

ANNEX B

EXECUTIVE SUMMARIES OF THE ORAL STATEMENTS OF THE PARTIES – FIRST MEETING

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ANNEX B-1

ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

(18 March 2004)

I. INTRODUCTION

1. In its oral statement, the EC first responds to a series of procedural and other obstacles that Korea is seeking to erect to obstruct the resolution of this case. Thereafter, it comments on a number of other issues but leaves a thorough refutation of Korea's many arguments to the rebuttal submission.

II. KOREA'S ROAD BLOCKS

A. BURDEN OF PROOF

2. The EC fully accepts that it has the burden of presenting a *prima facie* case. The EC worked on the principle that it is not necessary to state the obvious. Such proof is necessary only to the extent that Korea disputes in a substantiated way what we considered to be clear.

3. For example, the EC believes that it is sufficient to simply state that EC and Korean Liquefied Natural Gas carriers (LNGs) compete in the same market. Indeed, Korea even accepts that they are a *product*, thus making it otiose for the EC to prove that Korean LNGs compete with those built by the EC in the same market. As will be explained later, we reject the idea that there is a requirement to establish "likeness"; however, once there is a product such as an LNG, LNGs from Members are inevitably "like" each other. They are the same product. To the extent that Korea now has difficulties with other statements of fact, e.g. the definitions of other ship types, the EC will respond to that more fully below and in its rebuttal submissions.

4. Moreover, once the complainant has provided a *prima facie* case of a claim and the defendant seeks to refute it by asserting an additional fact, the onus is on the party asserting that fact to substantiate it. To illustrate this with another example, the EC has provided *prima facie* evidence that restructuring aids and other subsidies were a contributing cause for the price depression in the LNG market. If Korea wishes to counter that case by asserting further factors that may have caused a fall in prices, Korea must provide proof thereof.

5. The EC does not accept that there is any "fruit of the poisonous tree" doctrine whereby it may not rely at all (or at least not for the export subsidy claims) on the evidence gathered in the Annex V procedure because it was allegedly improperly sought. As the Appellate Body clarified in numerous cases, there is a duty on both parties to collaborate in the establishment of facts. This is particularly true in cases against subsidies that often involve complex economic facts that may not be easily accessible to the complaining party. Moreover, it should be noted that panels may seek information from the respondent relating to export subsidies under Article 13 of the DSU. The fact-gathering procedure foreseen in Annex V of the *SCM Agreement* in effect merely advances the provision of evidence to before the exchange of submissions by the parties rather than gathering the same information from the respondent later in the panel process.

B. EXPORT AND ACTIONABLE SUBSIDY – INSISTENCE ON CURRENT SUBSIDIES AND EFFECTS

6. There is no rule in the WTO that provides that a violation is forgiven once it is in the past. Obligations are drafted in the present tense to express the intention that they should apply all the time – in the past, in the present and in the future!

7. Of course, it may not always be possible to remedy past violations of WTO obligations. However, the Panel is not, in these proceedings, required by its terms of reference to specify what action Korea may have to take to bring itself into conformity with its WTO obligations.

C. PUBLIC BODY AND “ENTRUSTED AND DIRECTED”

8. Nothing in Article 1 of the *SCM Agreement* limits the types of evidence that may be used to demonstrate that a subsidy, i.e. a transfer of economic resources, can be linked to the government. Otherwise, circumvention would be easy. To the contrary, Article 1 of the *SCM Agreement* is based on a certain experience with governmental practices when granting subsidies. Thus, governments often act through public bodies or private bodies that do not formally constitute part of the government. Instead of requiring that each transfer of resources is linked back to the government by a piece of evidence, Article 1 of the *SCM Agreement* presumes that money that is handed out by a public body, or a private body which is a funding mechanism, can always be linked to the government.

9. Thus, the purpose of the concepts of “public body” and “private body” is to presume a link to the government in certain situations and thereby to avoid circumvention. Any financial contribution granted by a public body is necessarily imputed to the State. Similarly, a benefit granted by a funding mechanism to which the government contributes is legally imputed to the government.

10. Korea cannot rely on the panel ruling in *United States – Export Restraints* in support of its view that there must be proof of an explicit action relating to a specific transaction. That case concerned a general government intervention in the market – export restraints for a certain product, as opposed to a specific action of a government in a specific situation.

11. The use of the terms “funding mechanism”, “entrusts” and “directs” in Article 1.1(a)(1)(iv) of the *SCM Agreement* indicates that governments may use many different instruments to make a private body transfer resources. These terms are not to be interpreted narrowly in isolation from one another. They are intended to cover all the many different means by which governments may influence the behaviour of a private body. Therefore, panels are tasked in accordance with Article 11 of the DSU to determine the motivations of the private body for transferring the resources. If these can be linked to governmental action on the basis of all relevant evidence - even if circumstantial evidence, including secondary sources - this is sufficient.

D. KOREA’S CLAIM THAT EXPORT SUBSIDIES ARE EXEMPTED FROM THE DISCIPLINES APPLICABLE TO ACTIONABLE SUBSIDIES

12. Articles 3 and 5 of the *SCM Agreement* outlaw different forms of governmental behaviour. The absolute prohibition of export subsidies in Article 3 of the *SCM Agreement* targets any subsidy that is export contingent independently from its actual trade effect. The obligation not to cause adverse effects to the interests of another Member through the use of any subsidy (be it export contingent or not) requires demonstration of certain well-defined trade effects. Already the Panel in *Indonesia – Autos* has recognised that cumulative assessment of different types of subsidies is possible.

13. Korea's argument that a double violation would create a double remedy fails. Assume that Korea implements an adverse Panel finding that KEXIM pre-shipment loans are prohibited subsidies by making them also available for sales to domestic buyers. In such case, the subsidy would no longer be *de jure* export contingent. However, it remains a subsidy benefiting the production of ships and continues to contribute to serious prejudice. Whether a Member has brought all its subsidies in compliance with Article 3 and or 5 *SCM Agreement* may raise new and difficult questions. However, these are to be addressed in the implementation phase and are not relevant to the prior issue of establishing violations of WTO law.

III. THE EXPORT SUBSIDY COMPLAINT

A. THE THREE LEVELS OF THE EC COMPLAINT

1. The individual export subsidy transactions

14. The EC identified in its first written submission over 200 individual cases in which KEXIM has provided an export subsidy to the export of a ship. Korea argues that only presently existing subsidies may be attacked.

15. As discussed above, the EC does not believe that a violation is forgiven once it is in the past. The EC is therefore entitled to a finding that the 200 specifically identified KEXIM export subsidies violate the *SCM Agreement*.

2. The pre-shipment loan and APRG schemes

16. However, having these specific export subsidies removed (or expire) will not solve the underlying problem, which is that KEXIM will continue to grant export subsidies in support of future exports of Korean ships.

17. That is why the EC also attacked the subsidies at a second level – that of the pre-shipment loan and APRG schemes.

18. Korea admits that “until March 1998, KEXIM did not take credit risks into account for its APRG transactions” and then only gradually developed a credit risk policy.

19. Again, the EC considers that it is entitled to a finding that the APRG and pre-shipment loan schemes have been inconsistent with the *SCM Agreement*. Whether or not they still are today is a matter for the implementation phase of this proceeding.

3. The statutory framework

20. Korea's arguments illustrate the need to address the fundamental causes of export subsidisation in Korea and not just the specific export subsidy transactions or schemes – which can easily be changed in the future to avoid the defects found while still providing a subsidy to exports.

21. That is why the EC also formulated its export subsidy complaint at a third level – that of the rules governing the operation of KEXIM and effectively instructing and enabling it to subsidise exports – the KEXIM Act, the KEXIM Decree and the KEXIM interest rate guidelines. The EC has shown that KEXIM was set up to promote Korean exports, receives huge capital injections from the Korean government, does not have to pay any dividends to the Korean government, enjoys an unlimited State guarantee for its liabilities and deficits, and is prohibited from competing with

commercial banks. This inevitably leads to export subsidisation and therefore, according to the EC, the contested provisions of the KEXIM Act, the KEXIM Decree and the KEXIM interest rate guidelines are inconsistent with Article 3 of the *SCM Agreement*.

22. Korea's principal argument in response is to invoke the so-called "mandatory/discretionary doctrine", relying on the fact that, according to Korea, none of these provisions specifically mandate the provision of export subsidies.

23. The Appellate Body has warned against the mechanistic application of this doctrine and has also made clear that an analysis of a measure cannot end with the conclusion that it is in some sense "discretionary". It is necessary to continue the analysis to see whether the provisions have the prohibited effects.

24. One major reason why the mandatory/discretionary doctrine cannot be a mechanistic rule is that state measures are always, by definition, mandatory in some sense and very often leave some element of discretion. There are always some exceptions possible to any mandatory rule.

25. WTO provisions come in many different shapes and sizes. Some are result-oriented (for example, "no less favourable treatment") while others are regime-oriented (for example, those relating to investigations, transparency and domestic regimes). A provision that prohibits Members from maintaining schemes or programmes of a certain description is clearly violated if such a programme exists, even if it may not be applied.

26. As the EC has explained in its first written submission, Article 3, and in particular Article 3.2, of the *SCM Agreement* is designed to prevent the maintenance of export contingent subsidy regimes, as well as the grant of individual export subsidies.

27. In any event, the EC does not accept that the APRG and pre-shipment loan schemes are not "mandatory" in any relevant sense. First of all, the KEXIM Act, the KEXIM decree and the interest rate guidelines are mandatory for KEXIM. It is "mandated" to use the state resources put at its disposal to carry out the functions attributed to it in its governing instruments. These include the promotion of exports and the provision of financial assistance to exporters where this is not available from private sources – or is not sufficiently available or not available on such beneficial terms.

28. Even if it is not stated expressly anywhere that KEXIM must grant loans or guarantees, we do not believe that the senior management of KEXIM would stay in their jobs for long if they were to defy the statutory objectives of KEXIM, and either allow the resources entrusted to it to lie idle, or to support imports or domestic commerce. Indeed, the same would surely also happen if KEXIM were to use its state resources in defiance of the injunction in Article 24 of the KEXIM Act and compete with commercial banks.

29. Accordingly, the EC submits that KEXIM's statutory framework specifically envisages the grant of export subsidies – and indeed, for all practical purposes, effectively **mandates** such action. It is the very purpose of KEXIM to assist exports.

B. THE CONSEQUENCES OF A FINDING THAT ARTICLE 3 OF THE *SCM AGREEMENT* DOES NOT APPLY TO "DISCRETIONARY" MEASURES

30. Korea's position would allow an export-driven WTO Member to introduce a scheme whereby the Minister for export promotion could award any sum he considered necessary to ensure that a Korean exporter wins a contract against foreign competition, when he considers this in the national interest. Since the award of the subsidy would not be "mandatory" for the Minister, the scheme

would not, according to Korea, violate the *SCM Agreement*. So WTO Members would be required to bring action against each individual subsidy grant once it has been made. And then, they would only have a pyrrhic victory. The scheme itself would not have to be changed, according to Korea, because it would still be non-mandatory.

C. SAFE HAVEN ARGUMENTS

31. Pre-shipment loans and APRGs do not fall within the scope of the first paragraph of item (k) (in the case of pre-shipment loans) or items (j) (in the case of the APRGs) of Annex I to the *SCM Agreement*.

1. Pre-shipment loans

32. Korea attempts to pass off credits to exporters as export credits within the meaning of item (k). There is a clear and important distinction between these two concepts.

33. An export credit is provided to *buyers*, not exporters, *for a period that extends past the time of delivery*. The OECD, for example, defines the notion as follows:

Broadly defined, an export credit is an insurance, guarantee or financing arrangement which enables a foreign buyer of exported goods and/or services to defer payment over a period of time. ... Export credits may take the form of “supplier credits” extended by the exporter or of “buyer credits” where the exporter’s bank or other financial institution lends to the buyer (or his bank).

34. Indeed, the fact that export credits may only take the form of ‘supplier credits’ or of ‘buyer credits’ as defined above, is “*the shared understanding*” of all OECD shipbuilding nations - including Korea. The notion was considered so obvious that at the latest discussions on a revised text of the “Sector Understanding on Export Credit for Ships” the parties agreed to drop a specific reference into the text.

35. This understanding of the meaning of export credits has also been implicit in WTO jurisprudence discussing the applicability of item (k) of the Illustrative List.

36. Korea’s pre-shipment loans, by contrast, are production loans granted to manufacturers who engage in exporting certain capital goods from Korea independent of any credit granted to the buyer (who may be entirely unaware of this loan to the exporter). Furthermore, the period of the loan is closely tied to the date of delivery (hence “*pre-shipment loans*”). These are not the characteristics of export credits, which are loans provided, directly or indirectly, to buyers, extending past the time of delivery. Item (k) is simply not applicable to Korea’s pre-shipment loans.

2. APRGs

37. Similarly, APRGs are neither export credit guarantees nor, as Korea argues in the alternative, guarantee programmes against increases in costs. APRGs are, instead, guarantees of credits to Korea’s exporting manufacturers.

38. Export credit guarantees are those provided to a *bank* or to the *exporter* to guarantee that the foreign buyer will repay the export credit that has been accorded to him. APRGs, by contrast, are made available to foreign *buyers* to ensure the repayment of sums paid in advance of the delivery of a capital good, in the event of default by the exporting manufacturer.

39. Korea tries to rely, in the alternative, on a further element of item (j) and to present APRGs as a guarantee programme against increases in the cost of exported products.

40. Item (j) is expressed to cover guarantee programmes *against* increases in the cost of exported products. It is an increase in the cost of the exported *product* that is to be covered, not the overall *expenses* of the exporter or credit risks taken by the purchaser.

41. Korea's broad interpretation would allow any subsidy to the exporter or to exported products that is formulated as a "guarantee programme" to be covered by item (j) since any such subsidy will tend to reduce the cost of manufacturing the exported goods for the exporter or of buying the exported goods for the purchaser.

IV. THE ACTIONABLE SUBSIDY COMPLAINT

A. SUBSIDIES WITHIN THE MEANING OF ARTICLE 1 OF THE SCM AGREEMENT

1. Financial Contribution

42. The Government of Korea controlled the work-out of Daewoo even at the level of the *Corporate Restructuring Agreement*. Through that agreement, domestic banks had essentially waived their rights to act fully independently by committing to the workout as the solution for bankruptcy and subjecting themselves to penalties for breach of the Agreement. The fact that the *Corporate Restructuring Agreement* was negotiated and signed within one week shows that this was not done *voluntarily* by the financial institutions

43. The EC provided powerful general evidence with respect to how the Korean Government influenced the decision-making of private banks in the form of the Kookmin Bank brochure. In addition, public bodies such as KEXIM, KDB and KAMCO were major or substantial creditors for each of the shipyards. Without their exercise of the voting rights, none of the restructuring measures would have obtained the necessary approval.

2. Benefit Benchmarks

44. Foreign creditors are the only actual market benchmark. The only key difference between domestic and foreign creditors in this case was that foreign creditors "behaved independently and in their own self interest". Their behaviour serves as the starting point to consider whether the discretion of the Korean creditors in the work-out proceedings was bound by the governmental interest to rescue the companies.

45. Korea cannot refute that evidence of subsidisation by claiming that the work-out agreed to by Korean creditors was based on the results of an evaluation carried out by professional financial advisors (Arthur Andersen), and their conclusions that the going concern value of the debtor company was greater than the liquidation value, making the debtor company viable. The EC takes issue with the Arthur Andersen report on several grounds showing that the decision to restructure Daewoo, instead of liquidating it, was pre-cooked and that the Arthur Andersen Report is nothing but a rubber stamp, and certainly not evidence that creditors acting under market conditions would have opted for the restructuring.

B. SERIOUS PREJUDICE

1. In the same market

46. Unlike the provisions in Articles 6.3(a)-(b) and 6.3(d) of the *SCM Agreement*, Article 6.3(c) does not have any geographic qualification. In the shipbuilding market, national boundaries have hardly any effect on the shipbuilding business, because ships are not “imported” but may be entered on the shipping registry of any country and operated from any country in the world.

47. The idea that a world market is the relevant market in which to consider price depression was already recognised by the GATT Panel in *EC – Sugar (Brazil)*, under Article XVI:I. of the GATT 1947. In any case, even under Korea’s own view, the Panel would need to consider the complaint of the EC, because the world market can be seen as the sum of the relevant national markets in which the products compete. Article 6.3(c) of the *SCM Agreement* does not prevent Members from claiming price depression and suppression on several - or even all - “national” markets.

2. No formal “like product” test

48. The EC takes issue with Korea’s argument that a price suppression or depression claim under Article 6.3(c) of the *SCM Agreement* requires a formal “like product” analysis. First, the term “like product” used in Article 6.3(c) SCM semantically refers only to “undercutting”. All Article 6.3(c) requires is that the subsidies have the effect of “price suppression, price depression [...] *in the same market*”.

49. Ships are made to the specifications of individual purchasers, and no two ships are ever likely to be precisely “like”. In this respect, the market for ships is very different from that for cars, for example, where individual purchasers do not determine the size, shape and design of their vehicles themselves.

50. The term “same market” in Article 6.3(c) has not yet been defined in dispute settlement. Given that the definition of the market must enable the Panel to assess the existence of price depression or suppression, the existence of cross-price elasticity should play an important role in defining the relevant market. Korea itself agrees in the context of the discussion of price depression that ship prices are, of course, deeply influenced by the interaction of supply and demand.

51. Thus, the market must be determined in a way that allows consideration of both the supply and demand side. Korea’s approach of considering only whether, from the perspective of the ship-owner, products are “like” does not allow a correct understanding of the functioning of the market. The relevant market should also be determined from the perspective of the producers, i.e. the shipyards.

52. The EC has identified three distinct markets for which price developments have to be analysed. These are the markets for LNGs, container ships, and product and chemical tankers as the EC has clearly stated in its first written submission. Korea does not dispute that LNGs are a relevant product for which a price and market exists.

53. The contours of the market for container ships and product and chemical tankers – like any other market – are determined by the behaviour of the participants, buyers on one side and sellers on the other. From the point of view of **ship-owners**, that is from the demand side perspective, distinctions between markets are driven by freight market considerations. Thus, although it is practically impossible (or, rather, economically non-sensical) to replace a specialised ship type with

another specialised ship type on major trading relations (i.e. substitute a container ship for an LNG), there is no such clear division *within* the categories of specialised ship types, e.g. container ships.

54. Although further distinctions can be made by ship size, there is no strict rule for such distinctions, and sub-divisions depend on who is making them and for what purposes. Moreover, at least on smaller routes, there is overlap and different sizes of ships of one type are generally substitutable.

55. From the point of view of a **shipbuilder**, that is from the supply-side perspective, there is even greater potential for substitution between products. In the eyes of a shipbuilder, a ship is an assembly of steel panels, into which is fitted machinery, pipes, cables, accommodation and so on, and the ultimate function of the ship is largely irrelevant. In the eyes of a shipbuilder, a tanker, a dry bulk carrier and a container ship are broadly similar products, even though the arrangement and proportions of the parts that are assembled differ in each product. Whilst shipbuilders seek to improve economic efficiency by building similar products, very few shipyards specialise in a single product type.

3. No obligation to quantify

56. There is no obligation to quantify the effects of subsidies unless a complainant wishes to use Article 6.1(a) of the *SCM Agreement* in conjunction with Annex IV, which is no longer in force. The existence of purely qualitative presumptions in Article 6(1)(b)-(d) of the *SCM Agreement* corroborates that an adverse effects claim can be made without a quantitative calculation.

4. Actionable subsidy to be demonstrated subsidy by subsidy

57. There is no obligation to make a price depression or suppression case on a vessel by vessel basis. Article 6.3(c) refers broadly to the effect of a subsidy on prices on a market. A price in the market is generally the average of numerous sales of numerous products. If Korea had its way, the reference to price depression or suppression would be redundant since all cases under Article 6.3(c) would require proving lost sales with respect to one particular vessel.

5. Additional Serious Prejudice requirement?

58. The EC considers that under Art. 6.3(c) of the *SCM Agreement*, a complainant must show that:

- (1) there is price depression or suppression,
- (2) such price depression or suppression is significant, and
- (3) subsidies are *a* cause of significant price depression or suppression;

then

- (4) *ipso facto*, the effect of the subsidies is serious prejudice to the interests of the EC

59. Subsidies need not be shown to be the exclusive cause of price depression or suppression. A cause is sufficient. In fact previous GATT Panel reports referred to the subsidies as “contributing” or “amplifying” cause.

60. Korea itself acknowledges that no “such other factors are present” and that overcapacity suppresses prices. The EC demonstrated that the preservation of the capacity of the restructured yards has led to price suppression in the Korean industry in general and in turn in the rest of the world. Moreover, the capacity of the three shipyards is substantial.

61. There is no basis in the text of the Agreement to require as Korea suggests a separate demonstration of “serious prejudice”. The purpose of Article 6 of the *SCM Agreement* is to provide a definition of serious prejudice. Contextually, the structure of Article 6 supports the concept that all that is required is to show that one of the elements in Article 6.3 is fulfilled. Thus, Article 6.1 laid down a presumption of prejudice in egregious cases, which could only be rebutted according to Article 6.2 by showing that no serious prejudice existed as described in sub-paragraph 3. It follows that, whenever one of the elements in Article 6.3 is fulfilled, serious prejudice exists, unless there is a case listed in 6.7 whereby serious prejudice “shall not arise”.

62. Korea’s argument that some additional element of injury was required is contrary to principles of effective treaty interpretation because it would render the self-standing definition of serious prejudice in 6.3(c) redundant. However, the European Communities would like to highlight that its industry is seriously prejudiced by the price depressing and suppressing effects of Korean subsidies to shipbuilding.

ANNEX B-2

ORAL STATEMENT OF KOREA

(18 March 2004)

I. INTRODUCTION AND OVERVIEW

1. Korea would like to thank the Panel, the Facilitator and the Secretariat for all of their hard work on a number of difficult matters.

2. Before going further into the legal and factual questions before the Panel, Korea would like to recall some of the broader aspects of the history of this dispute including the financial crisis that swept into Korea from Southeast Asia and how the EC has dealt with its shipbuilding industry for decades.

3. The European shipbuilding industry has been the beneficiary of decades of heavy subsidization, particularly direct operating subsidies meant to convey a focused and specific competitive advantage. There have also been healthy doses of export subsidization which even the Commission has had to constrain (but certainly not stop). Regional subsidies, research and development subsidies (including a new programme to provide R&D subsidies of 25 per cent), restructuring subsidies (totally inconsistent with the EC's arguments before this panel) tied aid export subsidies, and so forth. The amount of subsidization provided to the EC shipbuilding industries is enormous. Indeed, it is so enormous that it lends new meaning to the term "floating currencies".

4. Large amounts of these subsidies have provided short-term bandages and kept in business small and uneconomical yards that have not had sufficient incentive to grow and learn and expand on their own. In fact, the EC in its Third Report on World Shipbuilding admitted that overall the subsidies, i.e. operating aid, has served to cushion yards from the full rigors of the market. The Commission in this report further stipulated that state aid needed to be refocused to promote and underpin efforts to improve the competitiveness, in particular lagging behind their Far Eastern competitors.

5. In distinct contrast with the EC's industrial policy of lavish subsidization, Korea faced, quite simply, a broad-based financial crisis that threatened to destroy the whole Korean financial sector and then bring the rest of the economy down with it. The inflows of capital that had underpinned Korea's economic growth in the past decades was focused on short term borrowing (generally in US dollars) that had been liberalized. The government had retained limitations on medium and long term borrowings. Due to restrictions on foreign borrowing by corporations, most of the borrowing was done by banks. Of course, many aspects of this are quite typical of rapidly developing countries. Very few countries have the luxury of being able to borrow in their own currency. However, as the financial contagion spread out of Southeast Asia, funds dried up regardless of the underlying health of the economy. Rapid depreciation of the currency exacerbated the liquidity problems.

6. The result was a classic credit crunch where money was not available for rolling over loans. Banks, faced with increasing liquidity problems themselves, began to call in their loans. Perfectly viable firms were caught in short term insolvency. In this situation the Government of Korea turned to the IMF to obtain funds to re-float the financial sector. After some tough negotiations, agreement

was reached between the Government of Korea and the IMF and interim funding was provided. In turn, the Korean government used these funds to provide liquidity to the banks. There were conditions attached to this provision of funds, but they were market reinforcing conditions. Banks needed to reduce their outstanding bad debts. They needed to meet BIS standards. They needed to ensure that all restructurings and workouts were done pursuant to market principles including maximization of returns from their debt.

7. In the IMF's view, Korea implemented this market-based approach with great success. As Korea has pointed out in its First Submission, in responses to the EC Commission's several requests, the IMF specifically made the point that they were very satisfied that Korea was undertaking this painful process based on market principles. Korea is not arguing that this panel is somehow estopped from pursuing its inquiries because of the IMF's position. Rather, the point is simply that the IMF's views in this regard are important factual evidence of Korea's market-based approach to restructuring to put in the balance when the Panel weighs the facts of the case.

8. Regarding the EC's approach to this dispute, instead of using its First Submission to set the framework of the dispute and to advance all of the facts and proof needed to support its *prima facie* case, the EC took the route of simply dumping thousands of pages of information in the Panel's lap (information provided by Korea, it must be noted) and asking you to take over proving their case for them. According to the EC, they consider that they do not need to do anything more than make mere assertions.

9. Obviously, the EC's approach is not consistent with the jurisprudence of WTO dispute settlement and neither is it consistent with the most basic tenets of due process required under general principles of international law. With respect to the Panel's duties, the Appellate Body in *Japan – Agricultural Products II* made it very clear in confirming long-standing jurisprudence. The panel is to use its information gathering authority to help it understand the parties' arguments, not to make the complainant's case for it.

10. Neither is the burden on Korea in this respect. Korea is designated by the treaty as being the "respondent" in this case. This means, sensibly enough, that Korea is obliged to answer the EC's arguments and refute its positions, to *respond* once the EC has established a *prima facie* case based on supported arguments and proven facts.

11. As Korea noted in its First Submission, the Annex V process involved serious abuses by the EC. Misleading statements were made by the EC to the facilitator and the Panel regarding the breadth of the product coverage. Related to that, the Annex V process was manifestly used in an improper manner to support a fishing expedition for facts to support baseless allegations of export subsidies. This is irrefutable. The EC's conflicting statements are contained in the record. Moreover, the "evidence" the EC provided to support its export subsidy claims clearly comes from the Annex V process. To make it worse, the EC then had the presumption to demand adverse inferences under the rules of Annex V for claims made under Part II of the SCM Agreement. Annex V is by its terms meant as a process related to serious prejudice. It has never been used by any other Member to try to gather evidence for export subsidies nor to claim legal authority for adverse inferences and it should not have been used in such a fashion here. These are serious matters that the Panel will need to address.

12. The two distinct sets of claims by the EC under Parts II and III of the SCM Agreement with respect to the same alleged subsidies present a unique issue for the Panel because failure to take account of this aspect of the case could result in a double-counting of subsidies in a manner that could result in inequitable findings and disproportionate remedies. Specifically, the EC has submitted claims with respect to the KEXIM programmes under both Parts II and III of the SCM Agreement.

These sets of claims raise serious questions about how to evaluate and remedy alleged violations. The overlapping claims of export subsidization and trade effects with respect to the same alleged subsidies risks the possibility of finding adverse effects caused by a combination of export and non-export subsidies when the non-export subsidies alone would not have resulted in an affirmative finding. That would be inequitable in a situation where the export subsidies would be remedied separately under Part II and should not therefore be included in determining whether a second remedy is appropriate. That would be double-counting and would be as inappropriate in this setting as parallelism problems have been found to be in Safeguards cases. Therefore, while it is true that multiple claims sometimes arise under multiple WTO provisions, no other WTO provisions are like Part III of the SCM Agreement. Unique circumstances require unique solutions.

II. ALLEGATIONS OF PROHIBITED SUBSIDIES

13. As an initial matter, the EC must establish that KEXIM bank is a so-called “public body”. There is no firm definition in the SCM Agreement of what the term “public body” means. It is a case-by-case assessment that must be established by a complainant to the satisfaction of the Panel.

14. The EC points to government ownership of KEXIM. It is true that KEXIM is majority owned by the government. But it is well established that ownership alone is insufficient. The EC also points to a public policy purpose for KEXIM. Yes, the actions of KEXIM are focused on the export sector, but privately owned institutions can have sectoral charters, too. Many countries are familiar with this in their own banking systems. That does not make such institutions public bodies. Something more is needed.

15. It seems clear that something more is the issue of whether or not the entity is fulfilling a function that by its nature is “governmental”. These include regulatory and taxation functions most predominantly. Conversely, entities that function on a commercial basis in their normal activities are not considered “governmental”, as indicated in Article I of the GATS.

16. The EC has asserted that the KEXIM Act and the APRG and pre-shipment loan programmes are inconsistent with the requirements of Part II of the SCM Agreement, “as such”. In order to get there, the EC looks for support in the Appellate Body decision in *US – Sunset Review*. However, the issue there was whether a non-legally binding measure could be challenged, not whether a discretionary measure could be challenged on an “as such” basis. In other words, the issue was a preliminary jurisdictional question as to whether there was a justiciable matter; it was not a question of whether the measure was mandatory or discretionary. Certainly there was no hint in the *US – Sunset Review* case that the Appellate Body intended to overturn substantial GATT and WTO jurisprudence regarding the distinction between discretionary and mandatory provisions.

17. Korea would also like to note that the APRG and pre-shipment programmes are types of lending activities; there is no underlying written rule to challenge. They are mere practices. This is the sort of question that was before the Appellate Body in *US – Sunset Review*. To the question as to whether the EC is legally permitted to pursue a claim against these practices, Korea would answer yes, provided of course that the EC presents proven facts and arguments to establish a *prima facie* case. However, to argue that two “programmes” that are really nothing but types of lending practice can be challenged “as such” as establishing the existence of prohibited export subsidies, simply makes no sense at all.

18. The KEXIM Act provides authorization for a wide ranging set of financial activities related to the export sector. It also requires KEXIM to act on a commercial basis to maximize returns and, in fact, the evidence is that KEXIM has consistently operated at a profit. KEXIM is required to set its base rates according to market conditions. Credit risk spreads must be taken into account; collateral is

required accordingly. KEXIM borrows funds from many sources, generally from international markets. And, contrary to what the EC asserts, KEXIM does in fact compete with other institutions. This requirement is clear from a review of the whole KEXIM Act, not just the snippet cited by the EC. Most importantly, it is quite clear from the facts in the record.

19. The so-called “market adjustment rate” in the APRG and pre-shipment loan programmes does not mandate below-market rates as is asserted by the EC. In fact, the market adjustment rate is not relevant to the setting of the basic rate which is *built up* from the cost of funds to determine the lending or guarantee rate. Rather, the market adjustment rate is a limiting factor on how much of a *downward* adjustment can be made under the discretion of the lending office. As is normally the case in any banking business, the bank officials in charge of disbursing loans and guarantees have a certain amount of discretion that they can exercise in making final offers in order to bring in business. This is typically based on competitive pressures, the customers’ payment history, etc. The “market adjustment rate” is intended to limit the ability of the bank officials responsible for that portfolio to make too large a downward adjustment in setting rates.

20. On the issue of the existence of benefits to the recipients of the APRG and pre-shipment loans, as complainant, the EC carries the burden of demonstrating that these programmes were applied in a manner more favourable to the recipients than what was available on the market. The EC has not met its burden. Indeed, here again, we see only the most cursory analysis of the issue. The EC has offered the APRG rates charged by a couple of non-Korean banks several years ago to support its allegations. However, this is far from establishing a legitimate market benchmark. These APRGs represented a statistically irrelevant sample. Further, APRGs are a highly technical and specialized area and the guarantee rates can be influenced by an assessment of the customer’s past performance and likely future performance. This can be very difficult to assess for a bank dabbling in the market from afar. In addition, the EC ignores the substantially different characteristics of these APRGs. The KEXIM APRGs were always secured by substantial collateral, including the so-called Yangdo-Dambo which establishes important security interests on the hull and materials. In contrast, certain foreign supplied APRGs only had a security interest in certain bank accounts for a minority of coverage of the guarantee.

21. It is also worth noting that the alleged below-market APRGs were advanced during the period of the Asian financial crisis. However, as noted at the outset, this was a difficult period during which funding and guarantees of any sort were difficult to obtain. The main concern of Korean banks was with meeting and maintaining BIS standards and issuing APRGs was adverse to maintaining BIS rates.

22. The selection by the EC of corporate bonds as a benchmark comparison to a pre-shipment loan is virtually a random grasp for an argument by the EC. The corporate bonds the EC refers to were of different terms than the programmes the EC compares them to. These bonds were generally for 3 years. In stark contrast, the pre-shipment loan programmes were for shorter periods of time, generally less than 6 months. The EC does not make any attempt at all to adjust for these term differences which is the most basic question in lending or to determine how the financial crisis impact these term differences. A review of the actual applicable corporate bond rates, as demonstrated in Korea’s first submission, shows that in every instance, the actual bond rate was considerably lower than the EC’s hypothetical rate.

23. Furthermore, the EC also ignores the fact that pre-shipment loans always carried other assurances. Generally, security interests were offered in the form of Yangdo-Dambo as well as other corporate guarantees and security interests of various types. The EC compares such loans with corporate bonds for which collateral was normally not provided. The question of security interests and guarantees is another major determinant of interest rate charges. Of the Korean shipbuilders,

Daedong offered collateral for its corporate bonds, but the actual Daedong bond rates were considerably lower than the hypothetical suggestions of the EC.

24. Finally, the other major factor that determines the rates for programmes such as these is the repayment history of the companies in question. These are narrow, highly technical banking practices and because they are related to the performance history of the companies and close analyses of the market, it is not something readily participated in by banks outside their familiar territories. This has been ignored by the EC. Thus, we can see that the so-called benchmarks offered by the EC against which to determine whether there was a benefit are quite dissimilar with respect to the three most important factors influencing interest rates.

25. Korea is confident that the panel will agree that the EC has not established its case with respect to the issue of alleged export subsidies. Nonetheless, again in consideration of the necessity of providing arguments on all issues, in the alternative Korea notes that it is clear that the so-called safe harbours provided by items (j) and (k) of Annex I to the SCM Agreement apply to the APRG and pre-shipment loan programmes, respectively.

26. With respect to APRGs, Korea notes that an export credit guarantee in item (j) refers to assistance to the export of a product and does not refer to who receives the guarantee. Indeed, the phrase “against increases in cost of exported products” assumes that it can be with respect to the exporter rather than the buyer. Costs are an exporters’ concern while prices are the concern of buyers. As Korea has demonstrated, the APRG programme has always been profitable; it certainly has covered its long-term operating costs.

27. Pre-shipment loans should be considered export credits within the meaning of Item (k); again there is nothing in the language that identifies who must receive the credit or loan. Moreover, the pre-shipment loan programme provided for credit at rates above the KEXIM’s cost of funds.

III. ALLEGATIONS OF ACTIONABLE SUBSIDIES

28. There is no more fact-intensive case under the WTO dispute settlement system than a serious prejudice case brought pursuant to Part III of the SCM Agreement. Here the complainant carries the full burden of establishing the equivalent of a CVD administrative record upon which to base the decision. It is a heavy burden indeed. And it is neither the Panel’s nor Korea’s burden. Only when the EC has satisfied its burden of proof is there an obligation of Korea as respondent to rebut those arguments and dispute the supporting facts. In the present dispute, the EC has not come even vaguely close to carrying its burden of proof. There are major and very basic elements of its case that have been left unaddressed.

29. The EC’s failures in this regard are manifest and multiple. In its First Submission, the EC failed to identify the financial contributions it actually was referring to with respect to the three insolvent companies, Daewoo Heavy Industries (DHI), Halla and Daedong. In fact, as part of its confused presentation, the EC does not even separate out the three companies from their successors and refers to them with compound names separated by slashes. One of the major reasons for this attempt to blur identities is the failure to establish exactly who the EC is claiming received the alleged benefits of the restructurings. Indeed, the EC fails to establish that anyone at all had received any benefit from anything at all.

30. With respect to the so-called restructuring subsidies, there was no government direction in these cases. The Korean economy was in danger of going into a free fall and it had to call in the IMF. As a part of the IMF bailout, restructurings had to be market-based. In fact, all of the banks involved bargained hard in order to maximize their own returns. This was required by both financial and

corporate restructuring schemes and that was the extent of the Korean government's involvement. The EC certainly cannot maintain that a restructuring scheme requiring banks to act on market principles and maximize returns is somehow improper governmental involvement.

31. There were some government-owned banks involved in the restructurings. However, these were banks operating purely on commercial terms; there was no governmental function involved in their participation. It also should be noted that each bank is somewhat different even though the EC chose to try to lump everything together. Indeed, it seems the EC wants to lump every entity in the whole Korean economy into one great government entity. Aside from being a stale and unfortunate stereotype, it certainly has no basis in reality in the present situation nor in the situation that existed during the financial crisis.

32. The EC simply has offered no evidence that these restructurings did not take place on market terms. Instead, the EC makes the suggestion that the "market" dictated that these companies be terminated and cease to exist. One needs to be a little careful with the terminology here for "liquidation" proceedings often result in the companies emerging simply in another form and continuing to carry on the same operations. For example, International Steel Group, the second largest steel manufacturer in the United States, is made up of several bankrupt steel manufacturers that were "liquidated." It is a fundamental aspect of a market economy that there be some method of addressing financially distressed companies short of termination. Certainly there is no functioning market economy in the world that operates without some sort of mechanisms to restructure such companies. And indeed, even the French authorities proceed with the restructuring of and financial support to the Alstom group with the approval of the European Commission, notwithstanding the doubts expressed by outside auditors, Ernst & Young and Deloitte Touche Tohmatsu, as to the going concern value of the group. Having said that, there really is not a single norm against which to measure restructurings. That is the case even within the EC itself.

33. Korea has established insolvency mechanisms that commentators consider fair and transparent and which contain elements of US-style Chapter 11 procedures combined with a more German-style civil law approach. Perhaps, given the difficulty of establishing a single norm against which to measure the Korean cases, it becomes easier to see why the EC urges the Panel to adopt a standard that absolutely no country in the world lives by; namely, termination and exit from the market on the part of insolvent companies. But that is no standard at all.

34. In all three instances in this dispute, the market assessment was that creditors would receive higher returns if the assets continued to be utilized. Whether the process happened under court supervision or pursuant to private agreement as in the so-called "London Approach" makes no difference. For that also is a function of normal market factors. Creditors decide which route to take to maximize their returns. All routes are available; they are not limited. They decide what is best for them financially and then pursue that path.

35. Furthermore, in the context of these restructurings, the EC has even failed to identify a "financial contribution". The main transfers the EC has identified that could possibly constitute a financial contribution are the debt-equity swaps. However, it is difficult to see how those could be financial contributions from the government. Those transactions consisted only of creditors exchanging one financial instrument (debt) for another of precisely equal value (new equity).

36. Finally, the EC also has never identified who the alleged beneficiaries are of these supposed financial contributions. In light of the EC's success in two disputes that focused on this very question of identifying current beneficiaries, their silence is remarkable. The EC successfully argued that "in the case of a change of ownership (including privatization), the investigating member is under

obligation to (re)consider the conditions of application of the SCM Agreement.”¹ It is remarkable that they ignore this, but it is not surprising. The fact is the EC cannot identify any current beneficiaries of the alleged subsidies. The debts were the responsibility of the prior equity holders. But these equity holders were virtually wiped out.

37. In the case of DSME and Samho Heavy Industry, the new owners were the creditors who found the value of their loans seriously impaired and were left with salvaging the best returns possible out of the insolvent companies. The new owners simply were looking for the best return on their new equity. In the case of STX Shipbuilding Co., Ltd., a non-creditor buyer (STX) bought out substantially all the ownership of the old Daedong and the proceeds of this buyout were paid out to the creditors of Daedong. Presumably, this simple set of facts is why the EC tries to hide the lack of current beneficiaries behind the blurring of the identities of the three companies when the EC keeps referring to the companies with compound names linked with slashes. However, that attempt to blur the identities only shows that the EC is focusing on the assets, not the legal or natural persons. But, as is also clear from the EC’s successful cases, the Appellate Body found that “any analysis of whether a benefit exists should be on ‘legal or natural persons’ instead of on productive operations.”²

38. At this point it might be useful to provide a few observations about the individual restructurings. In the case of Daewoo Heavy Industries (DHI), it went through a workout based on the London approach. This choice was made by the creditors following a study and assessment by the Korean affiliate of Arthur Andersen. The Arthur Andersen study showed that the going concern value of DHI -- and the shipbuilding group, which later became DSME, in particular -- was significantly greater than the value if it were liquidated and wound up. This was a totally objective assessment; Arthur Andersen had no incentive to choose one path over another and a lot of pressure to give an honest view of the best means to maximize creditor returns.³ Strangely, the EC also argues that the Korean creditors got less than they should have compared to some foreign creditors. It would seem, however, that what the creditors got was neither too high nor too low; it was what the market determined it to be.

39. Regarding these foreign creditors, it is important to recall that they were marginal credit holders, virtually *de minimis*. Moreover, the EC’s basis for assessing the returns is not a complete picture. The foreign creditors largely cashed out their debt. The domestic creditors stayed involved through a debt restructuring which worked out well over a longer period of time. The foreign creditors did also receive some quantities of warrants allowing them to participate to a lesser degree in any later gains from the equity markets. Thus, the small group of foreign creditors chose to take more up front and less in longer term participation than the domestic creditors. This is perfectly rational behaviour given the different situations of the two groups. Moreover there is simply no evidence that these terms were anything other than the result of hard bargaining by all parties concerned.

40. The final settlement came pursuant to a long series of creditor meetings. The first DHI workout plan was blocked by some minority debtors, again highlighting the point made above of the power of small, determined groups in such a process. Further it is worth noting that it is factually incorrect to state that KAMCO had a significant influence in determining the final settlement since KAMCO participated in the DSME debt equity swap at a later stage of the procedure after the structure and basic terms of the restructuring had already been formulated by the other creditors.

¹ EC’s second written submission to the Panel in *US – Countervailing Measures on Certain Products from the EC* at para. 108.

² Appellate Body Report in *US – Countervailing Measures on Certain Products from the EC* at para. 110.

³ See Arthur Andersen Report page 3 at para. 2 and annex 1 to the Arthur Andersen Report which stipulates the purpose of the assessment.

41. Halla took a somewhat different route into its restructuring. Halla went bankrupt and was sent through court-based restructuring under the Corporate Reorganization Act. The court-appointed receiver drew up a reorganization plan based on the assessment of a financial advisor. This advisor, Rothschilds, assessed that the value of the assets as a going concern was higher than the value on liquidation and wind-up of the business. The advisor recommended that the going concern be maintained by way of transferring all the assets to a newly established company. This course was approved by the court and the previous shareholders equity was extinguished. Pursuant to the reorganization plan, the Halla assets were transferred to a newly established company, RHHI, and the entity was renamed Samho Heavy Industries. Hyundai was given a contract to manage the business. Hyundai was also given a call option at the par value of new shares. When Hyundai did exercise its call option and purchased all the shares of Samho, the par value was greater than the net asset value so Hyundai paid the higher par value amount. The new entity now is no longer Samho, but Hyundai Samho Heavy Industries, Co., Ltd.

42. Daedong also went through the court-based corporate reorganization proceeding. In the case of Daedong, the court determined, based on a financial advisor's valuation report, that the going-concern value was higher than the liquidation and wind-up value. The court extinguished the shareholding of the previous controlling shareholder and reduced the holdings of the remainder by 80 per cent. The court then approved Daedong's appointment of an outside advisor, KPMG, to find a buyer for Daedong. KPMG sent out an Information Memorandum to 13 possible buyers including foreign interests. Six of these were then identified as potential investors. Ultimately, STX was the winning bidder. In later open-market sales, STX reduced its holdings from 97 per cent to 54 per cent as of late 2003.

43. The EC also has failed to establish that any of the alleged subsidies were specific to the recipients. Corporate workouts were widely available to any creditors that wished to use them. DHI's creditors used this approach, but so did many others involved in corporate restructurings of all sorts of companies in all sorts of sectors. If that was not considered appropriate by the creditors, then court proceedings were also available. The other two shipyards, Halla and Daedong, availed themselves of this process pursuant to the Corporate Reorganization Act. And so did thousands of other companies, again involved in all sorts of sectors.

44. As for the tax provisions, the EC does not seem to have fully understood the facts. The EC has also failed to show how the tax provisions resulted in "government revenue that was otherwise due" was forgone or not collected. This makes it practically impossible for Korea to specifically respond to the EC allegations on these tax issues. Moreover, there was simply nothing specific to DSME about the tax provisions in question. They are quite standard sorts of tax provisions generally available in most WTO Members.

45. While the lack of evidence of the existence of a subsidy in any of the restructurings is quite plain, it is still necessary for Korea to highlight the failure of the EC to establish serious prejudice or causation even if the Panel were to find that subsidies existed. The most elementary aspect of demonstrating serious prejudice and causation is to identify the "like product". Without this, nothing else can be meaningfully discussed. It is literally impossible to review the state of the EC's industry(ies) if they are not defined. One cannot try to assess the impact of the alleged subsidies unless one knows what like products they are associated with and, therefore, can gauge their impact on the like product market. However, the EC has completely failed to identify the "like products".

46. Rather remarkably, the EC proposed using an analysis like that in GATT Article III to establish the like product categories, but then did not provide any such analyses. Instead, we had constantly shifting proposals for something the EC identified as the "market", presumably as distinguished from "like products." But, even then, no supporting evidence was provided for any of

these potential like product categories. No market studies; no descriptions of the relative physical characteristics; no facts regarding end uses or consumer perceptions. Simply nothing at all.

47. The EC does not address the question of what EC interests have been seriously prejudiced and how that might have occurred. There is no evidence supplied about the state of the EC industry or “industries”, since we do not know if the EC claims one or several industries. It seems clear from the scheme of Articles 5 and 6 that a showing of adverse effects must satisfy the requirement of a causal link to serious prejudice of specific EC industry(ies) producing the like product(s), but it must also involve something more. Presumably there was a reason the term “interests” was chosen rather than injury and it clearly implies something more than just the alleged damage to specific industry(ies) for a Member’s “interests” are necessarily broader than just that. But, once again, the EC has provided no argumentation or evidence whatever.

48. The EC also did not provide any evidence on the level of the alleged subsidization. At the very end of its submission, the EC offered some numbers which it claims could represent the level of subsidization. These numbers are not broken down by programme; no supporting calculations are offered; no evidence is provided regarding how these numbers are derived. Instead we are presented with another instance where the EC insists that it reserves its rights to provide some sort of economic study should either Korea or the Panel challenge its unsupported assertions. Of course, the EC has no such right; rather, it had an **obligation** to provide supporting evidence and argumentation.

49. Without knowing what the level of the alleged subsidies are, it is impossible to make a causation argument with respect to the issue of serious prejudice. Perhaps not surprisingly, the EC makes no causation argument at all except to imply that even an apparently infinitesimally small effect of subsidization would satisfy the treaty language. One of the problems here is that the EC has collapsed a two-step analysis into one. The first step is to determine whether the effects of the subsidy are to cause, for example, significant price undercutting. Then, in step two, if the effects of the subsidy are to do that, Article 6.3 provides that such price undercutting may be one of several factors that may cause serious prejudice to the interests of the complaining Member. Actually, the EC is not just collapsing the two steps, it really is ignoring them altogether and trying to make an argument that the products have caused serious prejudice regardless of the effects of the subsidies themselves and regardless of the strength of the causal connection. Indeed, it is difficult to see what relationship the EC’s arguments have to the treaty language at all.

50. It is important to recall that the largest shipbuilder in Korea by a large margin is Hyundai and it is not involved in these allegations. There are many others as well. The restructured companies make up a minority of production and the panel should not accept allegations from the EC based on the practices of the “Korean industry”. The EC must differentiate the parts of the Korean industry that it is referring to in order to establish the necessary causal link. Vague references to the “Korean industry” are totally meaningless without both distinguishing the like products and distinguishing the companies.

51. In this regard, it is important to note that the largest measure of growth in the “Korean industry” – whatever that might mean exactly -- occurred prior to the alleged subsidization. That is, the factors shaping the market are clearly on display during a period in which the EC is not alleging subsidization. Of course, there are other factors at play here as well such as a severe global downturn, the rise of other new competitors, such as China, and the practices of longtime competitors such as Japan, but there is this one large anomaly sitting here at the outset that one must address. The EC has the most heavily subsidized industry pursuant to practices that have extended over decades and the EC Commission has acknowledged that these subsidies prevent the EC shipyards from adjusting to the market, to take into account changes in consumer demand, technology and competition.

52. There is also the question of why the EC narrowed its claims and excluded price undercutting and attempted to rely on some undefined market mechanism that could have caused the price suppression and depression that the EC alleges. The reasons are twofold. First, the evidence is weak with respect to price comparisons and causation based on the Korean ships. It is non-existent with respect to the effect of the subsidy. Second, a review of the language of Article 6.5 shows that among other elements, it refers to a comparison of the prices of the subsidized and “non-subsidized like products” (which, of course, is also reflected in Article 6.4). The EC cannot demonstrate that their ships are non-subsidized because, in fact, they are the most subsidized ships in the world.

53. What is absolutely critical here is that the panel not allow the EC to make a case on price undercutting but avoid the requirements of Article 6.5. As a matter of law, the EC cannot be permitted to do this. Thus, at every single step in this process the Panel must press the EC on just what the market mechanism is -- to the *exclusion* of allegations of price undercutting -- that is responsible for the serious prejudice the EC is alleging.

IV. CONCLUSION

54. In conclusion then the Panel is faced with a dispute where the complainant has been unable to prove facts or establish the requisite arguments to make a *prima facie* case with respect to any claims. The EC claims have continued to shrink to avoid matters that they cannot prove, but what is left is based on conjecture, innuendo and broad generalizations that read more like a newspaper article than submissions sufficient to carry the substantial burden of proof required of the complainant in this dispute.