ANNEX B

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

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ANNEX B-1

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

2 July 2004

I.

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

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

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

That concludes my closing remarks. Thank you.

ANNEX B-3

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

24 June 2004

General Issue - Standard of Review

1.

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

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

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

8. For example, despite its much publicized reforms, the GOK announced that it had to alleviate Hynix's liquidity crisis. The government then waived the ceiling on the amount of debt banks could carry for a single debtor on three separate occasions specifically for the purpose of additional loans to Hynix. The government also ordered the KEIC to resume insuring Hynix's exports for the purpose of increasing Hynix's accounts receivabln responsK alt bankss2.75ea8nsutitued an programe io resuri fhat iynixdirdnot sdefaulton tts muatring Hbonds

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

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

Issues Concerning the International Trade Commission's Injury Determination

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

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

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

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

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

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

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

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

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

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

25. <u>Non-subject imports</u>: The ITC found that subsidized imports, by themselves, were large enough and priced low enough to have a significant impact, regardless of the adverse effects caused by non-subject imports. The ITC determined that there were two principal factors that reduced the significance of the volume of non-subject imports. First, there was less competition between the domestic DRAM products and the non-subject imports than there was between the domestic DRAM products and the subject imports. The ITC determined

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

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

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

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

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

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

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

ANNEX B-5

ORAL STATEMENT OF CHINA AT THE THIRD PARTY SESSION

24 June 2004

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

I. INDIRECT FINANCIAL CONTRIBUTION

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

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

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

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

II. BENEFIT

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

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

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

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

III. SPECIFICITY

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

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

11. China notes that DOC in its *Decision Memorandum* adopted various evidence to show the intention of the GOK to rescue Hynix. In China's view, such intention, even if established, at best only shows the "reason to believe" that there may be *de facto* specificity. It should be pointed out that Article 2.1(c) of *the SCM Agre*intentiona prndicat an autho asw (, ion of) -0.-280.5 -12 TD 94.0992 T280.9617 o

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

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ANNEX B-6

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

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

IV. CONCLUSION

15. In conclusion, the EC respectfully submits

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

ANNEX B-7

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

24 June 2004

I. INTRODUCTION

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

II. ARGUMENT

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

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

3. We also agree with the United States that instructions by a government do not have to be in a particular form or on a transaction-specific basis.[4] The panel in *US – Export Restraints* interpreted the government's entrustment or direction to be an explicit and affirmative action prompting a particular party to perform a particular task or duty.[5] Article 1.1(a)(1)(iv), however, does not specify any particular methodology for evaluating the government's action relating to the entrustment or direction to private banks. The government's entrustment or direction, thus, does not have to be a publicly 3.iv).

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ANNEX B-8

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

24 June 2004

Introduction

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

ASCM Article 1.1(a)(1)(iv) "Entrust or Direct"

2. With regard to the interpretation of the terms "entrust or direct" in Article 1.1(a)(1)(iv) of the ASCM, we believe that the interpretation of the Panel in *US - Export Restraints* is applicable to the present case. The Panel directly examined the meaning of the wor4 -0.rNSs75 T.378dw (isse)es