KOREA - MEASURES AFFECTING TRADE IN COMMERCIAL VESSELS

WT/DS273

RESPONSE OF THE UNITED STATES OF AMERICA

TO QUESTIONS FROM THE PARTIES

March 22, 2004

Questions from Korea

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

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

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

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

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

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

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

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

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

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

6. No. As noted above in connection with Question 6, the benefit-to-recipient approach must be applied to KEXIM financing. That approach, in turn, requires a comparison of KEXIM financing to a market-based benchmark; *i.e.*, comparable commercial financing. Evidence that

KEXIM earned a profit would be irrelevant to this exercise, because it would not prove that KEXIM was charging market rates.

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

Questions from the EC

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

8. No.

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

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

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

10. No.

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

11. No.

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

12. A panel considering a dispute under Part III of the SCM Agreement (or an investigating authority in a countervailing duty proceeding under Part V) must put itself in the shoes of the creditor at the time of the investment decision. Because such a creditor would not have knowledge of the firm's future performance, the panel/investigating authority should not consider such information.

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

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