

Issues and Arguments in Trade Dispute Cases against Korean Industries on Countervailing Measures

*Kap-You Kim**

Abstract

Korean industries have been targets of complaints involving charges of unfair subsidies on steel and chemical products by the Korean government filed in the USA and the EU, Korea's two largest trading partners. A recent addition to these series of complaints is the complaint filed with the EU Commission against DRAM Industry in Korea, a Korean shipbuilding industry. These "countervailing duties" complaints, however, helped Korea identify and modify its problematic practices.

Although subsidies and countervailing duties are less frequently used than are anti-dumping duties, their coverage spans over, inter alia, the industrial policies, and the tax system of each country, wielding significant influence thereupon. In particular, restructuring issues have an impact on the economy and the society at large and therefore should not be neglected.

This paper will first offer an explanation of the ASCM and a review of operation of the current system and other general matters, and then will discuss a few cases that have identified potential flaws in the current system. Finally it will examine the DDA scene to anticipate possible future developments and propose certain means of preparation.

* Partner, Bae,Kim&Lee ; LL.M. and LL.B., Seoul National University ; LL.M., Harvard University ; J.D., Seoul National University; admitted to the Korean and Seoul Bar Association, New York Bar Association

With the birth of the WTO in January 1995, the “Agreement on Subsidies and Countervailing Measures” (“ASCM”) came into effect, becoming the international set of rules regulating government subsidies. Since then, the ASCM and the “Agreement on Implementation of Article VI of GATT 1994” (“ADA,” also known as Anti-Dumping Agreement) have been used as primary sources of remedial measures against unfair trade practices. Such agreements were recently included in the agenda of the WTO New Round, subjecting them to numerous rounds of negotiations to address certain perceived imperfections that have led to considerable debate and controversy throughout their implementation.

Korean industries have been targets of complaints involving charges of unfair subsidies on steel and chemical products by the Korean government filed in the USA and the EU, Korea’s two largest trading partners. A recent addition to these series of complaints is the complaint filed with the EU Commission against DRAM Industry in Korea, a Korean shipbuilding industry. These “countervailing duties” complaints, however, helped Korea identify and modify its problematic practices.

Although subsidies and countervailing duties are less frequently used than are anti-dumping duties, their coverage spans over, *inter alia*, the industrial policies, and the tax system of each country, wielding significant influence thereupon. In particular, restructuring issues have an impact on the economy and the society at large and therefore should not be neglected.

This paper will first offer an explanation of the ASCM and a review of operation of the current system and other general matters, and then will discuss a few cases that have identified potential flaws in the current system. Finally it will examine the DDA scene to anticipate possible future developments and propose certain means of preparation.

I. Agreement on Subsidies and Countervailing Measures

A. Overview of ASCM

Under the WTO regime, anti-dumping duties, countervailing duties and safeguard measures are recognized as the remedies against damages to the domestic industry caused by unfair trade practices. The term “countervailing duty” in this context means

a special customs duty levied by the importing country whose domestic industry is injured due to a subsidized product. The purpose of such duty is offset the subsidy bestowed upon the industry or the individual manufacturers producing such product.

Before the establishment of the WTO, subsidies had been regulated by Articles 6 and 16 of the GATT and by the Code on Subsidies and Countervailing Duties adopted at the Tokyo Round in 1979. Such regulations, however, did not prove effective primarily because the definition of a subsidy was too inclusive and ambiguous and no definite criteria were proposed with regard to countervailing measures. To make matters worse, the applicability of the agreements reached in the Tokyo Round was limited to 24 Members only.

To overcome these constraints and improve on the outcome of the Tokyo Round and GATT, numerous discussions were held during the Uruguay Round, resulting in the establishment of the ASCM at the time of the launch of the WTO. In contrast to the Tokyo Round, the ASCM offered a more explicit definition of subsidy, classified subsidies into “prohibited” subsidies, “actionable” subsidies and “non-actionable” subsidies by their nature, and introduced the concept of “specificity.”

Recently adopted at the fourth WTO Ministerial Conference held in Doha, Qatar in 2001, paragraph 28 of the Doha Declaration calls for a negotiation aimed at clarifying and improving the regulations under the ASCM.

B. Subsidy

1. Definition of “subsidy”

A subsidy means a “benefit” conferred on an exporter or a producer through a financial contribution made by a government or any public body. Under Article 1 of the ASCM, a subsidy exists when there is financial contribution or any form of income or price support by a government and conferring a benefit on an exporter or a producer through.

Article 1 of the ASCM classifies financial contribution into 4 categories: (i) a direct transfer of funds (e.g. grants, loans, and equity infusion) and potential direct transfers of funds or liabilities (e.g. loan guarantees), (ii) government revenue that is otherwise due being foregone or not collected (e.g. fiscal incentives such as tax credits), (iii) provision of goods or services other than general infrastructure, and (iv) purchase of

goods. Additionally, the definition of the scope of governments and public bodies given in the ASCM categorizes a private body as a government or a public body if such body is entrusted or directed by the government to carry out a financial contribution. Subsidies granted by a private body have led to controversies as to whether the entrustment or direction by the government exists in such context.¹⁾

Article 14 of the ASCM deems that a benefit exists in any of the following cases: (i) if the government provides equity capital and the investment decision is inconsistent with the usual investment practice of private investors within the territory of the country; (ii) if the government extends a loan and there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain in the market; (iii) if the government offers a loan guarantee and there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee; or (iv) if the government provides goods or services or purchases goods and the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to the prevailing domestic market conditions.

In general, a benefit is deemed to exist if there would be a difference had there been no intervention by the state or a public body. This test is used in determining the amount of a subsidy and the countervailing duty rate. Although the concept of finding the difference between the subsidized goods and the comparable goods under normal market conditions does seem logically correct, in practical application, it is not so trivial to pinpoint the comparable conditions that exactly fit into each case. On this account, comparable goods are selected in broad perspective, utilizing the market interest rate, yield to maturity, *et al.*²⁾

1) With respect to the countervailing duties cases involving Korean industries, the question of the government control over Korean financial institutions has been emerging as the single most important issue in virtually all investigations, which will be further discussed below.

2) In Korean cases, the 3-year bond yield is used with respect to bond issues, and the annual average offered rate by the Bank of Korea is used with respect to loans.

B. Types of Subsidies

The above subsidies are categorized by type into: (i) prohibited subsidies, (ii) actionable subsidies and (iii) non-actionable subsidies.

Prohibited subsidies under Article 3 include the subsidies contingent upon export performance (export subsidies) and the subsidies contingent upon the use of domestic over imported goods (import substitution subsidies). The ASCM lists specific cases of export subsidies in Annex I thereto.

Actionable subsidies and non-actionable subsidies are classified by whether the subsidy, as defined in the above Paragraph (1), causes adverse effects to the domestic industry of the importing country and whether the subsidy is “specific.” Adverse effects are deemed to exist when there is (i) injury to the domestic industry of the importing country, (ii) nullification/impairment of the benefits of another Member country accruing under GATT, or (iii) serious prejudice to another Member country. A Member country which determines that subsidized import has caused “material injury” to its domestic industry, may impose countervailing measures, pursuant to investigating initiated and conducted in accordance with Part V (Articles 10 to 23) of the ASCM.

Notwithstanding the above criteria, however, a few exceptions recognized by the ASCM, *i.e.* assistance for research activities, assistance to disadvantaged regions, and assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations are classified as non-actionable subsidies if such assistance meets the prescribed requirements.³⁾ These non-actionable subsidies and any annual changes therein, however, must be reported to the WTO Committee on Subsidies and Countervailing Measures.

C. Injury

The ASCM refers to the ADA with respect to quite a good portion of the procedures required therein, among others. The definitions and criteria of the injury to the domestic industry caused by subsidies are quoted mostly from the ADA.

D. Specificity

As mentioned above, initiation of countervailing measures requires that the subsidy be specific to a certain enterprise or industry or group of enterprises or industries (hereinafter referred to as “certain enterprises”).

Article 2.1 first determines specificity by whether a subsidy is limited to certain enterprises, by whether objective criteria governing the eligibility for the subsidy are established, and by other express and *prima facie* statutory requirements. Notwithstanding any appearance of non-specificity, specificity may be established in the following circumstances:

- (i) the subsidy is in fact provided for certain enterprises only;
- (ii) the subsidy is predominantly used by certain enterprises;
- (iii) disproportionately large amounts of the subsidy are granted to certain enterprises; or
- (iv) the granting authority exercises discretion in the decision to grant the subsidy.

In other words, specificity can be classified into *de jure* specificity and *de facto* specificity. As the investigating authority’s discretion plays a larger role in determining specificity, different authorities take different stances on the same program. In particular, to determine *de facto* specificity, the investigating authority of each country considers the size or quantity of certain enterprises, predominant use of the subsidy by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy, *et al.* However, the ambiguity in determination of “predominance” and other criteria result in different decisions on the same issue.⁴⁾

3) Please refer to Article 8.2 of the SCM Agreement.

4) Although it is reasonable to deem that certain clauses of the Regulation of Tax Reduction and Exemption Act of Korea that are applicable to the manufacturing industry involve no specificity, especially given the multitude of the entities encompassed in the manufacturing industry, yet the EU Commission decided that limiting the line of business to the manufacturing industry did give rise to specificity. On the same issue, however, the US Dept. of Commerce found that specificity did not exist, especially in view of the weight carried by the manufacturing industry in the overall economy of Korea.

E. Operation of ASCM

Each Member of the WTO must, as in the case of the ADA, provide the WTO with notifications regarding its domestic regulation on subsidies and countervailing duties and annual updates of operation thereof. In addition, each Member is required to notify annually to the WTO of any non-actionable subsidy programs that are recognized under the ASCM and operated in its territory and any annual changes therein.

Any disputes on subsidies between Members are to be resolved through mutual consultations and then the WTO dispute settlement procedures, as illustrated in the dispute settlement procedural flowchart below.

II. Analysis of Recent Cases and Identification of Problems

The current ASCM as entered into in 1995 has since been steadily used by quite a few countries as the favorite means of remedy, together with anti-dumping measures, against unfair trade practices. Against Korean industries, 11 subsidy complaints have been raised between 1995 and 2001, which is the second only behind the 25 cases lodged against India during the same period.

The following is the dispute settlement procedural flowchart:

WTO Dispute Settlement Procedural Flowchart

Member requesting consultations	Request for consultations	Member responding
	Reply within 10 days	
<Consultation Phase>		
	Entry into Consultations	(within 30 days of the request)
WTO Director-General may offer good offices, conciliation or mediation.		
<Panel Phase>		
	Request for establishment of a panel	(if unable to reach a settlement within 60 days of the request for consultations)
DSB: Dispute Settlement Body	Establishment of a Dispute Settlement Panel	(to be established at the 2nd DSB meeting following unless at the 1st meeting the DSB decides by consensus not to establish a panel)

	Composition of panelists	(to be appointed by the Director-General if there is no agreement on the panelists within 20 days after the establishment of a panel)
Expert review group	Review by the panel (by contacting the concerned Members and the 3rd parties)	
	An interim report submitted by the panel to the concerned parties	
	Circulation of the final report to the Members	(within 6 to 7 months after the appointment of the panelists)
(If appealed)		(If not appealed)
<DSB Phase>		<Appellate Body Phase>
Adoption of the panel report by the DSB (within 60 days after the date of circulation of the report)		Decision by the Appellate Body (within 60 days or in any case within 90 days after the notification of the intention to appeal)
		Adoption of the appellate body report by the DSB (within 30 days)
	Implementation of the recommendations and rulings adopted by the DSB (within 15 months)	
	Another panel procedure regarding compliance (takes 6 to 7 months if appealed)	
	Negotiation for compensation (within 20 days)	
	Retaliatory measures authorized by the DSB (within 60 days after the expiry of the reasonable period of time)	

Many of the complaints against Korea have been filed by the EU and the US steel industries.⁵⁾ The investigations conducted by the EU, however, have been terminated mostly due to nonexistence of injury. For this reason, we will discuss below the major issues of the complaints filed against the Korean steel manufacturers, how Korean industry reacted upon the cases and the decisions rendered by the US Department of Commerce.

A. Korean Cases

As mentioned earlier, subsidy complaints against Korean products have steadily been lodged, mostly in the US and the EU, since the 1990's. The major issues include Korean government's control over financial institutions, long-term Won or foreign currency denominated loans, and the clauses regarding the inclusion of reserves in deductible expenses, tax credit, abatement and exemption of the tax amount under the Restriction of Preferential Taxation Act (formerly known as the Restriction of Tax Relief Act), and the financial and taxation privileges granted to promote corporate restructuring during the Asian financial crisis. Power rates and port facilities were also raised as subsidy in several cases.

1. Korean Government's Control over Financial Institutions

The issue of the Korean government's control over the financial institutions has been a constant source of complaint and has led to investigations by the US Department of Commerce against Korean steel products.

Since the Korean War in 1950, the Korean government has actively intervened in the Korean financial system to direct what limited financial resources the country had to effectively develop key industries. For instance, the priority placed with the chemical and heavy industries between the 1970's to 1980's facilitated access to financial resources and favorable interest or borrowing rates by manufacturers in such industries.

5) A total of 11 subsidy complaints were filed against Korean products until 2001: 5 cases by the US and another 5 by the EU.

As the Korean economy reached a certain level of maturity in the late 1980's through the early 1990's, its economic development policies gradually evolved and resulted in the financial system moving closer to a self-regulating, efficient market model.

The Korean government implemented a four-phase interest rate liberalization program in 1991 that encouraged each Korean bank to set its own interest rates. It also amended the laws regarding outside directors and the appointment of the heads of financial institutions so that Korean banks might overcome inherent limitation of the "ownerless bank" and exercise autonomy in their individual marketing activities.

Over the course of the outbreak of the Asian financial crisis in 1997 and in the aftermath, the Korean financial system, in full compliance with the IMF recommendations, came to completely do away with the government control through, *inter alia*, the establishment of an integrated financial supervisory body and abolition of the regulations limiting interest rates, etc., most of which were informed by and adopted from the financial systems of developed countries', especially the financial system of the U.S.

a) American Standpoint

In the determination rendered by the US Department of Commerce subsidy investigation against Korean steel products in 1993, the Department evaluated the Korean financial system as of both prior to and after 1991, and reached the same conclusion for both periods: that the Korean financial system was under the direct and indirect influence of the government, which was demonstrated by the appointment of the head of each bank by the government, the government intervention in determination of interest rates by the banks and the government's support for specific industries in accordance with the planned economic objectives such as the above-mentioned heavy and chemical industry drive.

Although the US Department of Commerce investigated the changes that occurred after 1993 in the Korean financial system on a few more occasions, such as an investigation against Korean stainless plates in 1997 and the recent investigation against the Korean cold-rolled steel products that resulted in a final determination in October 2001, the Department maintained that the Korean financial institutions remained under the government influence despite the numerous reforms made

throughout the 1990's,⁶⁾ due to, in particular, an increase in the government stakes in the major commercial banks resulting from the public fund infusion through financial restructuring processes.

b) Korean Counteraction

Over the course of the subsidy and countervailing duty disputes with the US, the Korean government has steadily focused on explaining the above-mentioned changes in the financial system and stressing the definite changes that have been made from the early 1990's to the present.

Particularly, Korea explained the inevitability of the expanded government stakes in commercial banks that occurred in the course of the financial restructuring, and underlined the intrinsic difference between such government stakes and general investments made for the purposes of the managerial control or capital gains. The Korean government has laid further emphasis on the irrelevance of the expanded stakes to the government control over the financial institutions by presenting management normalization agreements and other various agreements with investment banks and mentioning that the government has declared a non-intervention doctrine with regard to daily businesses of banks, among others.

2.. Corporate Restructuring

To overcome the Asian financial crisis of 1997, a large number of enterprises struggled to rehabilitate through court receivership, composition or workout. In support of such efforts, full or partial exemption of debts, debt rescheduling, debt-to-equity swaps and other similar measures were taken. Debates about whether subsidies exist by nature in the financial and/or taxation support for certain enterprises with respect to these series of restructuring cases continue today. Regarding this issue, the US already examined the existence of a subsidy in its investigation into companies under workout in the structural steel beam case and the STS C/R case. Apart from these

6) Federal Register / Vol. 67, No. 32, "Notice of Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Certain Cold-rolled Steel Products from the Republic of Korea."

investigations, the EU Commission investigated the workout program for Daewoo Shipbuilding & Marine Engineering in the TBR shipbuilding case and is currently conducting a countervailing duty and subsidy investigation into Hynix Semiconductor, which is under restructuring program in accordance with the Corporate Restructuring Promotion Act.

During the process of the subsidy investigation into the workout program for Kangwon Industry in the structural steel beam case, the US separated its determinations on the nature of the workout program at large and the specific workout program implemented for Kangwon Industry. The US Department of Commerce determined that the workout program *per se* is not a program that grants any subsidies and accepted the assertions of the Korean government that the Korean workout program had been adopted on financial institution's own initiative by applying the London approach, and no limitation was placed on the selection of the subject companies. The US Department of Commerce, however, divided the specific workout program for Kangwon Industry into three subsections, determining that a subsidy existed within the extent of the subsection regarding the rescheduling and reduction of interests of the long-term loans, since the Department has already held that long-term loans to the steel industry had been subsidies.⁷⁾

Meanwhile, the EU Commission holds a different viewpoint from that of the US regarding this issue. The EU Commission determined that a subsidy existed in the workout program for Daewoo Shipbuilding in its TBR investigation report against the Korean shipbuilding industry. First, in rebuttal to the Korean assertion that workout programs were operated on financial institution's own initiative, the Commission pointed out that participant institutions were largely government-owned, or the initiative of operation of the programs had been taken by the institutions under the government influence. Second, as opposed to the assertion that no limitation was placed on selection of the subject companies, the EU Commission determined that the workout program was basically established for the purpose of restructuring 6 to 64 largest conglomerates, placing inherent limitations to its operation.

The assertions of the EU Commission add that the form of the workout program

7) Federal Register Vol. 64, "Preliminary Negative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Structural Steel Beams from the Republic of Korea".

itself manifests the financial institutions' own initiative, yet the program is mostly operated by public financial institutions such as the Korea Development Bank and private institutions having financial problems, and these financial institutions are unlikely to make the kind of decisions that go against the government interest, given that they rely on the government for their survival.⁸⁾

These determinations made by the EU Commission clearly demonstrate that it holds different perspectives on the normal business activities of commercial banks and on their participation in the workout or other restructuring programs for troubled enterprises.

In addition, the EU Commission does not bother to consider the scope of the industries that are actually subject to the program and goes on to recognize the existence of specificity merely because the subject companies are listed, while in fact the selection of the appropriate program among self-regulated corporate restructuring, workout schemes, *etc.* was made on basis of the economic scale of individual enterprises for the sake of efficiency. This further exhibits that the determination of specificity currently relies too much on the arbitrary volition of each investigating authority.

3. Taxation

The Korean government renders taxation support to enterprises under the clauses regarding inclusion of reserves in deductible expenses, tax credit, abatement and exemption of the tax amount under the Restriction of Preferential Taxation Act (formerly known as the Restriction of Tax Relief Act).

a) Export Loss Reserve

The export loss reserve makes it possible that a certain portion of the export income is counted toward a reserve and included in the expense in preparation for a potential future loss from export. Such amount is later set off against the loss if the loss does

8) Report to the Trade Barriers Regulation Committee: Examination procedure concerning an obstacle to trade., within the meaning of council regulation (EC) No 3286/94, consisting of trade practices maintained by Korea affecting trade in commercial vessel.

occurs in the future or is included back into income.

The US Department of Commerce asserted that this program allowed Korean exporters a grace of tax payment for the entire period prior to the offset or inclusion in income, since they might include a future loss in the current expense. For this reason, the US Department of Commerce determined that such deferred tax payment constitutes a subsidy contingent upon export performance under the ASCM.

The Korean government examined whether this program fell under the prohibited subsidies under the WTO agreement and determined that it constituted export subsidy thereunder. Therefore, Korea abolished the export loss reserve in the amendment to the Restriction of Preferential Taxation Act in 1998.

b. Foreign Market Development Reserve

The foreign market development reserve was devised to support exporters' effort to develop new markets. The US Department of Commerce determined that this program also constituted a prohibited subsidy under the WTO agreement, applying the same logic as with the case of the export loss reserve.

The Korean government acknowledged that the program constituted a prohibited subsidy under the WTO agreement, resulting in the abolition of the same amendment of the Restriction of Preferential Taxation Act in 1998.

c. Investment Tax Credit

This program was adopted to promote and support fixed investments by enterprises by deducting a certain portion of the investments in the new plant and equipment from the tax amount.

The US Department of Commerce asserted that this program fell under a subsidy contingent on the use of domestic goods over imported goods under the ASCM, since the program allowed more deductions for investments in domestically-produced equipment than in imported equipment.

The US Department of Commerce's assertion led the Korean government to review the compliance of the program with the WTO agreement, and concluded that it may fall under the import substitution subsidy. As a result, Korea amended the Restriction of Preferential Taxation Act in 1998 in such a way to level the applicable deductions for both domestically-produced equipment and imported equipment.

d. Miscellaneous

As mentioned above, the US Department of Commerce and the EU Commission have steadily been asking the Korean government about the existence of prohibited subsidies and specificity of subject companies with respect to the education and human resource development tax deduction, the investment tax credit after the amendment in 1998, various taxation issues related to research and development, and other programs under the Restriction of Preferential Taxation Act and the former Restriction of Tax Relief Act.

Most of the time, the primary issues are centered around the issue of specificity. The Korean government has been asserting the nonexistence of specificity, either *de jure* or *de facto*, in the application of the miscellaneous programs by providing the US Department of Commerce and the EU Commission with the text of the laws and the application case analysis. Meanwhile, the Korean government has been reviewing the determinations made by the US Department of Commerce and other authorities and improving regulations to avoid unnecessary controversies.

III. Recent Trends in Discussions Related to ASCM

A. Background Discussions; Problems of ASCM

As each Member accumulates experience under the ASCM and more and more cases are resolved through the system, the limitations and the problems of the current ASCM system have been exposed.

Although countervailing complaints have been filed with relatively less frequency than the anti-dumping complaints,⁹⁾ countervailing complaints have nevertheless been abused as a remedy against unfair trade practices.

11 countervailing duty complaints were filed against Korean products primarily by the US and EU industries for the period between January 1, 1995 and December 31, 2001. For the same period, only three cases resulted in the actual imposition of

9) A WTO report states that 1845 A/D complaints were filed from January 1, 1995 to December 31, 2001 while only 143 CVD complaints were instituted for the same period.

countervailing duties, which is a fairly limited number even with the assumption that the cases initiated in 2000 and 2001 had not produced any results within the same period.¹⁰⁾ Although the actions taken by the Korean government and exporters did contribute to the high percentage of dismissed complaints, the results also imply that the domestic industry of the importing Member customarily adds a countervailing duty complaint at the time of filing an anti-dumping complaint, based on past determinations without taking the steps to investigate to establish sufficient evidence in advance.

Such indiscriminate filing of complaints by the domestic industry of the importing Member and the initiation of investigations by the government of the importing Member only after the review of such insufficient evidence, only serve to place unnecessary constraints upon the Korean government and the exporters, filing of which is arguably another form of a trade-barrier.

B. Doha Development Agenda

Although Korea, Japan, the EU and virtually all other Members argued that negotiations be opened to prevent the abuse of anti-dumping and countervailing duty complaints by improving the ADA and the ASCM, such effort had been thwarted by the persistent US opposition until 2001, when a change in the US congressional stance resulted in an acceptance by the US of the improvement of the agreements on the condition of limiting the agenda and thus the Doha Ministerial Declaration came to include an agreement on initiation of such negotiations.

In Article 28 of the Doha Ministerial Declaration dated November 14, 2002, the Members agreed to initiate the negotiations for the subsidy matter, while preserving the basic concepts, principles and effectiveness of the ASCM and its instruments and objectives.¹¹⁾

10) Please refer to “the statistics on subsidies and countervailing measure” on WTO website (www.wto.org).

11) Doha Ministerial Declaration

Article 28. In the light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions,

The agenda of the negotiations focused on clarification and improvement of the disciplines and procedures regarding subsidies and countervailing measures under the current WTO regulations, while taking into account the necessity of subsidies arising from the economic situations surrounding developing and underdeveloped countries.

In particular, much attention was paid to the fisheries subsidies, given the extraordinary importance of such industry to developing countries.

Thus, the forthcoming negotiations for the improvement of the current ASCM are expected to produce clarification on specificity, which has been the source of much controversy. Additionally, the decision to consider the necessity of subsidies for developing and underdeveloped countries during the negotiations leaves room for due regard to the interest of developing and underdeveloped countries, whereas the ASCM has been criticized for protecting the interest of developed countries only, an inherited characteristic borne out of its legacy with the OECD, which was an exclusive club for developed-countries in 1950. On November 13, 2001, the WTO SCM Committee decided to extend the developing country clause in Article 27.4 of the current ASCM until 2007, which is widely viewed as a legitimate consideration for the benefit of the developing countries.¹²⁾

1. Progress of DDA¹³⁾

As expressed in Article 28 of the Declaration, the initial phase of the negotiations regarding subsidies is focused on identification of trade distorting practices and the current clauses in need of clarification or improvement.

In March 2002, the first official meeting of the Negotiating Group on Rules was

including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries. We note that fisheries subsidies are also referred to in paragraph 31.

Article 29. We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.

12) WTO G/SCM/With471/Rev. 113 November 2001, "Proposed Procedures for Extensions under Article 27.4 for Certain Developing Country Members".

13) Paraphrased from Recent Trend in DDA Subsidy Negotiations written by Kang, Moon Song

held, where there was a general discussion on appointment of the chairman and operational suggestions. In the second meeting of the Group, there was discussion on export credit, reinstatement of the provisions on non-actionable subsidies and serious prejudice, more preferential treatment of developing countries, among others, which were brought up by Brazil, Canada and India. Each of these countries presented unfairness issues and suggestion on possible improvement measures for the current agreements, based on the complaints filed so far.

2. Propositions Made

a) Brazil

With respect to export credit, Brazil asserts that the provisions of Annex I (1) and (2) of the current ASCM fail to reflect the differences between developed countries and developing countries, which may result in a disadvantageous application to developing countries. Brazil argues that, in particular, the provisions that presumes that the compliance with the OECD guidelines automatically warrants the nonexistence of subsidies are disadvantageous to the WTO Members that are not OECD members.

b) Canada

Canada argues for a clarification of certain ambiguous provisions that may give rise to disputes and for the reinstatement of the non-actionable subsidy clause, which expired at the end of 1999. The specific arguments are as follows:

- Clarification of the export subsidy clause
- Reinstatement of the non-actionable subsidy clause in Article 6.1
- R&D subsidy, regional development subsidy, environmental subsidy and other non-actionable subsidies under Article 8
- Authorized remedies under Article 9

The above clauses were provided for a limited period of time of 5 years ending on December 31, 1999, under Article 31.

c) India

India argues for the strengthening of Article 27, which contains a special clause to the benefit of the developing countries, on the ground that subsidy and countervailing measure duties imposed against the exports of a developing country would cause a significant amount of social and economic problems due to the labor-intensiveness of the export industry of such country, and that a developing country is more prone to significant financial costs, insufficiency of the infrastructure, inadequate information environment and other adverse conditions than faced by a developed country.

- Extension of a grace period for the application of export subsidies under Article 27.3
- Raising of the negligible imports criteria under Article 27.10

Raising of the *de minimis* criteria under Article 27.11

C. Future Prospects and Likely Influence on the Korean Economy

As widely known, the core issues of the Doha Development Agenda is the negotiations regarding services and agricultural products. Due to the strong opposition by the US and the limits placed on the agenda thereby, the ADA and the ASCM are not expected to be core issues among the entire DDA negotiations. Especially, since it was agreed that the current frame of the agreements would be maintained throughout the negotiations, no major changes in the current agreements are expected.

As mentioned earlier, however, these agreements might be amended in such ways to actively recognize the needs of the developing countries, given that the recent trend has been towards a more flexible approach to the economic growth of developing and underdeveloped countries. The developed countries might also seek to gather support for the New Round by developing countries. Thus, the negotiations will likely be steered towards the compromise between fair trade, the objective of the ASCM, and economic development, the needs of the developing countries.

However, since little difference exists among the stance of each country on the framework of the current ASCM, the framework is not expected to emerge as a major issue in the course of forthcoming multilateral negotiations. Still, negotiations will be centered around clarification of “specificity” and other terminology, export credit in

developing countries, non-actionable subsidies, *et al.*

The subsidy problem may have a fatal impact upon a company struggling for survival due to specificity in restructuring and the resultant countervailing duty measures taken by the competing country if not properly addressed by a country such as Korea, which had to survive the traumatic ordeal of financial and corporate restructuring during the Asian financial crisis. The significance of the subsidy problem is not any less than that of agriculture or the service industry, especially when countervailing measure complaints converge on the steel, chemical products, and shipbuilding, which all have material influence on the Korean economy.

In the meantime, the provisions granting a preferential treatment to developing countries may be enhanced to the point of deforming the framework of fair trade by the US and certain developed countries to gain support of developing and underdeveloped countries with regard to other aspects. The unfair trade practices allowed to developing countries may create a trading environment that is unfavorable to Korea, which is, more often than not, in direct competition with developing countries.

IV. Conclusion

Under the current ASCM, Korean industries have been suffering significant damages due to the abuse of countervailing duty investigations, illustrated by 11 complaints, currently ranked at 2nd place. Korea has therefore been actively seeking to improve the ASCM as well as the ADA so as to prevent abuse of complaints resulting from the ambiguity of the terminology and avert economic loss caused thereby.

In the coming days, the Korean government should argue for clarification and stringent application of the provisions so as to prevent unnecessary trade disputes that have occurred due to the ambiguity and arbitrary interpretation of “specificity” and other terminology by competing industries. Furthermore, enhancement of the preferential provisions for developing countries, which are in competition with Korea, should be kept to a minimal, since it would otherwise wield adverse impact on the Korean economy.

In addition, Korea must analyze various industrial assistance programs, which have been the source of complications, and correct any problematic components that may

cause trade friction, by implementing such corrections in the regulations. In particular, any aspects that have a huge influence on the state economy such as the financial assistance and tax breaks related to corporate restructuring, such as in the case of Hynix and Daewoo Shipbuilding, does deserve more deliberate attention in devising and implementing the relevant regulations.