ANNEX D

ORAL STATEMENTS OF PARTIES AT THE
SECOND SUBSTANTIVE MEETING

ANNEX D-1

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

30 July 2004

I. INJURY ISSUES

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

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

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

D. Non-Attribution

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

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

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

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

II. SUBSIDY ISSUES

A. Financial Contrib

ANNEX D-2

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

21 July 2004

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

Injury Issues

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

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

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

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

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

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

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

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

On non-subject imports, the ITC is trapped by its own logic. If the substitutability of a commodity product enhances the volume effects, then the much, much larger volume of non-subject imports must have been having an overwhelming effect on the market. Non-subject imports were five times larger, gaining market share three times as fast, and underselling domestic prices with almost the same frequency. None of the ITC explanations satisfactorily separate and distinguish the role of this other factor in the market. The ITC acknowledges the magnitude and trends of non-subject imports, but never explains its conclusion thats fasa D -52c 0s6trendshrst almos317a -64.5 TD (TD monsrimp

The United States has argued in its opening statement that Korea is reading "entrusts" out of the agreement, but that argument is wrong. That word remains in the agreement; but our argument is that the "entrusts" portion of the standard is not properly part of this case. "Entrusts"

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

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

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

ANNEX D-3

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

21 July 2004

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

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

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

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

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

ANNEX D-4

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

2 August 2004

The Commerce Department's Subsidy Determination

1. ***Korea's Submission of New Information*:** Korea's second written submission and answers to the Panel's questions are replete with information which was never provided to the DOC at any time during its investigation, notwithstanding the DOC's extensive requests for information. All of this new information – some of which is contradicted by evidence that was submitted during the investigation – should be disregarded by the Panel. Prior panels have recognized that in disputes involving the review of a determination by a national investigating authority, the consideration of new –

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

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

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

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

10. With respect to specificity, as discussed earlier, Korea's argument concerning the timing of Hynix's nomination for the KDB Fast Track programme is contradicted by the record evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX D-5

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

2 August 2004

Standard of Review

1. We just heard our Korean colleague say that the Panel must decide whether import volume

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

5.

10.

16. Thus, it found a pattern of frequent, sustained underselling by subject imports, often at high margins, was especially significant in the context of the DRAM market, and could be expected to have particularly deleterious effects on domestic prices. Although certain other factors played a role in the price declines, the ITC found that the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important