

ANNEX B

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

Contents		Page
Annex B-1	Executive Summary of the Statement of Korea	B-2
Annex B-2	Executive Summary of the Statement of the European Communities	B-9
Annex B-3	Third Party Oral Statement of China	B-13
Annex B-4	Third Party Oral Statement of Japan	B-16
Annex B-5	Third Party Oral Statement of Chinese Taipei	B-19
Annex B-6	Third Party Oral Statement of the United States	B-22

ANNEX B-1

EXECUTIVE SUMMARY OF THE STATEMENT OF KOREA

(15 November 2004)

INTRODUCTION

1. At the outset, I would like to comment on a few general issues. First, the EC has misstated the standard of review. As discussed in its First Submission,¹ the EC's attempt to rely on the standard of review set out in Article 17.6 of the Anti-Dumping Agreement. Korea submits that this is flawed, because the SCM Agreement does not contain such a standard of review. The Panel in *US-Hot Rolled Leaded and Bithmus Carbon Steel* (DS138) firmly rejected the argument that this special standard of review should be applied outside the anti-dumping context. Therefore this Panel should simply apply the standard of Article 11 of the DSU.

2. I would also like to clarify some confusion in the EC First Submission about the burden of proof. The EC confuses the burden of proof during the underlying investigation, which is borne by the investigating authorities, and the initial burden of proving inconsistency in the context of the WTO dispute settlement proceedings, which is borne by the complaining party. Korea wishes to reiterate that the investigating authorities can not request a respondent to prove the absence of elements of a subsidy as a condition of a negative determination. Doing so constitutes an impermissible shift of the burden that the authority itself must bear. If there is incomplete or insufficient evidence for one of the elements of a subsidy, then there is no basis for the authority to find a subsidy in the first instance.

EC INJURY INVESTIGATION – CLAIMS OF ERROR

Article 15.1 Standards

3. Article 15.1 requires that the competent authority have "positive evidence," and that evidence must receive "objective examination." The Appellate Body has confirmed that evidence supporting a finding of injury must be affirmative, objective, verifiable, and credible and emerge from an unbiased investigation.² Further, Article 15.1 is an overarching provision requiring each of the substantive provisions of Article 15 to be read in light of Article 15.1. Thus, all aspects of the injury investigation must be based on positive evidence and an objective examination of the facts.

4. The EC tries to make light of these obligations. The EC seems to believe that if an authority considers some matter, then its job is finished.³ Korea believes that an "objective examination" requires more. We agree that panels are not to re-weigh the evidence, and substitute their judgment for that of the authorities. But at the same time, as the Appellate Body has recognized, Panels are not

¹ EC First Submission, paragraph 41.

² See *US – Hot Rolled Steel (AB)*, at paras 192-193 (discussing parallel issues in anti-dumping context). Note that we use the same short forms in this oral statement that we used in the Korea's First Submission.

³ EC First Submission, at paras 41-42.

to "simply *accept* the conclusions of the competent authorities."⁴ Rather, panels must carefully and objectively examine the facts, the reasoning provided by the authority, and the logical connection between the two. In this case, the EC reasoning bears so little relationship to the facts that the EC determination failed to meet the requirements of Article 15. If the facts conflict,⁵ the authority still must draw reasonable inferences and explain the factual and logical basis for that inference.

Significant Increase in Subsidized Imports

5. We begin with the issue of allegedly increasing imports. The EC mechanically cited import indices in its Definitive Regulation, but largely ignored any meaningful analysis of the significance of those figures. Given the unique nature of the DRAM market, and the ever-increasing total bits supplied and consumed, an increase in the number of bits being imported is meaningless. Rather, based on the facts of this particular case, an objective authority must examine the increased imports relative to consumption on an overall basis, and relative to the market share of the other suppliers. An objective authority would also have considered imports relative to production, which in this case would have confirmed the declining role of the imports. Otherwise, the authority simply cannot make any reasonable and objective assessment of the "significance" of any alleged increase in imports.

6. The EC takes an overly narrow approach in interpreting the alternatives contained in Article 15.2 of the SCM Agreement. By specifically requiring the authorities to make findings of "significant" volume effects, the text of Article 15.2 does not allow the investigating authorities to stress one factor at the expense of others, particularly when the factor being ignored in fact provides a more appropriate basis for comparison. The investigating authorities should conduct volume analysis based on both quantitative and qualitative factors. It is not enough simply to find some increase. It is all the more necessary in the case of DRAMS, where only the relative increase provides a meaningful parameter to analyze volume effects.

7. Under Articles 15.1 and 15.2, the national authority must prove that there was material injury to the domestic industry caused by subsidized imports, not the imports from the country being investigated as a whole. In this case, however, the EC mistakenly considered the volume and market share of imports from Korea as a whole, even though the EC itself had already concluded that a portion of those imports were not subsidized. This constitutes a manifest error and is inconsistent with Articles 15.1 and 15.2.

8. The EC's discussion of Korea as a whole takes on an Orwellian twist when the EC argues that the LG Semiconductor ("LGS") shipments prior to the 1999 merger should be added to non-Hynix imports from Korea.⁶ As the merger with LGS took place with Hynix, and not with any other Korean DRAM producer, there is no justification for adding the import data of LGS to the volume of imports from Korea instead of that of Hynix. By doing so, the EC attempts to create the erroneous impression that Hynix imports increased substantially faster than imports from Korea as a whole.

9. The EC argues⁷ that Hynix failed to include the information on LGS data, and this information could not be verified. The implication of this argument is that the EC was not aware of the merger issue, which is completely wrong. As Korea has pointed out, Infineon's complaint provided data that raised the issue of the need to collapse Hyundai and LGS when discussing Hynix trends. Korea refrains from going into details, which are provided in paragraph 110 through 121 of its First Submission concerning the EC's treatment of information about LGS imports. It suffices to say that the EC was aware of the relevance of the merger in the context of volume analysis and had in its possession the necessary information. The EC can not ignore the LGS data submitted by Hynix on

⁴ US - Lamb Meat (AB), at para 103 (emphasis in original).

⁵ EC First Submission at para 41.

⁶ See para. 177 of Definitive Regulation.

⁷ EC First Submission, at paras 82-83.

the grounds that verification was not possible as the relevant data was already provided by the complainant itself. At a minimum, the LGS data contained in the complaint should have been taken into account. Ignoring the available data is an egregious violation of the objective examination requirement.

10. Perhaps recognizing the weakness of this argument, the EC goes on to argue that it did not have the information in time.⁸ We disagree. As Korea's First Submission documents at some length,⁹ Hynix raised this issue early and often. Even if the EC was slow to recognize this issue, this late recognition does not excuse the Definitive Regulation persisting in erroneous analysis.

11. This persistent error is particularly baffling, given the petition filed in this case. According to Infineon's own complaint, the data show a significant drop in Hynix market share, from about 20 per cent in 1998 to 15 per cent in 2001. Infineon could admit this reality, since Infineon thought it would be able to include increasing imports from Samsung in the total analysis. Once Samsung was excluded as not being subsidized, the approach had to change to find any significant increase in imports. Thus, the EC's finding of an "increase" in market share rests solely on improper manipulation of the data.

12. Korea reiterates that the fact that Hynix market share fell over the period being investigated explains why the EC had to struggle so hard to find some way to create the appearance of any increase.

Significant Price Effects of Subsidized Imports

13. We now turn to the issue of price effects. The EC made findings about pricing at odds with both the facts of this case, and with basic economic logic. By far the most important specific fact is that at the height of the alleged subsidization of Hynix in 2001, Hynix was losing market share in the EC market, not gaining share. If price were truly as important to customers as the EC has stated, and if Hynix were truly the lowest price supplier in the EC market, Hynix would have gained market share in 2001, not lost share. Therefore, it defies economic logic to blame Hynix pricing, when Hynix was losing market share for a commodity product.

14. The EC tries to brush aside economic logic.¹⁰ In Korea's view, economic logic is a very important context within which authorities and panels can and should evaluate arguments about pricing. The text of Article 15.2 explicitly focuses on the "significance" of price undercutting or other price effects, and thus imposes a higher standard than just finding some price effects. Authorities must consider what is really happening in the market, and then address those realities in a credible and objective manner. It is not enough mechanically to check off some box confirming that there were some price effects. The authorities must instead find and explain "significant" price effects from imports, a much higher standard than simply finding some price effects.

15. The EC undertook three different approaches to analyzing price undercutting, but then inexplicably chose to focus on the only method that demonstrated price undercutting without explaining why it jettisoned the two other approaches. It is critical to note that the two other findings demonstrated no significant price undercutting by Hynix. The EC did not find any price undercutting when it properly compared average prices to average prices. Instead, the EC compared transaction specific prices by EC producers with an average price by Hynix, an approach that virtually ensures price undercutting whenever the two sets of prices are close. Korea submits that the price comparison approach used by the EC results in a completely distorted analysis, i.e., the average to transaction

⁸ EC First Submission, at paras 76-85

⁹ Korea First Submission, at paras at 111 to 121.

¹⁰ EC First Submission, at para 91.

comparison methodology has an inherent bias against the exporter as shown in Figure 6 of Korea's First Submission.¹¹

16. The EC discusses its pricing analysis at some length, and we will respond in our second submission. At this stage, we simply wish to highlight one very interesting admission. The EC argues that the "producer offering the lowest price will get the business,"¹² and calls this feature of the DRAM market "undisputed." Given this feature, the fact that Hynix lost market share thus becomes a powerful fact suggesting that others in the market were offering lower prices and winning market share.

17. The EC also brushed aside any meaningful discussion of other factors that affect pricing. This evidence before the EC demonstrated that DRAM market prices are affected by: (1) the general economic downturn and decrease of demand, which causes "inventory burn"; (2) excess capacity by other suppliers; and (3) imports from other suppliers. In its discussion of price effects from other factors, the EC dismissed them out of hand by concluding that either they only played some limited role in the market price decline or they are completely irrelevant. The EC thus failed to consider positive evidence on the record that showed factors other than Hynix price caused the significant drop of DRAM prices in 2001. Given the fact that the Hynix market share was indeed decreasing, the EC should have been particularly alert to other causes of the DRAM price decline.

18. If they had an open and objective mind, the EC authorities should have realized that low priced non-subsidized imports that were rapidly gaining market share caused the dominant price effects, and that any remaining effects of subsidized imports could not reasonably be considered "significant." Therefore, the EC finding was inconsistent with Articles 15.1 and 15.2.

Condition of the Domestic Industry

19. We turn now to the condition of the domestic industry. Article 15.4 requires an evaluation of all relevant economic factors and indices, and recognizes that the relevant economic factors and the weight to be given to each of those factors will differ from case to case.

20. Perhaps the single most important economic factor in the DRAM market is the notorious business cycle for DRAM producers. The DRAMs industry has endured a continuing history of "boom/bust" cycles. The evidence demonstrated that the DRAM industry had gone from the top of the boom (in 2000) to the trough of the bust (in 2001) during the period under consideration. Although the EC had to be aware of the existence of the notorious business cycle, it completely ignored the business cycle when analyzing the causes of the deterioration of the domestic industry's financial condition.

21. We believe the EC determination glossed over inconsistencies in what the domestic industry said to different audiences, and provided only a superficial examination of the condition of the Community DRAM industry. The EC did not meet the standards of Article 15.4.

Causation

22. We now turn to the particularly important issue of causation. Under Article 15.5, Members must demonstrate an explicit "causal relationship" between the subsidized imports and any material injury suffered by the domestic industry. The evidence before the EC demonstrated that there was no correlation between the trends in subsidized imports and the condition of the domestic industry. Hynix was losing market share while the domestic industry gained market share.

¹¹ Korea's First Submission, page 41

¹² EC First Submission, at para 101.

23. The EC tries to brush aside the significance of this lack of correlation.¹³ But these EC arguments have two serious flaws. First, the EC cites to absolute trends in imports, even though those trends make no sense in the DRAM industry. The number of "bits" of memory is always increasing. Hynix market share -- properly defined -- was declining. Perhaps recognizing the importance of market share, the EC proceeded to rely only on an improperly defined Hynix market share. Second, the EC cites to differences between the SCM Agreement and the Safeguards Agreement. Korea agrees the two agreements are different, but in this particular context the underlying language about "causation" in each agreement is basically identical. Moreover, the Appellate Body in *U.S - Hot Rolled Steel* expressly recognized the value of analogizing the concepts of causation in the two different agreements.¹⁴

24. Moreover, the non-attribution requirement in the third sentence of Article 15.5 requires the authority not to impute to subsidized imports any injury caused by other factors. According to the plain meaning of Article 15.5 as well as the unambiguous guidance from Appellate Body, the competent authority must "separate" and "distinguish" the injurious effects of factors other than subsidized imports to ensure they are not attributed to the subsidized imports.

EC SUBSIDY INVESTIGATION – CLAIMS OF ERROR

Facts Available

25. Before we turn to the issues of whether the EC properly found a subsidy, there are a number of issues about the EC use of facts available that must be addressed. The EC has twisted the concept of "facts available" in very disturbing ways. Under the EC approach, whenever a competent authority does not like a particular fact, or does not know how to respond to that fact, the authority may simply find some excuse to invoke "non-cooperation" and then dismiss the adverse fact. The EC has abused the narrow concept of "facts available" to dismiss important pieces of factual information in this case. The text of Article 12.7 and the related jurisprudence both demonstrate that the use of "facts available" should be exceptional and narrow. Korea believes that the Appellate Body discussion of "facts available" in the antidumping context provides useful guidance on this issue.¹⁵ In this case, however, the EC abused "facts available" to ignore other evidence when that evidence could not be reconciled to its outcome driven analysis.

Financial Contribution

26. We now turn to the EC arguments about subsidies. In this oral statement, we address the EC failure to show either financial contribution, or benefit. We focus on the more important issues here, but we will address all of the issues and all of the EC arguments in our second submission.

27. Under Article 1.1 (a)(1)(iv), "entrustment" or "direction" can be established only where there is government action so clear and unambiguous that the actions of private bodies can be imputed to the government itself.

28. The panel in *US – Export Restraints*¹⁶ held that the acts of entrusting and directing carry with them the following 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.

¹³ EC First Submission, at paras 167-172.

¹⁴ *US - Hot Rolled Steel (AB)*, at paras 229-234.

¹⁵ *US – Hot-Rolled Steel (AB)*, at paras 82-86. We recognize that the SCM Agreement does not have provisions analogous to Annex II of the AD Agreement. But since Annex II elaborates on Article 6.8 of the AD Agreement, which is nearly identical to Article 12.7 of the SCM Agreement, Korea believes that Annex II provides useful context to understand Article 12.7.

¹⁶ *US - Export Restraints*, at para 8.29.

This decision confirms that generalized statements of government intent or desire, or even general interventions in the market itself, cannot establish a financial contribution through a private body. Thus, it is required to show that each alleged government delegation or command be examined with respect to each party, and with respect to each task or duty.

29. Yet this is exactly what the EC did in this case. After its 14-month investigation, the EC failed to come up with direct evidence to prove GOK "entrustment or direction" of Hynix creditor banks. The EC relied on largely a collection of circumstantial evidence that cannot be corroborated or verified in a judicially reliable and meaningful way. When necessary to bolster its collection of circumstantial evidence, the EC applied "facts available" and substituted adverse inferences for evidence.

30. Korea believes that this Panel needs to decide the legal standard to apply over the course of this Panel proceeding as applied in *US – Export Restraints*. For now, we simply wish to object to the EC characterization of the GOK admitting that it took actions to push or "nudge" banks into any of the Hynix restructurings.¹⁷ When read in context, the cited portion of the Korea's First Submission makes quite explicit that we disagree with this characterization from the newspaper report. Our point was to highlight how little the EC has actually established. The EC took a newspaper statement about a single bank, and then jumped to conclusions about all banks. Such an approach simply does not comply with the standards of Article 1.1.

31. The EC also relies extensively on the fact that the GOK held ownership interests in certain banks involved in Hynix's restructuring. Mere ownership cannot establish direction or entrustment by the government. Such evidence of ownership simply cannot provide any basis to find an explicit and affirmative delegation or command to *all* banks, particularly banks with little or no GOK ownership. Korea reiterates that the Hynix creditors made their financial decisions under commercial considerations at each stage without any government intervention.

32. For instance, Hynix's October 2001 restructuring was carried out under a Korean law of general application. Well over 100 companies were restructured under this framework. Under the terms of the October 2001 restructuring, Hynix's principal creditors agreed on a menu of options they could choose in moving forward (or cutting ties) with respect to Hynix. The very existence of *choices* in the October restructuring contradicts the EC's suggestion that there was "entrustment or direction" by the GOK. The totality of circumstances of the October restructuring confirms the commercial reasonableness of the measure and negates any notion of "entrustment or direction." Further, the EC did not produce a single piece of evidence to demonstrate the constituent elements of "entrustment or direction" in the October restructuring.

Finding And Measurement Of "Benefit"

33. The second requirement for establishing a countervailable subsidy is that the competent authority must demonstrate that a "benefit is thereby conferred." As noted by the Appellate Body in *Canada – Aircraft*, a benefit analysis under Articles 1.1(b) and 14 requires a comparison of what was received by an entity versus what was available on the market. Moreover, the SCM Agreement defines benefit in the context of the experience of private actors in the market of the Member under investigation.

34. The EC goes on at some length about its approach to future risk, and its view about Article 14(a).¹⁸ We disagree that Article 14(a) does not set forth any specific rules. The text makes explicit that an authority must consider the "usual investment practice" of investors in "the territory of the member." This language provides a quite explicit benchmark for evaluating the existence of a

¹⁷ EC First Submission, at para 276.

¹⁸ EC First Submission, at paras 403-423.

benefit. Thus, contrary to the EC argument, there are explicit obligations that authorities must respect. Authorities do not have carte blanche to impose their own economic views on the investors in a particular WTO member country.

35. After initially finding no "benefit" on many issues in its *Provisional Regulation*, the EC changed its position in its *Definitive Regulation* and suddenly found the existence of "benefit." This change was wrong. Nothing that could affect the "benefit" analysis could have possibly changed since the *Provisional Regulation*: the market environment, terms of the loans, and credit ratings remained unchanged. In fact, the EC acknowledged that it changed its decision on the syndicated loan in the *Definitive Regulation* because of new information; *i.e.*, documents with respect to the Economic Ministers' meetings. Even if true, however, all this new information concerned only GOK "entrustment or direction," and had nothing to do with the EC's benefit analysis. As such, the EC's change of analysis for benefit was completely erroneous and unwarranted because it failed to engage in any meaningful discussion as to why it was changing its "no benefit" conclusion from the *Provisional Regulation*.

36. Setting aside the fundamental flaw of the EC's benefit calculation, which treated all allegedly countervailable programmes as a "grant" without regard to the circumstances to the nature of the transaction, the EC also made numerous mistakes in calculating the benefit even under its own methodology.

ANNEX B-2

EXECUTIVE SUMMARY OF THE STATEMENT OF THE EUROPEAN COMMUNITIES

I. OBLIGATIONS, FACT, EVIDENCE

1. The European Communities considers that, in exercising *judgment, in good faith*, pursuant to Article 3 of the DSU, as to whether assertions made before this Panel are even capable of being fruitful, it is helpful from time-to-time to refer back to the specific text of the *SCM Agreement*; to the facts; and to the evidence. It is a matter of considerable regret that Korea does not appear to share this view.

2. Korea has the *burden of proof*, and must adduce *evidence*. Yet its submissions are peppered with *bare assertion* unsupported by any evidence, and with *hypothesis*. For example, Korea repeatedly makes factual allegations about what it alleges to be the "usual method or practice" of the European Communities in relation to various matters,¹ but adduces no evidence in this respect. The European Communities hereby expressly contests and refutes all such bare factual assertions. Korea's casual approach is incapable, as a matter of law, of leading to a resolution of this dispute in Korea's favour – and rightly so.

3. For certain matters, the investigating authority was obliged to rely on the facts available, within the meaning of Article 12.7 of the *SCM Agreement*, and in this respect, the European Communities has two comments.

4. First, Korea states in its first written submission that "the EC alleges that ... the GOK lied in its questionnaire response and during verification." The European Communities would like to clarify that it has never expressly made this allegation and does not do so now – that word is chosen by Korea, not by the European Communities. Whether or not a respondent "lies" in an investigation, that is not the legal test provided for in Article 12.7 of the *SCM Agreement*. Pursuant to that provision, the question is rather whether or not the Member or interested party refused access to or otherwise did not provide necessary information within a reasonable period or significantly impeded the investigation. It is abundantly clear that this is precisely what happened in this case.

5. Second, the European Communities wishes to place on record in the strongest terms its view that Korea cannot now place before this panel unverified and unverifiable factual assertions or alleged copies of documents that are not part of the record before the investigating authority. Unlike other types of investigation, in a subsidies investigation the Member itself is also a respondent, and has a full opportunity to participate in the investigation. There are no circumstances, exceptional or otherwise, that could possibly justify Korea attempting to proceed in such a way at this late stage. Should the Panel even entertain such a possibility, a balanced approach would at the very least require the production of the very large number of documents – including documents no doubt highly prejudicial to Korea's case - that remain undisclosed by the Korean respondents.

¹ For example, First written submission of Korea, paras. 153 and 161.

II. SUBSIDY

6. When large subsidies are granted to save a national champion from impending doom, a careful scrutiny of the documents usually reveals that, during the relevant period, the granting Member has been busy singing two songs.

7. The *first*, generally necessary to appease national taxpayers and other national groups opposed to the subsidy, is that the market is in meltdown, the company in dire jeopardy, and the subsidy urgently necessary to avert disaster, for public policy reasons.

8. The *second* refrain, often repeated in a vain attempt to bamboozle investigating and judicial authorities into swallowing a counter-factual and unreal view of the circumstances, is that business is (or will soon be) booming, that the company is mean, lean and fighting fit, and that capital is pouring into the company because investors – including the government – think it's the best thing since sliced bread – a sure thing – **a safe bet**. Assertions of this type have been made with such frequency by the Korean respondents in this file, that I will spare the Panel a further re-iteration.

9. Well, these two tunes do not harmonise. They clash horribly. And they cannot plausibly co-exist, at least in relation to the same time period.

10. As lawyers, or as accustomed to listening to lawyers, we are all accustomed to legal arguments being made in the alternative. And there is nothing wrong with that, even if elements of the *reasoning* in the different legal arguments are, to some extent, in conflict with each other. However, it is *intolerable* to have two different versions of the *facts* underpinning a legal analysis, and no investigating or judicial authority will countenance that.

11. So what are the facts in this case? What was really happening in 2001? Well, you don't need a PhD in rocket science to figure it out. Condemning themselves from their own mouths, the Korean respondents have repeatedly asserted that in this market there was a "perfect storm" in 2001; and Hynix was right in its path, facing annihilation, but for Government intervention, for public policy reasons. *Quod erat demonstrandum*. Let's remind ourselves of some of the basic facts that are not seriously in dispute.

12. Starting in November 2000, the three Economic Ministers of Korea, no less, met repeatedly to decide what to do about Hynix. The Korean Ministers responsible for the national economy, for national industrial policy and for Korea's international competitiveness, for Korean state money. Not surprisingly, this went right to the top.

13. The Ministers *decided* to take *measures, initiated* by the Government of Korea, in pursuit of a Government of Korea *coordinated policy* to save Hynix, at all costs, and issued *directions* to that effect, relating to both the Syndicated Loan and the KEIC Guarantee. The detail of the directions, in terms of day-to-day management, is remarkable. Those directions were still being implemented on 9 January 2001, on 10 April 2001, on 30 June 2001, and at least right up until the end of the investigation period, on 31 December 2001.

14. The Government of Korea also put in place, also at least for the whole of the investigation period (1 January to 31 December 2001) the KDB Debenture Programme – another government backed bailout for Hynix (and the Hyundai group generally), which was by far the most important intended and actual beneficiary.

15. On 10 March 2001, the Government of Korea, acting *via* the Vice Commissioner of the Financial Supervisory Service, participated in the critical creditors meeting, precisely in order to

"nudge" – to use Korea's own words – the banks into accepting the arrangements for the May 2001 Rescue Package.

16. In October 2001, as the market and the financial situation of Hynix further dramatically deteriorated, most of the private banks and capital finally "jumped ship". The hard-core that remained to participate in the October 2001 Rescue Package were under the ownership, control, entrustment or direction of the Government of Korea.

17. Thus, if one takes a step back and considers the overall situation during the whole of 2001, a period during which the Government of Korea was heavily intervening to save Hynix, *via* the Syndicated Loan, the KEIC Guarantee and the KDB Debenture Programme, it just defies any reasonable logic that the Government of Korea simply lost interest in the May and October 2001 Rescue Packages. And it is simply impossible to accept, based on the facts, that during this period, in which the Government of Korea was acting urgently to save Hynix from disaster for *public policy* reasons, the banks were, *at the same time*, throwing good money after bad, based on *purely commercial* considerations. It may well be that, by this time, it had become clear to the continuing participants that Hynix was a "safe bet" – but that was not because of its outstanding condition and performance. It was simply because it had become abundantly clear that the Government of Korea would never abandon Hynix, and was in fact busy pouring public money and support into it. Only the best athletes may, in truth, be considered a safe bet – but not if they flunk the drugs test.

III. INJURY

18. A determination of injury must be based on *positive evidence*. To suggest that it is not is a serious allegation, that comes very close to calling into question the good faith of the investigating authority. This type of allegation is made repeatedly by Korea in this case – and it is utterly without foundation. It is, in any event, an incomprehensible allegation, given that much of the determinative evidence was provided *by the Korean parties themselves*, and the accuracy of the rest has not even been challenged. So just what exactly is Korea now alleging? That the information provided by the Korean parties during the injury investigation was also false or misleading or incomplete? That is hardly likely to advance Korea's case.

19. Essentially, the *specific* obligation on the investigating authority is to *examine, consider* and *evaluate* certain matters, no one or several of which can necessarily give decisive guidance. Manifestly, it results from the text of the measure at issue that this is precisely what the investigating authority did in this case. Repeatedly and counter-factually asserting the contrary cannot change this fact. A mantra is not a legal argument. Korea might disagree with the outcome of the overall assessment, but that is entirely beside the point.

20. What Korea's case boils down to is the nebulous and generalised assertion that, in relation to certain matters on which the *SCM Agreement* is silent, the investigating authorities' determination did not involve an objective examination. In other words, right from the start, it is the most tenuous of cases. Perhaps not surprisingly, Korea's definition of "objective" turns out to be anything that generates a favourable result for Hynix in this case. The briefest scrutiny of Korea's arguments demonstrates that they are in fact built on one false or hypothetical statement after another. There is simply *nothing* in Korea's submissions capable of supporting the assertion that the investigating authority in this case did anything other than make a determination involving an objective examination.

21. Given the global nature of the market and its dire state at the time – points on which Korea itself insists at great length, it would indeed be quite extraordinary and amazing if a subsidy of the magnitude granted to Hynix had no repercussions on other players in the market – like a stone thrown into a pond that mysteriously vanishes below the surface without generating a single ripple. In fact,

the whole purpose of the kind of "survival" subsidy granted by Korea to Hynix is *relative* : it is precisely to improve the relative situation of Hynix *vis a vis* its competitors, and thus enable it to survive. Otherwise, there would be fundamentally no point to it.

ANNEX B-3

THIRD PARTY ORAL STATEMENT OF CHINA

(4 November 2004)

1. Thank you, Mr. Chairman, and Members of the Panel. It is my pleasure to present the views of China in this proceeding.

2. China has noted that the parties in the present dispute disagree with each other on the interpretation and application of Article 12.7 of the SCM Agreement. Among those issues in dispute, China particularly concerns with the EC's assertion that the "essential point" of Article 12.7 "is and can only be the possibility of drawing adverse inference". In this oral presentation, China will only address its views on whether Article 12.7 connotes such asserted possibility.

I. THE EC'S ASSERTION IS OF NO LEGAL BASIS IN THE TEXT OF ARTICLE 12 OF THE SCM AGREEMENT

3. With respect to the EC's above assertion, China fails to see the so-called "essential point" of "drawing adverse inference" contemplated or implied under Article 12.7. China recalls the Appellate Body has observed on various occasions that, in accordance with the customary rules of interpretation of public international law, a proper treaty interpretation is first of all a textual interpretation, and the task of interpreting a treaty provision must begin with the specific words of that provision.¹ Moreover, the interpretive principle is that "an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".²

4. In this regard, China considers that the interpretation of Article 12.7 should be first of all on the basis of the ordinary meaning of the text, and should also be analysed in the context of Article 12 as well as Part V of the SCM Agreement.

5. With respect to the ordinary meaning of the text, it is evident that Article 12.7 only provides for applying facts available under certain circumstances, and the text of this paragraph contains no explicit provision of drawing adverse inference. In the absence of such express provision, should any interested Members and interested parties fail to provide or refuse access to the required necessary information or significantly impede the investigation, the investigating authority could only base its determinations on objective assessment of the facts available to it.

¹ *Japan-Taxes on Alcoholic Beverages ("Japan-Alcoholic Beverages II")*, Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, § G. See also *US-Offset Act ("Byrd Amendment")*, Appellate Body Report, para. 281.

² *United States-Standards for Reformulated and Conventional Gasoline ("US-Gasoline")*, Appellate Body Report, WT/DS2/AB/R, adopted 20 May 1996, §III. B.

II. IN LIGHT OF PERTINENT PROVISIONS IN THE SCM AGREEMENT, THE APPLICATION OF FACTS AVAILABLE DOES NOT DENOTE DRAWING ADVERSE INFERENCE

6. In order to analyse the EC's argument, China would like to present its further considerations in light of the context of certain relevant paragraphs of Annex V of the SCM Agreement.

7. Annex V of the SCM Agreement deals with procedures for developing information about "serious prejudice" in cases involving actionable subsidies under Part III. This Annex does address, in impressive detail, the drawing of adverse inferences under certain circumstances.³ Paragraph 7 of Annex V provides explicitly that "the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process". Further, China takes special note of the fact that paragraph 6 in the same Annex addresses the issue of the application of best information available. It can be seen that the two distinct paragraphs of Annex V address the application of best information available as well as adverse inference respectively.

8. In China's opinion, it is helpful to analyse the relationship between the application of "best information available" under paragraph 6 and "drawing adverse inference" under paragraph 7 of Annex V. In accordance with the effective treaty interpretation rules, if paragraph 6 were interpreted as empowering the panel to draw adverse inference from any party's non-cooperation, then the provision of paragraph 7 in respect of adverse inference would result in "redundancy or inutility". Obviously, the appropriate reading shall be that the authority to draw adverse inference can not be induced from the provision of best information available.

9. The above understanding is also supported by paragraph 8 of Annex V, which provides "[I]n making a determination to use either best information available or adverse inferences, the panel shall.....". The terms of "either best information available or adverse inferences" connote that, the two methods are different. Applying best information available does not contain the meaning of drawing adverse inference by itself.

III. THE FINDINGS OF THE APPELLATE BODY IN *CANADA-AIRCRAFT* IS IRRELEVANT TO THE PRESENT DISPUTE

10. China notes that the EC's conclusion reading "the essential point of such a provision is and can only be the possibility of drawing adverse inference" is based on the Appellate Body Report in *Canada Aircraft*. However, China considers that paragraphs 181 through 206 of the Appellate Body Report in *Canada-Aircraft* are concerned with the authority of the panel, but not that of the investigating authority to draw adverse inferences under certain circumstances, thus can not provide interpretive guidance for the present issue.

11. It is evident that the issue before the Appellate Body in *Canada-Aircraft* was "[w]hether the Panel erred in law to draw adverse inference from Canada's refusal to provide information to the Panel about the EDC's debt financing activities"⁴, that is, the Panel's authority to draw adverse inference "in cases that involve prohibited export subsidies for which the adverse effects are presumed".⁵ The Appellate Body concluded that "[C]learly, in our view, the Panel had the legal authority and the discretion to draw inferences from the facts before it".⁶ In addition, Annex V of the

³ *Canada--Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R, 2 August 1999 ("*Canada-Aircraft*"), para. 201.

⁴ *Canada-Aircraft*, para. 181.

⁵ *Id.*, para. 202.

⁶ *Id.*, para. 203.

SCM Agreement invoked by the Appellate Body also concerns with the panel procedures in cases of actionable subsidies, but not relevant to the investigating authority in the underlying investigation.

12. In this regard, China believes that the observations made by the Appellate Body in *Canada-Aircraft* with respect to the authority of the DSB panel are irrelevant to the evidentiary rules to be applied by the investigating authority in the countervailing investigation. Therefore, the EC's reliance on the Appellate Body Report in *Canada-Aircraft* is of no help to its argument.

13. In conclusion, Article 12.7 does not explicitly provide the possibility of "drawing adverse inference" in applying "facts available", and such an understanding is further supported when analyzed together with the context of Annex V of the SCM Agreement. Virtually, the Respondent's reliance on the Appellate Body Report in *Canada-Aircraft* is of no merit in the present dispute.

14. This concludes my presentation. Thank you for your attention.

ANNEX B-4

THIRD PARTY ORAL STATEMENT OF JAPAN

(4 November 2004)

I. INTRODUCTION

1. Mr. Chairman and distinguished Members of the panel, on behalf of the Government of Japan, I thank you for giving 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 in the SCM Agreement, and should be addressed further.

II. ARGUMENT

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

2. The EC argues that the investigating authorities correctly found that other known factors "may have caused injury, however not to an extent breaking the causal link between the subsidized imports and the injury caused by the subsidized imports."¹ It appears that the EC misunderstood the non-attribution rule under Article 15.5. The question to be addressed for the non-attribution rule is whether the authorities examined the causation between the subsidized imports and the injury after separating and distinguishing injury caused by other known factors. As discussed in our third party submission, upon separating the injury caused by other known factors, the authorities are required to examine whether the injury caused solely by the subsidized imports was material or not.

3. Article 15.5 provides that the authorities "shall also examine any known factors other than the subsidized imports," and "injuries caused by these other factors must not be attributed to the subsidized imports."² The word "also" clarifies that the authorities are obliged to analyze the causal link between any known factors and injury in addition to the causal link between the subsidized imports and the injury. The phrase "must not be attributed" in Article 15.5 further clarifies that investigating authorities are required to separate and distinguish injury caused by other known factors from injury caused by the subsidized imports. As we explained in details in our third party submission, the Appellate Body repeatedly has explained this non-attribution requirement in the context of analysis of the meaning of Article 3.5 of the AD Agreement, which is equivalent to Article 15.5 of the SCM Agreement.

4. It appears that the EC's causation analysis did not separate and distinguish injury caused by the subsidized imports from injury by other known factors. As such, the EC's causation analysis in this dispute appears insufficient. Japan thus respectfully requests that this Panel carefully review whether the EC separated and distinguished injury caused by other known factors from the injury

¹ The First Written Submission by the European Communities ("EC First Written Submission"), dated 11 June 2004, para. 180 (footnote and emphasis in original omitted).

² Article 15.5 of the SCM Agreement (emphasis added).

caused by subsidized imports in its injury determination consistently with Article 15.5 of the SCM Agreement.

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

5. We agree with the EC that the entrustment or direction by a government does not have to be in a particular form or on a transaction-specific basis.³ The panel in *US – Export Restraints* interpreted the government's entrustment or direction to mean an explicit and affirmative action prompting a particular party to perform a particular task or duty.⁴ Article 1.1(a)(1)(iv), however, does not specify any particular methodology for determining whether a government's action was entrustment or direction. 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 of financial supports. In this connection, the EC correctly argues that "[t]here is, for example, nothing in Article 1.1 *SCM Agreement* that would preclude an oral entrustment or direction."⁵ 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.

6. Consequently, the question in this dispute in connection with Article 1.1(a)(1)(iv) is the evidence, on which the investigating authority may be based to find that a government's instruction was 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 the Panel to review an investigating authorities' determination, based on "an objective assessment". Further, Article 11 directs panels to make an objective assessment of the facts of the case. We also could 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 the investigating authorities base its determination on evidence sufficient to allow the authorities 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 for the evidentiary standards applicable to Article 1.1 of the SCM Agreement. As such, we respectfully request that this Panel carefully review the investigating authorities' determination on entrustment and direction in light of this evidential standard.

C. APPLICATION OF FACTS AVAILABLE UNDER ARTICLE 12.7

7. In replying to the argument by Korea that the EC incorrectly applied facts available, the EC has argued that "[t]he questions repeatedly posed by the European Communities were sufficiently precise, and of sufficient scope, to catch matters such as the ministerial meeting and related documents."⁶

8. As discussed in our third party submission, an investigation requires two-way communication between the investigating authorities and the responding parties. The investigating authorities are required to effectively communicate to responding parties the information that the authorities would like to receive before the authorities decide to apply facts available. Article 12.1 clarifies this initial obligation of the authorities, providing "[i]nterested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities

³ See EC First Written Submission, para. 284.

⁴ Panel Report, *United States – Measures Treating Export Restraints as Subsidies* ("US – Export Restraints"), WT/DS194/R, adopted 23 August 2001, para. 8.29.

⁵ EC First Written Submission, para. 272.

⁶ *Id.*, para. 214.

require." Indeed, without knowing what information the authorities consider to be "necessary," the responding parties cannot refuse to access to, or otherwise do not provide, necessary information.⁷

9. The authorities' request, however, would be sufficient if it was specific enough that a responding party was able to understand what type of information the authorities requested. The authorities' request does not have to identify a specific name of the document. In fact, the authorities would not be aware of what specific information is available to responding parties at the initial stage of an investigation. If the responding party has difficulties to identify or understand the scope of the requested information, the SCM Agreement requires that the responding party communicate the difficulties to the authorities. Article 12.11 provides "[t]he authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable." In order for the authorities to take due account of a responding party's difficulties, the authorities have to be informed of the difficulties. The responding party may not keep silent, waiting for the authorities' additional inquiries.

10. When the investigating authorities effectively communicated what information the authorities would like to receive from a responding party, but the responding party did not respond to the request, then the authorities may consider that the respondent "otherwise" did "not provide necessary information",⁸ and apply the facts available. As the panel in *Argentina – Floor Tiles* states, the authorities "may not fault an interested party for not providing information it was not clearly requested to submit."⁹ In this connection, we disagree with the EC's interpretation that the words "or otherwise" in Article 12.7 refer to "a situation in which no such request has been made."¹⁰ The facts available is allowed to apply when the responding party did not submit the information although it was clearly requested to do so. While Japan does not take any position on the factual aspects of this dispute, the investigating authorities, as unbiased and objective triers of facts, may assess the fact of the non-submission, taking into account other evidence that the authorities also collected.

III. CONCLUSION

11. For the reasons set forth above and in our written submission, Japan respectfully requests that this Panel carefully review the consistency of the EC's injury determination with Articles 15.5 and the subsidy determination with Articles 1.1(a)(1)(iv) and 12.7 of the SCM Agreement.

⁷ See, Article 12.7 of the SCM Agreement.

⁸ Article 12.7 of the SCM Agreement.

⁹ *Argentina - Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy* ("Argentina – Floor Tiles"), WT/DS189/R, adopted 5 November 2001, para. 6.54.

¹⁰ EC's First Written Submission, para. 199.

ANNEX B-5

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

(4 November 2004)

Mr. Chairman, Members of the Panel and parties to the dispute, thank you for giving us the opportunity to express our views.

I. INTRODUCTION

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu makes this third party oral statement because of its trade and systemic concerns regarding the correct interpretation of the Agreement on Subsidies and Countervailing Measures (ASCM).

2. In this oral statement, we will briefly comment on the following:

- The interpretation of the words "entrusts or directs",
- The methodology used in determining "benefit", and
- Non-attribution analysis in the determination of injury.

II. THE DETERMINATION OF SUBSIDY

A. THE INTERPRETATION OF THE WORDS "ENTRUSTS OR DIRECTS"

3. In our view, the Panel in *US – Export Restraints*¹, by deriving its interpretation of the terms "entrust" and "direct" from ordinary meaning of the words in the context of Article 1.1(a)(1)(iv), adequately clarifies their meanings. We see no reason why the interpretation in that case cannot be applied here. Under that Panel's interpretation, the conditions upon which a government can be considered to have "entrusted or directed" a private body under Article 1.1(a)(1)(iv) are: (i) 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.² In other words, the mere fact of influence or intervention in the market by a government, which it might undertake at different levels for different purposes, is not in itself sufficient proof of entrustment or direction.

4. An investigating authority must base its determination on positive evidence showing that the above three conditions exist in order to find government entrustment or direction. We would therefore respectfully request the Panel to carefully determine whether the EC has addressed the three conditions above in its investigation.

¹ United States – Measures Treating Exports Restraints as Subsidies (US – Export Restraints), Panel Report, WT/DS194/R.

² *US-Export Restraints*, WT/DS194/R., para. 8.29.

B. THE METHODOLOGY USED IN DETERMINING "BENEFIT"

5. With regard to the methodology adopted by the investigating authority to calculate the amount of a subsidy in terms of benefit to the recipient, Article 14 of the ASCM sets forth relevant guidelines relating to equity investments, loans, loan guarantees, the provision of goods or services by a government, and the purchase of goods by a government. The Appellate Body pointed out in the *Canada – Aircraft* case that the word "benefit" used in Article 1.1(b) implies some kind of comparison. A "benefit" arises under each of the guidelines provided under Article 14 if the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.³ We share the view of Korea, expressed in paragraphs 572–573 of its first written submission, that in order to conduct a proper "benefit" analysis under Article 14, the investigating authority is under an obligation in measuring benefit to compare what firms received with what was available on the market.

6. In addition, in our view, Article 14 provides for a preference for domestic market of the Member under investigation as the benchmark. It seems illogical to use the commercial market of some other territory as the benchmark, when a benchmark to measure benefit can be found within the territory of the Member against which a financial contribution has allegedly been conferred. Only when the domestic market of that Member is distorted should the investigating authority be permitted to use another market as a benchmark. Otherwise, an investigating authority would be able to arbitrarily choose any market, which could result in the use of the highest CVD margin as its benchmark.

III. THE DETERMINATION OF INJURY

7. We agree with Korea that Article 15.5 of the SCM Agreement requires a "non-attribution" analysis.⁴ The third sentence of Article 15.5 of the SCM Agreement requires that "the authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports."

8. The Anti-Dumping Agreement and the SCM Agreement are widely recognized as being related, as both agreements are derived from GATT Article VI. The provisions of these two Agreements often employ a similar language and interpretations of corresponding provisions have been used interchangeably by panels and the Appellate Body in cases such as *US – Continued Dumping and Subsidy Offset Act*⁵ and *US – Softwood Lumber Investigation*.⁶

9. The two provisions in this case, Article 15.5 of the SCM Agreement and Article 3.5 of the Anti-Dumping Agreement employ substantially the same language in the same context, namely, in the examination of injury to domestic industry. The jurisprudence for Article 3.5 of the Anti-Dumping Agreement clearly requires the investigating authorities to separate and distinguish "the injurious

³ *Canada -- Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R, 2 August 1999, at para. 157-58.

⁴ First written submission of Korea, para. 221-232

⁵ Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, with regard to Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement.

⁶ Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, para. 7.129.

effects of the other factors from the injurious effects of the dumped imports".⁷ This requirement also applies to Article 15.5 of the SCM Agreement. The Panel in the softwood lumber case mentioned above specifically made this point.

10. Based on the above, we ask the Panel to examine whether the EC has met the non-attribution obligation required by Article 15.5 of the SCM Agreement.

IV. CONCLUSION

11. In light of the above-mentioned comments, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu respectfully requests the Panel to take the above views into account when making its findings in this case.

⁷ Appellate Body Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, para. 223.

ANNEX B-6

THIRD PARTY ORAL STATEMENT OF THE UNITED STATES

(10 November 2004)

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, it is my privilege to appear here today to present the views of the United States concerning certain issues in this dispute. In our written submission, we already commented on the submissions of the European Communities ("EC") and Korea. Therefore, the principal focus of my comments today will be on the third-party written submission of Japan.

2. At the outset, however, I would like to make a couple of general observations. First, with respect to the issue of directed lending by the Government of Korea ("GOK"), as we explained in our written submission, "the issue before the Panel is whether a reasonable, unbiased person looking at the totality of the evidence before the EC authorities could have reached the same conclusion as did those authorities; namely, that the GOK entrusted and directed private financial institutions to bail out the financially distraught Hynix."¹ In our view, this issue is not even a close call. There can be no serious question that a reasonable, unbiased person could have reached the same conclusion as the EC authorities.

3. Second, with respect to the question of material injury, the United States is not in a position to comment on the details of the EC's injury determination. However, it appears to the United States that Korea would have this Panel believe that the GOK'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. While the consequences of Korea's subsidization of Hynix likely varied from market to market, we strongly disagree with Korea's suggestion that the subsidization of Hynix had no adverse consequences whatsoever.

4. Having made these general observations, I now would like to comment on certain aspects of the third-party submission of Japan.

The Evidentiary Standard for Entrustment or Direction

5. The United States agrees with most of Japan's discussion regarding the evidentiary standard applicable to questions of entrustment or direction under Article 1.1(a)(1)(iv) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").² The United States agrees that there is no special evidentiary standard for government entrustment or direction. The United States also agrees that subparagraph (iv) does not require that a government's delegation or command be so detailed as to instruct every step that the bank must follow. Finally, the United States agrees that the

¹ *Third Party Submission of the United States of America*, 16 June 2004, para. 31 [hereinafter "US Submission"].

² *Third Party Submission of the Government of Japan*, 16 June 2004, paras. 7-13 [hereinafter "Japan Submission"]; see also US Submission, paras. 16-31.

elements of entrustment or direction may be found on the basis of circumstantial evidence or by evidence from secondary sources. Indeed, the United States would go further and submit that circumstantial and secondary evidence takes on particular importance in situations where, as in the case of the Hynix bailout, a government acts behind the scenes and takes advantage of its ownership stakes in banks to direct their behaviour.

6. The one exception the United States would take to Japan's discussion of evidentiary standards for entrustment or direction involves the heading to Section II.B.1 of its submission. There, Japan states that "[t]he Panel should apply the correct evidentiary standards to review the existence and the extent of entrustment or direction" The Panel's task is not to determine *de novo* whether entrustment or direction existed, but instead is to review *the EC's* determination. Therefore, it is more accurate to say that the Panel's task is to determine whether *the EC* applied the correct evidentiary standard.

The EC's Injury Determination

7. Turning to the EC's injury determination, Japan criticizes the EC for failing to separate and distinguish the injurious effects of other known factors to the domestic industry from the effects of subsidized imports.³ More specifically, Japan asserts that the EC did not address subsidized imports and non-subsidized imports separately in its overcapacity analysis. In addition, Japan asserts that the EC, after acknowledging the harmful effects of non-subsidized imports, failed to adequately separate the injurious effects of subsidized imports from non-subsidized imports.

8. In the view of the United States, these assertions suggest a standard of analysis that is beyond what the SCM Agreement actually requires. In this regard, the United States would note that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of unfair imports from the injurious effects of the other known causal factors are not prescribed by the WTO agreements. The Appellate Body has reached this same conclusion consistently. For example, the Appellate Body has stated as follows: "Thus, provided that the investigating authority does not attribute the injuries of other causal factors to [unfair] imports, it is free to choose the methodology it will use in examining the 'causal relationship' between [unfair] imports and injury."⁴

9. Similarly, there is no requirement in the plain text of the SCM Agreement that an investigating authority "isolate" subject imports or the effects of the subject imports and other known factors on the domestic industry. Neither in *US - Hot-Rolled Steel* nor in subsequent reports has the Appellate Body found any requirement for the investigating authority to "isolate" the injurious effects of the unfair imports. Instead, the standard articulated has been whether the investigating authorities provided a satisfactory explanation of the nature and extent of the injurious effects of those other factors, as distinguished from the injurious effects of the unfair imports.

10. Second, Article 15 of the SCM Agreement does not require that the subject imports alone, in and of themselves, be the cause of material injury. Even in the context of reviewing safeguards determinations, the Appellate Body has stated that Article 4.2(b) of the *Agreement on Safeguards* does not require that increased imports alone be the cause of serious injury.⁵ In *Wheat Gluten*, the

³ Japan Submission, para. 6.

⁴ *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, Report of the Appellate Body adopted 18 August 2003, para. 189, relying on *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, Report of the Appellate Body adopted 23 August 2001 [hereinafter "*US - Hot-Rolled Steel*"].

⁵ See, e.g. *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, Report of the Appellate Body adopted 19 January 2001, paras. 70,

Appellate Body found that the causation requirement of the *Agreement on Safeguards* can be met where serious injury is caused by the interplay of increased imports and other factors.⁶

The EC's Use of Facts Available

11. Moving on to the EC's use of facts available in connection with its subsidy determination, the United States in its written submission addressed Korea's arguments concerning the facts available. Today, I would like to comment briefly on Japan's arguments regarding this topic.

12. Japan asserts that "the general principle of good faith under international law and the specific requirements under Articles 12.7 and 12.11 mandate that facts available are the last resort for the authorities."⁷ The United States has several problems with this statement.

13. First, with respect to Japan's reference to "good faith," there is no basis for using a principle of "good faith" to depart from the text of the agreements – including the SCM Agreement – as negotiated. There is also no basis or justification in the WTO Agreement for a WTO dispute settlement panel to enforce a principle of "good faith" as a substantive obligation agreed to by WTO Members.

14. Dispute settlement panels have clear and unequivocal terms of reference: they are to examine the matter before them "in the light of the relevant provisions in ... the covered agreements cited by the parties to the dispute ..."⁸ Nowhere in Appendix 1 to the DSU, which defines the "covered agreements" for purposes of the DSU, is there listed an international law principle of good faith.

15. Second, there is no basis for Japan's assertion that Articles 12.7 and 12.11 of the SCM Agreement "mandate" that facts available be used only as a "last resort." The text of Article 12.7 describes the prerequisites for using facts available. That text does not include the phrase "last resort" or any similar concept, nor does the text of Article 12.11.

16. Thus, the task for the Panel is to determine whether the EC reasonably determined whether the prerequisites existed under the relevant provisions of the SCM Agreement for relying on facts available. The Panel's task is not to rewrite those provisions so as to incorporate an undefined notion of good faith.

17. Finally, the United States would not take issue with Japan's observation that cooperation in a countervailing duty investigation is a two-way process.⁹ However, the United States would emphasize that the process is, indeed, two-way, and requires cooperation from the investigated parties as well as from the investigating authorities. In the report cited by Japan – which, it must be noted, involved the interpretation of provisions not found in the SCM Agreement – the Appellate Body emphasized that "the level of cooperation required of interested parties is a high one ..."¹⁰ Can Korea's extremely narrow interpretation of the EC's questions and its withholding of information regarding the meetings of Economic Ministers be regarded as a "high level" of cooperation? Can Hynix's submission of one page of the Arthur Andersen report to the EC authorities, even though it submitted the entire report to US authorities in their countervailing duty investigation, be regarded as

79 [hereinafter "*Wheat Gluten*"]; *United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, Report of the Appellate Body adopted 16 May 2001, paras. 165-170.

⁶ *Wheat Gluten*, paras. 67-68.

⁷ Japan Submission, para. 14.

⁸ DSU Article 7.1.

⁹ Japan Submission, para. 18.

¹⁰ *US - Hot-Rolled Steel*, para. 100.

a "high level" of cooperation? Can Hynix's refusal to give consent to Citibank to provide EC authorities with documents pertaining to Citibank's role in the Hynix bailout be regarded as a "high level" of cooperation? To merely pose these questions is to answer them.

Conclusion

18. Mr. Chairman, members of the Panel, that concludes the third-party statement of the United States. Thank you for your attention.