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Is Export Credit Insurance Counter vailable Subsidy under the SCM Agreement? Focusing on EC-Countervailing Measures on DRAM Chips from Korea (DS299)

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Abstract: This study analysed the issue of export credit insurance (ECI) in the World Trade Organization (WTO) dispute (DS299) between Korea and the European Communities (EC) regarding countervailing measures on the ECI provided by the Korea Export Insurance Corporation (KEIC) for export of DRAM chips from Korea. The study reviewed the WTO panel decision on whether the EC countervailing measures on the KEIC export credit insurance were consistent with the Subsidies and Countervailing Measures (SCM) Agreement. It also analysed and interpreted the relevant provisions of the SCM Agreement and the WTO panel decisions on ECI. If an export credit agency charges less than a market fee for specific credit insurance, a benefit would be deemed to exist to the recipient and the specific credit insurance would be considered a subsidy. When an export credit agency is a public body, there is no further need for an additional finding of entrustment or direction by the government to the export credit agency for the ECI to constitute a financial contribution in the sense of Article 1.1(a)(1)(i) of the SCM Agreement. This study also provided some guidelines for export credit agencies to operate ECI programmes without countervailing measures being imposed by the importing countries.

Keywords: export credit insurance, countervailing measures, SCM Agreement, export credit agency, subsidy, WTO, DS299

INTRODUCTION

Export credit insurance[1] programmes contribute to promoting international trade by covering default risks of transactions, but they may distort the fair competition in the international trade.[2] European Communities — Countervailing Measures on DRAM Chips from Korea (DS299)[3] is a World Trade Organization (WTO) dispute including but not limited to Korea's "export credit insurance" for export of DRAMs. This dispute

arose from the European Communities' (the "EC") final determination imposing definitive countervailing duties, also known as anti-subsidy duties, on DRAMs from Korea. The EC determined that Korea's five different support and restructuring programmes including export credit insurance cover conferred a benefit to Hynix, a Korean DRAM manufacturer and that these programmes were countervailing. The issues in this case are whether five such different financial contributions conferred a benefit to Hynix and thus constituted prohibited subsidies in the sense of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement").[4] However, this article mainly discusses the issue of whether a particular export credit insurance cover by the Korea Export Insurance Corporation (the "KEIC") constituted prohibited subsidies under the Article 3 of the SCM Agreement and item (j) of the Annex I.[5]

Article 1 of the SCM Agreement provides that a subsidy shall be deemed to exist if there is a financial contribution by a government or a public body[6]. Article 3 of the SCM Agreement defines prohibited subsidies including illustrated subsidies in Annex I. Item (j) of Annex I provides that export credit guarantees or insurance programmes by governments (or special institutions controlled by governments) operated at premium rates that are inadequate to cover the long-term operating costs and losses of the programmes are prohibited subsidies. Export credit insurance or guarantee programmes are operated by the governments or by the government agencies in most countries[7]. It does not seem to be at odds that the export credit insurances operated by the governments or by the government agencies will fall within the phrase of "export credit guarantee or insurance programmes" under item (j) of Annex I, except the phrase of "at premium rates that are inadequate to cover the long-term operating costs and losses of the programmes." Therefore, it is very likely that export credit insurances fall within the prohibited subsidies under Article 3 of the SCM Agreement and that countervailing measures would be taken against them. In Korea, export credit insurance programmes are insurance policies and risk management products operated by a government agency, the Korea Trade Insurance Corporation (the "K-Sure")[8], which is wholly owned and controlled by the government of Korea under the Trade Insurance Act. The programmes are offered to business entities wishing to protect their export accounts receivable from losses due to credit risks.

This study analysed the WTO panel findings and decisions on an export credit insurance in order for export credit agencies[9] to operate export credit insurances or guarantees programmes without countervailing duties being imposed by the importing countries.

ECONOMIC ASPECTS OF SUBSIDIES AND COUNTERVAILING DUTIES

In general, the theoretical justification on dumping in the importer government regulations for dumping in international trade is extremely weak and overtly political in nature. In the case of countervailing duties to regulate exports as well as government support (such as anti-dumping exporting countries), theoretically proving its legitimacy is also weak. Figure 1 shows the case of subsidized exports with very large scale government subsidies that affects the international price of exports.[10] The chart on the far left (Export country) represents the supply and demand for any commodity exporting countries, while the chart on the far right (Import country) shows the supply and demand situation in the importing country. Domestic market equilibrium price of the exporting country (PX) is lower than the domestic market of the importing country and so it has an international comparative advantage in that commodity. International trade of this product may look at taking into account the import demand curve (ID) representing the difference between the supply and demand of the export supply curve (ES) representing

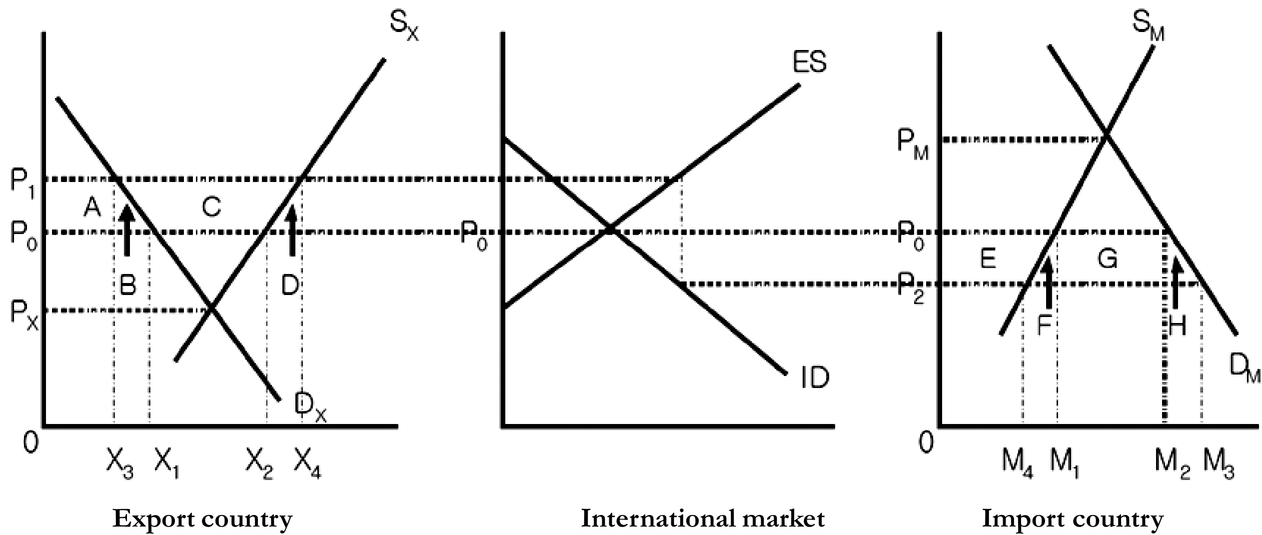

Figure 1: Impact of Export Subsidies - Large Country Case

the difference between the supply and demand of the exporting countries at each price level of the countries. In other words, balance can be achieved in that the two curves meet in the middle of Figure 1 at this point is the equilibrium price P0. At this price, the exporter is exporting the amount of X1X2 after producing as much as OX2 amount except to meet the domestic demand of 0X1 amount. Contrary to this, importing countries produces 0M1 amount with domestic production and imports as much as the rest of M1M2 amount. The exports constitute the X1X2 amount found to be consistent with the import volume M1M2 and all markets reach equilibrium.

Now the government of the exporting country decides to give export subsidies to producers, which is equal to the producers who would receive a higher price. Because of the subsidies, the domestic market price increases to P1; it may be a high price by the grant of export subsidies because it is more advantageous to export abroad rather than supplying the domestic market and makes the price go up in the domestic market. Therefore, the export volume is increased to X3X4 amount instead of domestic demand is decreased to OX3 amount. This exceeds the supply that occurred in the international market and the import price of the international market is the same as that being dropped to P2. If so, the import countries domestic production is reduced to OM4 amount; instead of this, the import is increased to M3M4 amount. At this point, where X3X4 amount of exports and M3M4 amount of all imports are exactly equal, the market is again balanced.

But these subsidy grants of exporting countries give a change in the welfare of both exporting and importing countries.[11] First of all, look at the changes in the welfare of the country of export; prices climbing from P0 to P1 are reduced as the consumer surplus of A + B. However, the producer surplus is stretched by A + B + C. Here, the cost of government spending as export subsidies may be called B + C + D. Therefore for the overall welfare benefits of the exporter, it can be seen to reduce as much as B + D, as shown in the following equation. On the other hand, because the price lowered from P0 to P2 in the import country, consumer surplus grows to E + F + G + H; instead, the producer surplus is reduced by E. In the end, in the importing country position, the overall welfare benefits as shown below are stretched as far as F + G + H.

Change of welfare in export country:	Consumer surplus	- (A+B)
	Producer surplus	A+B+C
	Subsidy cost	- (B+C+D)
	Total welfare	- (B+D)
Change of welfare in import country:	Consumer surplus	E+F+G+H
	Producer surplus	- (E)
	Total welfare	F+G+H

As shown in the equations, the payment of export subsidies reduces the overall welfare of the exporting country but it can (if anything) increase the overall welfare of the importing country.[12] However, the analysis as described is the case of a large country where the exports scale can affect the international price. In the case of small countries that do not affect the international price, the payment of export subsidies reduces welfare in the exporting country but does not affect the welfare of the importing country.

It is important to note that if the export subsidies are continuously paid, the people of the exporting country shall bear the continuous reduction of benefits. It can be said that government policy would be irrational to tolerate this behaviour. Of course, the producers of the importing country can be hurt due to such behaviour, but because the overall welfare of the importing country is continuously increasing, the position of the importing country can be called a rather logical choice to enjoy the situation. However, in response to the unreasonable export subsidies in the exporting country it can be said to be that it is also unreasonable to impose countervailing duty actions. In other words, if the opponent party of export subsidies is deemed unfair trade practices, it can be evaluated that the corresponding countervailing duties are also unfair protectionist behaviour. In particular, the granting of an export subsidy is even more unfair to the other country if the country is small; it would be unfair regulation because it cannot cause any damage to the domestic industry.

As export subsidies and countervailing duties are imposed, they may not all be recognized in a theoretical justification. Nevertheless, the cause of export subsidies and countervailing duties are frequently cited. It might be better to recommend that one should look at the obvious political and institutional factors. If so, one should review how these subsidies and countervailing duties developed in an actual event through the Hynix case.

FACTUAL ASPECTS

To protect themselves from the risk of payment default in international trade, exporter firms at any rate may secure what is called an export credit guarantee. This service is generally offered by export credit agencies (ECAs), which are usually supported or owned and operated by the domestic government (see Figure 2 on Dispute DS299).

3.1. Key facts in WTO DS299 dispute

On 25 July 2002, Korea requested consultations with the European Communities ("EC") with regard to the provisional countervailing measures[13] imposed on DRAMs from Korea, and with regard to any final measures on the same products.[14] On 25 August 2003, Korea requested further consultations with regard

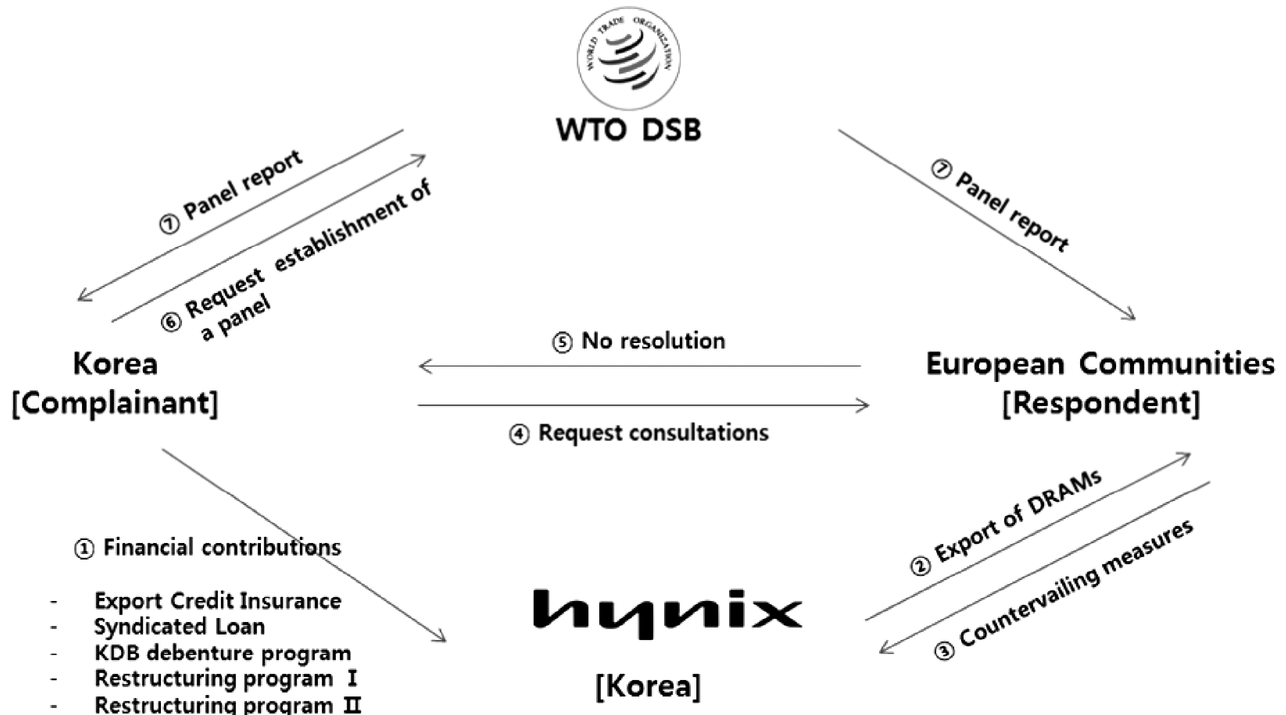

Figure 2: Flowchart of Dispute DS299

to the EC final countervailing measures,[15] which were adopted by the European Council on 11 August 2003. On 8 October 2003, Korea and the EC held a second round of consultations, but did not reach a mutually satisfactory resolution.[16] On 19 November 2003, Korea requested the establishment of a panel to examine the matter, but the DSB deferred the establishment of a panel. The DSB established a panel at its meeting on 23 January 2004 pursuant to a second request to establish a panel by Korea, and the panel was composed on 24 March 2004. The Panel Report was circulated to members on 17 June 2005, and was adopted by the DSB on 3 August 2005.

Table 1
Key dates in the WTO dispute

Event	*Date*
Request for Consultations received	25 July 2003
Request for the Establishment of a Panel by Korea	19 November 2003
Panel established	23 January 2004
Panel composed	24 March 2004
Panel Report circulated	17 June 2005
Panel Report adopted	3 August 2005

3.2. Korea's five support and restructuring programmes

Hynix's financial situation was critical during the years following the 1997 financial crisis in Korea. Hynix had accumulated more than USD $9.46 billion in liabilities by the end of 2000. By November 2000, Korea

decided to take action to "alleviate Hynix' cash crunch" and provided financial contributions through five different support and restructuring programmes from December 2000 to October 2001: the Syndicated Loan, the KEIC short-term export credit insurance, the KDB debenture program, the May 2001 Restructuring Programme and the October 2001 Restructuring Programme.

In January 2001, fourteen Hynix creditor banks increased the ceiling of the export credit facility for D/A[17] provided to Hynix from USD $800 million to USD $1.4 billion (an increase of $600 million). Hynix could receive immediate payment from the negotiating banks by negotiation of transport documents. The KEIC short term export credit insurance guarantees that the negotiating banks receive payment in case the importer fails to make payment and the exporter fails to repay the negotiated amount.[18] In this case, the KEIC short term export credit insurance enabled Hynix to negotiate the transport documents to the negotiating banks. The Syndicated Loan with a total amount of KRW 800 billion was provided to resolve the problem of a "mismatch" between Hynix's cash flow and the extent of debt obligations by ten banks including the Korea Development Bank ("KDB"), the Korea Exchange Bank ("KEB") and the Korea First Bank ("KFB"). The EC found the KDB to be a public body, and that the KEB and KFB were acting under the direction of the Korean government, with each participating in the Syndicated Loan for an amount of KRW 100 billion. On 4 January 2001, Hynix was admitted to the KDB Debenture Programme, under which maturing debt was to be rolled over and repackaged for investors. Hynix had to pay 20 per cent of the due debt, while 80 per cent was purchased by the KDB.

In May 2001, the "May 2001 Restructuring Programme" was agreed by the eighteen Hynix creditor banks united in the Creditors' Council. The May 2001 Programme included an injection of fresh capital into Hynix through the offering of KRW 1.3 trillion of global depositary receipts; an extension of the maturities of short and long-term debt; and the purchase by the creditor banks of convertible bonds worth KRW 1 trillion. The EC found that the creditor banks had been directed by Korea to agree to these measures. On 31 October 2001, the Creditors Financial Institutions Council decided on a second restructuring package for Hynix, the "October 2001 Restructuring Programme." Creditor banks were given several options, ranging from walking away from Hynix and collecting part of the amount owed as determined by a liquidation report, to providing even further financing.

3.3. EC countervailing measures

The countervailing investigation was initiated on 25 July 2002, and the period of investigation ("POI") for the subsidy investigation covered from 1 January to 31 December 2001, while the injury POI covered from 1 January 1998 to 31 December 2001.[19] On 24 April 2003, the EC published Regulation 708/2003[20] imposing provisional countervailing duties on DRAMS from Korea (hereafter, "the Preliminary Determination"). Two programmes (the KDB Debenture and the October 2001 Restructuring Programme) were found to be countervailing subsidies and the rate of the provisional countervailing duties for Hynix was set at 33%.[21]

On 22 August 2003, the EC published Regulation 1480/2003[22] imposing a definitive countervailing duty on DRAMs from Korea (hereafter, "the Final Determination"). The definitive countervailing duties are trade import duties imposed under WTO rules to neutralize the negative effects of subsidies.[23] The EC determined that five programmes were countervailing and the rate of the definitive countervailing duty for Hynix was 34.8% ad valorem, equal to the subsidy amount.[24] The United States and Japan also imposed

countervailing duties on imports of Hynix DRAMs and the disputes were filed to the WTO DSB.[25] The EC determined that from December 2000 through November 2001, Korea extended subsidies to Hynix, either through the provision of a financial contribution by its public bodies or by directing private bodies to take part in the restructuring operation of Hynix. The EC also determined that such financial contributions conferred a benefit to Hynix and thus constituted subsidies in the sense of the SCM Agreement. The provisions stipulated the determination of injury are more or less the same in the basic Regulation of the Community and the SCM Agreement of the WTO. It is understood that a determination of injury for the purpose of imposing countervailing measures shall be based on positive evidence and involve an objective examination of both (1) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (2) the consequential impact of these imports on the domestic producers of such products.[26] Examining developments in the state of the domestic industry from 1998 to 2001, the EC concluded that the subsidized imports of DRAMs were causing injury to the domestic producers of DRAMs.[27]

Table 2
Key dates in EC countervailing measures

Event	*Date*
Countervailing Investigation Initiation	
• DRAMs from Korea (Hynix and Samsung)	
• Subsidy investigation: 1 January to 31 December 2001	25 July 2002
European Commission published Regulation 708/2003 (Preliminary Measures)	
• Imposing provisional countervailing duties (33% for Hynix, no duty for Samsung on *deminis*)	
• Two programmes were countervailing- KDB debenture program- October 2001 Restructuring Programme	24 April 2003
European Commission published Regulation 1480/2003 (Final Determination)	
• Imposing definitive countervailing duties (34.8% for Hynix, no duty for Samsung on *deminis*)	
• Five programmes were countervailing	
- Syndicated Loan	
- KEIC export credit insurance	
- KDB debenture program	
- May 2001 Restructuring Programme	
- October 2001 Restructuring Programme	22 August 2003

ANALYSIS OF PANEL FINDINGS AND DECISIONS ON KEIC EXPORT CREDIT INSURANCE

The SCM Agreement has allowed two protection devices for countries that got damages owing to the importation of goods from the subsidy granted countries. In other words, the SCM Agreement allowed directly suing the subsidy grant countries in the WTO dispute settlement mechanism to eliminate the subsidies harm, or to exercise right of offset on the effects of the subsidies matter by taking countervailing measures against those export countries that have been granted subsidies. The countervailing measures are imposed after an investigation finds that a foreign country subsidizes its exports, injuring domestic producers

in the importing country. To take countervailing measures in such a one-sided manner of regulation, there must be a financial contribution from the government that the subsidy have to be corresponding to the concept basically provided by the Article 1 of the SCM Agreement and the grants should have specificity that is determined by a panel of the DSB.[28]

Government directed the KEIC to provide export credit insurance

Article 1.1(a)(1) of the SCM Agreement provides that a financial contribution by a government shall be deemed to also exist when the government entrusts or directs a private body to carry out one or more of the type of functions illustrated in subparagraphs (i) to (iii) of Article 1.1(a)(1) of the SCM Agreement. Therefore, a financial contribution will be considered to have been provided by the government in cases where the government or a public body itself provides such a financial contribution, or in cases where the government entrusts or directs a private body to do so.[29] The meaning of the term "entrust" is "to give a person the responsibility for a task" or "to commit the execution of a task to a person," while the meaning of the term "direct" is "to give authoritative instructions to; order a person to do; order the performance of."[30] In other words, "entrust" refers to a delegation of the performance of a task, while the term "direct" refers to a more direct command.[31]

The panel found that there is no need for a finding of entrustment or direction in cases where it has been established that the party providing the financial contribution was itself a public body.[32] In the Final Determination, the EC determined that the KEIC is a public body. The KEIC, the former name of the K-Sure, is wholly owned and controlled by the government of Korea under the Export Insurance Act. Therefore, it is indisputable that export credit insurance by the KEIC shall be deemed to be a financial contribution under Article 1.1(a)(1) of the SCM Agreement. Export credit insurance programmes are mostly by public bodies,[33] and in particular, in developing countries. Therefore, it is very likely that a financial contribution by a government or a public body is deemed to exist where export credit insurance is provided in a developing country.

On the other hand, if a private insurance company provides export credit insurance, no financial contribution deems to exist in the sense of Article 1.1(a) of the SCM Agreement, unless it is established that a private insurance company is entrusted or directed by the government to provide export credit insurance.[34] Although export credit insurance is, in most cases, provided by government agencies, it is also provided by private insurance companies, e.g., AIG (U.S.), COFACE (France), Atradius (Netherlands), etc. Export credit insurance by private insurance companies might fall within a financial contribution under Article 1.1(a)(1) of the SCM Agreement subject to the entrustment or the direction by the government to do so.[35] To conclude, export credit insurance by a private company shall be deemed to be a financial contribution only when directed or entrusted to provide export credit insurance by the government.

Benefit conferred by export credit insurance

Once export credit insurance is deemed to be a financial contribution under Article 1.1(a) of the SCM Agreement, the next step to determine is whether a benefit is conferred by export credit insurance under Article 1.1(b) of the SCM Agreement. Article 1.1 of the SCM Agreement provides that a subsidy can be deemed to exist only when there is a financial contribution by the government that confers a benefit. The panel found that the existence of a financial contribution by the government is thus prerequisite, but not

sufficient to conclude that a subsidy has been provided, and that a subsidy would be deemed to exist only when this financial contribution confers a benefit.[36] Countervailing duties are tariffs when the opposite government of the international trade (import country) lowers export prices to pay export subsidies to domestic producers, it suffers damage imposed for the purpose of offsetting a subsidy in the exporting country.[37] The panel in this case affirmed that the standard for determining the existence of a benefit conferred by a financial contribution is whether the financial contribution has left the recipient better off than it would otherwise have been, absent the financial contribution by the government.[38]

The EC concluded that the export credit insurance cover, without any adequate premium being paid, is considered to have conferred a benefit and that the coverage of the D/A extension is effectively a grant on the grounds that no comparable commercial loan could be obtained without the export credit insurance.[39] However, the panel also found that the question of the existence of a benefit in the case of a government guarantee including export credit insurance can be examined from more than one angle, depending on the circumstances; it concluded that a benefit in the sense of Article 1.1 of the SCM Agreement is determined in relation to the market place.[40] The panel concluded that export credit insurance provided by the government comparable to credit insurance provided by the market would be one possible approach.[41] According to the panel, if an export credit agency charges less than a market-based fee for its insurance, in light of the specific circumstances of the case, there would be a benefit to the recipient.[42]

The panel considered that the KEIC export credit insurance conferred a benefit to Hynix in a manner consistent with Article 1.1(b) of the SCM Agreement on the grounds that none of the parties argued that a private market operator would have provided export credit insurance similar to that provided by the KEIC so that the fees could be compared. It was also on the grounds that no private market operator was even argued to have been willing to provide such export credit insurance.[43] In Korea, export credit insurance is operated solely by the K-Sure (or the KEIC) under the Trade Insurance Act (or the Export Insurance Act), and private insurance companies are not permitted to operate export credit insurance by the Financial Supervisory Service, although the Trade Insurance Act does not expressly prohibit the operation of export credit insurance by a private body. In most developing countries, export credit insurance is exclusively operated by the government itself or by public bodies. In these circumstances, one cannot conclude that export credit insurance confers a benefit just on the grounds that no private body is willing to provide export credit insurance because there is no private body that is allowed to provide or is operating export credit insurance. One needs to look into whether a government or a public body charges inadequate premiums, where premium rates are inadequate to cover the long-term operating costs and losses, or whether the government has been continuously contributing funds to the export credit agency.

Amount of a benefit

The panel considered export credit insurance to be a loan guarantee under Article 14(c), and focused on the difference between the amounts paid on a loan guaranteed by the government, compared to the amount that would have to be paid on a comparable commercial loan, absent the government guarantee.[44] The panel found that no reasonable private investor would have been willing to provide funds to Hynix, whether in the form of a loan, a loan guarantee or an equity infusion, and that the funding provided, in whatever form, was equal to the provision of risk capital for which Article 14(a) of the SCM Agreement does not provide a precise method for calculating benefit.[45]

Export credit insurance is not the same as a grant because it requires the recipient to repay the money. However, the EC considered that export credit insurance had conferred the same benefit as the provision of funds without any repayment obligation. It also considered the full amount of the D/A extension of USD $600 million as the benefit provided by the KEIC export credit insurance on the grounds that Hynix would not have obtained the D/A extension without it.[46] The panel found that it is the perspective of the recipient that is important, not that of the provider of the financial contribution in a benefit analysis.[47]

Adequacy of insurance premium rates to cover operating costs and losses

Article 3 of the SCM Agreement provides prohibited subsidies and includes illustrated subsidies in Annex I. Item (j) of Annex I provides that export credit guarantee or insurance programmes by governments (or special institutions controlled by governments) operated at premium rates that are inadequate to cover the long-term operating costs and losses of the programmes are prohibited subsidies.

Korea argued that item (j) of Annex I requires that in government export credit insurance, benefit has to be assessed by examining whether the fees paid by the recipient of the insurance are adequate to cover long-term operating costs and losses. However, the Panel found that Annex I of the SCM Agreement sets forth an illustrative list of prohibited export subsidies[48] and item (j) of Annex I is thus relevant in determining whether a prohibited export subsidy exists, not whether a benefit exists.[49] The panel also found that item (j) applies a cost-to-government standard rather than a benefit-to recipient standard, and that the test set forth in item (j) is simply irrelevant in determining whether a benefit in terms of Article 1.1 of the SCM Agreement exists.[50] The EC asserted that the reference by Korea to item (j) of Annex I of the SCM Agreement was misplaced as it did not concern a long-term guarantee programme but rather an *ad hoc* guarantee by the government to Hynix through the KEIC.[51] The panel concluded that in so far as the existence of a benefit is concerned, the EC made a reasonable and reasoned conclusion (on the basis of the record before it) that the KEIC export credit insurance conferred a benefit on Hynix in a manner consistent with Article 1.1(b) of the SCM Agreement.[52]

In the Brazil - Export Financing Programme for Aircraft dispute (DS46),[53] Brazil asserted that pursuant to item (k) of Annex I, such payments[54] are prohibited only "in so far as they are used to secure a material advantage in the field of export credit terms," and that *a contrario* "such payments are permitted in so far as they are not used to secure a material advantage in the field of export credit terms."[55] However, the panel did not find that a payment within the meaning of item (k) that is not "used to secure a material advantage in the field of export credit terms" is permitted by the SCM Agreement. This was even though it is a subsidy within the meaning of Article 1 of the SCM Agreement that is contingent upon export performance within the meaning of Article 3.1(a) of that Agreement[56] and rejected Brazil's affirmative defence based on item (k) of the illustrative list.[57]

In the United States - Subsidies on Upland Cotton dispute (DS267),[58] the panel found that the SCM Agreement contains, in item (j) in Annex I, an explicit indication as to when export credit guarantee programmes constitute *per se* export subsidies for the purposes of the SCM Agreement and that if an export credit guarantee programme meets the elements of item (j), it is a *per se* export subsidy.[59] The panel proceeds to a further contextual examination of the definitional elements contained in Articles 1 and 3 of the SCM Agreement, only if the item (j) test is not met.[60] Therefore, export credit insurance may be deemed to be a prohibited subsidy although it does not fall within item (j) in Annex I. To conclude, export

credit insurance at premium rates adequate to cover long-term operating costs and losses may not be permitted subject to a benefit-recipient standard.

KEIC export credit insurance premium adequacy

In this case, the EC considered the KEIC export credit insurance to be a loan guarantee. Korea submitted that under Article 1.1(b), and Article 14 in the context of item (j) of Annex I of the SCM Agreement, the EC should have examined the difference between the actual fee paid by Hynix and the fee that covered the operating costs and losses of the export credit insurance programme to determine the existence of a benefit. Korea also contended that the EC failed to even examine what an adequate premium would have been.[61] Even if the EC was correct in considering the export insurance programme as a loan guarantee, Korea argued that Article 14(c) of the SCM Agreement then required the EC to examine the difference between the financial alternatives that could be obtained with the guarantee and those obtainable without the guarantee.[62] The panel found that the EC's general assertion that no alternative financing would have existed without the guarantee was economically unsustainable as an alternative would always exist and that the EC's analysis of the KEIC's export credit insurance as a grant was thus erred because Hynix did pay a premium.[63]

CONCLUSIONS

In general, anti-dumping and countervailing duties are imposed to compensate for the perceived damage to the domestic industry by improper conduct of the counter parties in the international trade.[64] However as already discussed, this was followed by a view that somehow these measures taken by the EC in this study are not treatments issued solely in that aspect. In many of the importing countries including the U.S. and EU, trade actions can be seen as protectionist in nature based on the political side, especially coming as recently charged with such a personality pattern that gradually increases the frequency of protectionist trade measures. Subsidies have been provided widely throughout the world as a tool for realizing government policies in such forms as grants (normal subsidies), tax exemptions, low-interest financing, investments and export credits.

In a WTO dispute on the countervailing measures, the complaining party is required to establish both the existence of subsidy and injury as stated in the SCM Articles 15.2 and 15.4.[65] As the causal connection between subsidy and injury is presumed, it would be the responsibility of the defending party to demonstrate that injury is not caused by 'the effects of the subsidy' but by something else.[66] If the defending party fails to demonstrate this, the countervailing duty would be justified.[67]

Annex I of the SCM Agreement sets forth an illustrative list of export subsidies and item (j) of Annex I is thus relevant in determining whether a prohibited export subsidy exists. Although the premium rates of export credit insurance are inadequate to cover the long-term operating costs and losses of that insurance, such insurance may be considered to be prohibited subsidies. As item (j) of Annex I creates a balanced playing field between developing and developed countries, some countries proposed amendments of item (j) of Annex I to reduce the unbalances due to the financial and risk conditions of developing countries against developed countries.[68]

If an export credit agency charges less than a market-based fee for its specific export credit insurance, a benefit would be deemed to exist to the recipient, and the specific export credit insurance would be considered

a subsidy. When an export credit agency is a public body, there is no further need for an additional finding of entrustment or direction by the government to the export credit agency for the export credit insurance to constitute a financial contribution in the sense of Article 1.1(a)(1)(i) of the SCM Agreement.

A loan guarantee by a government may be considered as conferring a benefit if 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. As most export credit agencies operate export credit insurance comparable to a loan guarantee, some export credit insurances may be considered subsidies under Article 1 and Article 14(c) of the SCM Agreement.

NOTES

1. An "export credit insurance"and an "export credit guarantee" are treated as the same or equivalent export credit under the Organisation for Economic Co-operation and Development (OECD) Arrangement on Officially Support Export Credits (the "OECD Arrangement"). The OECD Arrangement defines an export credit insurance and an export credit guarantee in the same form of official support and calls them as 'pure cover' in comparison with official financing support such as direct financing, refinancing, and interest support. (See Chapter I.5 Scope of Application) and minimum premium rates for credit risk does not differ between the two export credits (see. Chapter I.24 Minimum Premium Rates for Country and Sovereign Credit Risk). The term of export credit insurance and the term of export credit guarantee are interchangeably used among export credit agencies. In this dispute, the panel used the term of KEIC "export insurance and guarantee," or shortly the term of "KEIC guarantee" (see. WT/DS299/R, para. 7.85, p.30), although the official title of the export credit insurance, in the instant case, is a short-term export insurance. In this article, the term "export credit insurance"shall include "export credit guarantee," "export insurance," and other terminology of the same meaning.
2. Roberto Soprano, "Doha Reform of WTO Export Credit Provisions in the SCM Agreement: The Perspective of Developing Countries," Journal of World Trade Vol. 44 No. 3 (Jun 2010), pp. 611-632.
3. European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea, WT/DS299//R, adopted 3 August 2005 (hereafter, EC-Countervailing Measures on DRAM Chips), para, 1.1.
4. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments-Results of the Uruguay Round, available at http:// www.wto.org/english/docs_e/legal_e/final_e.htm (Jan. 11, 2001).
5. It is hotly debated that whether government financial support clearly met 'subsidies' requirement in any sense. See Richard Snape, "International Regulation of Subsidies, "14 The World Economy (1991), p.139.
6. In the U.S., the privatization of a government-owned company, per se, does not and cannot eliminate this countervailing action. General Issues Appendix, 58 Fed.Reg. at 37,263.
7. 41 among 50 members of the International Union of Credit & Investment Insurers (the "Berne Union") are the government departments or owned by the government. (Source: the International Union of Credit & Investment Insurers, Berne Union 2014, 2015.).
8. The Korea Export Insurance Corporation was renamed the Korea Trade Insurance Corporation in July 2010 as the Export Insurance Act was revised and renamed the Trade Insurance Act in 2010. Therefore, the Korea Export Insurance Corporation is the same entity as the Korea Trade Insurance Corporation.
9. "Export credit agency" is an institution providing export credit insurance or guarantees. (Macolm Stephens, "The Changing Role of Export Credit Agencies, "IMF, 1999, p.85.). All 50 members of the Berne Union are export credit agencies.
10. The issue is whether the government program in question affects marginal costs in the short run, or has an effect on long-run marginal cost that is sufficient to cause capacity to remain in production. See Charles Goetz, Lloyd Granet

& Warren Schwartz, "The Meaning of Subsidy and Injury in Countervailing Duty Law, "Int'l Rev. L. & Econ. Vol.6 (1986), p.17.

11. Alan O. Sykes, "Countervailing Duty Law: An Economic Perspective, "Colum. L. Rev. Vol.89 (1989), p.199.
12. Warren F. Schwartz and Eugene Harper, Jr., "The Regulation of Subsidies Affecting International Trade, "Mich. L. Rev. Vol.70 (1972), p. 831 (describing with example).
13. OJ L 102, 24.4.2003, Commission Regulation (EC) No 708/2003 of 23 April 2003 imposing a provisional countervailing duty on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea.
14. WT/DS299/R, para. 1.1.
15. OJ L 212, 22.8.2003, Council Regulation (EC) No 1480/2003 of 11 August 2003 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea.
16. WT/DS299/R, para. 1.2.
17. Documents against acceptance ("D/A") is an arrangement in which an exporter instructs a bank to hand over commercial documents (i.e., invoices, transport documents, documents of title or other similar documents) to an importer only if the importer accepts the accompanying bill of exchange by signing it. (The Uniform Rules for Collections (URC 522) Article 6, Article 7).
18. Short-term export credit insurance, in principle, indemnifies the insured, an exporter, in the event that the importer does not make payment. However, it is very usual that the insured assigns the right to claim the insured amount to a negotiating bank.
19. WT/DS299/R, para. 2.1.
20. OJ L 102, 24.4.2003, Commission Regulation (EC) No 708/2003 of 23 April 2003 imposing a provisional countervailing duty on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea.
21. WT/DS299/R, para. 2.2.
22. OJ L 212, 22.8.2003, Council Regulation (EC) No 1480/2003 of 11 August 2003 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea.
23. Johannes Friedrich Beseler & A. Neville Williams, "Anti-Dumping and Anti-Subsidy Law: The European Communities, "London: Sweet & Maxwell (1996), p. 224.
24. WT/DS299/R, para. 2.3. (An ad valorem tax is imposed based on the value of a transaction).
25. Meredith A. Crowley & David Palmeter, "Japan – Countervailing Duties on Dynamic Random Access Memories from Korea (DS 336 and Corr.1, adopted 17 December 2007)", World Trade Review, Vol.8, Issue 1, (2009), p.261.
26. Article 15.1 of the SCM Agreement.
27. See the arguments of the material injury test in John H. Jackson, William J. Davey & Alan O. Sykes, "Legal Problems of International Economic Relations, "(1995), pp.737-46.
28. As related with bilateral disputes over the subsidy grants, the preferred process is problem solving through the 'promise' under Article 18 of the SCM Agreement. However in reality, unilateral imposition of countervailing measures has been more frequently used than solving the problem of trade dispute by the 'promise.' Because it is an easy workaround that the 'promise' can resolve the issue through bilateral negotiations, countervailing duties are imposed unilaterally, if only to meet the requirements of imposition duties. Therefore, the countervailing duty should be imposed on the basis of clearly controlled regulations and exclude arbitrary determination on the status of importing countries as possible. The purpose of imposing countervailing duties is to remove the injury to the domestic industry.

29. WT/DS299/R, para. 7.48, p.20.
30. WT/DS299/R, para. 7.52, p.20.
31. WT/DS299/R, para. 7.52, p.20. (Panel report, US-Export Restraints, paras. 8.28-8.29).
32. WT/DS299/R, para. 7.49, p.20; para. 7.87, p.31.
33. 41 among 50 members of the International Union of Credit & Investment Insurers (the "Berne Union") are the government department or owned by the government. (Source: the International Union of Credit & Investment Insurers, Berne Union 2014, 2015.).
34. WT/DS299/R, para. 7.49, p.20.
35. WT/DS299/R, para. 7.50, p.20.
36. WT/DS299/R, para. 7.173, p.54.
37. In the practice area, countervailing duties tend to appear in industries where the forces of protection are active. See Howard Marvel and Edward Ray, "Countervailing Duties," Econ. J. Vol.105 (1995), p.1576.
38. WT/DS299/R, para. 7.188, p.59; Appellate Body report, Canada-Aircraft (WT/DS70/AB/R), para. 157, p.39.
39. OJ L 212, 22.8.2003, para. 45; WT/DS299/R, para. 7.164, p.52.
40. The Panel exampled that one possible approach for examining whether a benefit existed would be to compare the guarantee provided by the government with a comparable guarantee provided by the market.
41. Larry Qiu, "What Can't Countervailing Duties Deter Export Subsidization?, "J. Int'l Econ. Vol.39 (1995), p. 249.
42. Even though export subsidies will produce a net loss to the nations of import the subsidized goods or services, it's not a big deal at all in this case. See James Brander & Barbara Spencer, "Export Subsidies and International Market Share Rivalry, "J. Int'l Econ. Vol. 18 (1985), p. 83.
43. WT/DS299/R, para. 7.189, p.59, para. 7.192, p.60.
44. WT/DS299/R, para. 7.190, p.59.
45. WT/DS299/R, para. 7.211, p.66.
46. OJ L 212, 22.8.2003, para. 45; WT/DS299/R, para. 7.164, p.52.
47. WT/D S299/R, para. 7.212, p.66.
48. Marc Benitah, "The Law of Subsidies under the GATT/WTO System, "Kluwer Law Int'l l Ltd, Great Britain, (2001), p. 141.
49. WT/DS299/R, para. 7.191, p.60.
50. Id.
51. WT/DS299/R, para. 7.165, p.52.
52. WT/DS299/R, para. 7.192, p.60.
53. Brazil — Export Financing Programme for Aircraft, WT/DS46/R, 14 April 1999.
54. In this dispute, payments means those under the interest rate equalization component of the Programa de Financiamento as Exportcaoes ("PROEX"), the export financing support programme of Brazil, on exports of Brazilian regional aircraft. PROEX provides export credits to Brazilian exporters either through direct financing or interest rate equalization payments.
55. WT/DS46/R, 14 April 1999, para. 7.15, pp.79-80.
56. WT/DS46/R, 14 April 1999, para. 7.17, p.80.
57. WT/DS46/R, 14 April 1999, para. 7.37, p.88.
58. United States — Subsidies on Upland Cotton, WT/DS267/R, 8 September 2004.

59. WT/DS267/R, 8 September 2004, para. 7.802, 7.083, p.199.
60. WT/DS267/R, 8 September 2004, para. 7.083, p.199.
61. WT/DS299/R, para. 7.151, p.49.
62. Id.
63. Id.
64. Usually the anti-dumping duty has been adjusted to avoid accumulation with a countervailing duty resulting for export subsidies. See Ivo Van Bael & Jean-Francois Bellis, "Anti-dumping and other trade protection laws of the EC, "4 thed, Kluwer Law Int'l, Netherlands, Hague (2004), p. 563.
65. Meredith A. Crowley, David Palmeter, "Japan – Countervailing Duties on Dynamic Random Access Memories from Korea (DS 336 and Corr.1, adopted 17 Dec. 2007), "World Trade Review Vol. 8 Special Issue 01, (2009), p. 6.
66. Id.
67. Id.
68. Soprano, supranote 2, pp.611-632.

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