KOREA - MEASURES AFFECTING TRADE IN COMMERCIAL VESSELS

WT/DS273

THIRD PARTY SUBMISSION

OF THE

UNITED STATES OF AMERICA

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I. INTRODUCTION

1. The United States welcomes this opportunity to present its views in this dispute involving the alleged provision of subsidies by the Government of Korea to Korean shipyards.

2. Although the United States has serious concerns with respect to the Government of Korea's direction of the activities of Korean financial institutions, the United States takes no position on whether the measures identified by the European Communities ("EC") in this dispute are inconsistent with Korea's WTO obligations. Instead, the United States focuses on those issues that are particularly important from a systemic perspective. Moreover, because of the sheer volume of the issues raised by the parties in their submissions, and the limited amount of time allowed in which to digest Korea's voluminous first submission, the United States is, of necessity, addressing only a limited set of issues in this submission. The United States reserves comment on other issues until its oral statement at the third-party session.

3. At the outset, however, the United States wishes to emphasize that this dispute does, indeed, raise a host of issues that are of systemic importance to the operation of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). At the same time, the United States takes note of Korea's argument that the EC has failed to properly identify the "like product(s)" for purposes of the analysis under Article 6.3(c) of the SCM Agreement.[1] 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 and find that the EC has, in fact, 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

A. Issues Concerning Burden of Proof and Evidence

1. Burden of Proof in General

4. At paragraph 61 of its submission, the EC, citing to paragraph 157 of the Appellate Body report in *Japan - Apples*, asserts as follows: "[T]he principle that the complainant must establish a *prima facie* case of inconsistency with a covered agreement does not require the complainant to offer proof of every fact that it asserts." The United States questions the accuracy of the EC's characterization, given that the Appellate Body stated in paragraph 157 "that the party that asserts a fact is responsible for providing proof thereof."[2]

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[1] *See*, *e.g.*, Korea Submission, paras. 50-54 (overview). In the version of the Korea Submission received by the United States, the pagination and paragraph numbering resume at "1" after the initial overview section. Accordingly, for citation purposes, the United States will use the term "(overview)" to indicate when it is citing to the overview section.

[2] Appellate Body Report, *Japan - Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, para. 157.

5. If the EC's broader point is merely that a complainant may use the Annex V process to obtain evidence that it can submit, or to argue to the Panel that the respondent's non-cooperation in the information-gathering process under Annex V entitles the complainant to an adverse inference on a particular factual question, the United States does not disagree. However, 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.

2. Issues Concerning Annex V

6. The parties have raised several issues concerning Annex V of the SCM Agreement. First, at paragraph 64 of its submission, the EC cites paragraphs 6 and 9 of Annex V for the proposition that "the information provided under the Annex V procedure constitutes 'the record' on the basis of which the Panel is to decide the case."[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. Article 6.8 of the SCM Agreement provides that "the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel, *including* information submitted in accordance with the provisions of Annex V" (emphasis added). Thus, the "record" includes, but is not limited to, information developed through the Annex V process.

7. Second, at various places in Section IV.C of its submission – the section dealing with the EC's prohibited subsidy claims – the EC asks the Panel to make an adverse inference under paragraph 7 of Annex V.[4] However, there is no reference in Part II of the SCM Agreement to Annex V, and there is no reference in Part III or Annex V to Part II. Thus, under the text, a complainant cannot invoke Annex V to support a prohibited subsidy claim under Part II, because Annex V does not apply to Part II.

B. The Mandatory/Discretionary Distinction

8. At paragraphs 78-85 of its submission, 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.

9. 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. If legislation provides discretion to authorities to act in a

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[3] 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.

[4] EC Submission, paras. 170-172.

WTO-consistent manner, the legislation, as such, cannot be deemed inconsistent with a Member's WTO obligations. This distinction follows naturally from the equally well-established principle that there can be no presumption of bad faith in WTO dispute settlement.[5] Thus, to the extent that a Member retains discretion under a measure to act in accordance with a WTO obligation, it may not be presumed that the Member will violate that obligation, or to conclude that the measure – separately from the measure's application in a specific instance – may be found inconsistent with that obligation.

10. The EC relies heavily on the panel report in the *US - Section 301* dispute.[6] Assuming for purposes of argument that the analysis of the panel in that dispute was correct, the United States agrees with Korea that the EC has failed to explain how Article 3 of the SCM Agreement – the provision at issue here – equates with Article 23 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") – the provision at issue in *US - Section 301*.[7]

11. Contrary to the EC's suggestion, there is nothing in the language of Article 3 of the SCM Agreement that warrants the finding that the EC is seeking. With respect to Article 3.1(a), the EC argues that the phrase "shall be prohibited" means that "any measure of a Member that provides for such subsidies to be granted is inconsistent with this provision."[8] This is a *non sequitur*. The fact that certain subsidies are described as prohibited in Article 3.1(a) does not answer the question of whether legislation that authorizes (provides for) such subsidies to be granted, but does not mandate their grant, is also prohibited. The WTO agreements are replete with provisions that prohibit various activity, but this does not mean that legislation that permits, but does not compel, such activity is WTO-inconsistent as such.[9] That is the whole point of the mandatory/discretionary distinction. In this regard, it must be emphasized that the panel in *US - Section 301*, at para. 7.54, indicated that it was not discarding the traditional mandatory/discretionary distinction. Rather, it found (correctly or otherwise) that the obligation at issue in that dispute – DSU Article 23.2(a) – prohibited measures that grant discretion to Members' authorities to make certain determinations, unless those or other measures circumscribed that discretion.

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[5] As the Appellate Body has stated: "[W]here discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligation under the *WTO Agreement* in good faith." Appellate Body Report, *United States - Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, para. 259.

[6] EC Submission, para. 76, citing Panel Report, *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000.

[7] *See* Korea Submission, paras. 110-113.

[8] EC Submission, para. 79.

[9] For example, the fact that a Member's legislation may permit action that is contrary to the WTO does not mean that the measure on its face is inconsistent. Nothing in the WTO agreements requires that Members maintain two separate legislative regimes, one for WTO Members and one for non-Members. The same legislation may be used so long as it is not applied to WTO Members in a manner inconsistent with the WTO agreements.

12. With respect to Article 3.2 of the SCM Agreement, the EC emphasizes the phrase "neither grant nor maintain," asserting that the word "maintain" would have no meaning if legislation providing for the discretionary grant of subsidies was not prohibited.[10] Accepting for purposes of argument (1) the EC's definition of the word "maintain" as "cause to continue," and (2) the notion that "maintain" refers to subsidy legislation rather than a "subsidy" itself, the application of the mandatory/discretionary distinction to Article 3.2 does not render the word "maintain" meaningless. The word "grant" can be construed as applying to actual, discrete bestowals of subsidies under subsidy legislation – "as applied" situations – while the word "maintain" can be construed as applying to the enactment of legislation that mandates the "grant" of prohibited subsidies, thereby causing such subsidies to continue – "as such" situations. Under this approach, legislation that conferred discretion to bestow subsidies would not run afoul of either term insofar as an "as such" challenge is concerned.

13. Indeed, the one panel to have considered this issue found that legislation which authorized, but did not require, authorities to grant export subsidies was not inconsistent with Article 3.1(a).[11] Although the panel properly limited its findings to the facts before it, it nonetheless did apply the mandatory/discretionary distinction to an "as such" claim concerning legislation under which prohibited subsidies allegedly are conferred.

14. Finally, the United States notes that the EC's brief discussion of the Appellate Body report in the *Japan Sunset* dispute is misleading to the extent that the EC suggests that the Appellate Body rejected the mandatory/discretionary distinction.[12] The sentence from the report quoted by the EC was from the section of the report in which the Appellate Body found "that panels are [not] obliged, *as a preliminary jurisdictional matter*, to examine whether the challenged measure is mandatory."[13] In *Japan Sunset*, the Appellate Body simply reversed the panel's finding that a particular legal instrument was not a "measure" because it was discretionary. 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.[14]

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[10] EC Submission, paras. 79-80.

[11] Panel Report, *Brazil - Export Financing Programme for Aircraft - Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW/2, adopted 23 August 2001, paras. 5.42-5.51, 6.1(a).

[12] EC Submission, paras. 73-74.

[13] Appellate Body Report, *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, para. 89 (emphasis added).

[14] *Id.*, para. 78.

C. The EC's Claim Under Article 5(a) of the SCM Agreement

15. The United States takes note of Korea's request that the Panel formally find that the EC has abandoned its claim under Article 5(a) of the SCM Agreement. The United States takes no position on Korea's request. However, because of its substantial interest regarding the application of Article 5(a), the United States requests that if, in the course of this proceeding, the EC should pursue its claim under Article 5(a), the United States and other third parties be given the opportunity to comment on the arguments of the parties concerning Article 5(a). Such an opportunity would be consistent with the spirit of Article 10 of the DSU.

III. ISSUES CONCERNING THE IDENTIFICATION AND VALUATION OF SUBSIDIES

A. Identifying a "Public Body" and a "Private Body"

16. The EC sets forth various criteria for identifying a "public body." Applying those criteria, the EC concludes that six particular Korean financial institutions constitute "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement.[15]

17. 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). As demonstrated by the EC's use of different factors to analyze different financial institutions, any attempt to impose a single set of criteria to define a "public body" may result in a definition that is either too broad or too narrow, depending on the facts of a particular case.

18. The particular factors that establish the public nature of one body may not be relevant to other bodies, whose public status may derive from other characteristics. The same can be said with respect to the EC's statements concerning "private bodies."[16] Thus, the United States urges the Panel to limits any findings on this issue to the facts of this dispute.

19. Also on the topic of "public body," Korea proposes a restriction on the term by claiming that the Korea Development Bank ("KDB") can only be considered a "public body" when it is "acting in an official capacity on behalf of the people as a whole," and not when it is involved in financing activities and corporate reorganizations. Apart from the fact that institutions like the KDB can be acting on behalf of the people as a whole when they engage in financing activities and corporate reorganizations, the text of the SCM Agreement provides no support for the notion

[15] EC Submission, paras. 102-117, 195-225.

[16] EC Submission, para. 107, where the EC states that a private body would be profit-oriented and would not provide grants. Obvious examples of private bodies that are not profit-oriented and that do provide grants are private charities and private universities.

that a public body ceases to be a public body if it carries out a function that is also carried out by private bodies.

B. The "Entrusts or Directs" Standard Under Article 1.1(a)(1)(iv)

20. With respect to the EC's allegation that the Korean Government directed private financial institutions to provide subsidies to the shipyards, Korea asserts that the EC must document an explicit and affirmative governmental action delegating responsibility for subsidy actions to each of these institutions.[17] Korea has not cited to any language in the SCM Agreement to support its assertion, and there is no such language. Korea's reliance on the panel report in *US - Export Restraints* is misplaced, and amounts to an attempt to insert into Article 1.1(a)(1)(iv) of the SCM Agreement words that are not there. The drafters did not include in that provision any requirement that "entrustment" or "direction" take any particular form, let alone the form of an explicit, documented delegation. Likewise, the text of the provision does not require that a separate showing of entrustment or direction be made with respect to each private body. Accepting Korea's arguments on this point would be tantamount to altering the rights and obligations of Members under the SCM Agreement, an outcome which is forbidden by DSU Articles 3.2 and 19.2.

21. The EC addresses the "entrusts or directs" standard at paragraphs 227-230 of its submission. The United States is in general agreement with the EC's analysis, interpreting the phrase "entrusts or directs" to mean that if a government affirmatively causes or gives responsibility to a private body or group of private bodies to carry out what otherwise would be a governmental action of the type described in subparagraphs (i) through (iv) of Article 1.1(a)(1) of the SCM Agreement, a financial contribution exists.

22. It is appropriate in this section to comment on two assertions made by Korea concerning the types of evidence needed to support a claim of governmental "entrustment" or "direction." Korea asserts that what it refers to as "unofficial" commentary may not be used as evidence of government behavior.[18] The United States disagrees, and notes that Korea cites to nothing in the SCM Agreement or any other WTO agreement to support its assertion. Indeed, in the case of subsidies that involve the activities of financial institutions, much evidence will, of necessity, be from secondary sources, given the proprietary nature of such activities. In such instances, secondary sources can be particularly credible as they represent the views of observers who are independent and lack a vested interest in the outcome of a dispute.

23. The United States also takes issue with Korea's assertion that in *US - Export Restraints*, the Appellate Body stated that circumstantial evidence is insufficient to support a claim of

[17] Korea Submission, paras. 321-329.

[18] Korea Submission, para. 289.

"entrustment" or "direction."[19] The panel report was not appealed, so the Appellate Body could not have made the statement attributed to it by Korea. Regrettably, Korea provides no citation to support Korea's assertion. The United States has looked in vain for the relevant passage in the panel report. Moreover, based on an electronic word search of the panel report, the phrase "circumstantial evidence" does not even appear. More generally, to the extent that Korea is asserting that circumstantial evidence may not be used to support claims in WTO dispute settlement proceedings, there is no support for such an assertion.

C. "Foreign" or "Domestic" Status Does Not Determine Whether Private Financial Institutions Can Serve as a Benchmark for "Market" Behavior

24. The EC argues that the commercial behavior of "foreign financial institutions" that were creditors of Daewoo provides the relevant "market" benchmark in this dispute for determining whether the Daewoo work-out plan conferred a benefit on that company.[20] Korea, on the other hand, argues that it is unrealistic to compare the actions of Korean financial institutions with those of non-Korean financial institutions.[21]

25. Based on the specific facts of this dispute, the classification of the banks at issue as "foreign" or "domestic" may be a useful shorthand to describe the group of banks representing "market" behavior. There is no basis, however, 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. Unless the SCM Agreement specifies the parameters for a benchmark – as it does, for example, in Article 14 – the Panel should neither accept nor create some general standard applicable to all cases.

26. Establishing an appropriate market benchmark is necessarily a fact-specific exercise. In a dispute such as this one, where there is an allegation that the government entrusted or directed private banks to provide subsidies, what determines whether the actions of a particular bank provide an appropriate "market" benchmark may not be a simple matter of whether the bank is "foreign" or "domestic," but instead may depend on the degree of independence of the bank (or group of banks) from the government. In some cases, there may be no basis to presume that the impact of a government's intervention in the market is limited to domestic banks.

27. The United States notes that the EC provides a specific analysis of the two groups of banks. The EC also recognizes that it is the fact that the foreign banks – and only those banks – "operated outside the scope of the Government of Korea's pressures" that determines the suitability of that group for use as a "market" benchmark.[22]

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[19] Korea Submission, para. 371.
[20] EC Submission, paras. 278 *et seq.*
[21] Korea Submission, para. 378.
[22] EC Submission, paras. 277-278.

D. Financial Contributions Can Be Made by Owners of Companies

28. Korea 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.[23] This argument is incorrect, because 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). Thus, Korea's argument is at odds with the text of the SCM Agreement.

E. IMF or World Bank Approval Does Not Exempt a Subsidy from the Disciplines of the SCM Agreement

29. Korea asserts that actions "implemented by the Korean government with the approval or recommendation of the IMF and World Bank *must not be used* as a basis to prove WTO incompatibility of a specific measure at issue in the present case ... ."[24] Again, Korea is wrong, because 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. Although Korea cites to Article III:5 of the WTO Agreement and Article XV of the GATT 1994, it does not explain how these provisions render the DSB bound by the views of the IMF or the World Bank on any issue arising in this dispute.[25] To paraphrase the Appellate Body: "There does not appear to be anything in the *WTO Agreement* or in the other legal instruments cited by [Korea] that would relieve a Member from its obligations under [the SCM Agreement]."[26]

F. KEXIM's Activities Constitute a "Government Practice"

30. Korea asserts that the activities of KEXIM do not constitute a "government practice" within the meaning of Article 1.1(a)(1)(i) because the extension of financing facilities such as APRG's (advance payment refund guarantees) or pre-shipment loans is a function normally performed by banks, rather than by governments. Korea's assertion is incorrect.

31. As an initial matter, export promotion through financial support is a very common government function. One need only look to Annex I of the SCM Agreement to see that this is so. Similarly, the text of Article 1.1(a)(1)(i) includes as examples of ways in which "a government practice involves a direct transfer of funds" transactions such as "loans" and "loan guarantees." The pre-shipment loans and APRG's are precisely the types of transactions whereby a government may provide a subsidy to exporters.

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[23] Korea Submission para. 26 (overview), 318-319.

[24] Korea Submission, para. 46 (emphasis added).

[25] Korea Submission, paras. 47-49.

[26] Appellate Body Report, *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 1998, para. 74.

32. Thus, the fact that commercial banks also may provide financial facilities to exporters is irrelevant. Indeed, accepting Korea's argument that anything other than such uniquely governmental activities as regulation and taxation must be deemed beyond the scope of a "government practice" would vitiate the disciplines of the SCM Agreement.

G. The Relevance of a Company's Subsequent Performance and the Use of Insolvency Procedures

33. Korea 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.[27] The United States disagrees, and believes that 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 contribution at the time the decision to provide the financial contribution was made.

34. In addition, Korea seems to assert 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.[28] The United States disagrees that the use of such procedures has the type of *per se* effect alleged by Korea, and Korea certainly has not proven why this is the case. For example, Korea has not demonstrated how it would be impossible for the Korean Government, in the context of a workout under the Corporate Reorganization Act, to entrust or direct creditors to act in a non-commercial manner.

IV. ISSUES CONCERNING SERIOUS PREJUDICE

A. Prohibited Subsidies Can Be Included in a Serious Prejudice Case

35. The United States disagrees with Korea's assertion that export subsidies cannot be included in a serious prejudice case.[29] Nothing in the text of the SCM Agreement supports this proposition. Moreover, as a contextual matter, Article 13(c)(ii) of the Agreement on Agriculture makes clear that prohibited subsidies can be the subject of a serious prejudice case. Article 13(c)(ii) provides that export subsidies conforming to Part V of the Agreement on Agriculture shall be "exempt from actions based on Article XVI of GATT 1994 or Articles 3, 5 and 6 of the Subsidies Agreement." The reference to Articles 5 and 6 would be superfluous if export subsidies could not be the subject of a serious prejudice case.

[27] Korea Submission, para. 384.
[28] *See, e.g.*, Korea Submission, paras. 434, 472.
[29] Korea Submission, paras. 34-36 (overview).

36. 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 United States does not agree that there is any "double-counting." Moreover, a proposition similar to Korea's assertion was rejected by the panel in *Indonesia - Autos*, in which the panel found that certain subsidies were both inconsistent with Article I or Article III of the GATT 1994 and a cause of serious prejudice to the interests of the EC within the meaning of Article 5(c) of the SCM Agreement.[30] An inconsistency with Articles I or III and an export subsidy inconsistent with Article 3 of the SCM Agreement are both rules violations. If a measure that is inconsistent with Article I or Article III can be the subject of a serious prejudice claim, then so can a measure that constitutes a prohibited subsidy under Article 3.

37. 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. For example, if the Panel were to find a particular subsidy to be prohibited, Korea would be under an obligation (once the DSB adopted the finding) to withdraw the subsidy. If the same subsidy formed part of the basis for the Panel's separate finding of serious prejudice, Korea might then be able to argue that the withdrawal of the prohibited subsidy was sufficient to remove the serious prejudice found. Because the Panel is charged with making findings to promote the prompt settlement of disputes, should this situation occur, 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.

B. "Serious Prejudice" Is a Separate Requirement That Is a Different, But Not Necessarily a Higher, Standard Than "Material Injury"

38. The United States agrees with Korea that "serious prejudice" is a separate requirement that must be satisfied.[31] 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 ordinary meaning of "may" is "have ability or power to; can"[32] and "to express possibility, opportunity, or permission."[33] Thus, the ordinary meaning of the *chapeau* is that there is a "possibility" or "opportunity" for serious prejudice in

[30] Panel Report, *Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 23 July 1998, para. 15.1 [hereinafter "*Indonesia - Autos*"].

[31] See Korea Submission, Section V.D.7(a)(i).

[32] *The New Shorter Oxford English Dictionary*, vol. 1, at 1721 (1993 ed.).

[33] *The Random House Dictionary of the English Language, Unabridged Edition* at 886 (1983).

the sense of Article 5(c) to "arise" where one or more of the effects listed in Article 6.3 is found. Indeed, if this were not the case, any measurable degree of market displacement or impedance, regardless of how small (e.g., $1.00), would constitute serious prejudice by virtue of Article 6.3(a)-(b).

39. On the other hand, the United States does not agree with Korea's discussion of the standard of proof for serious prejudice. Citing the difference between the terms "serious" and "material," Korea asserts that the standard of proof for "serious prejudice" is much greater than the standard for "material injury."[34] Korea might be correct if Article 5(c) of the SCM Agreement referred to "serious injury" to a domestic industry. However, Article 5(c) does not say that, but instead refers to "serious *prejudice to the interests of another Member*" (emphasis added). Thus, 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.

40. 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. Moreover, Articles 5 and 6 contain no language indicating that the series of analytical elements set forth in Articles 11 through 15 of the SCM Agreement are intended to be incorporated into the "serious prejudice" analysis. Further, although the causation elements of Parts III and V of the Agreement may be similar in some respects, the elements specified in the two Parts are not similar in all – or even most – respects, and should not be construed as such.

C. Meaning of the Phrase "In the Same Market" for Purposes of Article 6.3(c) of the SCM Agreement

41. At paragraphs 392-397 of its submission, the EC argues that the phrase "in the same market" in Article 6.3(c) of the SCM Agreement can refer to the "world market." The United States disagrees.

42. The EC asserts that Articles 6.3(a) and 6.3(b) impose what the EC refers to as "geographical limitations on the term 'market' (*i.e.*, national markets)."[35] The EC then concludes that if the drafters had intended to limit the term "market" in Article 6.3(c) to national markets, they would have included language similar to that used in Articles 6.3(a) and 6.3(b).[36]

43. It strikes the United States as more likely that in subparagraphs (a)-(c) of Article 6.3 the drafters intended "market" to mean national market, and that the limiting language in

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[34] *See, e.g.,* Korea Submission, paras. 55-59 (overview).
[35] EC Submission, para. 394.
[36] *Id.*

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. Thus, for example, subparagraph (a) applies to market displacement or impedance in the market of the subsidizing Member, but not the markets of the complaining Member or a third Member.

44. In addition, 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." Indeed, given that one of the effects identified in Article 6.3(c) is "lost sales in the same market," the EC's interpretation would mean that a complaining party could advance a claim with respect to a lost sale anywhere in the "world," even if products from the responding party were not sold in the market in which the lost sale occurred. This result, too, would render the "in the same market" language meaningless.

45. Finally, the EC asserts 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."[37] The EC does not explain why this is so. In particular, the EC fails to explain why, when discussing international trade, it is not always the case that a purchaser may have the option to import from a number of other countries. Whether a purchaser in country *X* is buying wheat, chemicals, televisions, or ships, the fact that suppliers in other countries are competing for sales in the purchaser's country does not change the scope of the market. Here, the fact that a purchaser located in a particular country has the option of purchasing ships from a variety of suppliers located in various parts of the world does not change the fact that the market of the country in which the purchaser is located constitutes a "market" for purposes of Article 6.3(c). Nor are Members precluded from challenging subsidies provided on products offered or sold in that market.

D. "Significant" Price Depression or Suppression

46. 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.[38] Korea takes issue with the EC's approach.[39] 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.

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[37] *Id.*, para. 396.

[38] EC Submission, paras. 479-483.

[39] Korea Submission, paras. 528-530.

47. 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*.[40] 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 percent lower represents "significant" price undercutting under anyone's definition.

48. 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,"[41] 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."

E. Causation and Price Depression or Suppression

49. 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.

50. 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.[42] 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.[43]

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[40] *Indonesia - Autos*, para. 14.254.

[41] *The New Shorter Oxford English Dictionary*, vol. 2, at 2860 (1993 ed.) (second definition).

[42] *See, e.g.,* SCM Agreement, Articles 15.1 and 15.2.

[43] *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

(continued...)

V. CONCLUSION

51. 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.

[43] (...continued)
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.*