

ANNEX D

ORAL STATEMENTS OF PARTIES AT THE SECOND SUBSTANTIVE MEETING

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ANNEX D-1

EXECUTIVE SUMMARY OF THE SECOND ORAL STATEMENT BY THE GOVERNMENT OF KOREA

30 July 2004

I. INJURY ISSUES

A. Volume Effects The limited market share, the small change in market share, and the unique circumstances of a US based factory shutting down all demonstrate that the volume of subject imports was not “significant”.

B. Price Effects The United States continues to cite figures concerning frequency of underselling in a vacuum. Even if non-subject import were underselling only 61 per cent of the time rather than 70 per cent, non-subject imports were 5 to 6 times larger in terms of market share. The ITC focused on relatively small changes in the frequency of underselling, while ignoring the dramatically different volumes of non-subject imports, about 80 per cent of which the United States now concedes was fully interchangeable.

C. Causal Link Hynix subject imports increased about 2 percentage points of market share (because of the shutdown in Oregon), but Hynix brand sales actually decreased about 4 percentage points. In the meantime, non-subject imports increased almost 7 percentage points of market share. Hynix subject import underselling increased slightly from 2000 to 2001. If the Hynix brand is losing market share, and if non-subject imports are able to gain market share at more than *three times* the rate of subject imports, it simply defies logic to find a causal nexus to subject imports.

D. Non-Attribution

Non-subject imports The US producers and importers reported that non-subject and domestic DRAMs products were generally used interchangeably and 22 out of 24 reported no important difference in product characteristics or sales conditions between them. In addition, the ITC never reconciled the frequency of underselling analysis with the vastly different volumes of subject and non-subject imports. In 2001 the portion of subject imports underselling was about 5 per cent of the market, but the portion of non-subject imports underselling was about 27 per cent of the market. The ITC determination provides no satisfactory explanation of how it separated and distinguished the effect of this 27 per cent, and did not improperly attribute this effect to the 5 per cent represented by subject imports.

Collapse in demand To the extent the ITC felt supplier competition was somehow a factor, the ITC does not explain why it attributed the effect to the small change in subject import market share rather than the much larger market share and change in market share by non-subject imports. The modest difference in the frequency of underselling is dwarfed by the huge difference in market share, and the fact that non-subject imports were gaining market share at more than three times the rate of subject imports.

Increased capacity There is no discussion in the ITC determination that links detailed information about which suppliers were increasing their capacity, and the more general discussion of

general capacity as part of the business cycle. To look at capacity in the aggregate simply does not allow the necessary analysis.

II. SUBSIDY ISSUES

A. Financial Contribution

The Legal Standard To have any meaning, the text of Article 1.1(a)(1)(iv) must impose some threshold that must be met. To focus on who is being entrusted to do what is a textually sound way to ensure this legal threshold is being met. This interpretation may make it more difficult for authorities to make sweeping, broad-brush conclusions about debt restructuring programmes. But that is the unavoidable consequence of giving this provision some substantive legal content. Also, a careful review of the treaty text in context confirms this interpretative approach as encapsulated in *US - Export Restraints*.

The Evidence Once the evidence of entrustment or direction cited by the United States is held up against the proper legal standard, the deficiencies become quite apparent. The deficiencies are most egregious for the October 2001 and May 2001 restructurings. As for the May restructuring, the United States describes the restructuring without even acknowledging the \$1.25 billion in new equity capital that was raised. As for the October restructuring, the United States largely ignores the critical feature of the October restructuring: many banks, including some 100 per cent owned by the GOK, declined to provide any new money. The United States also misstates both the function of the CRPA and the actual facts of the October restructuring. Contrary to the US allegations, each creditor under the CRPA had a chance to see whether the restructuring options were more attractive than appraisal rights. With respect to the Kookmin prospectus, the US now argues that the GOK could and did influence {Kookmin's} lending decisions. Yet the actual behavior of Kookmin clearly demonstrates that Kookmin was exercising its own judgment with respect to the different phases of the Hynix restructuring. In the end, this evidence simply does not support the sweeping DOC conclusion that every single Korean bank was entrusted or directed to engage in every single transaction with respect to the Hynix restructuring.

B. Benefit

The DOC approach to “benefit” is utterly at odds with the textual requirement of Article 14(b) in that the DOC crafted onto Article 14 the requirement of finding the perfect benchmark, and rejecting anything less. The DOC simply did not have the legal or factual basis to reject all possible benchmarks. This rush to reject all benchmarks is particularly egregious for Citibank. The DOC simply has not explained satisfactorily why Citibank was not “comparable” within the meaning of Article 14(b) for loans, and why Citibank was not indicative of the “usual investment practice under Article 14(a) for debt equity swaps. In addition, the US argument that because Citibank’s initial loan to Hynix was small relative to total Hynix debt is just absurd in that nothing in Article 14(b) requires a loan to be both “comparable” and large relative to total debt.

C. Specificity

The United States has defined the subsidy in an overbroad way so as to render the specificity requirement irrelevant. Of course there is only one Hynix ‘bailout’. But hundreds of Korean companies obtained loans, and hundreds of indebted Korean companies went through restructuring. By failing to analyze the constituent elements of the Hynix restructuring, the United States failed to comply with the requirements of Article 2.

ANNEX D-2

CLOSING STATEMENT OF THE GOVERNMENT OF KOREA AT THE SECOND SUBSTANTIVE MEETING

21 July 2004

We would like to thank the Panel and the secretariat for another productive two days of meetings and tough questioning. We believe this process has further focused the enquiries in this case. We use these closing comments respond to the Chairman's request to offer our thoughts for how the Panel should go about its task in this case.

Injury Issues

We start with the injury issues. Both parties have stressed different aspects of the standard of review. In our view, both parties are correct: the Panel must undertake an objective assessment without reweighing the evidence. In a sense, the standard of review is not really the issue.

But make an "objective assessment" of what? There are a number of key issues. Under Article 15.2, the Panel must make an objective assessment of whether the subject import volume is "significant". In our view, the ITC cited a number of facts and trends, but never really explained why the volume of imports was "significant". The United States has argued extensively about the overall context of the import volume. But the United States never adequately addressed the two most important aspects of this overall context: the role of the shutdown of the Hynix Oregon facility in explaining the modest increase in Hynix subject import market share; and the significance of modest levels of subject imports in light of the much, much larger volume of non-subject imports.

It is against this context that the Panel must evaluate the sufficiency of the US argument that subject imports were highly substitutable. So were Hynix DRAMs made in Oregon, and the substitution between 2000 and 2001 was largely Hynix customers switching from Hynix DRAMs made in Oregon to Hynix DRAMs made in Korea. Since Hynix brand lost market share over this period, Hynix subject imports were not even replacing the market share lost when Oregon shutdown. But in addition, the non-subject DRAMs were also completely substitutable. The United States acknowledges that 80 per cent of these DRAMs are fully interchangeable, and this fact alone substantially undermines the credibility of the ITC claim that the modest additional volume of subject DRAMs could have "significant" volume effects as required by Article 15.2.

With regard to price effects, it is hard to say anymore. The US refusal to provide key data – even data for which it is difficult to see the rationale for continued confidential treatment – makes the Panel's task more difficult. Unlike the volume arguments, where Hynix data alone provides a reasonable proxy, the pricing arguments are by necessity more abstract. But in our view, there are at least two core issues that the United States has not addressed adequately.

First, does it make any sense to focus on Hynix subject imports only relative to each other supply source, or should the ITC have also addressed – as Hynix argued – the combined effect of the other sources? Put differently, can the findings on price effects be considered sufficient without at least addressing this issue, and explaining why in spite of the combined effects of all the other lowest price supply source, there are still significant price effects.

During our meeting yesterday, the United States stressed the facts of changing frequency of underselling. We acknowledge those facts. But does it make any sense to rely on those facts in isolation, when the other facts show that the other non-subject import sources were much bigger, were growing in market share much faster, and were underselling with almost the same frequency? We believe this conclusion does not make sense, and the ITC finding of “significant” price effects is inconsistent with Article 15.2.

Which brings us to causation. We do not believe the ITC has shown the requisite causal link, but really have nothing to add to our prior arguments on this issue. On the issue of non-attribution, however, we would like to offer a few additional thoughts.

First, the Appellate Body guidance in this area has not been very concrete. But the two general principles are clear: the authorities must “separate and distinguish” and they must provide a “satisfactory explanation” based on positive evidence. This need to determine whether the authority has provided a “satisfactory explanation” requires the Panel to consider the facts, consider the explanation offered, consider the alternative explanations of the facts, and decide whether the authority’s explanation is detailed enough, complete enough, and logical enough to be considered “satisfactory.” From this perspective, the ITC findings are simply insufficient.

On non-subject imports, the ITC is trapped by its own logic. If the substitutability of a commodity product enhances the volume effects, then the much, much larger volume of non-subject imports must have been having an overwhelming effect on the market. Non-subject imports were five times larger, gaining market share three times as fast, and underselling domestic prices with almost the same frequency. None of the ITC explanations satisfactorily separate and distinguish the role of this other factor in the market. The ITC acknowledges the magnitude and trends of non-subject imports, but never explains its conclusion that subject imports themselves were still the cause of material injury.

Note that we are not saying that the existence of other factors means that subject imports cannot also be the cause of material injury. That is a false characterization of Korea’s position. Our argument is that in this case, the ITC explanation is so deficient that we really do not know whether or how the ITC separated and distinguished this other factor. We know the ITC conclusion, but we do not have a satisfactory explanation of how it reached that conclusion. Put differently, we have no idea how the ITC controlled for the effect of non-subject imports, and did not mistakenly attribute these effects to subject imports. Both explanations offered – the limited volume of specialized products, and the different frequency of underselling – fail under more careful scrutiny.

The same problems infect the ITC discussion of other alternative causes. We need not repeat those arguments now.

The United States yesterday made a plea that domestic industries are entitled to protection from subsidized imports. This may be true, but under WTO standards the domestic industry is entitled to such protection only when very specific standards have been met. In this case, they have not been met. This Panel is charged with applying these standards, and ensuring that protection is given only when these international standards have been met.

Subsidy Issues

With respect to subsidy issues, we offer just a few thoughts on the issue of entrustment or direction.

First, we continue to believe it is critical to decide on the legal standard. The United States has tried to side-step this issue. We disagree. We think this treaty language has a very specific meaning, and the Panel’s probing has helped us focus our own interpretation.

The United States has argued in its opening statement that Korea is reading “entrusts” out of the agreement, but that argument is wrong. That word remains in the agreement; but our argument is that the “entrusts” portion of the standard is not properly part of this case. “Entrusts” must have some meaning different than “directs,” otherwise the word would be unnecessary. When read in light of the phrase “normally vested in”, we believe this word conveys the idea of something concrete that can be entrusted. Since the word “vested” conveys the core meaning of giving someone a legally fixed right, it seems quite natural to read “entrusts” as focusing on those situations when the government has transferred responsibility for some programme to a private body. A party can have some legally fixed right pursuant to a formal programme. A party cannot have any legally fixed rights with regard to a general “bailout”. After all, the word “directs” remains to cover other situations not involving such formal programmes. The US interpretation simply does not give any separate meaning to “entrusts” and blurs the distinction between these two important terms.

Second, with respect to this legal standard, the key requirement remains: has the United States provided sufficient evidence to meet the legal standard. During this dispute, we have often used the phrasing “who” was directed to do “what”, or called for a bank-by-bank or transaction-by-transaction analysis. But underlying both of these analytic frameworks is the simple idea that there must be evidence to support all aspects of any finding of entrustment or direction. Having entrusted or directed part of an alleged bailout does not automatically establish entrustment or direction of the entire alleged bailout. Certain evidence might support some, but not all, of such a finding.

Third, although we believe the US evidence fails with respect to all aspects of the Hynix restructuring, these failures are most apparent with respect to the October 2001 restructuring and with respect to the private Korean banks. The United States had only limited evidence with respect to October. We agree with the United States that general pronouncements are not enough. So the US argument for the October restructuring is based entirely on the role of the Creditors’ Council.

We have discussed at length the US flawed interpretation of the statutory framework of the CRPA. But more fundamentally, the US theory cannot explain what else the United States expected the creditors to do in the October restructuring. Unless the United States is arguing for a per se rule that companies must declare bankruptcy and not restructure, what else were the creditors to do? The option 3 banks simply took the liquidation value, and walked away from any further involvement. The statute sets forth a series of procedural rights, including the right to mediation. The Hynix financial statement clearly shows these banks invoked their right to mediation, and Hynix recorded their claims as a current liability. The option 2 banks took a chance on a debt for equity swap to recover a larger portion of the outstanding debt, but refused new loans. The option 1 banks – those with the largest amounts of debt at stake – made some new loans so as to be allowed to swap more debt for equity, and thus limit the size of the write-offs they had to take at the time. None of this is sinister or suspicious. These are the typical choices in a debt restructuring, and individual banks made those choices that made the most sense for them. This is hardly entrustment or direction.

Similarly, the evidence with respect to private banks is simply insufficient. We urge this Panel to consider not just the evidence cited by the United States, but the other evidence left out of the DOC determination. The outside experts were quite consistent in stating that the private banks were different, and acted independently. The information before the DOC about substantial foreign ownership of these private banks is also fundamentally at odds with the DOC finding of entrustment or direction. The evidence of private bank independence, such as the refusal of KFB to participate in many parts of the Hynix restructuring provides further evidence. In the final analysis, the US evidence with regard to private banks is simply insufficient to meet the legal standard.

We believe the Panel can usefully focus its analysis on the private banks. If the Panel finds that the private banks were not entrusted or directed, either for all or for parts of the Hynix

restructuring, then the remainder of the DOC analysis fails. The DOC cannot countervail those loans or investments by those private banks not entrusted or directed. Moreover, those banks then can serve as benchmarks for any other banks.

Indeed, this interplay between “entrusts or directs” and “benefit” explains why the DOC made the overbroad finding of entrustment or direction in the first instance. The DOC realized that it had to disqualify all of the Korean banks so that none of them would be available to serve as benchmarks. These other benchmarks would reinforce the conclusions that DOC could and should have drawn based on Citibank as a benchmark.

We thank the Panel for its time, and look forward to the next round of written questions that will allow us to address any additional specific areas of concern.

ANNEX D-3

COMMENTS OF KOREA ON THE US OPENING STATEMENT AT THE SECOND SUBSTANTIVE MEETING IN THE US DRAMS CASE (DS 296)

21 July 2004

I would like to make a few points about the US argument on new information. First, as a legal matter, the Panel has discretion to consider whatever information it finds useful. That is significance of the SCM Agreement not having a provision like Article 17.5 of the Anti-Dumping Agreement.

Second, as a practical matter, we agree that the Panel should not be undertaking *de novo* review. But that argument goes to the way in which the evidence is being used, not the mere existence of evidence. If there is some information that helps clarify what the authority did during the investigation, there is no reason that the Panel cannot use that information to understand better what the authorities did and what information the authorities considered.

Third, in this case the United States has seriously exaggerated the extent and use of new information. Let me review the main items.

With respect to the default rates, this information serves a very narrow purpose. We argue at paragraph 148 of our second submission that the information about cumulative default rates could easily have been provided if DOC had asked. We have not and are not asking the Panel to use this information for any recalculation or any other purpose. We are simply illustrating how easily Korea could have responded if we had been asked.

With respect to the MOU, the US argument is quite disingenuous. As paragraph 183 of the US First Submission shows, the DOC reviewed such documents during the verification, and offered its own characterization of the MOU. All Korea has done is provide the Panel with the MOU itself, so that the Panel can itself test whether the DOC has fairly characterized the document reviewed at verification. The US argument is basically that it can review the MOU, but the Panel cannot. This argument is absurd.

With respect to the sequence of meetings leading to the Hynix enrollment in the KDB programme, we cited specifically to the DOC verification report. We refer the Panel to Exhibit GOK 61, which provides the DOC document. Even if Hynix made a minor misstatement in its questionnaire response, when the DOC investigation collected additional and more detailed information, the DOC cannot ignore that information.

With respect to the FSS document in Exhibit GOK 50 and para 83 of the GOK Second Submission, this information is simply responding to a US argument at para 52 of the US First Submission. If the United States can draw an inference from a newspaper article, and refer to Hynix as being "conspicuously absent", all without any citation to the DOC determination below, then Korea should be allowed to respond to that innuendo. Exhibit GOK 50 does nothing more.

With respect to the alleged pressure on credit rating agencies, we are simply responding to a new argument raised in the US First Submission. At the outset, we note that this whole line of argument is secondary, and does not really address alleged entrustment or direction of the Hynix

creditors. The Panel thus can and should ignore this US argument entirely. The US First Submission does not identify where DOC had made any finding about this issue, and we could not find any discussion in the DOC decision memorandum provided at Exhibit GOK 5. So Korea's goal was simply to let the Panel know that these various accusations reported in the press, and included along with hundreds of other articles submitted by Micron in the case below, had been denied by the FSS at the time.

Finally, the United States goes on at some length about the CRPA. At the outset, we note that this Korean law has been on the DOC record, and much of the Korean argument is simply clarifying, based on citations to the relevant provisions, how this Korean law works. That fact that DOC may have misunderstood the CRPA does not make these misunderstandings "evidence" to support the DOC conclusions. Moreover the Korean argument is based substantially on the evidence before the DOC. In particular, we cite to Exhibit US 125, which is the relevant Hynix financial statement. The United States professes surprise about the fact of mediation, but the text of the CRPA specifically provides for mediation in Articles 29 and 32, and the notes to the Hynix financial statement specifically note this fact. If the DOC did not read the documents very carefully, that is not our fault.

We concede that the actual payment with interest is a fact not before the DOC. But what was before the DOC are the facts that the zero coupon debenture was proposed, but then rejected. That is precisely why the option 3 banks went to mediation, as the financial statement discloses. Moreover, the DOC knew that Hynix had made a particular reserve, in anticipation of losing this point in mediation. Thus, the only new fact is the final outcome of the mediation in 2002. But this final outcome is not really the issue. The United States adopted as "fact" a scenario that was not at all a fact based on the financial statement before the DOC.

In summary, the United States has dramatically exaggerated the extent of new information, in part because the United States must realize now that its theory of GOK control is at odds with the actual text and operation of the CRPA. We believe all the Korean arguments can be fully supported with information before the DOC. They do not in any way ask the Panel to conduct a de novo review. Rather, they will help the Panel in discharging its responsibilities under Article 11 of the DSU. If the Panel has any questions about any specific points, we are happy to address those either today, or in the form of answer to written questions.

ANNEX D-4

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

2 August 2004

The Commerce Department's Subsidy Determination

1. ***Korea's Submission of New Information:*** Korea's second written submission and answers to the Panel's questions are replete with information which was never provided to the DOC at any time during its investigation, notwithstanding the DOC's extensive requests for information. All of this new information – some of which is contradicted by evidence that was submitted during the investigation – should be disregarded by the Panel. Prior panels have recognized that in disputes involving the review of a determination by an investigating authority, the consideration of new evidence by a panel is incompatible with the principle that "a panel is not to perform a *de novo* review of the issues considered and decided by the investigating authorities".

2. Korea's submission of new evidence illustrates its continuing efforts to have the Panel reweigh the facts. It is remarkable that Korea so blithely has ignored its own admonition that the focus must be on the "evidence before the agency" at the time of its determination. We are quite certain that if, for example, the United States had provided the Panel with information showing that prior to its privatization in December 2003, the GOK formally acknowledged to the WTO its legal and practical control over Kookmin Bank, Korea would object strenuously on the grounds that the information was not on the record.

3. It is equally distressing that Korea's second submission and responses to the Panel's questions are laced with many assertions of fact without citation to any support in the underlying record. An objective assessment of Commerce's explanation of how the record evidence supported its determination will lead the Panel to find that Commerce's determination was entirely consistent with the SCM Agreement.

4. ***Financial Contribution, Benefit, and Specificity:*** Korea, based on a novel and fundamentally flawed interpretive analysis, and some verbal sleight of hand, concludes that the facts of this case dictate the appropriate interpretation of the Agreement. Specifically, Korea argues that "in the context of the Hynix restructuring" only the term "directs" is relevant. Thus, Korea argues for purpose of this case the Panel should read the term "entrusts" out of the SCM Agreement. There is absolutely nothing in the text of subparagraph (iv) that even remotely suggests that the task delegated to a private body must involve the administration of a formal "government programme".

5. Korea argues that the term "directs" can only mean "orders" because the French and Spanish verbs – "ordonner" and "ordenar" – *translate* into English as "to order". The drafters could easily have used the term "orders" in the English text for Article 1.1(a)(1)(iv), but they did not. The drafters used the term "directs". While "order" is certainly one meaning of "directs", it is not the only meaning.

6. The United States has consistently taken the position that whether there is government entrustment or direction within the meaning of subparagraph (iv), requires consideration of whether a government "gave responsibility to", "ordered", or "regulated the activities of" private bodies to "carry out" financial contribution functions.

7. The United States has explained in great detail – relying entirely on record evidence – the factual and legal bases for the Commerce Department's determination that the GOK pursued a policy to support Hynix and prevent its failure and that the GOK entrusted and directed Hynix's creditors to effectuate that policy. Korea does not deny the existence of GOK support for Hynix. Nor could it do so with any credibility given the explicit statements of government officials from the Blue House and the Financial Supervisory Commission (FSC), as well as from Economic Ministers, regarding government support of Hynix. Rather, Korea suggests that after the Economic Ministers meetings in late 2000, the evidence of the GOK's Hynix policy dries up. However, the extensive evidence of GOK actions over the course of the entire 10-month period of the Hynix bailout – as documented in our previous submissions – belies Korea's claim. It also bears mentioning that in the midst of the planning for Hynix's October 2001 restructuring and recapitalization, a high-level Hynix official acknowledged that "We won't be going bankrupt. The Korean government won't let us fail".

8. Korea's allegations of "gaps" in the evidence rests on its view that a bank- and transaction-specific analysis is required. We strongly disagree. The concept of government entrustment or direction of a task does not require that the government micro-manage those given responsibility for carrying out that task. Moreover, governments typically have a wide range of tools at their disposal to deliver a financial contribution indirectly. These tools may vary greatly in terms of their transparency. If subparagraph (iv) is to have any meaning, it is essential to recognize the importance of examining, on a case-by-case basis, all of the evidence surrounding possible government entrustment or direction, and to recognize reasonable inferences that may be drawn from that evidence. It is Korea's suggestion that such an analysis is impermissible that the Panel should find alarming. Given the nature of indirect subsidies, the type of rigid evidentiary standard advocated by Korea would render subparagraph (iv) virtually meaningless.

9. Finally, the United States will touch very briefly on the topics of "benefit" and "specificity". As a general matter, Korea offered nothing new on these issues in its second submission. In response to the Panel questions, however, Korea states that, although it does not challenge the conclusion that the KDB Fast Track Programme constituted a financial contribution, it does challenge the existence of any benefit from, and the specificity of, the programme. Given Korea's concession that the KDB Fast Track programme constitutes a financial contribution, it is difficult to fathom how Korea can argue that financial contributions provided by banks under the Fast Track programme could themselves serve as benchmarks for determining the benefits from those very same financial contributions. Korea offers no explanation for this dichotomy.

10. With respect to specificity, as discussed earlier, Korea's argument concerning the timing of Hynix's nomination for the KDB Fast Track programme is contradicted by the record evidence submitted by Hynix. Moreover, Korea entirely ignores the fact that in the one-year existence of the Fast Track programme, only six companies *in total* participated in the programme, four of which were Hynix and its Hyundai affiliates.

The ITC's Injury Determination

11. ***Subject Import Volume was Increasing:*** Korea's arguments that volume did not increase are based entirely on the assumption that "volume" does not mean the volume of subsidized subject *imports*, but instead means the volume of all Hynix-brand products being sold in the US market. A brand-name analysis was not appropriate under the circumstances and would contradict the SCM

Agreement, because a brand-name analysis would not have corresponded to the relevant enquiry, which is to ascertain the effect of subsidized subject imports on the domestic industry.

12. ***Korea Cannot Explain Away the Increased Volume of Subject Imports:*** Even if, as Korea asserts, subsidized subject imports gained market share in the US market only by replacing products produced by Hynix's Eugene facility, any such gain was at the expense of the domestic industry because the Eugene facility was part of the domestic industry. Moreover, Hynix was not principally using Eugene products to service the US market.

13. ***Korea's Other Volume Arguments Also Fail: Context Matters.*** Consistent with the approach endorsed in *Thailand – H-Beams*, the ITC put the import figures and trends into the factual context of the DRAMs industry and the circumstances of the DRAMs investigation. As the ITC determined, 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. Korea concedes that Article 15.2 of the SCM Agreement does not impose any numerical threshold on what is a "significant" volume or a "significant" increase in volume.

14. ***Data Arguments.*** The Panel should disregard Korea's continuing efforts to assign values to the confidential volume data considered by the ITC. There is no basis to use data from Hynix's importer questionnaire response – however compiled – as a proxy. Moreover, there are a number of problems with GOK Exhibit 62, problems that do not exist with respect to Confidential US Figure 1. Whereas Confidential US Figure 1 rightly includes company transfers in the calculation of Hynix's US shipments of subsidized subject imports, GOK Exhibit 62 does not include such transfers. GOK Exhibit 62, therefore, presents a distorted picture of Hynix's US shipments of subsidized subject imports.

15. ***Korea Has Not Shown any Shortcomings in the ITC's Price Effects Analysis:*** Underselling by subject imports increased between 2000 and 2001 at a time when the volume of subsidized subject imports was increasing, domestic market share was declining, and underselling of standard products by non-subject imports was relatively stable. The underselling by subsidized subject imports ballooned to 69.8 per cent of all observations in 2002, and underselling by subsidized subject imports was at a much higher frequency than underselling by non-subject imports at that time. While not required to do so, the ITC *did* conduct a disaggregated analysis, which showed that Hynix's subsidized subject imports were the lowest priced product more often than products from any other source.

16. Contrary to Korea's assertion, subject imports can have significant adverse price effects if they force domestic producers to lower their prices in order to retain market share. With respect to the ITC's conclusion that subsidized subject imports significantly depressed prices in the US market, to the extent that Korea is implying that evidence of price leadership is required under the SCM Agreement, it is wrong. Second, the ITC found that factors other than subsidized subject imports could not explain the unprecedented price depression experienced during the period of investigation. Third, Korea's assertion that non-subject imports are completely fungible with the domestic like product is simply not supported by the evidence in this investigation.

17. ***The ITC's Impact Analysis Was Consistent with the SCM Agreement:*** Korea tries to rebut the ITC's impact analysis with snippets of information about individual producers. These snippets of information pertain only to individual producers, and are taken out of context and/or based on the company's global operations and/or operations on a broader array of products.

18. ***The ITC's Determination Was Also Consistent with Article 15.5 of the SCM Agreement:*** The ITC's determination more than satisfies the standard articulated by Korea of "some causal connection" between subject imports and the material injury to the domestic industry, whether or not

the Panel examines the data under a correlation lens, a conditions of competition lens, or some other lens. A brief summary of the data is provided in Figure US-5, attached to this statement.

19. The ITC examined known factors other than the subsidized subject imports which at the same time were injuring the domestic industry to ensure that it did not attribute injury caused by such other factors to the subsidized subject imports. The ITC provided a thorough evaluation of known causes of injury other than the subsidized subject imports in its determination. The ITC explicitly agreed with Hynix that there were capacity increases both globally and in the United States during the period of investigation, but its analysis did not stop there. The ITC recognized that capacity increases lead to increased supply and that imbalances in supply lead to the characteristic boom and bust phases of the DRAM industry's business cycle. At the same time, the ITC found that the business cycle, as well as other factors affecting prices, simply did not explain the dramatic price declines experienced during the period of investigation. The other factors affecting prices that the ITC examined included the operation of the product life cycle and the slowing in the growth of demand at the end of the period of investigation. Korea continues to mischaracterize the evidence as showing a dramatic decline in demand. The evidence showed that demand continued to increase throughout the period of investigation, but the growth in demand was not as great at the end of the period of investigation. Korea simply fails to meet its burden of demonstrating how the United States failed to comply with the requirements of SCM Agreement Article 15.5.

Article 19.4 of the SCM Agreement and Article VI:3 of GATT 1994

20. Korea has failed to demonstrate that the United States has levied duties at all, let alone levied duties inconsistently with Article 19.4 and Article VI:3. Korea recognizes that the word "levy" is defined in footnote 51 of the SCM Agreement as "the definitive or final legal assessment or collection of a duty or tax", but Korea ignores the fact that what has to be "definitive" for purposes of Article 19.4 is not the "duty", but rather the "assessment or collection" of the duty. Korea concedes that the United States has not yet "collected" any countervailing duties, and offers no explanation as to how the United States has "assessed" countervailing duties.

21. Why Korea chose to invoke Article 19.4 and Article VI:3 is Korea's business. However, those provisions cannot be rewritten under the guise of interpretation in order to accommodate Korea's litigation choices.

Korea's Consultation Request Failed to Comply with Article 4.4 of the DSU

22. The Panel should reject Korea's claims regarding Commerce's countervailing duty order because Korea's consultation request failed to comply with Article 4.4 of the DSU. Korea refused to indicate any provision of a WTO agreement with which it considered the countervailing duty order to be inconsistent, even after the United States pointed out this failure to Korea. Korea claims that its second consultation request "specifically cited to Article VI:3 of GATT 1994," but the second consultation request does not mention Article VI:3.

23. Article 4.4, at a minimum, requires an indication of at least one provision with which a measure is considered to be inconsistent. While the requirements of Article 4.4 are minimal, they cannot be blithely ignored. Moreover, the United States promptly informed Korea of the defect in its second consultation request, and subsequently explained the defect to the DSB.

24. The United States does not believe that a failure to comply with Article 4.4 can be excused by an alleged absence of prejudice, and Korea cites nothing to support such a proposition. However, to the extent that the Panel considers a showing of prejudice necessary, the United States believes that it was prejudiced by Korea's *repeated* refusal to honour the US right to receive an indication of the legal basis behind Korea's consultation request insofar as the countervailing duty order was concerned.

ANNEX D-5

EXECUTIVE SUMMARY OF THE CLOSING STATEMENT OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

2 August 2004

Standard of Review

1. We just heard our Korean colleague say that the Panel must decide whether import volume was significant. Of course, that is not the issue before the Panel. Instead, the issue is whether the ITC's conclusions regarding import volume were reasonable. Based on the discussion over the past few days, we believe the Panel fully understands this.

The Commerce Department's Subsidy Determination

2. At the last meeting the Panel asked, what must the government *do* for there to be an indirect subsidy? We have thought a great deal about this question and we have explored it with the Panel. In the end, we have concluded that the only answer is the one found in the SCM Agreement itself – the government must "entrust" a private entity or "direct" a private entity to make a financial contribution. That is, the government must set the task, the task must involve making a financial contribution, and the government must give responsibility for carrying out that task to a private entity. Thus, we know what the government must do. We also know based on the ordinary meanings of "entrust" and "direct" what the government need not do. That is, the government does not have to have a formal programme or dictate precisely how that task is carried out. Moreover, nothing in the ordinary meaning of entrustment nor direction suggests that the party tasked must believe that what it is being tasked to do is totally irrational – that it is something no one would do absent government intervention. The issue is simply whether that party acts at the behest of the government to provide a financial contribution.

3. So, once again, let us step back from that impressionist painting and look at the whole picture rather than focusing on the dots. In this case, there is ample evidence that the government set the task; *i.e.*, to give Hynix the financial assistance needed to resolve the company's financial crisis. There is also ample evidence that the banks had not been relieved of that task prior to the October restructuring. Explicit statements by Ministers and by Hynix itself demonstrate that; just prior to the October restructuring the government had publicly stated that Hynix was going to get whatever it needed.

4. We also know that, for the most part, the government did not directly give Hynix the funds it needed. So, how did the government implement its decision? Of course, the government did not make the decision and then simply do nothing to implement it. The government turned to Hynix's creditors and gave them responsibility for completing the task. Korea argues that the banks acted solely for commercial reasons. But, the record supports a different conclusion. Record evidence for all elements of the Hynix bailout, such as the loan approval documents and the Kookmin prospectus, indicate that even the banks that were not controlled by the government were acting at the government's behest; *i.e.*, that the government had asked them to assist Hynix and they were doing so

in accordance with that request. There is also the evidence of Hynix's dismal financial condition, evidence that the banks were classifying the chances of recovery on Hynix's debts as doubtful at the same time they were providing additional assistance, and evidence of government coercion of recalcitrant banks. Based on the totality of that evidence, it was certainly reasonable for Commerce to conclude that the banks were, in fact, acting at the behest of the government, and not purely for commercial reasons.

5. In addition, there is the fact that delegating the task of saving Hynix to the banks was a readily available option for the GOK because most of Hynix's debt was held by government banks, which the government knew it could trust to carry out its decision. There was also a system – the Creditors' Council – through which those government banks could dictate terms to other Hynix creditors as well, particularly if it was demonstrated to the banks that the government was willing to step in as the enforcer, doing a little arm-twisting where necessary. While the GOK denies these allegations by the banks, it cannot explain them under its theory of purely commercial behaviour.

6. In sum, the government did not micro-manage the Hynix bailout; but there is ample evidence that the banks were acting at the government's behest in bailing out Hynix. Thus, as the EC noted, this is not a close case. The government's hand – as policy maker, facilitator and enforcer – is all over the Hynix bailout. Without question, based on the evidence as a whole, one can objectively and reasonably conclude that the Hynix bailout was a financial contribution. Frankly, if the evidentiary bar is set so high that the evidence in this case is not sufficient to establish a financial contribution, then the indirect subsidy provision in Article 1 is utterly useless.

The ITC's Injury Determination

7. Throughout these proceedings, Korea has insisted that the United States, through the ITC, "violated" US obligations under the SCM Agreement, "ignored" record evidence, and considered other evidence in a "vacuum". Notwithstanding its repeated arguments, Korea has fallen far short of satisfying its burden of proving that the United States acted in a WTO-inconsistent manner. Indeed, several of Korea's factual and legal arguments contain no reference to the factual record, the ITC's determination, the SCM Agreement, or reports reviewing other investigating authorities' determinations.

8. Korea has repeatedly asserted that the volume of subject imports declined. The facts, however, showed that subject import volume and market share increased, as even Hynix's counsel admitted at the ITC's hearing. In fact, what Korea is really alluding to in its argument is the Hynix brand (composed of subsidized Hynix products made in Korea and products produced at Hynix's US facility in Eugene, Oregon), not Hynix's subject imports. But, Korea cannot point to any provision in the SCM Agreement for the investigating authority to consider volume on a brand-name basis in circumstances such as in the DRAMs investigation, where brand names do not reflect country source and thus do not correspond to the relevant legal inquiry: namely the effect of subsidized subject imports on the domestic industry.

9. Korea never explained why the ITC's rejection of Hynix's proffered reason for the increase in subject import volume was inconsistent with the SCM Agreement. Hynix's Eugene facility was part of the domestic industry, so even if Hynix substituted subsidized imports for DRAM products made by its US affiliate in Eugene, Oregon, those imports injured the domestic industry. The ITC provided a satisfactory explanation for its rejection of Hynix's factual argument, but Korea simply disagrees with the reason. As for Korea's argument that Hynix has no obligation to supply the US market first from its Oregon facility, and then supplement it with imports, Hynix can supply the US market with imports, as Samsung did, but only if those imports are fairly traded. Hynix's imports benefited from unfair subsidies, as my colleagues have explained at length.

10. The ITC found significant price undercutting by subsidized subject imports at high margins and increasing frequencies, no matter how the data were examined. Korea calls the ITC's pricing analysis "crude". In fact, the weighted average pricing comparisons that the ITC conducted were tailored to the conditions in the DRAMs industry and were painstaking and representative. The ITC calculated a weighted average for subject imports and offset instances of overselling with instances of underselling. It compared the weighted average price for subject imports with the weighted average price for domestic producers' US shipments. Thus, the ITC's analysis was consistent with the relevant legal inquiry under the SCM Agreement, which is the price effects of subsidized subject imports on the domestic industry.

11. Although Korea has yet to demonstrate that a brand-name analysis was required, let alone permitted, under the SCM Agreement given the facts of the DRAMs investigation, the ITC also examined the pricing data on a disaggregated basis by brand name by source, and this analysis confirmed the results of its weighted-average pricing analysis. The disaggregated analysis revealed that Hynix was the lowest-price source more often than any other source.

12. Korea repeatedly accuses the ITC of conducting its examination of the volume and price effects of subsidized subject imports in a vacuum. But, it is Korea that wants the Panel to look at certain facts and findings in a vacuum. Korea wants the Panel to look at the absolute volume of subject imports and the increases in subject import volume both absolutely and relative to domestic consumption and production in the abstract. But, the SCM Agreement does not require such an approach, because it does not define any volume or increase as "by definition" significant or insignificant.

13. As evidenced by its lengthy discussion of the relevant conditions of competition and business cycle in a separate section of its determination, and by the integration of this discussion into its analysis of the volume, price effects, and impact of subsidized subject imports on the domestic industry, the ITC clearly examined the evidence and the relevant factors in context. Subsidized subject imports were highly substitutable for domestic DRAM products. In this commodity market, price was important, and purchasers reacted quickly to price undercutting through the rapid dissemination of pricing information to certain purchasers, including through such mechanisms as most-favoured customer, best price clauses, and other informal arrangements. Demand was inelastic, so lower prices were unlikely to generate additional demand for the product, and demand continued to rise each year. Because DRAM producers must invest constantly in new capital equipment and research and development, they had to maximize capacity utilization.

14. Under these circumstances, a given volume can be more harmful than in other cases involving a highly differentiated product because it is more likely to have a direct impact on the market, particularly in terms of purchasers' willingness to switch to, or increase their purchasing of, subsidized subject imports, and/or use the low prices of subsidized subject imports as leverage to extract lower prices. Indeed, under these circumstances, it was not even necessary for subsidized subject imports to gain market share, if they forced the domestic industry to lower its prices in order to retain its share of the market.

15. The SCM Agreement, which employs disjunctive language, does not even require a finding of a significant increase in subsidized subject import volume, let alone a significant increase in market share. Here, however, not only were there significant adverse price effects in the form of significant underselling and significant price depression, but there was also a significant volume of subsidized subject imports and significant increases in subject import volume, no matter how measured. As the ITC explained, the commodity-like nature of the highly substitutable domestic and subsidized subject DRAM products magnified the ability of a given volume of imports to impact the domestic market and industry. In such a commodity market, which adjusts quickly to price changes, the ITC found that significant monthly price disparities between suppliers would not usually be expected.

16. Thus, it found a pattern of frequent, sustained underselling by subject imports, often at high margins, was especially significant in the context of the DRAM market, and could be expected to have particularly deleterious effects on domestic prices. Although certain other factors played a role in the price declines, 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. 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. In the absence of significant quantities of subject Korean product competing at relatively low prices, domestic prices would have been substantially higher. Korea never seriously challenged the ITC's analysis of the impact of subsidized subject imports on the domestic industry.

17. In the DRAMs investigation, there was a very high causal nexus between the material injury suffered by the domestic industry and the subsidized subject imports, no matter what standard the Panel applies, and no matter what lens the Panel uses to examine the evidence. Korea's contrary arguments are predicated on the assumption that the volume of subsidized subject imports was declining, an assumption that has no support in the record evidence.

18. Finally, Korea has failed to demonstrate why the ITC's evaluation of factors other than subsidized subject imports is inconsistent with US obligations under the SCM Agreement. As Korea stated, there is no requirement in the SCM Agreement for an investigating authority to quantify injury, nor has the Appellate Body ever said there was any requirement to do sophisticated modelling or an econometric analysis of the data. The Appellate Body has explained that to "separate and distinguish" means that an investigating authority is to provide a satisfactory explanation of the nature and extent of the injurious effects of other factors, as distinguished from the injurious effects of the unfair imports. The ITC's determination shows that the ITC not only examined all such factors, but provided a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the unfair imports. Korea has been unable to show why the ITC's explanation is inadequate.

19. Korea would have the Panel believe that the Government of Korea's intervention in the market to artificially sustain the existence of the number three producer of DRAMs in the world had no adverse consequences on Hynix's competitors. We respectfully disagree. While the consequences of Korea's subsidization of Hynix may have varied from market to market, the evidence before the ITC – and the ITC's analysis of that evidence – leave no doubt that subsidized subject imports from Hynix caused material injury to the US DRAMs industry.