

ANNEX B

ORAL STATEMENTS OF PARTIES AND THIRD PARTIES AT THE FIRST SESSION OF THE FIRST SUBSTANTIVE MEETING

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ANNEX B-1

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE GOVERNMENT OF KOREA AT THE FIRST SUBSTANTIVE MEETING

2 July 2004

I. ITC INJURY INVESTIGATION – CLAIMS OF ERROR

A. ARTICLE 15.1 STANDARDS

1. As an overarching provision, Article 15.1 sets the basic framework for the injury portion of the current dispute. Article 15.1 requires that all aspects of the injury investigation must be based on positive evidence and an objective examination of the facts.

2. In the case below, the ITC violated the requirements of Article 15.1 by not providing sufficient explanations in support of the various conclusions it drew.

B. SIGNIFICANT INCREASE IN SUBJECT IMPORTS

3. The data in the underlying case showed that the Hynix brand lost market share over the period of investigation, and that subject imports changed only slightly in reaction to the temporary shutdown of the Hynix US operations.

4. The ITC now tries to obscure these facts with detailed arguments about the data. For example, the United States accuses Korea of erroneously mixing the shipment data of subject imports based on their value with other data based on volume. However, the data provided by Korea to the ITC was based on volume.

5. The ITC tries to look at import volume in a vacuum, mechanically checking off boxes. But Article 15.2 requires more than such mechanical checking. For the term “significant” to have meaning, the authorities must ensure whether there have been increases in various measures.

6. Moreover, the ITC tries to address the shutdown at the Hynix Oregon facility, but never credibly explains why substitution between factories by a single Korean company can represent a significant increase in volume or market share of subject imports.

C. SIGNIFICANT PRICE EFFECTS BY SUBJECT IMPORTS

7. The ITC’s traditional underselling analysis was not an objective examination for the pricing analysis in this particular case because it ignored the prices of non-subject imports.

8. As with the volume effects, any objective assessment of the pricing evidence taken as a whole would find that the price effects of allegedly subsidized imports were not “significant”. Accordingly, the ITC’s finding was inconsistent with Articles 15.1 and 15.2.

D. CONDITION OF THE DOMESTIC INDUSTRY

9. Unlike the ITC assertion, the evidence before the ITC demonstrated overall strength, not weakness, of the domestic industry. Most egregiously, the ITC failed to even address the public

statements that Micron and Infineon made to the financial community and their investors that they were doing quite fine. Moreover, the ITC never put the condition of the domestic DRAM industry into the context of the overall business cycle.

E. CAUSATION

10. Pursuant to Article 15.5, Members must demonstrate an explicit “causal relationship” between the subsidized imports and any material injury suffered by the domestic industry. In this case, the evidence before the ITC demonstrated that there was no correlation between the trends in subject imports and the condition of the domestic industry. Most importantly, record evidence shows that there was an unprecedented drop in underlying demand for computer and telecom equipment and that 2001 was the single worst year in decades for these industries.

11. The ITC defence is that it did address these various arguments. The United States seems to believe that any mention of a fact or argument is somehow sufficient and meets WTO obligations. But such an approach does not satisfy obligations under Article 15.

II. DOC SUBSIDY INVESTIGATION – CLAIMS OF ERROR

12. Much of the US financial contribution and benefit analysis is based on the predicate that the US style bankruptcy approach is *the single norm* against which to measure all restructurings everywhere in the world. Yet it is a fundamental aspect of any market economy that there be some method of addressing financially distressed companies short of termination or bankruptcy.

A. FINANCIAL CONTRIBUTION

13. In the underlying case, DOC brought together a patchwork of evidence and determined that all lending to Hynix by all Korean banks over a ten-month period was somehow being directed by the GOK. This absence of evidence is particularly egregious for the financing transactions later in the period of investigation. With respect to the October restructuring, the only evidence the DOC provides regarding alleged GOK action is the unverified assertions of a single anonymous “expert” interviewed by the DOC in Seoul.

14. The United States argues that the evidence indicates that the post-1997 reform measures did not guarantee complete bank independence or eliminate government interference in lending decisions in Korea. In so arguing, however, the United States largely ignores the extensive GOK discussion of various legal mechanisms effectively precluding and prohibiting any form of inappropriate government intervention in the banking and financial sectors of Korea.

15. For instance, contrary to the erroneous US allegation, the actual language of Article 1 of the Prime Minister Decree No. 408 makes amply clear that this law had a very different purpose than that attributed by the United States.

16. The United States also makes much of the “Corporate Restructuring Promotion Act”. Yet as Korea made clear, the CRPA is a law of general application. Also, creditors still have choices under the CRPA as they could put the company in question into a court receivership, or exercise appraisal rights and can walk away.

17. In the present case, the United States tries to read Article 1.1(a) so broadly as to provide authorities with almost limitless discretion. Yet as the panel in *US -Export Restraints* articulated, the plain meaning of “entrusts or directs” poses the core questions of “who” is being directed to do “what”.

B. FINDING AND MEASUREMENT OF “BENEFIT”

18. In this case, the DOC had a wide range of possible commercial benchmarks. Yet rather than acknowledge the range of facts, and search for the best possible benchmark, the DOC instead searched for reasons to disregard all of the banks.

19. The DOC approach in this case was to create a set of rules that would make it impossible for any company to engage in a debt workout rather than a bankruptcy. The US approach seems to be that because Korea favours the “London Approach” of debt workouts that avoid bankruptcy, rather than US style bankruptcy proceedings, any debt workout of Hynix must be condemned as a subsidy.

C. SPECIFICITY

20. In its first submission, the United States argues for unlimited discretion under Article 2. But the fact that Article 2 does not enumerate specific tests or methodologies does not mean that authorities can draw conclusions in a vacuum. The very idea of disproportionate use has imbedded in the term “disproportionate” the idea of some benchmark level of use that makes sense.

D. SECRET MEETINGS

21. Finally, Korea believes that the United States breached Article 12.6 when it conducted secret verification meetings in Korea over explicit objections by the Government of Korea.

22. The US argument now interprets Article 12.6 as presenting an impossible choice. The United States argues that a Member must consent either to any and all procedures or to none at all. However, a “right” to guarantee itself adverse facts available is not a right at all.

ANNEX B-2

FIRST SUBSTANTIVE MEETING - CLOSING STATEMENT OF THE GOVERNMENT OF KOREA

Mr. Chairman and Members of the Panel, thank you for your time over the past two days. I believe we have made progress in focusing the issues in this case. We also believe that your written questions will further focus the issues. We welcome those questions. I would like to close this meeting with several general observations.

First, the United States is correct that there is no real disagreement over the standard of review. In paragraph 6 of its opening statement, the United States agreed the Panel should consider whether the agency decision is “well reasoned” and “adequately supported”. We agree. But with all due respect, we submit that the ITC and DOC decisions in this case are neither well reasoned nor adequately supported. That is what the Panel must decide.

Second, this case is not about bold and colourful language used by politicians and political groups. The United States has certainly collected many examples of the most colourful language of Korean politicians. But in many different contexts, WTO jurisprudence has recognized the wisdom on focusing on what countries actually do, and not on what politicians in those countries might say. Consider the comment yesterday in the US opening statement about the “bottomless pit”. We checked last night, and it turns out this report was drafted and submitted by the opposition party in Korea on the eve of the Presidential election, and was never accepted by the Korean Congress. Criticism of the government by its opposition party in such circumstances must be viewed with a healthy scepticism. This example illustrates the danger of relying on such statements as “evidence”.

It was legal error for the United States to rely on such statements as the keystone of its determination, and to spend so little time focusing objectively on what actually happened with respect to specific transactions. We are confident this Panel will focus on the specific actions of the Government of Korea, and the Korean banks, and not on the rhetoric.

What were those actions? Consider paragraph 15 of the US opening statement that identifies three concrete actions. But even if these actions led to some loans, the United States then goes much further and condemns all loans including those that have nothing to do with these actions. Loans by other banks that did not require any waiver of lending limits. Loans at distant points of time, far removed from the initial loans. Loans that had nothing at all to do with rolling over maturing Hynix bonds.

This represents the overarching legal flaw in the US approach. The United States does not seem to mind when it has weak or no evidence of “entrustment or direction” with respect to various loans or investment decisions. Under the US approach, evidence for some transactions somehow becomes evidence for all transactions. We believe this is a flawed interpretation of Article 1.1(a) of the SCM Agreement. Third, this case is not about mere Korean disagreement with DOC findings. This case is about whether the DOC and ITC rationales can survive factual and legal scrutiny. Consider for example, the DOC decision to reject Citibank as a possible benchmark. DOC offered various reasons for rejecting Citibank, most of which had nothing to do with the specific transactions at all. Article 14(b) of the SCM Agreement requires only that a loan be “comparable” and “actually

obtained on the market” for that loan to serve as a benchmark. The Citibank loans were both. Even if the Citibank loan was not a perfect comparison, there is no credible factual basis to conclude that these loans were not at least “comparable”.

Or consider the numerous conclusions drawn by ITC. The ITC should provide the factual underpinnings that justify its various conclusions. Obtaining such data – in its actual form -- is the only way for the Panel to do its job. We urge the Panel to view sceptically any summaries that obscure the real figures. A range may be appropriate. But an average can be seriously misleading, depending on how the average is done.

But even before receiving any additional data, the flaws in the ITC analysis of causation stand out. The ITC brushed aside the role of non-subject imports with a vague statement that a “significant” portion of those imports did not compete. But how large were these specialized products, and why does attenuated competition for some portion of non-subject imports negate the effect of the still large remaining portion. The ITC never explains. Or consider the role of capacity increases by other suppliers. Just because the ITC may not have collected certain evidence does not mean that evidence can be ignored. Even if it prefers its own data, that is no reason for the ITC to ignore without any explanation other credible data. Yet that is precisely what the ITC did in this case.

That concludes my closing remarks. Thank you.

ANNEX B-3

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

24 June 2004

General Issue - Standard of Review

1. While Korea says that it does not advocate *de novo* review, in fact, it does. Korea does not allege errors in the evidence on which the DOC and the ITC relied. Rather, Korea argues that the US authorities should have discounted certain facts and relied on others, or analyzed the evidence in different ways. In other words, Korea wants this Panel to reweigh the evidence to reach a different outcome. That is *de novo* review, and the Panel should reject Korea's suggestions to the contrary.

2. This case is, in fact, a perfect example of why *de novo* review is *not* the standard of review. The administrative records of the DOC and the ITC are enormous, totalling tens of thousands of pages. The authorities took many months to review and evaluate all of the record evidence, and explained in considerable detail the conclusions they drew from that record evidence. The depth and complexity of this investigation demonstrates the wisdom of a standard under which the Panel's task is not to step into the role of investigator and gather or reweigh evidence, but rather, in examining whether a Member met its agreement obligations relating to fact-finding, to consider whether the investigating authority's decision-making is well reasoned and adequately supported by the evidence before it.

Issues Concerning the Commerce Department's Subsidy Determination

3. *Financial Contribution* – "Injecting money into a bottomless pit" – that is how a November 2002 report by the Korean Congress – entitled "Public Fund Mismanagement Investigation" – characterized the GOK's policy in 2000-2001 to bail out the Hyundai Group companies, including Hynix. By the end of 2000, Hynix had incurred staggering losses, totaling 1.9 billion dollars, and the company's debt was 186% of its total equity. Hynix, which employed over 24,000 workers, was very important to the Korean economy, and singled it out for special treatment. The GOK established a policy to ensure that the debt-ridden Hynix did not fail. The Hynix bailout totalled over 11 billion dollars, in less than 12 months, a figure nearly three times total sales of *all* Hynix products in 2001. 11 billion dollars equaled total sales of DRAMS, by all DRAM producers worldwide, in 2001, as indicated by the record evidence.

4. Korea asks the Panel to substitute its judgment for that of the DOC and find, despite all the record evidence to the contrary, that this enormous financial assistance for a company that was "technically insolvent" was simply the result of commercial banks doing as they saw fit. The facts, however, paint a very different picture – a picture in which the GOK is directing and entrusting Hynix's creditors to carry out the GOK's decision that the company not go under.

5. Korea insists that Hynix's creditors were motivated purely by commercial considerations. However, while commercial considerations are relevant to the issue of whether a company received a benefit, they are not germane to the issue of a financial contribution. "Financial contribution" focuses on the action of the government in making the financial contribution. In particular, subparagraph (iv)

focuses on whether the government has given responsibility to, ordered, or regulated the activities of private bodies to make the financial contributions.

6. There is no support in the SCM Agreement for Korea's suggestion that a formal mandate is required to find a financial contribution. While governments may act in such a formal manner, they frequently operate behind closed doors. There is no textual basis for the assertion that the SCM Agreement somehow ceases to apply when the doors close.

7. In this case, the GOK knew it would be heavily criticized, both domestically and internationally, for bailing out Hynix. Thus, it is not surprising that the GOK operated behind closed doors. Nevertheless, due in part to intensive public interest in such an enormous bailout, there is ample compelling evidence that the GOK directed and entrusted Hynix's creditors to rescue the failing company.

8. For example, despite its much publicized reforms, the GOK announced that it had to alleviate Hynix's liquidity crisis. The government then waived the ceiling on the amount of debt banks could carry for a single debtor on three separate occasions specifically for the purpose of additional loans to Hynix. The government also ordered the KEIC to resume insuring Hynix's exports for the purpose of increasing Hynix's accounts receivable financing. The GOK also instituted a programme to ensure that Hynix did not default on its maturing bonds.

9. The evidence also demonstrates that the GOK did not merely extend a helping hand to Hynix – it used its strong arm to protect the company as well. For example, when KFB balked at participating in the bailout, government officials threatened the bank with the loss of deposits and the loss of customers. After the government arm-twisting, KFB got the message. Likewise, KorAm Bank balked initially, but subsequently succumbed to government threats and intimidation and went along with the programme.

10. The evidence also demonstrates that government threats were not limited to creditors, but extended to anyone who might jeopardize the success of the Hynix bailout. In particular, the government reprimanded and threatened credit rating agencies that lowered (or attempted to lower) Hynix's rating to reflect the reality of the company's dismal financial situation.

11. Even if we assume, for the purposes of argument, that the motivations of Hynix creditors are relevant to the question of a financial contribution, the record evidence also demonstrates that Hynix creditors were acting to fulfil the government's objective. For example, the rationale given by KEB for participating in the May and October 2001 restructurings was to be aligned with the "social and economic policy concerns of the GOK".

12. Could an investigating authority reasonably conclude, based on this evidence, that the GOK directed and entrusted Hynix's creditors to ensure that the company did not fail? Absolutely. The government's message was crystal clear. As the Deputy Prime Minister and Minister of Finance and Economics stated: "If Hynix says it needs an additional one trillion won, and if the creditor group cannot make a decision whether or not to provide additional support, the financial authorities should decide. We cannot simply leave it blindly to the creditor group."

13. *Benefit* – Hynix's financial picture was abysmal. Given this, could an investigating authority reasonably conclude that in measuring the benefit to Hynix from loans, the benchmark should include a risk premium? Absolutely. Could an investigating authority also reasonably conclude that a reasonable investor would not have invested in Hynix? Absolutely.

14. Korea does not dispute the facts concerning Hynix's poor financial condition. Nevertheless, Korea challenges the DOC's finding that Hynix was not creditworthy or equityworthy during the

period of investigation. Korea's argument echoes its argument that the GOK did not direct or entrust private banks to rescue Hynix. The evidence supports the DOC's determination that private banks in Korea were directed or entrusted by the GOK, and, therefore, could not provide an appropriate market benchmark for loans and equity infusions. The sole exception was Citibank, and the United States explained in its first written submission why Citibank did not provide an appropriate benchmark.

15. The facts on the record of the investigation support each of the DOC's findings with respect to financial contribution, benefit, and specificity. There is also a "reasoned and adequate" explanation of how the facts support those findings. The DOC's determination that a countervailable subsidy exists is therefore consistent with the requirements of the SCM Agreement, and the Panel should reject Korea's claims to the contrary.

Issues Concerning the International Trade Commission's Injury Determination

16. *The Many and Misleading Data Sources Cited by Korea* – The ITC used a single, consistent data source: questionnaire responses covering the period 2000 to 2002 and the first three months of 2002 and 2003. Korea relies on an ever-varying set of data sources and time periods depending on the point that it seeks to make. Through its selective use of other data sources, Korea repeatedly makes statements in its submission that are completely inconsistent with the data used by the ITC in its injury determination.

17. *No Basis for Korea's Insistence that Only Market Share Increases Matter* – There is no legal support for Korea's assertion that increases in market share are the only indicator that matters for an affirmative material injury analysis. The investigating authority has discretion to select the methodology to analyze the volume of subsidized subject imports. The ITC found that the absolute volume of subsidized subject imports was significant. It also found that the increase in that volume was significant both absolutely and relative to both production and consumption. Article 15.2 specifies that no one or several of these factors is determinative.

18. *Korea Disregards Important Conditions of Competition in this Industry* – Korea does not dispute that subsidized subject imports were highly substitutable for domestic DRAM products. They were used interchangeably, and there were no important differences in product characteristics or sales conditions between them. Throughout the period of investigation, Hynix's subject Korean operations produced many of the same product densities as domestic producers. Moreover, subject imports and domestic DRAM products were sold largely to the same customers and through the same channels of distribution.

19. The commodity-like nature of domestic and subject imported DRAM products magnified the ability of a given volume of imports to impact the domestic market and industry. These conditions of competition, as well as the importance of price in this particular industry, were also important to the ITC's price effects findings. In a commodity-type market which adjusts quickly (even biweekly) to price changes, significant price disparities between suppliers would not usually be expected. Thus, the ITC found the patterns of frequent, sustained high-margin undercutting by subsidized subject imports (at margins often exceeding 20 per cent and at increasing frequencies) was especially significant in this industry, and could be expected to have particularly deleterious effects on domestic prices.

20. *Korea Seeks Alternate Methodologies without Demonstrating Any Shortcoming in the Methodologies Used by the ITC* – Korea merely asserts that the ITC's weighted-average pricing analysis was "wrong for this industry" and that the ITC should have examined pricing and volume on a brand-name basis. These arguments ignore the fact that it is for the investigating authorities in the first instance to select methodologies for their analysis under Article 15.2 of the SCM Agreement. There is no requirement to conduct a brand-name analysis, and on the facts of this case, a brand-name

analysis was not consistent with the relevant inquiry under the SCM Agreement. Use of the brand-name analysis urged by Hynix would not reflect the source country of the DRAM products and would be utterly inconsistent with the requirement under the SCM Agreement to examine the effect "of the subsidized imports" on the "like product", the product produced by the domestic industry. By comparing the weighted-average price of subsidized subject imports with the weighted-average price of domestic shipments for each time period, the ITC's methodology in this investigation addressed the inquiry posed by Article 15.2 – the assessment of the price effects of the subsidized imports on the domestic industry.

21. In any event, the ITC *also examined* the pricing data on a disaggregated basis (broken down by both brand-name and by source). Even a disaggregated analysis showed that subsidized subject imports were the lowest-priced product "*more often than DRAM products from any other source*".

22. *Korea Asks This Panel to Reweigh the Evidence and Factors Concerning the Impact of Subsidized Subject Imports, but the Result is the Same* – Based on an examination of trade, financial and other industry performance indicators, the ITC concluded that the domestic industry's performance declined over the period of investigation with respect to many indicators, and its financial performance worsened precipitously. The ITC determined that declining prices were the primary reason for the industry's large operating losses, and that subject imports "contributed materially to the steep price declines that occurred over the period." Korea argues that the ITC should have weighed the evidence differently, and it asserts that in this industry there are only five key indicia.

23. Korea ignores that it is the investigating authorities that are to evaluate the impact factors and weigh the evidence and that no one or several of the non-exhaustive list of enumerated SCM Agreement Article 15.4 factors is determinative. The ITC's final determination reflects evaluation of positive evidence concerning each of the various Article 15.4 factors showing changes in the industry's condition, but even the select criteria that Korea asserts are important in this industry showed declines during at least part, if not the entire, period of investigation.

24. *The ITC's Causation Analysis was Proper* – In ascertaining whether there is a "causal relationship", authorities must demonstrate a causal relationship between the subsidized imports and the injury to the domestic industry based on an examination of all relevant evidence before the authorities. The authorities also must examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry to ensure that the injury caused by these other factors is not attributed to the subsidized imports. The ITC clearly demonstrated such a causal relationship, and also provided a satisfactory explanation of the nature and extent of the injurious effects of other factors. Even in the context of reviewing safeguards determinations, the Appellate Body has found that Article 4.2(b) of the Safeguards Agreement does not require that increased imports alone, in and of themselves, are causing serious injury. Nor is there any such requirement in Article 15 of the SCM Agreement.

25. *Non-subject imports*: The ITC found that subsidized imports, by themselves, were large enough and priced low enough to have a significant impact, regardless of the adverse effects caused by non-subject imports. The ITC determined that there were two principal factors that reduced the significance of the volume of non-subject imports. First, there was less competition between the domestic DRAM products and the non-subject imports than there was between the domestic DRAM products and the subject imports. The ITC determined after examining the composition of non-subject imports that a significant portion of non-subject imports were Rambus and specialty DRAM products for which domestic producers had no significant production during the period of investigation. Second, even those non-subject imports consisting of "standard" products did not have the price effects that subsidized subject imports did during the period of investigation. Price effects were what the ITC concluded caused the "primary negative impact" on the domestic industry.

26. Other possible reasons for price declines: The ITC also evaluated other possible reasons why prices declined in the US market (including product life cycles and business cycle changes in demand and supply that lead to "boom" and "bust" periods characteristic of this industry). While slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the ITC found that the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor. It concluded that the increasing frequency of underselling by subsidized subject imports from 2000 to 2002 corresponded with the substantial decline in US prices over those same years and that in the absence of significant quantities of subsidized subject imports competing in the same product types at relatively low prices, domestic prices would have been substantially higher.

ANNEX B-4

CLOSING STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

24 June 2004

Subsidy Issues

1. In closing, we would like to comment briefly on Korea's suggestion that the Commerce Department is an over-zealous agency run amok. Korea characterizes the US position in alarming terms, portending unlimited discretion for investigating authorities and a world in which the financial community has no choice but to stand by and watch ailing companies go bankrupt. The alarm Korea sounds is necessary to justify the fact that Korea is asking the Panel to read into the "entrusts or directs" language of Article 1.1(a)(1)(iv) a special evidentiary requirement that would immunize all informal government action from the disciplines of that provision, by prohibiting reliance on circumstantial evidence, no matter how compelling, and by requiring explicit, concrete evidence of government entrustment or direction not only for a particular task, but also for each action necessary to accomplish that task. Korea's solution, in short, is to make Article 1.1(a)(1)(iv) so easy for governments to circumvent that it would render the provision meaningless – an absurd result that Korea apparently does not find alarming.

2. As we discussed in our submission and over the past two days, the DOC provided a well-reasoned analysis of why the facts – and admittedly the facts are very complex – when viewed as a whole, present a clear picture of a government bailout of Hynix.

Injury Issues

3. In its written submission, Korea repeatedly asserted that the volume of subsidized imports declined. In its opening statement, Korea retreated from this assertion, arguing in paragraphs 7 and 9 only that the Hynix brand declined. Indeed, Korea even conceded in paragraph 11 that subject imports did increase.

4. Even without an increase, subject imports can have price effects if, for example, they force other market players to lower their prices. For the sales that the financially troubled Hynix did make, there was significant price undercutting, however measured. It does not take much to set the margin in a commodity market where prices are rapidly disseminated.

5. Korea admitted that there was injury here. The fact that other factors may have been causing injury at the same time as subsidized subject imports does not, under the SCM Agreement, invalidate or prevent an investigating authority from finding that subsidized subject imports caused material injury to the domestic industry.

Standard and Scope of Review

6. Over the course of the past two days, we and Korea have repeatedly referred to the fact that "we have a disagreement" or "we have a dispute". It is important that we be clear about what the disagreement before the Panel is all about.

7. One possible disagreement is historical, involving the question of whether Hynix received subsidies and whether imports of subsidized merchandise caused injury to a US industry. That issue was resolved by the Department of Commerce and the International Trade Commission in their determinations, and is not before the Panel.

8. The present disagreement – the disagreement before the Panel – is different; it is whether a reasonable, unbiased person *could* have reached the same conclusions as those agencies, based on the evidence before them.

9. Korea says that there is no disagreement concerning the standard of review, but there is. Korea said earlier that your job is to determine what a reasonable authority *should* have found. However, your task is *not* to determine what a reasonable authority *should* have found. Rather, your task is to determine what a reasonable investigating authority *could* have found based upon the evidence before it.

10. A related issue is the scope of the Panel's review. We can certainly understand the Panel's desire to have as much information before it as possible. However, once you stray into the area of non-record evidence, you risk running afoul of the provisions of Article 11 of the DSU. We urge you to consider that if you are thinking of accepting non-record evidence. The Panel cannot perform its assigned function if it is considering information that was not before the agency.

11. Finally, it is Korea that bears the burden of proving that a reasonable, unbiased person could not have reached the same conclusions as the DOC and the ITC. So far, all Korea has done is to say that there are conflicting pieces of evidence in the record, but it has failed to prove – although it repeatedly suggests – that the agencies' consideration of such evidence was improper. In other words, Korea has failed to satisfy its burden of proof with respect to the disagreement that is before this Panel.

12. Thank you again for agreeing to participate in the work of this Panel. We look forward to continuing that work with you in the coming weeks.

ANNEX B-5

ORAL STATEMENT OF CHINA AT THE THIRD PARTY SESSION

24 June 2004

Thank you, Mr. Chairman, and members of the Panel. China appreciates the opportunity to present this oral statement as a third party. China wishes to highlight certain aspects of the issues contained in its written submission.

I. INDIRECT FINANCIAL CONTRIBUTION

1. The first legal issue China would like to address is indirect financial contribution by a government. In this respect, China holds the view that Article 1.1 (a)(1)(iv) of *the SCM Agreement* should be interpreted strictly.

2. First, this view is supported by the reading of the plain text of the provision. The Panel in *US – Export Restraint* concluded that the words of “entrust” and “direct” consist of three elements: (i) an explicit and affirmative action, be it delegation or command; (ii) addressed to a particular party; and (iii) the object of which action is a particular task or duty”. China thinks that these three elements must be proved by positive evidence in order to find “entrustment” or “direction” by a government.

3. Second, in the negotiating history of *the SCM Agreement*, the element of financial contribution was included in the definition of a subsidy to limit the kinds of government actions to be regarded as subsidies. On the other hand, subparagraph (iv) of Article 1.1(a)(1) was intended as an anti-circumvention provision, disciplining subsidies provided by a government through a funding mechanism or a private body. Taking together, a strict reading of the subparagraph (iv) not only serves the purpose of limiting the applicable scope of *the SCM Agreement*, but also ensures the effective operating of the anti-circumvention provision.

4. In the context of reviewing a countervailing duty determination by a panel, it is crucial to assess whether the facts before the investigating authority at that time supported its finding of financial contributions, and whether the investigation reports set forth “the basis on which the existence of a subsidy has been determined” as provided by Articles 22.4 and 22.5 of *the SCM Agreement*. In China’s view, although *the SCM Agreement* does not provide for any special evidentiary standard for the finding of indirect financial contribution, the facts accepted by the investigating authority must support the finding of the above-mentioned three elements of entrustment or direction.

II. BENEFIT

5. Now China would like to turn to the second legal issue, the selection of a market benchmark for the determination and calculation of benefits. On this issue, China submits that the current dispute involves a set of questions similar to those in *US – Lumber CVDs Final*.

6. First, China thinks that the investment decision of Citibank may constitute a primary market benchmark in the course of determining and calculating benefits conferred by the alleged subsidy programmes.

7. Second, by analogy to the Appellate Body report in *US – Lumber CVDs Final*, China is of the view that the threshold for abandoning a primary benchmark is very high. It is preferable to adjust the benchmark for some elements of incomparability. Therefore, in the cases of equity infusion and loans provision, if there are investment activities conducted by a private entity to the same company under investigation, it is desirable to use such activities as the primary market benchmark instead of to reject this readily available and actual benchmark and to construct an additional set of “market terms”.

8. Third, even if a readily available market benchmark is properly rejected with good cause, Article 14 of *the SCM Agreement* requires that any alternative method used shall be consistent with the guidelines. In China’s view, the specific requirements set out in Article 14(a) and (b) have the function of ensuring that only the advantage of a subsidy is calculated through the application of guidelines contained therein. This understanding is supported both by the Appellate Body report in *US – Lumber CVDs Final (AB)* and by the well accepted interpretation of the term “benefit” in Article 1.1 by the Appellate Body in *Canada – Aircraft*. Therefore, China believes that Article 14(a) and (b) impose an obligation of excluding any factor that affects comparability of the terms that are being constructed by an authority.

III. SPECIFICITY

9. The third key legal issue on which China would like to comment is the determination of specificity.

10. First, in China’s understanding, Article 2.1(c) of *the SCM Agreement* provides for a three-layer requirement in the determination of *de facto* specificity: (i) there shall be facts indicating the possible existence of *de facto* specificity; (ii) consideration may then be turned to any or all of the four factors; (iii) when looking at factual factors, one *shall* take into account two circumstantial factors, i.e. the extent of diversification of economic activities and the length of time of the application of the subsidy programme.

11. China notes that DOC in its *Decision Memorandum* adopted various evidence to show the intention of the GOK to rescue Hynix. In China’s view, such intention, even if established, at best only shows the “reason to believe” that there may be *de facto* specificity. It should be pointed out that Article 2.1(c) of *the SCM Agreement* does not include the intention of a granting authority as one of the four factors.

12. Second, in China’s opinion, while deciding on the issue of granting disproportionately large amounts of subsidy to certain enterprises, the mere fact that a company accounted for a large share in the debt restructuring provided by the government does not conclusively prove that the amount of granted subsidy is “disproportionately large”. In China’s opinion, the disproportionate largeness should be determined on the basis of comparison with other participants in the restructuring programme, not only from the perspective of the absolute amount of debt, but also, *more importantly*, from the perspective of the scales and needs of financing of all participants in the same programme.

13. China also is of the view that Article 2.1(c) of *the SCM Agreement* clearly provides that two circumstantial factors have to be considered in the determination of specificity, namely, the “extent of diversification of economic activities” and the “length of time”.

14. Furthermore, in China’s view, though Article 2.1(c) does not require an authority to consider each and every factual factor listed therein, when taking into account of the particular settings of the debt restructuring, the consideration of the third factor, amount of subsidy, should be combined with the fourth factor, the manner of exercising discretion. The authority should have looked into whether there were other applications for debt restructuring by other companies of scale similar to Hynix and

in similar needs of financing, and whether such applications were refused despite situations similar to those of Hynix. Such an inquiry would clarify whether the subsidy is of limited availability.

15. Therefore, China thinks that the DOC's approach to finding disproportionately large amount of subsidies does not seem well founded pursuant to Article 2.1(c) of *the SCM Agreement*.

16. Third, China would like to express its view that Article 2 of *the SCM Agreement* requires that specificity of subsidy programmes be determined with respect to each separate subsidy programme. It is not consistent with Article 2 for an investigating authority to take a particular *financial contribution* out of the subsidy programme and consider it in isolation. Neither is permissible to combine *various separate subsidy programmes* as a whole and review them as a single programme.

17. In this dispute, the responding party seems to introduce a so-called "inherent specificity" theory. It is argued by this party that in the situation where the government provides a grant to a single, financially distressed manufacturer, the nature of the subsidy is inherently specific. Contrary to such point of view, China believes that specificity should be examined on the basis of a subsidy programme, rather than an individual financial contribution granted under the same programme. If specificity is to be determined on the basis of any particular financial contribution under the subsidy programme, there would be no subsidy programme that is not specific.

18. On the other hand, DOC also appears to have put together some seemingly separated programmes under a big "programme" named "Direction of Credit and Other Financial Assistance" and examine their specificity as a single programme. Such a practice seems inconsistent with *the SCM Agreement*. China believes that specificity should be examined in relation to each separate and distinct subsidy programme. Under *the SCM Agreement*, a subsidy becomes countervailable only after its specificity is confirmed. A finding of the specificity of a subsidy programme does not necessarily extend to other subsidy programmes. Article 2.4 of *the SCM Agreement* also specifically requires that any determination of specificity shall be clearly substantiated on the basis of positive evidence. China thinks this provision obliges an investigating authority to clearly inquire into and demonstrate the specificity of each separate subsidy programme.

IV. CONCLUSION

19. This concludes the oral statement of China. Thank you again for this opportunity to express our views.

ANNEX B-6

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE EUROPEAN COMMUNITIES

8 July 2004

1. The EC generally refers to its written submission in this case, and only wishes to make very few further observations mainly, triggered by submissions made by other third parties, which the EC submits have to be nuanced.

I. THE APPELLATE BODY REPORT IN US – SOFTWOOD LUMBER IS NO SUPPORT FOR KOREA’S PRIMARY BENCHMARK TEST

2. According to Korea, supported by China, the US-Softwood Lumber case established principles that, in respect of the calculation of the amount of the benefit of the subsidy in accordance with Article 14 of the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”) apply across each of the paragraphs of Article 14. In particular and again based on the *US-Softwood Lumber* case, Korea argues that if a benchmark exists in the market of the Member under investigation, this primary benchmark must be used unless the investigating authority demonstrates that this benchmark is distorted. The EC does not agree that there is any primary benchmark included in Article 14 (b) of the *SCM Agreement* and submits, for the reasons that will follow, that alternative benchmarks may be used.

3. China also argues that, based on the finding of the Appellate Body in *US- Softwood Lumber*, the threshold for abandoning a primary benchmark is very high.

4. The EC does not agree with this view. The EC would first of all recall that Article 14 of the *SCM Agreement* leaves the methodology for determining the amount of a benefit to Members, referring in its chapeau to “any” method used. The word “any” indicates that more than one method may be acceptable and, the principles in Article 14 subparagraphs (a) to (d) of the *SCM Agreement* contain “guidelines”. Secondly, Article 14 sub-paragraphs (b) and (c) of the *SCM Agreement* bear no limitation in respect of the market which could provide a comparative benchmark for establishing the benefit. Sub-paragraphs (b) and (c) refer in general terms to a “*comparable commercial loan*” and to “*the market*”. This wording does not support an interpretation according to which, in the application of Articles 14 sub-paragraphs (b) and (c) of the *SCM Agreement*, regard must be had first to any benchmark on the market of the Member under investigation.

5. In that context, the EC supports the US view according to which the *US- Softwood Lumber* case is not a relevant authority for this case. From the report it is very clear that the Appellate Body ruled on the specific facts of the case and that it was concerned only about the interpretation of Article 14 sub-paragraph (d) of the *SCM Agreement* which concerns the provision of goods and not as in the present case the provision of loans and equity. Accordingly the EC submits that China’s argument concerning the threshold for abandoning a primary benchmark would be, if at all, applicable only to the case of Article 14 sub-paragraph (d) of the *SCM Agreement*, which is, however, not at issue in this case. Furthermore, it is submitted that all parties do not dispute that the Appellate Body’s holdings in the US- Softwood Lumber Case were limited to the interpretation of Article 14(d). For these reasons, the EC submits that the *US- Softwood Lumber* case should be disregarded as authority in this case.

II. DISTORTION OF MARKET BENCHMARKS

6. The EC also wishes to comment on China's argument that it is not reasonable require that the investment decision of a private entity should be free of any government involvement in order for it to be used as benchmark.

7. The EC submits that this argument needs to be nuanced, especially in the case of financial investments. It is submitted that, if there was also an investment by the government, this can be an important factor in assessing whether the decisions by private entities to invest as well were tainted by the government's action. Indeed any perception that a government invests in a company will give the signal that the government is committed to the company receiving the investment. That in turn suggests that the company invested in, because the government is behind it, is unlikely to fail. In the case of an otherwise highly risky investment opportunity, such government backing may well tilt the private operators' risk assessment in favour of the decision to actually invest. It is therefore, the EC submits, reasonable to assume a distorting effect by such government commitment, at least in the absence of convincing factors pointing to another finding.

8. Therefore, the EC disagrees with the argument put forward by China that the mere perception that the GOKs policy commitment to Hynix's survival continued to be significant should not have influenced Citibank's decision in such a substantial way as to invest in a company that, according to DOC, should have failed. Purely from a logical point of view, it is perfectly conceivable for the reasons just explained that because of the perception of a GOK policy commitment to Hynix, Citibank may have assessed the risk of failure as small. This could have tilted the decision by Citibank in favour of investing.

9. However, the US dismissed Citibank as a reliable benchmark also because of its role as financial adviser. China argues that all commercial entities operate in a complex commercial reality. A decision in a particular transaction may be influenced by that in another transaction and suggests that even if such an influence exists, it may not necessarily constitute a justification for denying the commercial nature of the first decision. The EC actually agrees that transactions can be influenced by decisions in other transactions. However, the issue is: can it be assumed that the investments made by the other participating banks were based on commercial grounds just because Citibank, as private sector bank, invested too?

10. It is submitted that for a benchmark to make any sense in this context, the comparison to it must be made on an equal footing. In other words: it is not appropriate to compare the lending decision of a bank which is engaged vis-à-vis the recipient of the loan only by its lending business to the motivation of a bank whose main role is that of financial advisor. Indeed precisely because decisions in one transaction influence those in others, the interest a bank has as financial advisor is bound to taint the decision such bank takes in respect of lending to its advisory client, especially if this lending is comparatively small.

11. Hence, the EC submits that the Panel should bear in mind the very specific position of Citibank in assessing Korea's and China's arguments in respect of Citibank as a possible benchmark.

III. EVIDENTIARY STANDARDS TO REVIEW THE EXISTENCE OF ENTRUSTMENT OR DIRECTION BY THE GOVERNMENT OF KOREA IN THIS CASE

12. The EC would like to take this opportunity to underline that Japan seems to be of the same opinion as the EC in respect of the degree of evidentiary standard required for showing government direction for proving a financial contribution under Article 1.1.(a)(1)(iv) of the *SCM Agreement*. The EC, as further set out in its written submission, comes to that conclusion as well.

13. The EC also fully agrees with the interpretation by Japan that the *Export Restraints* panel did not set forth the type of evidence required for finding entrustment or direction, and that these elements may also be shown by circumstantial or secondary evidence. The EC agrees that it would be sufficient for the authorities to find a financial contribution, if the evidence is such that the authorities can reasonably conclude that the government delegated a privately-controlled bank to provide financial support to a specific company.

14. Hence, the EC would suggest the Panel should find that the US finding of direction was consistent with WTO rules in so far as an objective assessment of the evidence would reasonably allow the Panel to reach the conclusion the authorities did.

IV. CONCLUSION

15. In conclusion, the EC respectfully submits

- That the *US- Softwood Lumber* case should be disregarded as authority in this case;
- That Citibank's specific situation in this case should be borne in mind when assessing whether it was a proper benchmark for the purposes of Article 14 SCM Agreement; and
- That government entrustment or direction can properly be established on the basis of circumstantial evidence.

ANNEX B-7

ORAL STATEMENT OF JAPAN AT THE FIRST SUBSTANTIVE MEETING, THIRD PARTY SESSION

24 June 2004

I. INTRODUCTION

1. Mr. Chairman and distinguished Members of the panel, on behalf of the Government of Japan, I thank you for giving us this opportunity to express our views on this important matter. This morning, we will focus on certain arguments presented by the parties, which involve systemic issues, and should be addressed further.

II. ARGUMENT

A. ENTRUSTMENT OR DIRECTION BY THE GOVERNMENT UNDER ARTICLE 1.1(A)(1)(IV)

2. The United States argues that the words “entrusts or directs” in Article 1.1(a)(1)(iv) of the SCM Agreement dictate that “[t]he focus in determining entrustment or direction is on the government’s action”.¹ We agree. As the panel in *US – Export Restraints* explained, the word “entrust” means to “give (a person, etc.) the responsibility for a task . . . Commit the . . . execution of (a task) to a person . . .”.² The word “direct” means to “[g]ive authoritative instructions to; order (a person) to do . . . order the performance of”.³ The ordinary meaning of these words, as analyzed by the *US – Export Restraints* panel, clarifies that Article 1.1(a)(1)(iv) is concerned with the action taken by the government. The reactions of private banks are not the primary concern of this Article. Some private banks may accept the responsibility wholly or partly for a task entrusted or directed to them by the government. Other private banks may decline to take the responsibility. The reaction of such private banks, however, does not affect the evaluation for the existence of entrustment or direction under Article 1.1(a)(1)(iv).

3. We also agree with the United States that instructions by a government do not have to be in a particular form or on a transaction-specific basis.⁴ The panel in *US – Export Restraints* interpreted the government’s entrustment or direction to be an explicit and affirmative action prompting a particular party to perform a particular task or duty.⁵ Article 1.1(a)(1)(iv), however, does not specify any particular methodology for evaluating the government’s action relating to the entrustment or direction to private banks. The government’s entrustment or direction, thus, does not have to be a publicly announced command, or a command instructing a private bank, in every detail, to provide financial support to a specific company. It is sufficient under Article 1.1(a)(1)(iv) if the government’s action were such that a private bank were able to understand what the government delegated or commanded.

¹ The First Written Submission of the United States (the “*US First Written Submission*”), dated 21 May 2004, para. 175.

² Panel Report, *United States - Measures Treating Export Restraints as Subsidies* (“*US – Export Restraints*”), WT/DS194/R, adopted 23 August 2001, para. 8.28.

³ *Id.*

⁴ See *US First Written Submission*, paras. 162-170.

⁵ Panel Report, *US – Export Restraints*, para. 8.29.

4. Consequently, the major question under Article 1.1(a)(1)(iv) is the evidence on which the investigating authority may base its finding on whether the government's instruction constituted an entrustment or direction under this Article. As we discussed in our third party submission, the instruction may be shown through circumstantial evidence. The evidentiary standard applicable to this Article is found in Article 11 of the DSU. Article 11 requires that the Panel review whether an investigating authority's determination was based on "an objective assessment of the matter before it, including an objective assessment of the facts of the case". Article 11 directs panels to make an objective assessment of the facts. However, we would consider that this obligation of an objective assessment applies equally to the investigating authorities' assessment, because panels are required to review the investigating authorities' evaluation of facts in accordance with that standard. Article 11 thus requires, in this case, that an investigating authority must base its determination on the evidence sufficient to allow the authority to reasonably conclude that the government delegated or commanded a private bank to provide certain financial support to a specific company. There are no further requirements of the evidentiary standards applicable to Article 1.1 of the SCM Agreement.

B. NON-ATTRIBUTION RULE UNDER ARTICLE 15.5 OF THE SCM AGREEMENT

5. The United States argues that "there is no requirement to collect detailed information concerning 'other factors,' including non-subject imports"⁶ to comply with the non-attribution rule under Article 15.5 of the SCM Agreement. This argument should be carefully examined. Article 15.5 requires that the authorities "examine any known factors other than the subsidized imports" and that "injuries caused by these other factors must not be attributed to the subsidized imports".⁷ This language clarifies that if any other factors are known by the investigating authority, the investigating authority must undertake positive actions to collect and evaluate the evidence so that the investigating authority can separate and distinguish the possible injurious effects of the other known factors.

6. The Appellate Body has repeatedly explained that the investigating authority must take positive actions to collect and assess information regarding the known factors. In *US – Hot-Rolled Steel*, the Appellate Body clarified the meaning of the word "examination". According to the Appellate Body, an examination "relates . . . to the way in which the evidence is gathered, enquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally".⁸ Regarding the authorities' conduct of the "investigation", the Appellate Body explained:

The ordinary meaning of the word "investigation" suggests that the competent authorities should carry out a "systematic enquiry" or a "careful study" into the matter before them.⁴⁵ The word, therefore, suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an enquiry or a study – to use the treaty language, an "investigation" – must actively seek out pertinent information.⁹

⁴⁵ *The New Shorter Oxford English Dictionary, supra*, footnote 43, Vol. I, p. 1410.

⁶ The "US First Written Submission", para. 422.

⁷ Article 15.5 of the SCM Agreement (emphasis added).

⁸ Appellate Body Report, *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("US - Hot-Rolled Steel"), WT/DS184/AB/R, adopted 23 August 2001, para. 193.

⁹ The Appellate Body Report, *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("US – Wheat Gluten") WT/DS166/AB/R, adopted 19 January 2001, para. 53.

The examination to separate and distinguish other known factors under Article 15.5 is a part of the authorities' conduct of the investigation under Part V of the SCM Agreement.¹⁰ As the Appellate Body explained in the above reports in *US-Hot-Rolled Steel* and in *US-Wheat Gluten*, therefore, the investigating authorities are required to take positive actions to “gather” and “evaluate” the evidence related to other known factors.

7. The phrase “must not be attributed”, in Article 15.5, further clarifies that the investigating authorities are required to take positive actions to separate and distinguish injury caused by other known factors from injury caused by the subsidized imports. The Appellate Body has clarified Article 3.5 of the AD Agreement, which is equivalent to Article 15.5 of the SCM Agreement:

We recognize, therefore, that it may not be easy, as a practical matter, to separate and distinguish the injurious effects of different causal factors. However, although this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors.¹¹

8. In sum, WTO jurisprudence has clarified that the investigating authorities are required to take positive actions to collect and evaluate other known factors to separate and distinguish injury caused by factors other than the subsidized imports.

III. CONCLUSION

9. For the reasons discussed above and in our third party submission, Japan respectfully requests that this Panel carefully review the consistency of the injury determination and the subsidy determination by the United States.

¹⁰ See Article 10, which provides “Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.” (footnote omitted, emphasis added.)

¹¹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 228 (emphasis added).

ANNEX B-8

THIRD PARTY ORAL STATEMENT SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

24 June 2004

Introduction

1. Based on trade and systemic concerns, the Government of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu wishes to take this opportunity to express its positions with regard to the interpretation of the Agreement on Subsidies and Countervailing Measures (ASCM) concerning the dispute between the United States and Korea. We will address, in particular, two issues: the interpretation of ASCM Article 1.1(a)(1)(iv) “entrust or direct”, and the selection of a suitable benchmark in the calculation of benefit pursuant to ASCM Articles 14(b).

ASCM Article 1.1(a)(1)(iv) “Entrust or Direct”

2. With regard to the interpretation of the terms “entrust or direct” in Article 1.1(a)(1)(iv) of the ASCM, we believe that the interpretation of the Panel in *US - Export Restraints* is applicable to the present case. The Panel directly examined the meaning of the words “entrust” and “direct” in the context of ASCM Article 1.1(a)(1)(iv) in a general manner.¹ The Panel held that

the act of entrusting and that of directing...necessarily carry with them the following three elements: (i) there must be an *explicit and affirmative* action, be it delegation or command; (ii) addressed to a particular party; and (iii) the object of which is a particular task or duty...We therefore do not believe that either entrustment or direction could be said to have occurred until all of these three elements are present.”²
[emphasis added]

3. It follows from the Panel’s stringent standards that mere influence or control by the government is, in itself, insufficient to prove entrustment or direction. The investigating authorities must determine whether the government influence was the result of an explicit and affirmative act addressed to a particular party for a specific task. Drawing inference from circumstantial evidence does not discharge a competent authority’s evidentiary burden in this regard. It is our view that the competent authority should make an examination of all evidence in order to decide whether the above three elements of entrustment or direction have been met.

Benchmark Pursuant to Articles 14(b) of the ASCM

4. Article 14 of the ASCM deals with the calculation of benefit based on four guidelines, in which Article 14 (b) addresses the issue of loans and loan guarantees. The paragraph emphasizes the difference in capital costs by comparing the interest payments the firm would make on government loan with the amount it would otherwise pay on “*comparable commercial loan* which the firm could

¹ *United States – Measures Treating Exports Restraints as Subsidies (US – Export Restraint)*, Panel Report, WT/DS194/R, paras. 8.25-8.32.

² *US – Export Restraint*, para. 8.29.

actually obtain on the market”, or the benchmark.

5. In selecting a benchmark, we believe that Article 14(b) should be interpreted along with other paragraphs of Article 14 in a consistent manner. In our view, the appropriate benchmark for comparable commercial loans should be the marketplace in the Member’s territory in question. If the firm under investigation received its funding from local sources, the use of a non-domestic benchmark would be incongruous. It is only when all possible domestic benchmarks have been determined by the investigating authorities to be indeed distorted should other benchmarks be considered. In doing so, the investigating authorities should also establish that the other benchmark of their choice relates to the prevailing market conditions of the market at issue.

Conclusion

6. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu respectfully submits the above positions for consideration by the Panel. We thank you again for the opportunity to offer our comments.