ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX E-1

SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

(13 April 2004)

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II. FACTUAL BACKGROUND

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III. BURDEN OF PROOF AND ADVERSE INFERENCES

3. Rather than respond to the EC's evidence, Korea hides behind unsubstantiated assertions that the European Communities has not established a *prima facie* claim. Korea has even argued that the European Communities does not understand the difference between the role of complainant and respondent, and is asking the Panel to make "the complainant's case for it." As discussed in the EC's Oral Statement, Korea misunderstands what is necessary to make a *prima facie* case. If complainants were obliged to set out a case in the excruciating detail demanded by Korea, any dispute settlement proceeding would become unworkable.

4. A *prima facie* case can be based on simple assertions of facts that do not need to be further proven if undisputed by the respondent. The complainant would then be obliged to provide further proof only if the defending party disputes sru.3652 ns that

8. To determine whether an entity is a public body or a private body entrusted or directed by the government, a Panel must consider all evidence, including circumstantial evidence. Korea wrongly interprets the terms "public body" and "government" as being synonymous and provides irrelevant context for the interpretation of "public body" from the

15. While not required to demonstrate the current effects of subsidies, the European Communities has nevertheless done so in its Responses to the Panel's Questions with respect to the actionable subsidies granted to the shipyards through the corporate reorganisation and restructuring proceedings.

VI. PROHIBITED SUBSIDIES

16. The European Communities responds to numerous arguments raised by Korea claiming that (i) the KEXIM Act, KEXIM Decree, and KEXIM Interest Rate Guidelines as such, (ii) the KEXIM APRG and pre-shipment loan programmes as such, and (iii) specific grants of APRGs and pre-shipment loans do not constitute prohibited export subsidies under Article 3 of the *SCM Agreement*.

17. First, the European Communities demonstrates that that the mandatory/discretionary doctrine can not be used to shield the KEXIM Act, KEXIM Decree, KEXIM Interest Rate Guidelines, or APRG/pre-shipment loan programmes from the obligations of the *SCM Agreement*. In particular, the Appellate Body has confirmed that analysis of WTO consistency of a measure does not end with a finding that it is discretionary. Moreover, it is clear from the *SCM Agreement* that subsidy regimes like those of KEXIM are subject to prospective challenge.

18. The European Communities further explains that Korea has not rebutted the EC's evidence that the KEXIM Act, KEXIM Decree, and KEXIM Interest Rate Guidelines specifically envisage the provision of prohibited export subsidies. The European Communities reiterates its understanding that various provisions of the KEXIM Act, Decree, and Interest Rate Guidelines, including Articles 18, 19, 24, 36(2), and 37 of the KEXIM Act, and Articles 17(2) and 25(6) of the Interest Rate Guidelines, specifically envisage the grant of subsidies that violate Article 3 of the *SCM Agreement*. Korea's responses, including a request that the Panel virtually ignore Article 24 of the KEXIM Act based on an explanation that it should have been repealed, lack merit.

19. The European Communities next addresses Korea's counter-arguments regarding the specific grants of APRGs and pre-shipment loans, and confirms that these specific grants provide benefits to Korean shipyards. In particular, the European Communities demonstrates that transactions by foreign creditors provide a relevant market benchmark, and makes use of additional information provided by Korea to again demonstrate the benefit provided by KEXIM APRGs and pre-shipment loans. Additionally, the European Communities demonstrates that the alternative benchmarks proposed by Korea are not relevant benchmarks.

20. Finally, the European Communities reiterates that Korean APRGs and pre-shipment loans cannot be considered to fall within "safe havens" under the *SCM Agreement*. APRGs are neither export credit guarantees nor guarantee programmes against increases in costs under item (j) of the Illustrative List. Moreover, pre-shipment loans are not "export credits" within the meaning of item (k) of the Illustrative List.

VII. ACTIONABLE SUBSIDIES

A. RESTRUCTURING SUBSIDIES

21. Korea implies throughout its First Written Submission and Oral Statement that the European Communities believes that *all* bankruptcies and reorganisation proceedings constitute actionable subsidies within the meaning of the *SCM Agreement*. Moreover, Korea characterises the EC's arguments as indicating that a restructuring scheme requiring banks to act on market principles and to maximise returns results in the granting of an actionable subsidy. This is plainly an incorrect reading of the EC's submission. Indeed, as detailed previously, the European Communities fully accepts that bankruptcy law is a necessary part of a market economy, and that a bankruptcy proceeding does not generally give rise to a subsidy within the meaning of the *SCM Agreement*.

ANNEX E-2

SECOND WRITTEN SUBMISSION OF KOREA

(13 April 2004)

I. INTRODUCTION

1. In Korea's Second Written Submission, Korea rebuts the factual and legal allegations made by the EC in its Oral Statement of 9 March 2004 and in the responses submitted by the EC to the questions raised by the Panel and Korea on 22 March 2004. Korea addresses the core issues raised by the EC in terms of the subsidy allegations and sets forth the factual and legal grounds on which Korea relies to conclude that no prohibited or actionable subsidies were granted by Korea.

2. Korea notes from the outset that the EC's continued references to a centralized role of the Korean Government in the Korean economy are outdated and inappropriate. Ironically, to the extent that there was guidance from the Korean Government during the relevant period, it was to ensure that market principles and commercial considerations were paramount in the course of restructurings and more generally throughout the financial sector – a fact repeatedly confirmed by the IMF despite the EC's pressure on the IMF to say otherwise.

II. EVIDENTIARY ISSUES

3. The EC has utterly failed to carry its burden of establishing a *prima facie* case for each of its claims based on proven facts. The EC as complainant has the burden to establish every point necessary to demonstrate each claim. Failure on one point means failure on the claim as a whole. The EC has failed or refused to even argue critical issues underlying its claims.

4. Regarding prohibited subsidies, the EC does not have sufficient evidence and has been forced
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GATT and WTO jurisprudence regarding the mandatory/discretionary distinction in evaluating legislation.

8. Regarding the EC's claim of serious prejudice, not a single element of the *prima facie* case has been proven. The EC did not establish that the banks identified were "public bodies". The EC cites to the fact that there is governmental ownership and public policies stated in the charter but these certainly do not suffice to be a 'public body'. A public policy or sectoral focus is also found in many privately owned companies. Further, Korea has identified the key issue in identifying a 'public body' as looking to the governmental function. With respect to "private bodies directed or entrusted by government" the EC has utterly failed to provide any explicit evidence at all.

9. The EC has for the first time actually identified the alleged beneficiaries. But its answers are mutually contradictory. On the one hand, the EC argues that the beneficiary of the Daewoo restructuring is Daewoo. Does the EC mean the old bankrupt Daewoo? If so, the EC has admitted that the new entity is not subsidized for the owners of the new entity want market returns on their assets and that motivation is completely detached from any earlier events under prior ownership. It may be that the EC actually means to refer to the new entity, DSME. But this would be similar to the losing arguments of the United States in the privatization cases. Moreover the EC argues that the subsidy occurs because the DHI creditors paid too much for the DSME stock they received in the restructuring. The contradictory nature of the EC's arguments is revealed when it turns to Hyundai and argues that the basis for the subsidy is that Hyundai paid too *little* for Samho.

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15. Like product has been left undefined. There is no information regarding how the products are physically similar or distinct in meaningful ways. More than that, the EC explicitly rejects that the notion is relevant and instead relies on some extra-treaty term of "market segmentation" but even then products seem to sail in and out of each pliable category depending on which passage of the EC's submissions one refers to. The EC continues to refuse to provide this essential evidence.[4] It is too late to do so now.

16. In question 30, the Panel asked for the EC to provide the capabilities and experience of each shipyard that produces vessels within the scope of the dispute. The EC refused to do so because the number of relevant shipyards is "too many". This is outrageous. The EC submitted about 600 questions to Korea in the short Annex V process and demanded that Korea translate thousands of resulting pages for the convenience of the EC. The EC then simultaneously shrank the size of its case, meaning much of that effort was wasted and then tried to claim adverse inferences liberally. Yet, when asked by the Panel for a relevant piece of information the EC refuses to answer the question because it allegedly is too hard. Korea requests that the Panel make adverse inferences against the EC in this regard.

17. With respect to causation, the EC rejects any need to quantify the alleged subsidy and rejects any need to link that subsidy to the alleged price suppression or depression. The EC has abandoned any attempt at identifying, much less explaining, the market mechanism that transmits the effects of the alleged subsidies, having abandoned every other element of proof contained in Article 6.3, including price undercutting.

18. The EC has failed to carry its burden of proof and indeed explicitly rejected it on element after element. Korea has been as forthcoming as it can be in supplying information; however, this

market-based analysis the creditors exchanged debt for equity. In each of the cases, the stock was then sold on the open market for fair market value.

31. Remarkably, the EC claimed that the creditors paid too much for the stock in DSME but then complained that Hyundai-HI paid too little for Samho. These contradictions leave it unclear in which scenario the EC is arguing a benefit is conferred. Nonetheless, Hyundai-HI is an independent party that freely decided to purchase the stock in an arm's length transaction. Therefore, no benefit should be found to exist. The EC has also erred in calculating the benefit in a piecemeal fashion by wrongly considering the various portions of the debt restructuring in isolation.

32. For example, as explained at paragraph 411 of Korea's First Written Submission, Halla Heavy Industries filed for a corporate reorganization proceeding with the Court on 6 December 1997. The Court then determined that the going concern value was greater and appointed a receiver. The receiver submitted the first reorganization plan on 22 October 1998. The corporate reorganization was not concluded until 6 September 2000. Therefore, any payments made during the course of the corporate reorganization process have to be taken into consideration in the calculation of the debt. If the alleged subsidy is the corporate reorganization, then the entire process has to be taken into consideration in determining whether a benefit was provided. Therefore, this would not be an *ex post* analysis. Similarly for Daedong, if the EC is claiming that a subsidy was provided during the course of the corporate reorganization proceeding it must consider the entire proceeding. Consideration of the entire bankruptcy process would not be an *ex post* analysis.

33. [illegible] the EC is to consider the entire proceeding) Tj 57.75 0 TD 0 Tc 0.187

37. The EC is incorrectly advocating benefit from the perspective of the physical assets of the company and not the legal entity. As discussed by Korea in response to Question 46 of the Panel's questions, the Appellate Body in *US - Countervailing Measures*

provide any coherent product analysis to allow such an assessment and thus the EC cannot meet its burden of establishing serious prejudice.

43. Price suppression and depression must be demonstrated for each like product separately with separate supporting evidence. But the EC's so-called evidence in support of price depression (i.e., the decrease in newbuilding price index, the increase in order book volume, the alleged increase in freight rates and increase in cost of production) is based on data for the whole range of commercial vessels including vessels that are totally unrelated to the present dispute including cruise ships, bulk carriers, RoRos or LPGs. No finding of serious prejudice can be made on the basis of such wholly defective evidence.

44. The EC's claim that price suppression or depression does not require head-to-head competition but mere capability on the part of the EC shipyards to compete is legally unfounded and must be rejected. Article 6.3(c) of the SCM Agreement requires head-to-head competition as a pre-requirement to find price suppression or price depression.

45. The EC's mechanism to establish price suppression or depression is fatally flawed. The EC alleges that it is not required to show that the complainant's prices are actually depressed or suppressed. This is incorrect. Price depression or suppression must be established with regard to the prices of the EC vessels and the prices of the complaining party's products must therefore be shown to have declined or to have been suppressed.

46. In addition, the causal link between the price effects and the alleged subsidies must be demonstrated and the causal link requires a quantification of the alleged subsidies and their effect on the prices of the Korean vessels. The EC claims, among others, that alleged overcapacity suppresses or depresses prices, but the EC has nowhere established how this allegedly occurs. The EC has failed to carry its burden of proof.

47. The use of the term "any subsidy" in the *chapeau* of Article 5 of the SCM Agreement and in Article 7.8 confirmed by the multiple references to "the subsidy" in Article 6.3 confirms that the effects of a subsidy must be reviewed for each subsidy separately. The existence of price depression or suppression caused by the effects of the subsidies as outlined above must be carried out for each subsidy individually.

48. A finding of price depression or suppression caused by the alleged subsidies does not mean that a serious prejudice finding is automatic. Rather, a finding of serious prejudice must be made separately. This is clear, *inter alia*, from the use of the word "may" and the use of the words "one or several" in the *chapeau* of Article 6.3. Any other interpretation would mean that the standard to find serious prejudice under Article 5(c) is substantially lower than to find material injury under Article 5(a) and footnote 11, whereas the Appellate Body in *US – Lamb* has concluded that the word 'serious' connotes a much higher standard of injury. Thus, something more must be proven to establish serious prejudice. Article 5(c) of the SCM Agreement refers to serious prejudice to the "interests" of a "Member". There must have been a reason that the term "interests" (in plural) 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.

49. Nonetheless, the alleged subsidies have not caused significant price depression or suppression and the EC's claims fall far short of demonstrating serious prejudice. The EC provides in Attachment 2 to its responses to the Panel's questions a response to the Panel's question with regard to the existence of significant price depression or suppression caused by the alleged subsidies. But there is, among others, no indication of the like product vessel and hence the data is fatally flawed from the outset and cannot establish price depression or suppression for the like product vessels. Nor is there any serious attempt to establish a causal link. Among many other flaws, the price allegations

are also inaccurate. In sum, the EC has failed to establish any semblance of a *prima facie* case that would allow a finding of serious prejudice in this case, even assuming, arguendo, that alleged subsidization could be shown.