ANNEX D

ORAL STATEMENTS OF PARTIES AT THE SECOND SUBSTANTIVE MEETING

ANNEX D-1

EXECUTIVE SUMMARY OF THE STATEMENT OF KOREA

(10 January 2005)

1. The EC repeatedly embraced self-serving methodologies and arguments in this case. Rather than objectively examining the facts, the EC had an outcome in mind and approached the facts from that perspective. That is why the EC ignored the shipment data for LG Semiconductor("LGS"). That is why the EC distorted its price comparison methodology. That is why the EC applied improper and overbroad facts available. That is why the EC tries to cover gaps in its analysis by invoking the "totality" of the evidence.

Financial Contribution

13. Korea would also like to point out that with respect to public bodies, the EC determinations are fixed and cannot now be expanded. With respect to private bodies and the meaning of "entrusts or directs," the EC would like to ignore the core meaning of "entrusts" and "directs" as provided in Article 1.1(a)(1)(iv), but its efforts to distinguish *US -- Export Restraints* from this case simply fail. The factual differences in this case and that case have little relevance to that panel's careful and reasoned articulation of the appropriate legal standard.

14. On a more general level, Korea believes there are fundamental problems in the way the EC has approached the context of this case, the issues creditors confront in a restructuring situation, and the reality that governments can take an interest in restructurings without engaging in entrustment or direction. The EC also continues to blur the distinction between financial contribution and benefit. By doing so, the EC improperly focuses on the effects of alleged entrustment or direction, inconsistent with *US-Export Restraints*.

15. Syndicated Loan. The EC first argues that it need not show any entrustment or direction, because there were some public bodies. But the mere fact that FSC granted a loan waiver in no way establishes that a public body has granted the loans. The EC has improperly blurred the distinction between granting a waiver of a regulatory requirement and providing a loan. It also ignored the decision by seven other banks to lend to Hynix as part of the syndicated loan. Since the EC so regularly invokes the "totality" of the evidence, this approach seems odd.

16. KEIC Insurance. The EC argues that it need not show entrustment or direction. But this argument assumes that the insurance and the loans being insured are one in the same. On the contrary, the KEIC provides the insurance, but the individual banks – not the government -- provide the short-term financing. If the EC intends to treat the KEIC insurance as a grant in the total value of the D/A credit line, as opposed to the methodology prescribed in Annex I(j) of the *SCM Agreement*, the EC must demonstrate that Hynix' creditors were entrusted or directed to provide the D/A financing.

17. KDB Programme. The EC argues that it need not show entrustment or direction. But like it did with the KEIC insurance, the EC is mischaracterizing the programme. The KDB alone did not absorb all of the bonds, holding only a small fraction of them. Yet, the EC takes the position that it may countervail the entire amount of bonds refinanced under the KDB as a grant provided by a public body. This position is illogical in light of the nature of the programme, including the burden sharing explicitly contemplated by the programme.

18. May 2001 Restructuring. The EC implies it need not show entrustment or direction. The fact that two lenders may have been public bodies, however, does not address the numerous other lenders that were not

never provides any credible basis to find entrustment or direction. It also ignores the key fact with respect to the October restructuring package – the banks had choices.

Benefit

general, and ignores the inconsistent facts about Hynix successfully raising new funds. The EC also obscures the factual context of the Hynix restructuring. Providing new money to Hynix is one issue. But the October restructuring also involved debt-equity swaps and debt forgiveness. The EC seems to think that existing creditors could simply insist on full repayment. That approach ignores the reality of debt restructuring.

27. Finally, the EC would like to obscure the fact that in the presence of legitimate benchmarks, it chose to simplify the equation by effectively treating every financial transaction at issue as a grant. Thus, it offers its long discussion of risk capital and the prospect of not being repaid. However, nothing in the *SCM Agreement* permits a Member to recast a transaction out of hand.

Calculation Errors

28. The EC ignored timely

ANNEX D-2

EXECUTIVE SUMMARY OF THE STATEMENT OF THE EUROPEAN COMMUNITIES

(9 December 2004)

Mr. Chairman, Members of the Panel,

I. INTRODUCTION

1. In the long run, we are all dead. Very drole. Very *true*. Except in the case of Hynix, apparently. And in one sense that's what this case is all about. If a government "thinks big enough" – that is, thinks "too big to fail" - almost anything is possible - with a little help from the taxpayer and a little flexing of state muscle, of course.

2. With deep enough pockets, you can fix the capital markets the way you want them to achieve your policy objective. A bit like a billionaire playing "double or quits" in a small town casino – which is precisely why there are limits on the maximum bet - as Nick Leeson eventually discovered. It is also precisely one of the reasons why we have the *SCM Agreement* - to regulate the power of government in markets. At least on this point the parties agree.

3. So let's take "government" out of the equation. Given what is known and uncontested about Hynix's *dire* financial state, the *dire* state of the DRAMs market, and the *dire* state of the Korean financial markets, what do *you* think would have happened to Hynix if the GOK had done **nothing** at all? No repeated "requests" from the Economic Ministers of Korea. No Syndicated Loan from KDB, KEB and KFB. No extension of the prudential rules by the FSC. No guarantee from KEIC. No guarantee to KEIC. No KDB Debenture Programme. No implied guarantee that Hynix was too big to fail. No new capital or roll-overs or debt write-offs from public bodies. No massive GOK payments to Citibank/SSB, which was busy "marketing" the GDR issue to unsuspecting and, it turns out, deluded international investors. No CRPA. No high level GOK attendance at creditors' meetings. No menacing statements of intent by the Korean Deputy Prime Minister. No massive GOK capital injections to banks. No Prime Minister's Decree No 408. No Memoranda of Understanding. No interference with the appointment of mangers of banks. No threats to banks. No threats to credit rating agencies … After-all, this is the kind of Stalinist view of history that Korea would have us swallow, isn't it?

4. Assuming these facts, and placing yourself at the end of 2000/beginning of 2001, if you were *forced* to stake your sole family property/life savings/professional reputation *one way or another*, what would you bet? Would you bet that Hynix would have succumbed to the normal judicial bankruptcy procedures? Or would you bet that, miraculously, Hynix would somehow claw its way back from the abyss unaided? Consider the mountain of evidence (the EC has listed some 867 facts) pointing towards bankruptcy before making your choice. I know what I would bet my house on (if forced to bet). There isn't really any choice, is there? We all know that Hynix would have gone bust, just as Daewoo had before it. In fact, Hynix was "technically" bust already. We all know that the GOK, which itself created the situation by forcing through the LG Semicon merger, saved Hynix's skin – essentially unscathed. The GOK achieved its policy objectives.

the "facts

choice but to rely on the totality of the facts and evidence available. Korea's continuing efforts to prosper in these Panel proceedings as a result of denying evidence to the investigating authority and eventually this Panel should be rejected.

B. SUBSIDY

15. A great deal has been said about "entrustment or direction". However, this Panel must not forget that where there are direct subsidies, including guarantees from the government, as in this case, it is unnecessary for this Panel to discuss the concept of "entrustment or direction". When a government gives a guarantee, express or implied, *that* is a financial contribution. The benefit or amount of subsidy is the missing market premium that should have been paid by Hynix for the guarantee. At maximum risk, including when the company would otherwise be bankrupt, the premium is at least equivalent to the capital amount covered by the guarantee. Another way of saying essentially the same thing is that the banks, in providing capital to a bankrupt company, had been entrusted or directed to do so. The benefit and the amount of the subsidy are the same, whichever way you look at it. We must not forget that the record categorically proves that all through 2001 the GOK publicly gave Hynix an express guarantee because it was considered too big to fail.

16. Korea continues to assert that this case is only about "entrustment or direction". That assertion is false, and a factual and legal error of monumental proportions. As the European Communities has set out in detail in the regulations and in its submissions to this Panel, this case did not just involve issues of "entrustment or direction", it also involved direct subsidy. Korea having chosen to ignore this fact, and having failed to present any serious evidence or argument in this respect, Korea's submissions on the question of subsidy must inevitably fail.

17. The parties agree that the concepts of subsidy and benefit are legally distinct, but that the same facts and evidence may be relevant to both. However, despite paying lip-service to this general statement, it is Korea, not the European Communities, that continues to run the two legal concepts together. Thus, Korea repeatedly asserts that an investigating authority can only determine that a loan or a guarantee is a "financial contribution" within the meaning of Article 1.1(a)(1)(i)trai6 -12.70rea -12.70 Tc 74.8

20. If this Panel does find it necessary to consider the concept of "entrustment or direction", what this Panel must do is relate the facts of this case to that legal rule. This Panel must not substitute the words in the *SCM Agreement* with other words. The *SCM Agreement* does not refer to an "affirmative act". It does not use the words "delegation" or "command". To read these words into the *SCM Agreement* when, manifestly, they are not there, would represent an *ex-post* rationalisation of the negotiation process, and would be a legal error. It is not this Panel's task to legislate.

21. Korea's reliance on the words "a private body" to assert that a bank-by- bank analysis is the only possibility under the *SCM Agreement*[18], and that an investigating authority cannot rely on the totality of the facts and evidence available, may be dismissed with ease. It is self-evident that a government could give a direction addressed to 2 banks, or for that matter any number of banks, in one document, mentioning each by name. Such an event would certainly be capable of being caught by Article 1 of the *SCM Agreement*. The situation is no different if the banks, rather than being identified by name, are identified in some other way, such as all banks that are creditors of the bankrupt company in need of funds. Korea's defence boils down to the assertion that it is impossible for a bank (or a group of banks) to be entrusted or directed to "save" a company. Why, if a government has repeatedly and publicly stated that a company is too big to fail? Such an assertion is simply wrong.

22. Korea asserts that it "goes through the EC evidence, piece by piece".[19] That assertion is false, insofar as Korea ignores the great body of facts and evidence set out in the regulations[20], electing only to discuss certain isolated facts and evidence. What *is* true is that Korea proceeds "piece by piece" – an admission that its entire case simply fails to address what the investigating authority did in this case – that is, consider the totality of facts and evidence before it.

23. This Panel must consider the totality of facts and evidence relied on by the investigating authority. It must also take into account the profound *economic* links, as well as the legal links, between the different elements of the subsidy. Particularly, the inside investor way of looking at the world that the Korean respondents have so often invoked. The GOK put Hynix and the banks on a steep and slippery slide - and then held their hands all the way down.

III. INJURY

24. With regard to injury, Korea's suggestion that the position of the European Communities in this case does not reflect the language of the *SCM Agreement* is entirely contrived from an incomplete, inaccurate and out-of-context quotation.[21] The Panel should not be fooled by such desperate rhetoric. The European Communities has discussed in detail in its submissions all aspects of all the provisions in respect of which Korea has made claims in this case.

25. With regard to LG Semicon, as with most of this case, the simple facts settle the matter in the European Communities' favour. On March 2001 HEI was merely *renamed* Hynix (the underlying legal person remained unchanged). HEI first *acquired* LGS on 7 July 1999. HEI was then re-named HME and *then* merged with HEI effective 13 October 1999.[22] So, tracing backwards in time, the European Communities followed Hynix/HEI (the same legal person, with a different name). It was not required to follow the LGS production facility prior to the same legal person coming into [illegible]

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the complaint to which Korea alludes[24] make no reference to LGS – the investigating authority based itself on the data provided by the Korean respondents, as verified. Finally, Korea's assertion[25] that appropriate data were submitted in a timely manner is false – the true facts are set out in the European Communities first written submission.[26] In any event, a 155 per cent increase in the volume of subsidised imports is, on any view, and certainly in the circumstances of this case, significant.

26. Mr. Chairman, Members of the Panel, if, as Bismark would have it, government or politics is the art of the *possible*, then perhaps law is the art of the *reasonable*, and the *SCM Agreement*, in a sense, a meeting place. The GOK's policy that Hynix was too big to fail, no matter the cost, was made *possible* by throwing vast amounts of taxpayer money at the problem, and by putting the banks into a position where they were entrusted or directed to do the same. The investigating authority came to the only conclusion *reasonably* supported by the totality of the facts and evidence available. There is no lawful reason for this Panel to disturb its findings.

Thank you for your attention.

[24] Korea rebuttal, para 31.
[25] Korea rebuttal, para 33.
[26] EC FWS, paras 74 to 85.