)(1)(i). The argument put forward by Korea¹ centres around the words “government practice” in Article 1.1(a)(1), which is alleged to restrict the scope of transfers that may be considered as a subsidy.

8. Norway finds it difficult to follow Korea’s argument, since Korea appears to be using the term “government practice” to refer to something different from “public body practice”. The word “government” is defined in Article 1.1(a)(1) as including “public body” throughout the SCM Agreement. Making a distinction based on the argument that “government” in this sub-paragraph must mean a reference to certain functions that are normally vested in governments (e.g. regulatory powers or taxation) runs counter to the general definition of “government” in Article 1.1(a)(1), and should not be upheld.

(b) A public body

9. The term “public body”, which appears in Article 1.1(a)(1) of the *SCM Agreement*, is not defined in the agreement.

10. However, the General Agreement on Trade in Services (GATS) has two definitions that are of interest here. Firstly, the definition of “measures by Members” (i.e. Member Governments) includes central, regional or local governments and authorities, and also “non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities” (GATS Article I:3(a)(ii)). Secondly, in paragraph 5(c) of the Annex on Financial Services to the GATS Agreement “public entity” is defined as:

a government, a central bank or a monetary authority, of a Member or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions (our underlining).

11. Furthermore, in Annex 1, paragraph 6, of the Agreement on Technical Barriers to Trade, central government body is defined as “central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question” (our underlining). While Norway certainly recognises that no definition contains the precise words “public body”, and that no transposition can be made directly from one agreement to another, the definitions

¹ First written submission by Korea, para. 161- 165.

in these agreements appear to be relevant when defining “public body” as used in the SCM Agreement.

12. It would seem from the above that “ownership” by the Government, or “control” by the Government in respect of the activity in question are necessary ingredients when defining “public body”. However, ownership is not in itself enough, since many state-owned enterprises are not considered to be public bodies simply by virtue of their ownership.

13. The second element that may be inferred from the above, that the “body” (in order to be a “public body”) must carry out governmental functions or activities for governmental purposes, is more difficult to assess. What is to be considered governmental functions or activities for governmental purposes is to a large degree dependent on the organisation of the State, and the extent to which its political leadership has decided that certain functions or services are to be provided by the government, directly or indirectly. There are great divergences between the Members of the WTO in this respect. The statutes of the body, its funding, and whether the government has guaranteed that the body cannot go into liquidation, are all elements that may indicate that the body in question is a “public body”.

14. It should also be noted that “export credit guarantee or insurance programmes” are explicitly covered in the “illustrative list of export subsidies” in Annex I to the SCM Agreement. This is an indication that when government-controlled bodies provide such guarantees or insurance, this will normally be considered to be covered by the subsidy definition.

15. Norway submits that the following elements provide convincing evidence to the Panel in its assessment that KEXIM must be considered a “public body” within the meaning of Article 1.1(a)(1) of the Agreement on Safeguards:

- According to Article 1 of the KEXIM Act KEXIM’s task is “to promote the sound development of national economy and economic co-operation with a foreign country”.
- In the KEXIM 2002 Annual Report, KEXIM is described as “an official export credit agency providing comprehensive export credit and project finance to support Korean exporters and investors” and facilitating “the development of the national economy and enhanc[ing] economic co-operation with foreign companies as a financial catalyst”.²
- Since December 2002 KEXIM has been owned by the Government of Korea, the Bank of Korea and Korea Development.³ The two latter bodies are government agencies.
- A number of other articles in the KEXIM Act confirm that KEXIM is a “public body” within the meaning of SCM Agreement Article 1.1(a)(1), see in particular Article 37 of the Act?, “any net loss incurred by the Export-Import bank during any fiscal year shall be covered by its reserves. If the reserves are insufficient to cover the net loss, the Government shall provide funds to cover such net loss”.⁴
- See also KEXIM Act Articles 36(2), 11, 21, 32 and 33, which clearly underline that KEXIM is a “public body” within the meaning of Article 1.1(a) of the SCM Agreement.

² See Exhibit EC-14

³ See KEXIM 2002 Annual Report, p.34 (Exhibit EC-14)

⁴ See KEXIM Act (Exhibit EC-10)

(c) A benefit is thereby conferred

16. Further, Article 1.1(b) of the SCM Agreement requires that a “benefit” has to be conferred. The term has not been defined in the SCM Agreement, but has been interpreted in WTO jurisprudence in a number of cases. In The Panel Report *Canada – Aircraft* the term was defined as:

[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 in the market.⁵ (our underlining)

17. The Appellate Body upheld this interpretation.⁶

18. Article 26 of the Kexim Act clearly states that “*Except where inevitable for maintaining the international competitiveness to facilitate the export,...* the interest rates, discount rates and fee rates applicable to loans, and guarantees extended under paragraphs (1) and (2) of Article 18 shall be so set as to cover the operating expenses...”

19. In Norway’s view, the wording of Article 26 implies that the Government of Korea (hereinafter GOK) *de facto* instructs Kexim, to offer lower interest rates on pre-shipment loans and premiums on APRGs than the market rate, if such practice is necessary in order to secure export contracts for Korean companies. Thus, the Kexim Act allows for financing “on terms that are more advantageous than those that would have been available to the recipient in the market” and may thereby confer a “benefit” within the meaning of Article 1.1 (b) of the SCM Agreement.

20. Norway will not discuss in detail whether the terms on which KEXIM programmes, in question, are granted are more advantageous than those that would have been available to the recipients in the market. This is for the parties to the dispute to argue. Norway wishes to point out, however, that if this is the case, it may thus constitute a *prima facie* case of “benefit”.

(d) Conclusion

21. Based on the above, Norway submits that we are faced with a “*financial contribution*” by a “*public body*” that may confer a “*benefit*” and thereby constitute a “subsidy” within the meaning of the SCM Agreement Article 1.

B. PROHIBITED SUBSIDIES

3. The APRG and the Pre-shipment Loans constitute a subsidy which is “specific” within the meaning of Article 2.3

22. According to Article 2.3. of the SCM Agreement any subsidy falling under the provisions of Article 3 is to be deemed to be specific.

4. The APRG and the Pre-shipment Loans constitute a subsidy which is “contingent on export performance” within the meaning of Article 3.1(a)

23. According to Article 3.1, for a subsidy to be prohibited it must be contingent on either export performance (a) or the use of domestic goods over imported goods (b). The APRG is in our opinion contingent on export performance.

⁵ Panel Report, *Canada - Aircraft*, para. 9.112., but also *Brazil – Aircraft*, para 7.24 and *US – Lead and Bismuth II*, para 6.66

⁶ AB Report *Canada – Aircraft*, paras 154, 157.

24. The wording of the KEXIM Act clearly shows that the purpose of the KEXIM programmes is to facilitate export. For example, Article 18 of the Act states that the loans are given “for the promotion of the export of goods”. The wording of the Act leaves no doubt that the programmes represent a subsidy whose goal is to promote the export of Korean goods. The subsidy is contingent on export performance and is therefore a prohibited subsidy within the meaning of Article 3.1(a)

5. Conclusion on prohibited subsidies

25. According to the facts presented by the EC regarding the specific grants (paras 166-182) , these grants are provided on terms that are more advantageous than those that would have been available to the recipient in the market. Based on these findings, Norway is of the opinion that the Panel should find that the specific grants provided under the APRG and the Pre-shipment Loan Programmes are inconsistent with Article 3.1(a) of the *SCM Agreement*.

C. ACTIONABLE SUBSIDIES

26. In its first written submission, part IV D, the EC demonstrates that Korea granted subsidies, as defined by Part I of the SCM Agreement, to Daewoo-SME/Daewoo-HI, Samho-HI/Halla-HI and STX/Daedong, and that those subsidies were specific. The EC further argues that the subsidies provided by Korea are actionable subsidies within the meaning of Articles 5(c) and 6.3(c) of the SCM Agreement.

27. Norway will in this respect only address certain issues of interpretation arising from Article 6.3(c) of the SCM Agreement.

28. Article 6.3(c) states that:

“the effect of the subsidy is significant price undercutting by the subsidised 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” (our emphasis).

29. The EC is only claiming the existence of “price suppression” and “price depression”, not “price undercutting”. The question of interpretation thus only arises as regards the second alternative in Article 6.3(c), i.e. “or significant price suppression, price depression or lost sales in the same market.”

30. Norway therefore presents the following arguments as regards the interpretation of the legal definition of (1) the “same market” as used in Article 6.3(c) in the context of the shipbuilding industry, and (2) how price depression or price suppression is related to a “like product” or other comparison between products.

1. Same market

31. A geographical market, in the ordinary meaning of the word, can refer to a market of any size, with national, regional or even global dimensions. Unlike Article 6.3(a) and 6.3(b), which impose geographical limitations on the term “market” (i.e. national markets), Article 6.3(c) includes no such limitation. If the negotiators had intended to limit the term market in 6.3(c) to national markets, they could have done so by using wording similar to that in 6.3(a) and 6.3(b).

32. The term “same market” has not been defined in jurisprudence. Norway submits that the term “same market” in Article 6.3(c) should not be interpreted narrowly as a Member’s national market, but that due regard must be given to the special characteristics of the shipbuilding industry.

33. In the case of commercial vessels, it is widely recognised that the market is global. In its comments to the OECD regarding possible measures used to regulate low-price “dumping” by shipbuilders, the Korean Shipbuilders’ Association noted that: “[t]here is only a single fully integrated global market in this sector, wherein shipbuilders compete with each other without any restriction on market access, purchasers, or movement of vessels. No meaningful distinction of national markets exists in the world shipbuilding industry.”⁷

34. The fact that the market for commercial vessels is global needs no clarification; ships can sail anywhere, be owned by anyone, and be registered anywhere in the world regardless of the nationality of the shipowner and his place of business. This has been the trend for a large number of years, in particular since the 1970s, when there was a rise in the number of “international ship registers”. Shipowners themselves do not operate within geographical boundaries when they order new vessels. The only “boundaries” in the shipbuilding world, where there are highly sophisticated shipbuilding companies everywhere, is in reality the price. Subsidies in any form, in this highly competitive industry, can have a major impact and steer the market towards a particular country.

35. Based on the above Norway submits that the only meaningful interpretation of the “same market” in this particular context is a global market without any national boundaries.

2. “Like product” or other product comparison

36. Article 6.3(c) makes reference to a “like product” in respect of “price undercutting”, but does not make a direct reference to a “like product” in respect of price suppression, price depression or lost sales in the same market.

37. It is clear, however, that price suppression, price depression and lost sales can only occur when the products are competing for the same contracts. “Like product” must therefore be understood to refer not only to “price undercutting” in the first alternative in Article 6.3(c) but also to price suppression, price depression and lost sales in the second alternative. Furthermore, in respect of ships, due regard must be given to the many sub-categories of ships (e.g. Aframax, Panamax, Suezmax) that do not compete with each other.

D. CONCLUDING REMARKS

38. Norway respectfully requests that the Panel take the arguments presented above into consideration when making its findings and recommendations in this case.

⁷ OECD Council Working Party on Shipbuilding, Industry Hearing on Establishing Normal Competitive Conditions in World Shipbuilding, Submission by the Korean Shipbuilders’ Association, C/WP6(2002)3/ADD1/REV2.

ANNEX C-7

ORAL STATEMENT OF NORWAY

(9 March 2004)

Mr. Chairman,
Distinguished Members of the Panel,
Ladies and gentlemen,

Introduction

1. First of all, I would like to thank you for this opportunity to present the Norwegian view on certain aspects of the present case without any reference to BCI. In its third-party submission, Norway addressed certain issues of legal interpretation which we consider to be of crucial importance for the settlement of the case. I will not repeat all these arguments here, but concentrate on certain legal aspects of the KEXIM pre-shipment loans.

2. I will start by commenting on whether the loans in question can benefit from a safe haven based on item (k) of Annex I to the SCM Agreement. I will continue with the discussion of whether these loans can be considered prohibited subsidies within the meaning of Article 3.1 (a) read in conjunction with Article 1 of the Agreement, and in this regard I will limit myself to discussing the requirement that a benefit must be conferred.

3. I will also comment on the discussion of whether the loans are actionable subsidies according to Article 5(c) read in conjunction with Article 6.3 (c). In this respect I will limit myself to some remarks on the interpretation of the term “same market” with regard to commercial vessels.

The understanding of Annex I item (k)

4. In its first written submission Korea states that its pre-shipment loans are excluded from the ambit of Article 3 of the SCM Agreement as they are covered by the exception in item (k) of Annex I to the SCM Agreement.¹

5. According to the second paragraph of item (k) the application of an export credit practice should not be considered a prohibited export subsidy if 1) the Member applying the practice is a party to an international undertaking on official export credits to which at least twelve Members are parties and 2) the practice is in conformity with the provisions of the relevant undertaking.

6. Korea together with more than 12 other Members² is party to an international undertaking under the auspices of the OECD, the “Consensus Agreement”³, thus fulfilling the first criterion. The

¹ See Korea’s first written submission paras. 269-277

² The OECD Export Credit Arrangement currently has 23 participants (counting the EU Member States), all of which are WTO Members.

³ Arrangement on Officially Supported Export Credits of 11 February 2004 TD/PG(2003)24

question remains therefore whether the contested loans are covered by and “in conformity” with the provisions of that Agreement.

7. Article 5 of the Consensus Agreement concerning the scope of the Agreement clearly states that “the Arrangement shall apply to all official support provided by or on behalf of a government for export of goods and/or services ... which have a repayment term of **two years or more**”.

8. In para. 277 (ii) of its first written submission, Korea states that the pre-shipment loans are provided with the usual maturity of 90 -180 days. Thus the loans have a shorter repayment term than required and consequently fall outside the scope of the Consensus Agreement.

9. In conclusion, Korea cannot claim a safe haven under the exception in Annex I item (k) for its KEXIM pre-shipment loans, which means that the loans must be assessed under the general rule in Article 3 of the SCM Agreement on prohibited subsidies.

Article 1.1 (b) – what constitutes a “benefit”

10. As I have already mentioned, Article 3 refers to Article 1, which defines the term “subsidy” for the purpose of the SCM Agreement. I would now like to discuss what constitutes a “benefit” according to Article 1.1 (b). The term “benefit” is not defined in the SCM Agreement, but has been interpreted by panels and the Appellate Body in a number of cases. According to *Canada-Aircraft*⁴ “a benefit is conferred if a financial contribution is provided on terms that are more advantageous than those that would have been available to the recipient in the market”.

11. Article 26 of the Kexim Act states that “Except where inevitable for maintaining the international competitiveness to facilitate the export,... the interest rates, discount rates and fee rates applicable to loans and guarantees extended under paragraphs (1) and (2) of Article 18 shall be so set as to cover the operating expenses...”

12. In Norway’s view, the wording of Article 26 of the KEXIM Act implies that the Government of Korea *de facto* instructs KEXIM to offer lower interest rates on pre-shipment loans if such a practice is necessary in order to secure export contracts for Korean companies.

13. I will not assess whether the interest rates provided by KEXIM place the Korean exporters in a more advantageous position than if they were to obtain such financing on market terms. However, if the Korean exporters enjoy such an advantageous position, we are faced with a *prima facie* case of “benefit”.

The concept of “same market” in Article 6.3(c)

14. I will now turn to the interpretation of the concept “same market” in Article 6.3(c), which have a bearing on whether the loans are “actionable subsidies” within the meaning of Article 5 (c) of the SCM Agreement.

15. In Norway’s opinion Article 6.3(c) provides two alternative ways to establish serious prejudice in the sense of Article 5(c): 1) the effect of the subsidy is a significant price undercutting by the subsidised product, as compared with the price of a like product of another member in the same market or 2) the effect is either a significant price suppression, price depression or lost sales in the same market.

⁴ Panel Report , *Canada-Aircraft*, para. 9.112 and AB Report *Canad-Aircraft*, paras. 154,157.

16. It is Norway's understanding that the EC, in the present case, claims that the effect is a significant price suppression or depression. However, to decide whether this is the case, both the geographical market and the product market concerned must be considered.

Geographical market

17. First some comments as regards the geographical market: In the ordinary meaning of the phrase, geographical market can refer to a market of any size, with national, regional or even global dimensions. Unlike Article 6.3(a) and 6.3(b), which impose geographical limitations on the term “market” (i.e. national markets), Article 6.3(c) contains no such limitation. If the negotiators of the SCM Agreement had intended to limit the term “market” in 6.3(c) to national markets, they could easily have done so by using wording similar to that in 6.3(a) and 6.3(b).

18. The term “same market” has not been defined by jurisprudence. Norway believes that the extent of the geographical market will vary depending on the characteristics of the products in question.

19. In the case of commercial vessels, it is widely recognised that the market is global. In its comments to the OECD regarding possible measures used to regulate low-price “dumping” by shipbuilders, the Korean Shipbuilders’ Association noted that: “[t]here is only a single fully integrated global market in this sector, wherein shipbuilders compete with each other without any restriction on market access, purchasers, or movement of vessels. No meaningful distinction of national markets exists in the world shipbuilding industry.”

20. This was confirmed last week by the OECD Special Negotiation Group for shipbuilding. The participants, including the delegation from Korea, agreed that there is only one single fully integrated market for commercial vessels – that is the global market.

21. In this respect, there are several examples of the fact that Norwegian yards compete with shipbuilders all over the world, including Korean yards, i.a. regarding contracts on product and chemical tankers. This supports the idea that, in the field of commercial vessels, there is only one meaningful interpretation of the term “same market” in Article 6.3 (c) and that is a global market.

The product market

22. Finally some remarks on the determination of the “product market”: This must be defined on a case-by-case basis. Norway is of the opinion that one must look to the specifics of the particular sector in question – that is the building of commercial vessels. In this sector there is a great potential for substitution between products as many yards all over the world are able to build different types of ships.

With this, Norway would like to thank the panel for this opportunity to comment on certain issues of the case at hand and hopes that they may be helpful.

Thank you for your attention.

ANNEX C-8

RESPONSES OF NORWAY TO QUESTIONS FROM THE EUROPEAN COMMUNITIES AND KOREA

(22 April 2004)

Questions from the European Communities

Q1: In Norway's view, are the APRGs and PSLs supplied by KEXIM provided on terms more favourable than is otherwise available on the market?

Reply

As a third party, Norway has not undertaken any assessment of whether the actual interest rates provided by KEXIM place Korean exporters in a more advantageous position than if they were to obtain such financing in the market. If however this is the case, as stated by the European Communities, a "benefit" is conferred.

Further, as explained both in our written submission and our oral statement, Norway is of the view that the wording of Article 26 of the KEXIM Act implies that the Government of Korea *de facto* instructs KEXIM to offer lower interest rates on pre-shipment loans than what is otherwise available in the market – provided that such practice is necessary in order to secure export contracts for Korean shipbuilders.

Q2: In Norway's view, do price suppression or depression claims under Article 6.3(c) of the SCM require the complainant to perform a "like product" analysis?

Reply

As a third party Norway has not undertaken any concrete assessment of the question raised.

Q3: In Norway's view, in the context of price suppression or depression claims in Article 6.3(c), what is the geographic scope of the phrase "in the same market"? Please describe the geographic scope of the market for LNGs, product and chemical tankers, and containerships.

Reply

Concerning the geographical scope of "the same market" in Article 6.3(c), the Norwegian view is that the wording of this provision – unlike the wording in Article 6.3 (a) and 6.3 (b) which imposes geographical limitations on the term "market" – has no such limitations in it. We believe that the negotiators of the Agreement – left the geographical scope to be defined depending on the characteristics of the market and product in question. In other words, the scope may vary and be national, regional or even global depending on the product concerned.

The geographic scope of the market for LNGs, product and chemical tankers and container ships are global as many yards all over the world are able to build these types of ships which operate internationally. This means that a buyer of the commercial vessels concerned may by and large address yards all over the world and choose the one able to provide the ship according to the required specifications at the best price.

Questions from Korea

Q8: In the assessment to determine whether a “public body” exists, Norway proposes to take into account whether the body concerned must carry out governmental functions or activities for governmental purposes. What does Norway consider to be governmental functions or activities for governmental purposes?

Reply

As a third party Norway, as stated in its written submission, limits itself to pointing out that it is difficult to undertake a general assessment of what constitutes governmental functions or activities for governmental purposes as such functions or activities to a large degree are dependent on the organization of the state, and the extent to which its political leadership has decided that certain functions are to be provided by the government, directly or indirectly. This could vary from one Member country to another as there are great divergences between the Members of the WTO in this respect.

Q9: Does Norway consider that the US market is open, i.e. that all shipbuilders whatever their origin can participate in bidding or sales processes for the commercial vessels concerned? Does Norway consider that the fact that a national market is open or closed is relevant for the assessment on adverse trade effects and on the definition of geographic market?

Reply

Norway as a third party, fails to see the need for – and will refrain from commenting upon any specific national market restrictions that may exist. However, any such restrictions that may exist cannot alter the fact that the overall market for commercial vessels in international trade is a global and integrated market as explained by Norway in its submission and oral statement.

ANNEX C-9

EXECUTIVE SUMMARY OF THE WRITTEN SUBMISSION OF THE UNITED STATES

(12 February 2004)

I. INTRODUCTION

1. Although this dispute raises a host of issues that are of systemic importance to the operation of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), properly identifying the "like product(s)" is one of the fundamental prerequisites for a *prima facie* case of serious prejudice under Article 6.3. If the Panel were to agree with Korea that the EC has failed to properly identify the like product(s), it would be appropriate for the Panel to deny the EC's actionable subsidy claims on that basis and to refrain from making findings with respect to the other issues raised in this dispute.

II. GENERAL ISSUES

2. The United States questions the accuracy of the EC's characterization of the report in *Japan - Apples*, given that the Appellate Body stated in paragraph 157 "that the party that asserts a fact is responsible for providing proof thereof". In addition, if the EC is asserting that Annex V somehow removes the burden of proof from the complainant, then the EC would be in error. Nothing in Annex V in particular or the SCM Agreement in general supports such an assertion.

3. If the EC is asserting that a Panel is limited to the consideration of information gathered through the Annex V process, then the EC is in error. Under Article 6.8 of the SCM Agreement, the "record" includes, but is not limited to, information developed through the Annex V process.¹ In addition, a complainant cannot invoke Annex V to support a prohibited subsidy claim under Part II, because Annex V does not apply to Part II.

4. The EC erroneously argues that legislation that authorizes, but does not mandate, the provision of export subsidies is inconsistent "as such" with the SCM Agreement. It is well established under past GATT and WTO dispute settlement practice that legislation of a Member is generally inconsistent with that Member's WTO obligations only if the legislation *mandates* action that is inconsistent with those obligations or precludes action that is consistent with those obligations. The EC reliance on the panel report in the *US - Section 301* dispute is misplaced. Even assuming for purposes of argument that the analysis of the panel in that dispute was correct, the EC has failed to explain how Article 3 of the SCM Agreement equates with Article 23 of the DSU – the provision at issue in *US - Section 301*.

5. Contrary to the EC's assertions, the application of the mandatory/discretionary distinction to Article 3.2 does not render the word "maintain" meaningless. Also, the EC's brief discussion of the

¹ The United States is unsure what the EC means when it refers to "the record". There is no formal "record" for purposes of these dispute settlement proceedings. Presumably the EC means to refer to all the evidence and information provided to, or obtained by, the Panel.

Appellate Body report in the *Japan Sunset* dispute is misleading, because the Appellate Body distinguished the question of whether an instrument is a measure from the separate question of whether the instrument, if it is a measure, mandates a breach of any WTO obligation under the mandatory/discretionary distinction.²

III. ISSUES CONCERNING THE IDENTIFICATION AND VALUATION OF SUBSIDIES

6. The United States does not take issue with the EC's conclusion that KEXIM and the other five Korean financial institutions analyzed by the EC are "public bodies". However, the criteria considered by the EC should not be regarded as constituting the *exclusive* standard for determining whether an institution is a "public body" for purposes of Article 1.1(a)(1). The United States urges the Panel to limit any findings on this issue to the facts of this dispute. With respect to Korea's arguments concerning the concept of "public body," the text of the SCM Agreement provides no support for the notion that a public body ceases to be a public body if it carries out a function that is also carried out by private bodies.

7. With respect to the EC's allegation that the Korean Government directed private financial institutions to provide subsidies to the shipyards, the United States is in general agreement with the EC's analysis of the phrase "entrusts or directs". Korea asserts that the EC must document an explicit and affirmative governmental action delegating responsibility for subsidy actions to each of these institutions. Korea has not cited to any language in the SCM Agreement to support its assertion, and there is no such language.³

8. Regarding the existence of a "benefit," there is no basis for a general presumption that a facile sorting of banks into "foreign" or "domestic" categories is sufficient in every case to establish which institutions provide an appropriate "market" benchmark. This is necessarily a fact-specific exercise, particularly in a case such as this where there is an allegation that the government entrusted or directed private banks to provide subsidies.

9. Korea incorrectly asserts that once a creditor bank becomes an owner of a company, the bank is no longer capable of making a financial contribution to that company, such as through a debt-to-equity swap or debt forgiveness. If the drafters of the SCM Agreement had contemplated having ownership of a company operate as an exemption from subsidies disciplines, they would not have listed equity infusions as an example of a form of financial contribution in Article 1.1(a)(1)(i).

10. With respect to Korea's assertions concerning the IMF and World Bank, there is nothing in the SCM Agreement stating that a prohibited or actionable subsidy ceases to be prohibited or actionable if it has some sort of blessing by the IMF or the World Bank. In addition, Korea incorrectly asserts that the activities of KEXIM do not constitute a "government practice" within the meaning of Article 1.1(a)(1)(i). Export promotion through financial support is a very common government function, and pre-shipment loans and APRG's are precisely the types of transactions whereby a government may provide a subsidy to exporters.

11. Korea incorrectly asserts that because DSME performed successfully after its spin-off, Daewoo's creditors necessarily made the correct decision and acted in a market-oriented fashion. In evaluating whether a financial contribution confers a benefit, one should focus on the economic indicators and other information that would have been available to the provider of a financial

² The United States also requests that if, in the course of this proceeding, the EC should pursue its claim under Article 5(a) of the SCM Agreement, the United States and other third parties be given the opportunity to comment on the arguments of the parties concerning Article 5(a).

³ The United States also disagrees with Korea's assertions that "unofficial" commentary and circumstantial evidence may not be used to demonstrate government "entrustment" or "direction".

contribution at the time the decision to provide the financial contribution was made. Korea also incorrectly asserts at various places in its submission that the fact that the companies in question went through established insolvency procedures automatically means that no subsidies could have been provided.

IV. ISSUES CONCERNING SERIOUS PREJUDICE

12. The United States disagrees with Korea's assertion that export subsidies cannot be included in a serious prejudice case. Nothing in the text of the SCM Agreement supports this proposition, and Article 13(c)(ii) of the Agreement on Agriculture makes clear that prohibited subsidies can be the subject of a serious prejudice case. To the extent that Korea is arguing that an export subsidy cannot be *simultaneously* the subject of both a prohibited subsidy claim and a serious prejudice claim, the United States also disagrees. Here, too, Korea does not cite to anything in the text of the SCM Agreement to support this proposition. Instead, it simply asserts that action under both Articles 4 and 7 of the SCM Agreement somehow results in some sort of unfair "double-counting". The presence of both prohibited and actionable subsidy claims with respect to the same subsidy, however, may have an impact on the findings made by the Panel. Because the Panel is charged with making findings to promote the prompt settlement of disputes, the Panel might want to consider making separate findings with respect to the claims of serious prejudice; *i.e.*, one set of findings that applies to all of the subsidies found by the Panel to be specific – including the subsidies found by the Panel to be prohibited – and another set of findings that applies only to the subsidies that the Panel finds are specific, but not prohibited.

13. The United States agrees with Korea that "serious prejudice" is a separate requirement that must be satisfied. Thus, a finding that one of the conditions described in subparagraphs (a)-(d) of Article 6.3 exists does not necessarily mean that "serious prejudice" exists. This conclusion follows from the use of the phrase "may arise in any case where one or several of the following apply" in the *chapeau* to Article 6.3. The United States does not agree with Korea's assertion that the standard of proof for "serious prejudice" is much greater than the standard for "material injury". The standards are different, but it cannot be said that one is necessarily higher than the other, because "prejudice to the interests of another Member" and "injury to a domestic industry" are not the same thing. The United States also disagrees with Korea's assertion that in order to demonstrate serious prejudice, the EC must demonstrate the elements set forth in Articles 11 through 15 of the SCM Agreement. To the contrary, the elements that the EC must establish are set forth in Articles 5 and 6.

14. The EC incorrectly argues that the phrase "in the same market" in Article 6.3(c) of the SCM Agreement can refer to the "world market". In subparagraphs (a)-(c) of Article 6.3, the drafters likely intended "market" to mean national market, and the limiting language in subparagraphs (a) and (b) was not intended to distinguish between national markets and a "world market," but instead was intended to distinguish between particular national markets. Interpreting "market," as used in Article 6.3(c), to include the world market would render the word "same" in the phrase "the same market" ineffective, because the subsidized and non-subsidized products always could be deemed to be in the same "world market". Finally, the EC never explains its assertion that if the phrase "in the same market" does not encompass a "world market," Members would be precluded "from challenging subsidies on the many products that are traded in world markets such as aircraft and ships".

15. Referring to the term "meaningfully affected" that the panel in *Indonesia - Autos* employed, the EC asserts that the price depression/suppression it alleges is "significant" because EC yards have had to close or have lost market share as a result of Korean subsidies. In particular, the EC argues that over-capacity in the shipbuilding industry has resulted in excessive price competition to obtain orders. Korea takes issue with the EC's approach. Although the United States does not agree with all of the conclusions drawn by Korea, it does agree that the EC's approach is incorrect.

16. Article 6.3(c) requires that "the effect of the subsidy" is "significant price suppression," but "significant" is not defined. The EC argues that the Panel should follow the standard employed in *Indonesia - Autos*. In that report, the panel wrote that the word "significant" was included in the text on price undercutting "presumably" to ensure that the text did not capture "margins of undercutting so small that they could not meaningfully affect suppliers of the imported product". It is difficult to ascribe much weight to that panel's finding, however, given that (1) the panel did not conduct a textual analysis of the provision, and (2) the panel itself explained that it was making an assumption about the provision's meaning. The panel went on to find, essentially, that a price that is 33.77 per cent lower represents "significant" price undercutting under anyone's definition.

17. A textual analysis of Article 6.3(c) would, as always, begin with its ordinary meaning. The ordinary meaning of "significant" is "important, notable; consequential," which suggests that the price suppression must reach a level at which it is important, notable, and consequential in order to be inconsistent with Article 6.3(c). The United States further notes that the term "significant" modifies "price suppression or depression"; therefore, it is the effect on *prices* that must be "significant" and not the direct effect on *producers*, as the EC argues. By shifting the analysis to the effect on producers, the EC is improperly collapsing the separate requirements of "significant" price suppression or depression and "serious prejudice".

18. The United States has two concerns regarding the arguments made by both the EC and Korea with respect to the issue of causation and price depression or suppression.

19. With respect to the EC's arguments, the EC appears to assume that the phrase "effect of the subsidy" – the phrase used consistently in Article 6.3 – is the same as the term "effects of the subsidized imports" – the term used consistently through Part V of the SCM Agreement.⁴ While the United States does not necessarily disagree with the EC's ultimate conclusion that subsidies need not be shown to be the exclusive cause of the effects identified in Article 6.3, this conclusion cannot be based on a supposed similarity in language between Article 6.3 and the provisions contained in Part V of the SCM Agreement. In this regard, the United States notes that, under Part V of the SCM Agreement, an investigating authority is expected to assess "the effects" or "the impact of the subsidized imports" on domestic prices and the domestic industry, not the "effect of the subsidy," which is what Article 6 of the SCM Agreement refers to.⁵

⁴ See, e.g., SCM Agreement, Articles 15.1 and 15.2.

⁵ Compare Article 15.1, 15.2, 15.3 and 15.4 of the SCM Agreement with Article 6.3 of the SCM Agreement. Indeed, Article 15 only refers to the "effects of the subsidies" – as opposed to the "effects of the subsidized imports" – on one occasion, the first sentence of Article 15.5. However, even there, the Agreement's negotiators added a footnote specifically indicating that the investigating authority was to assess the "effects of the subsidies" as set forth in Article 15.5 by performing the analysis described in Articles 15.2 and 15.4. Article 15.5, fn. 47. Articles 15.2 and 15.4 both clearly indicate that a material injury analysis must focus on the "effects" or "impact" of the "subsidized imports" on the industry and its prices, not on the "effects of the subsidy" itself. *Id.*

V. CONCLUSION

20. The United States thanks the Panel for providing an opportunity to comment on the issues involved in this proceeding, and hopes that its comments will prove to be useful.

ANNEX C-10

ORAL STATEMENT OF THE UNITED STATES

(9 March 2004)

Introduction

1. Mr. Chairman, members of the Panel, it is my privilege to appear before you to present the views of the United States in this dispute. Today, I intend to discuss certain issues that were not addressed in the US written submission. These issues are KEXIM financing, and changes in ownership of companies.

KEXIM Financing

2. Turning first to KEXIM financing, the United States disagrees with Korea's assertion that KEXIM's Advance Payment Refund Guarantees (APRG) and pre-shipment loans are protected by items (j) and (k), respectively, of Annex I to the SCM Agreement.¹

APRG

3. With respect to the APRG, item (j) of Annex I covers insurance or guarantee programmes pertaining to the following: (1) export credits; (2) increases in the cost of exported products; and (3) exchange risks. The APRG does not fall within any of these three categories of programmes.

4. The APRG does not involve the guarantee of an export credit. Export credit guarantee programmes typically consist of a contingent obligation by an export credit agency to pay a private lender in the event of a default by the foreign buyer. By contrast, the APRG does not refer to the extension of credit. Instead, the APRG consists of a guarantee of the obligation of the exporter to refund the foreign buyer's cash down payment in the event that the sales transaction is terminated. The cash down payment is the element of an export sales transaction that does *not* represent the extension of credit.

5. In addition, the APRG does not address increases in the price of the exported product or foreign exchange risk. Instead, the APRG addresses only the obligation on the part of the exporter to refund the down payment in the event that the sales transaction is terminated. However, there is no suggestion that the guarantee applies only to export sales contracts that were terminated because of the increased cost of the exported product or because of exchange rate fluctuations.

Pre-Shipment Loans

6. Turning to the KEXIM pre-shipment loans, the EC asserts that they are available to Korean exporters, manufacturers and raw materials providers.² However, they do not appear to fall within the

¹ Korea Submission, Sections V. 5 and V.6.

² EC Submission, para. 155.

scope of item (k), because they are neither "export credits" nor "the payment . . . of all or part of the costs incurred by exporters or financial institutions in obtaining credits."

7. First, these loans do not come within the description of "export credits" on the OECD website cited by Korea, which provides that "an export credit arises whenever a foreign buyer of exported goods and services is allowed to *defer payment*."³ The OECD description mentions two types of export credits: "supplier credits" and "buyer credits." "Supplier credits" are extended by an exporter directly to an overseas buyer. "Buyer credits" are extended by an exporter's bank or another financial institution as loans to the buyer (or the buyer's bank). Both types of credits are extended to the buyer or its bank. By contrast, the KEXIM pre-shipment loans are extended not to the buyer, but to the exporter. While such credits may be export-contingent, in that they would not be made by KEXIM but for the contemplated export, they are not export credits in that they do not finance the actual export.

8. Second, the pre-shipment loans do not appear to involve "the payment . . . of all or part of the costs incurred by exporters or financial institutions in obtaining credits." While the loans are made to exporters, there is no indication that they are at all related to "costs incurred . . . in obtaining credits."

Existence of a "Benefit"

9. Before leaving the topic of KEXIM financing, the United States would like to comment on one point made by Norway in its third-party submission. As the United States understands it, Norway argues that Article 26 of the KEXIM Act allows KEXIM to sometimes lend below its cost where concerns of "international competitiveness" make it necessary to do so. According to Norway, this proves that KEXIM financing allows for the conferral of a benefit on a *de facto* basis.⁴ The implication in this statement, however, is that KEXIM financing does not confer a benefit in the non-exceptional situation where Article 26 requires KEXIM to cover its operating expenses.

10. Assuming we have understood Norway's argument correctly, then the United States must disagree with the standard that Norway suggests. The Appellate Body has indicated previously that "the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been conferred"⁵ Actors in the marketplace seek to earn a profit and not merely cover their costs. Therefore, even in non-exceptional situations, KEXIM financing confers a benefit because, as a general requirement, Article 26 requires KEXIM to lend at cost.

Changes in Ownership

11. We now turn briefly to the second topic that we wish to discuss in this afternoon's statement. At various places in its first submission, Korea argues that the EC has failed to take into account the effects of changes in ownership on the existence and amount of subsidization.⁶ With respect to this argument, the United States simply notes that the Appellate Body has found that under certain circumstances, the privatization of a government-owned or -controlled company may have an effect on certain types of subsidy benefits that the company had received prior to its privatization.⁷ According to the Appellate Body, the precise effect depends upon the nature of the privatization transaction, and may include the complete extinguishment of prior subsidies. However, an analysis of

³ Korea Submission, para. 266 (emphasis added).

⁴ Norway Third-Party Submission, paras. 18-19.

⁵ *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Report of the Appellate Body adopted 20 August 1999, para. 157.

⁶ See Korea Submission, paras. 27-30 (Introduction), 374-375, 441 and 449.

⁷ See *United States - Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, Report of the Appellate Body adopted 8 January 2003.

the facts and circumstances of the privatization transaction is critical in determining whether certain subsidy benefits have, in fact, been extinguished.

Conclusion

12. Mr. Chairman, that concludes the third-party statement of the United States. Thank you for your attention.

ANNEX C-11

RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE PARTIES (FIRST MEETING)

(22 March 2004)

QUESTIONS FROM KOREA

5. Korea has introduced the IMF's views as an element of evidence to be weighted by the Panel. Does the US consider the IMF's views legally or factually irrelevant? If so, on what basis?

1. As a general proposition, the views of the IMF might be relevant to the question of whether a "financial contribution" exists. The IMF would be particularly well-placed to assess the extent of the Korean Government's involvement in the bail-out of troubled Korean firms.

6. Regarding the last sentence in Paragraph 10 of its Oral Statement, is the US now arguing that "benefit" is determined by cost to government?

2. No, the United States is not arguing in favor of a cost-to-government standard for determining the existence of a "benefit." To the contrary, as paragraphs 9-10 of the US Oral Statement make clear, the United States was contesting the apparent suggestion by Norway that a cost-to-government standard should be applied in analyzing subsidies provided by KEXIM. Indeed, in the last sentence of paragraph 10, the United States noted that there would be a benefit even in the non-exceptional situations where KEXIM was required to lend at cost. Such an assertion is hardly consistent with a cost-to-government standard.

3. In order to avoid any confusion on this point, the United States would add that commercial lenders do not routinely lend at cost, because they must seek to earn a profit. For that reason, financing at-cost by KEXIM in "non-exceptional" situations almost certainly would result in the conferral of a benefit under a "benefit-to-recipient" approach. The benefit would be even greater in those "exceptional" situations where KEXIM lends below its cost.

If the determination of "benefit" is based on a market benchmark, of what legal relevance is cost?

4. If a market benchmark is used to determine the existence of a benefit, then what should be relevant is what a commercial lender charges a borrower for financing, not the lender's costs. A focus on what the lender charges (or what the borrower pays) is the essence of the benefit-to-recipient approach.

Does the US statement in paragraph 10 go to the issue of "benefit" or "public body"?

5. The US statement goes to the issue of "benefit." It cannot be seriously maintained that KEXIM is not a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement.

7. In either case, if the actual evidence shows that KEXIM operated at a profit, would this change the US view expressed in paragraph 10?

6. No. As noted above in connection with Question 6, the benefit-to-recipient approach must be applied to KEXIM financing. That approach, in turn, requires a comparison of KEXIM financing to a market-based benchmark; i.e., comparable commercial financing. Evidence that KEXIM earned a profit would be irrelevant to this exercise, because it would not prove that KEXIM was charging market rates.

7. For example, assume that: (a) 5 per cent is a rate that covers KEXIM's costs and allows KEXIM to earn a profit; (b) 7 per cent is the rate KEXIM charges; and (c) 10 per cent is the market rate. In this scenario, KEXIM would be earning a profit, but still would be providing a benefit because it would be lending at below-market rates.

QUESTIONS FROM THE EC

1. Does the US believe that a "public body" in the context of Article I.1(a)(i) should only be considered a public body when, as Korea contends, it is "acting in an official capacity on behalf of the people as a whole"?

8. No.

2. Does the US believe that in order for a "private body" to be entrusted or directed in the context of Article I.1(a)(iv), such a body must receive explicit and affirmative direction from the government?

9. The phrase "explicit and affirmative direction" appears to be based upon *dicta* contained in the panel report in *United States - Measures Treating Export Restraints as Subsidies*, WT/DS194/R, Report of the Panel adopted 23 August 2001. The phrase cannot be found in the SCM Agreement itself. The United States has never been certain as to what the panel meant by "explicit and affirmative," but to the extent that the phrase is considered to require a direction in the form of a written command from the government to a private body, the United States disagrees.

3. Does the US believe, as Korea asserts, that it is impossible to distribute a subsidy through a creditor that owns a share of the enterprise that is receiving the benefit?

10. No.

4. Does the US believe that governmental actions undertaken with IMF or World Bank approval are exempt from the disciplines of the SCM Agreement?

11. No.

5. According to the US, when a panel decides whether a creditor acted according to market incentives in the context of a bankruptcy proceeding, should the panel consider the subsequent performance of the enterprise or should it consider only the information that was available at the time of the bankruptcy proceeding?

12. A panel considering a dispute under Part III of the SCM Agreement (or an investigating authority in a countervailing duty proceeding under Part V) must put itself in the shoes of the creditor

at the time of the investment decision. Because such a creditor would not have knowledge of the firm's future performance, the panel/investigating authority should not consider such information.

6. Could the US elaborate on their own experience regarding the GOK direction of credit to Korean companies and in particular their views on KEXIM so called market oriented behaviour?

13. With respect to this question, the United States refers the EC to the countervailing determinations of the US Department of Commerce in cases involving products from Korea. More specifically, the Department's treatment of particular Korean subsidy programmes can be found at <http://www.ia.ita.doc.gov/esel/eselframes.html>.

ANNEX C-12

RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL (SECOND MEETING)

(2 July 2004)

Q: The parties disagree on whether or not APRGs and PSLs constitute export credit guarantees and export credits respectively. The EC submits that they do not, whereas Korea asserts that they do. Would your export credit agency treat APRGs as export credit guarantees, and PSLs as export credits? Please explain and provide relevant documentation.

1. The United States thanks the Panel for the opportunity to reply to this question. As background for its reply, the United States notes that the Export - Import Bank of the United States (Ex-Im) is the principal US export credit agency.

Advance Payment Refund Guarantees (APRGs)

2. It is the understanding of the United States that under the APRG programme, the Korean Export-Import Bank (KEXIM) issues guarantees to foreign buyers that Korean exporters will refund any cash down payments made by the buyers in the event that the sales transaction is terminated prior to export. As explained in paragraph 4 of the Oral Statement of the United States (9 March 2004), while the APRG is a guarantee issued in connection with a proposed export (and which may, therefore, be export-contingent for purposes of Article 3.1(a) of the *Agreement on Subsidies and Countervailing Measures*), it is not a guarantee of an export *credit*. An export credit typically consists of a loan to the foreign buyer. If the loan is extended by the seller or by a private bank, the export credit agency may guarantee the lender against a default by the buyer regarding repayment. Such a transaction would be an export credit guarantee.

3. Section 9 b) of the OECD Arrangement on Officially Supported Export Credits (the *Arrangement*) provides that "Official support for ... down payments shall only take the form of insurance or guarantee against the usual pre-credit risks."¹ Ex-Im does not consider the APRG to fall within this definition. Ex-Im's practice with respect to pre-credit risks is to provide cover to the insured party (US exporter or lender acting on behalf of the US exporter) against the risks of contract cancellation by the foreign buyer, not for the foreign buyer. Moreover, Ex-Im is unaware of any other export credit agency that offers the type of cover to the foreign buyer that Korea provides under the APRG programme.

Pre-Shipment Loans (PSLs)

4. It is the understanding of the United States that under the PSL programme, KEXIM provides pre-shipment loans to Korean exporters. Pre-shipment loans are not export credits. Export credits typically are loans to foreign buyers. Although the OECD *Arrangement* does not define "export credits", Section 5 (Scope of Application) of the *Arrangement* states that:

¹ Arrangement on Officially Supported Export Credits, TD/PG(2004)12, 11 June 2004.

The Arrangement shall apply to all official support provided by or on behalf of a government for export of goods and/or services, including financial leases, which have a repayment term of two years or more.

- (a) Official support may be provided in different forms:
 - (1) Export credit guarantee or insurance (pure cover),
 - (2) Official financing support:
 - direct credit/financing or refinancing, or
 - interest rate support.
 - (3) Any combination of the above.

5. The *Arrangement* definition of “official support” is limited to support provided “for export” of goods and/or services. This definition would preclude pre-export financing to the *exporter*, such as the PSL programme. This interpretation is reinforced by language on the OECD’s website, “Export credits, about”, which states as follows:

Governments provide official export credits through Export Credit Agencies (ECAs) in support of national exporters competing for overseas sales. ECAs provide credits to *foreign buyers* either directly or via private financial institutions benefiting from their insurance or guarantee cover. ECAs can be government institutions or private companies operating on behalf of the government.²

While the PSL programme involves the extension of credits to Korean exporters that may be export contingent for purposes of the *Agreement on Subsidies and Countervailing Measures*, these credits are not export credits within the meaning of the OECD *Arrangement*.

6. US Ex-Im Bank has a Working Capital Guarantee Programme, under which Ex-Im offers a guarantee to the commercial lender providing export-related working capital to the US exporter. If the US exporter defaults on its commercial bank loan, Ex-Im makes payment on the guarantee, and seeks collection against the US exporter. Because the Ex-Im guarantee covers the risk of the US exporter, rather than the foreign buyer, Ex-Im does not consider this programme to be an export credit within the meaning of the OECD *Arrangement*.

² http://www.oecd.org/about/0,2337,en_2649_34169_1_1_1_1_37431,00.html. Visited 30 June 2004 (emphasis added).