

## ANNEX A

### SUBMISSION OF PARTIES AND THIRD PARTIES FOR THE FIRST SUBSTANTIVE MEETING

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## ANNEX A-1

### EXECUTIVE SUMMARY OF THE SUBMISSION OF KOREA

(14 May 2004)

#### I. EC INJURY INVESTIGATION – CLAIMS OF ERROR

##### A. OVERVIEW OF THE EC DRAM INDUSTRY

1. The EC DRAM industry has a number of distinctive conditions of competition. First, the DRAM market is highly cyclical, with regular well-known boom and bust periods. Second, the trend has been toward even more extreme boom-bust cycles. Third, DRAM product pricing is extremely volatile based on worldwide, not regional, supply and demand phenomena. The EC incorrectly argued for significant price effects of subsidized imports in the European market and ignored the economic reality that subsidized imports by a single company like Hynix into the European market have at most a very limited ability to have any effect on price, particularly relative to the overall business cycle. Understanding and taking into account these distinctive conditions of competition should have been a critical part of the EC's objective examination required by Article 15. Understanding these features will also be an important part of this Panel's "objective assessment" of the EC determinations in this dispute.

##### B. ARTICLE 15.1 STANDARDS

2. Article 15.1 requires that the competent authority have "positive evidence," and that evidence 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. 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.

##### C. SIGNIFICANT INCREASE IN SUBSIDIZED IMPORTS

3. The EC mechanically cited import indices, but largely ignored any meaningful analysis of the significance of those figures. Given the unique nature of DRAMs, and the ever-increasing total bits supplied and consumed, an actual increase in imports is meaningless. Rather, the authority must examine the increased shipments relative to consumption and relative to other suppliers.

4. 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 it 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.

5. The merger that created Hynix is a critically important factor in this case. In 1999 two separate Korean DRAM companies merged. Yet the EC did not take the merger into account in any

meaningful way, and this failure fundamentally distorted its analysis of the volume and market share of allegedly subsidized imports.

6. According to Infineon's own complaint, the data show a significant drop in Hynix market share, from 21.2 per cent in 1999 to 15.5 per cent in 2001. The EC's finding of an "increase" in market share, is based solely on improper manipulation of the data. Specifically, the EC compared the market share of single company (Hynix pre-merger, i.e. Hyundai Electronics) in 1998 with the combined market share of *two* companies (Hynix post merger, i.e. HEI and LGS) in 2001. The EC itself provided market share indices that showed a remarkable decrease by Hynix when the Hynix-LGS merger was appropriately accounted for, falling consistently over the 1998-2001 period from 100 to 61.

7. The market share of Hynix DRAMs fell consistently over the period, while other suppliers expanded their market share over the same period. Market share provides the context in which an objective authority would have analyzed whether particular import volumes were properly considered significant or not. But in this case, rather than analyze the context seriously and objectively, the EC authorities were both too broad and too narrow. The EC authorities cited data and trends for all of Korea, even though the EC had found that Samsung was not subsidized, and thus could not be considered part of the "subsidized imports" being analyzed. The EC authorities also refused to combine Hynix and LGS on a consistent basis, and thus impermissibly narrowed the data to create the illusion of a market share increase for Hynix that simply did not exist.

#### D. SIGNIFICANT PRICE EFFECTS BY SUBSIDIZED IMPORTS

8. The EC made findings about pricing at odds with 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. It defies economic logic to blame Hynix pricing, when Hynix was losing market share for a commodity product.

9. The EC also largely ignored its own finding that there really is no such thing as a "price leader" in the DRAM market, which should have called into serious doubt whether Hynix itself could really be the source of "significant" price effects. The absence of a price leader means that broader supply-demand factors are driving prices.

10. 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. Korea submits that the price comparison approach used by the EC results in a completely distorted analysis.

11. 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 other factors 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.

12. If it had an open and objective mind, the EC 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." The EC finding was inconsistent with Articles 15.1 and 15.2.

#### E. CONDITION OF THE DOMESTIC INDUSTRY

13. 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 each of those factors will differ from case to case. 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.

14. In analyzing the conditions of the domestic industry, the EC also failed to consider domestic industry's own assessment of factors that describe success in the EC DRAM market and its own description of its relative competitive position in the market. The EC, at least, should have considered these factors in its analysis of domestic industry's condition. The domestic industry was providing different answers to different audiences as it saw fit, and any objective authority would have considered these inconsistencies.

15. There is also no evidence that the EC properly examined "output" and "wages." With regard to these neglected factors, the EC did not make sufficient data available to be able to analyze what a proper analysis of "output" and "wages" would have revealed. It is particularly significant that the EC wrongfully neglected to examine the factor "output," considering its importance in an industry which exports so much.

16. This is not a purely formalistic point. Countervailing duties are only allowed if there has been material injury to the domestic industry caused by subsidized imports. To determine whether injury has been material, the competent authorities are obligated to conduct a thorough analysis of at least the factors enumerated in Article 15.4.

17. Moreover, the EC did not acknowledge that most of the injury factors showed the industry's health. The EC never explained adequately why just three of 13 factors should compel its conclusion that the domestic industry was suffering material injury. The other ten factors showed positive trends. Such failure demonstrates the lack of objective examination.

#### F. CAUSATION

18. 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.

19. 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 the 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.

20. The EC authorities ignored the specific evidence on **declining demand**. The EC cited certain data for overall EU consumption, as measured by "Mbits", but ignored the fact that the Mbits consumed are always increasing dramatically. The key issue is whether the rate of growth is consistent with historical trends. Hynix provided the EC authorities with data on both global and EC growth trends. This data shows that rate of growth in DRAM consumption fell sharply in 2001 from its historical average. Indeed, the fall off in growth in the EC market was even sharper than the fall off in global growth. The key legal point is that Hynix imports have virtually nothing to do with the level of demand. Demand either increases or decreases for independent reasons based on the level of demand for items that use DRAMs. Thus, to the extent that DRAM prices rise or fall because of the changing level of demand, those price changes have not been caused by Hynix imports.

21. The EC completely ignored the arguments about changes in **relative capacity** that confirmed the dominant role of other suppliers. Hynix's Korean capacity in wafer starts actually contracted slightly during this period. In contrast, others significantly increased capacity. Taiwanese capacity expansion is by far the largest increase, but several other expansions (including Micron's US expansion) were significant. Hynix played a relatively trivial role in capacity expansions that occurred during the period examined, while other suppliers have been the most aggressive in expanding total DRAM capacity and output.

22. The EC at least tried to address the role of **unsubsidized imports**, but either ignored or distorted the key evidence. The large and growing volume of these unsubsidized imports cannot be so easily dismissed. Non-subsidized import market share was 58 per cent in 2001 compared to 15 per cent of Hynix, or *more than three times* Hynix's market share. Under the EC's own theory of the significance of increased market shares for commodity products, the relative market shares mean that other imports *had three times the competitive effect as did Hynix's imports*. The EC did not conduct any analysis of *other* import suppliers. The data demonstrates that Taiwanese suppliers dramatically increased their share of the EC market, gaining 5.1 percentage points of markets while Hynix lost 6.2 percentage points. Yet the EC did not conduct any analysis of Taiwanese suppliers, and their rapid growth.

## G. THE EC REPORT OF ITS INVESTIGATION

23. As one of the most important procedural obligations, Article 22.3 requires authorities to explain their determination in sufficient detail. In this case, however, the EC failed to provide sufficient detail on several important issues such as volume effects, price effects, and causation, as explained above. This sparse and inadequate discussion by the EC of these key issues triggers two independent violations as recognized and applied by previous WTO panels: one violation of the underlying substantive obligation, and other violation of the procedural obligation to explain the basis of a particular decision. Since the discussion of findings is not directly discernable from the EC decision, the decision is inconsistent with Article 22.3.

## II. EC SUBSIDY INVESTIGATION – CLAIMS OF ERROR

### A. OVERVIEW OF FINANCIAL RESTRUCTURING

24. The underlying investigation emerged from the commercially-driven financial restructuring of a company, Hynix Semiconductor Inc., in the aftermath of Korea's 1997 financial crisis. The financial crisis triggered extensive and fundamental corporate and financial sector reform within Korea. This structural reform sought to create independence for Korean banks to make their own decisions, and to eliminate government interference in individual lending decisions.

25. Like many Korean companies, Hynix incurred substantial debt during the 1997 financial crisis. As a result, the Hynix management retained Citibank and Salomon Smith Barney (SSB) in

September 2000 to embark on a restructuring process. Hynix's financial restructuring and recapitalization consisted of several separate transactions over 2000-2001 period.

26. The intersection of these two events -- Hynix's financial restructuring on the one hand and Korean corporate and financial reform on the other -- has essentially been misconstrued by the EC as evidence of entrustment or direction by the GOK to save Hynix at any cost. The facts of the case show that nothing could be further from truth. Rather, this case illustrates the wisdom of the demanding standard in Article 1.1 for demonstrating a financial contribution through private bodies, a standard that protects innocent and fundamentally sound commercial conduct from the reach of improper countervailing duty actions.

## B. FACTS AVAILABLE

27. 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 fabricate 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. In this case, however, the EC abused "facts available" to create evidence where none existed and to ignore other evidence when that evidence could not be reconciled to its outcome driven analysis.

28. With respect to the GOK, the EC focused on two rather narrow pieces of evidence, and then proceeded to make sweeping accusations of non-cooperation against the GOK. The EC conclusions about these pieces of evidence are wrong. At most, Korea may have misunderstood the intent of some questions from the EC. In the end, however, Korea answered the specific questions posed fully and completely. Yet the EC still proceeded to use Korea's failure to provide certain information as the excuse to fabricate "evidence" about government direction and entrustment.

29. The EC used the same overbroad approach with respect to Hynix. In a last minute switch, the EC decided to reject all evidence about an Arthur Andersen valuation report because Hynix could not let the EC keep the full text of the report. Hynix provided the relevant excerpts. The EC could and did examine the report during the verification. Yet somehow this was not enough. Similarly, at the last minute the EC created new excuses to reject the extensive evidence submitted by Citibank. The EC seemed determine to expunge from the record any evidence contrary to its theory of the case. To use Article 12.7 to create favourable evidence and to ignore unfavourable evidence is wrong, and impermissible.

## C. FINANCIAL CONTRIBUTION

30. 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. The text requires that each alleged government delegation or command be examined with respect to each party, and with respect to each task or duty.

31. According to the *US – Export Restraints* case, 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. The panel in *US – Export Restraints* confirms generalized statements of government intent or desire, or even general interventions in the market itself, are insufficient to establish a financial contribution through a private body. It is insufficient to conclude that if *some* connection exists between government, *certain* events and *certain* actors, then financing by *all* lenders to a particular party, no matter when or how it occurs, is the result of entrustment or direction.

32. Yet this is exactly what the EC did in this case. After its 14-month investigation, the EC failed to come up with any single piece of 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. All such circumstantial evidence can show, at best, is the possible "effects" on the part of the creditors, which may have triggered certain "reaction" on the part of the creditors. Article 1 of the SCM Agreement and *US-Export Restraints* require more than showing of a mere effect or possible reaction of a private body.

33. The EC also relies extensively on the fact that the GOK held ownership interests in certain banks involved in Hynix's restructuring. This fact hardly constitutes evidence of an explicit and affirmative delegation or command by the GOK to entrust or direct credit to Hynix. But even if this shareholding somehow constituted "evidence" for the banks in which the GOK held a controlling stake, it is affirmatively not evidence of an explicit and affirmative delegation or command to *all* banks, particularly banks with little or no GOK ownership.

34. The EC focused too much on what the GOK was doing, and too little on what the various commercial banks were doing. In fact, the Hynix creditors were consistently assessing what made the most commercial sense for them. Each bank made its own assessment at each stage. The commercial banks drew upon an extensive body of data and information to help them make these various assessments. This extensive body of independent outside studies was submitted to the EC during the underlying investigation, but the EC largely ignored these studies.

35. The **December 2000 syndicated loan** rested on purely commercial considerations. Private banks – including Citibank – agreed to lend Hynix money. Given this participation by private banks for their own reasons, the burden of demonstrating any GOK entrustment or direction should be particularly high. The EC did not and cannot meet this strict standard for entrustment or direction. The fact that the FSC granted waivers to some banks allowing their full participation in the syndicated loan does not explain the decisions by these banks actually to participate in the syndicated loan. Likewise, it does not explain the participation of the seven other banks, which did not require waivers, in the syndicated loan.

36. Making available **export insurance**, and Hynix procuring that insurance through payment of the normal premiums, does not explain or describe any explicit and affirmative delegation or command by the GOK to Hynix creditors to extend short-term financing. It does not explain why the financing was made. The EC has again confused facilitating a transaction with directing that transaction.

37. With respect to the **KDB fast track programme** the scope of the EC's financial contribution findings remain unclear. Nothing in the KDB fast track programme required any specific lender to participate. The Korean financial community had great interest in the programme as a means to promote financial reform and restructuring. Since this programme to refinance existing debt would help bring stability to the market and spare creditors the need to struggle with clients in bankruptcy, the lenders all had their own self interest very much in mind. But no specific lender was legally obligated to participate in any specific refinancing. Indeed, the EC erroneously cites the example of KFB. What is truly remarkable about this particular "evidence" of entrustment or direction is that KFB in fact *did not participate* in the fast track programme. The EC weaves a grossly inaccurate tale when it concluded in its *Definitive Regulation* that "KFB gave in to the GOK demands and participated in the measures." This error highlights the dangers of relying on circumstantial evidence, rather than real facts.

38. The **May 2001 financial restructuring** package was proposed to the Hynix creditors at a time when DRAM prices had been rising again. According to the restructuring plan, Hynix would

seek an increase in private capital through global depository receipts ("GDRs"). In doing so, the creditor banks were essentially "market testing" their participation in the restructuring plan. The GDR offering was a success with private investors throughout the world. As a result of over-subscription, Hynix was able to raise more than USD 1.25 billion instead of the originally targeted USD 1 billion. Thus, the May 2001 restructuring occurred at a time of rising DRAM prices and occurred only because Hynix could persuade sophisticated international investors to invest in the company.

39. Against this background, the EC searched for any evidence to support a claim that the GOK was somehow secretly directing the outcome of the May restructuring. But the EC record shows little more than some unsubstantiated newspaper articles, and efforts to extrapolate from other events. The mere fact that an FSS official attended one meeting of the Hynix creditors does not become "evidence" that the GOK forced every creditor bank to participate. Newspaper reports about KorAm Bank, particularly since they were specifically repudiated at the time, should not become the basis to condemn the participation of every other creditor. The mere fact that Hynix needed debt restructuring is not evidence that the GOK must have been doing something behind the scenes. The most remarkable aspect of the EC determination is the willingness to conclude so much from so little.

40. 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."

41. The EC did not produce a single piece of evidence to demonstrate the constituent elements of "entrustment or direction" in the October restructuring. The EC continued to resort to its prior collection of "circumstantial" evidence to avoid its obligation to prove each constituent element of "entrustment or direction." The EC's evidence of "entrustment or direction" with respect to the Option 1 banks in October restructuring (those lending new money) consists primarily of the GOK shareholding in certain of them. Other than referring to the GOK shareholding, however, the EC did not provide any credible evidence as to each bank's motivations or intentions in participating in Option 1 of the October restructuring. Four banks -- including two 100-per cent GOK owned banks -- chose Option 3 and decided to sever their ties with Hynix completely. These four banks thus exercised appraisal rights on their debt rather than extend new loans to Hynix or convert debt to Hynix equity. This is compelling evidence showing lack of government intervention in the October restructuring. If the EC's allegation were true, the GOK would have easily forced these banks to participate, instead of twisting the arms of noisier private banks or banks with less government ownership. If the GOK could not direct even 100-per cent owned banks, it is hard to imagine direction over *independent* banks with no government ownership.

#### D. FINDING AND MEASUREMENT OF "BENEFIT"

42. 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.

43. After initially finding no "benefit" on many issues, the EC changed its position in its *Definitive Regulation* and suddenly found the existence of "benefit." This was flat 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*.

44. The EC understood that to find a countervailable subsidy from the **syndicated loan**, the EC could not afford to conclude again that there was no benefit. So ignoring its own sequence for the subsidy analysis as expressed in the *Provisional Regulation*, the EC found the benefit without engaging in any detailed discussion to explain or justify its change of position. All it provided as a rationale in this regard was that similar financing was not available at the time, which is preposterous since ten different banks, including a foreign bank, were involved in the particular loan at issue.

45. The EC also avoided a proper "benefit" analysis in examining **export insurance**. The standard as clarified by the Appellate Body in *Canada -- Aircraft* is to measure the difference between *what was received* and what was available on the market. Hynix received KEIC insurance in return for payment of listed premiums. Yet, nowhere does the EC attempt to conduct the appropriate benefit analysis. If anything, the benefit should consist of the difference between the actual fee paid and the fee that covers the operating costs and losses of the export insurance programme. But the EC never really addresses the matter. Instead, the EC mixed subjects, focusing on whether a "comparable commercial loan" could have been obtained by Hynix absent the KEIC insurance. But if the KEIC insurance was truly a loan guarantee, then the applicable measure of benefit would be the difference between the amount the firm receiving the guarantee paid on the loan guaranteed by the government and the amount the firm would pay on a comparable commercial loan absent the government guarantee, consistent with Article 14(c) of the SCM Agreement. This analysis was not performed.

46. The EC also rushed to judgment about the **KDB fast track programme**. The EC cannot substitute its own conclusion for the commercial judgment of Hynix creditors. It was never "evident" that the bonds would not be repaid. First, strict conditions applied to all applicants, including Hynix, such as credit rating, ability for upfront purchase of 20 per cent of the bonds, and long-term viability despite short term liquidity problem. Second, and more importantly, Hynix did obtain financing through loans in the same period in the form of the syndicated loan -- in the EC's own words, "a very similar transaction" to a bond -- and also in the form of the new equity issuance in the similar time period (i.e. in June 2001) on world financial markets. It seems creditors and investors did not agree with the EC's negative assessment.

47. The EC determined in its *Provisional Regulation* that there was no benefit conferred on Hynix from the **May 2001 restructuring** mainly because of the successful new equity offering. The fact that Hynix made a successful equity offering in June 2001 did not change after the *Provisional Regulation*. Nonetheless, the EC did change its "no benefit" conclusion, referring to "new information" obtained after the issuance of the *Provisional Regulation* that Korea submits can only be related to the EC's "entrustment or direction" analysis, not its benefit analysis. That "new information" primarily concerned the presence of FSC and FSS officials at a 10 March 2001 meeting of Hynix creditors, which has nothing to do with the success of the equity offering. Thus, the EC changed its benefit analysis without providing any adequate explanation.

48. The factual record completely undermines the EC's erroneous negative assessment. First, at the time that the convertible bond ("CB") purchase was decided, DRAM market forecasts were again favourable despite Hynix's particular financial difficulties. Second, private investors on the international market showed confidence in Hynix's long-term viability by purchasing the new equity. Third, the purchase of the CB was specifically conditioned upon the successful issuance of new equity. Fourth, the creditor banks' requirement that Hynix maintain the funding received from the CB purchase in escrow shows that the banks' concern that the funding be utilized for specific purposes as

a means of protecting their investment. Fifth, the fact that the banks chose to purchase convertible bonds instead of regular bonds further indicates that they were even hoping to obtain more than just their money back. At a time when the DRAM market was improving again, they wanted the opportunity to potentially participate in the gains resulting from such improvement through Hynix equity. These conditions and terms placed on the May restructuring negate the EC assertion that the creditors did not believe they would be repaid; they in fact took actions to help ensure repayment.

49. The EC made the same errors with respect to the **October 2001 restructuring**. The EC treated all three measures (the new loan, maturity extension, and debt to equity swap) as a disguised measure of debt forgiveness, and thus grants. In fact, the evidence showed that the banks did expect repayment, and required collateral. Moreover, third party objective analyses commissioned by the creditors in the course of October restructuring confirm that they were clearly expecting repayment. The creditor-commissioned Arthur Andersen report, which was provided by Hynix and examined by the EC as previously discussed, established the liquidation value for the Hynix debt at 29.9 per cent and the going concern value at 75.6 per cent. In other words, the likely recovery on debt was more than twice as large for Hynix as a going concern compared to liquidation. To some of the Hynix creditors (i.e. Option 1 creditor banks), it indeed made commercial sense as existing creditors to continue to finance Hynix.

50. If the EC's assertion that the banks did not expect to recover those loans were correct, the question arises why the banks did not simply write-off the loans, as was done with regard to considerable amounts of debt in the context of the October 2001 restructuring anyway. Contrary to the EC's assumption, the truth is that the banks that agreed to the maturity extension expected to recover those loans, in light of Hynix's financial restructuring and the banks' favourable assessment of Hynix's future outlook. Converting debt into equity makes sense for and is often used by creditors in a situation of financial restructuring, because the equity allows full participation in the upside potential of the company in difficulties. We note that the creditor banks had concluded that Hynix's going concern value was considerable and equity allows participation therein. They were clearly contemplating a return from their equities obtained through debt-to-equity swap. Like so many foreign investors that participated in the GDR offering, Citibank and the private Korean banks knew that Hynix stock had a substantial upside potential.

51. Moreover, the EC's analysis ignores the single most critical fact: the market studies prepared by outside consultants were done for existing creditors, not new outside investors. It is only common sense that an existing creditor will be thinking about two things when contemplating a new investment: what are the prospects for the new investment, and how does the new investment affect any existing investment. The EC's analysis allows the existing creditor to consider only one thing: the future prospects of the investment. These studies were numerous and extensive. The EC ignored these studies because it did not want to confront the basic point of all the studies: that further debt restructuring -- including the debt-equity swap -- was the best chance to ensure Hynix's survival and to maximize the recovery of the existing investment. This perspective is completely rationale for an existing creditor.

52. 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.

#### E. SPECIFICITY

53. Korea submits that the EC finding of specificity is inconsistent with Articles 1.2 and 2 of the SCM Agreement. Under these provisions, a finding of specificity must be "clearly substantiated" on the basis of "positive evidence." The EC specificity findings, on the contrary, do not rise to the level of precision required under the SCM Agreement.

## ANNEX A-2

### EXECUTIVE SUMMARY OF THE SUBMISSION OF THE EUROPEAN COMMUNITIES

(21 June 2004)

#### I. INJURY

1. Korea makes much of what it calls the "boom-bust cycle". This is a central pillar of its case. Contrary to what Korea asserts, this aspect was taken into careful consideration by the European Communities, but found not to break the causal link between the subsidized imports and injury to the domestic industry.

2. Korea's argument is, in any event, a very curious one. It may be that in markets such as the DRAM market it is necessary to take a long term view. That does not mean that the market place should not be subject to the disciplines of the *SCM Agreement*. When a player in the DRAM market gets it wrong, and the industry is in a downturn, in the normal course of events that player will have to contract by cutting costs and partially withdrawing from the market – opening up opportunities for others. The legal person might even "go bust" or the business or assets might otherwise be transferred to some other person, at a "distressed" price, or at least at a lower price, reflecting the cash-strapped situation of the original player, and the downturn in the market – once again, opening up opportunities for others. There is competition in a downturn, just as there is when times are good, quite probably even more so.

3. Of course, another alternative is government intervention, designed to enable the original player to "weather the storm" more or less intact and live to fight another day. Naturally, such government intervention effectively shifts the burden of the downturn onto other players in the market. The fact of the downturn does not make the subsidy any less injurious – if anything, the economic context makes the subsidy *even more* injurious. Thus, the simple question is this : must other players in the market be obliged to bear the burden of such subsidies ? Or rather, do the rules in the *SCM Agreement* ensure that, through countervailing measures, the effects of such subsidies can be contained, and not borne by the industry in other Members, but ultimately by the persons on whose behalf the subsidies were granted – namely Korean taxpayers – to whom, in the long term, those who grant the subsidies are accountable ? The correct answer is, without a shadow of doubt, the latter. And the "boom-bust" argument on which Korea relies so heavily has strictly no relevance whatsoever to that basic point.

4. The investigation concerned DRAMs originating in Korea and not DRAMs produced by Hynix. This was the reason why the investigating authorities looked at the development of imports from Korea. However, the subsidy part of the investigation established that, while imports from Hynix were subsidized, imports from Samsung, the only other Korean company which exported to the Community during the IP, were not subsidized. That is why the investigating authorities also separately examined volume, prices, and market share for Hynix's subsidized imports. For the same reason, the investigating authorities also established undercutting exclusively on the basis of the prices of Hynix's imports. The effect of the subsidized imports also concerned Hynix's imports. Thus, Korea is wrong to assert that the European Communities acted inconsistently with the *SCM Agreement* because Regulation 1480/2003 also refers to imports from Korea as a whole.

5. Korea's allegation concerning the merger hinges on the legal question of whether the investigating authorities were obliged by the *SCM Agreement* to add LGS' data to Hynix's data. The investigating authorities did not do that because doing so would have falsified the data for the trend analysis.

6. First, prior to 7 July 1999, Hynix could not control LGS' imports into the Community. Thus, Hynix's/HEI's, acquisition of LGS had no retroactive effect on Hynix's or HEI's import volume and market share in the Community in 1998 and in 1999 (up to 7 July). In other words, Hynix's acquisition of LGS' production capacity led to increased production capacity for the future. It did not retroactively affect Hynix's import volume and market share for 1998 and for 1999 (up to 7 July). Adding LGS's data to Hynix's data would, thus, falsify Hynix's market data for this period.

7. The European Communities would submit that the present situation is comparable to a situation in which a former competitor of the subsidized exporter gives up its business and sells its assets. If the subsidized exporter acquires the production facilities and equipment of the former competitor, it will be in a position to increase its production and acquire at least partially the market share held by the former competitor. Clearly, the former competitor's volume and market share would not play a role for the trend analysis regarding imports by the subsidized exporter. There are no reasons why the investigating authorities should have assessed the present case differently only because the acquisition of LGS was done in the form of a share deal and not an asset deal.

8. Second, Articles 15.1 and 15.2 *SCM Agreement* require the investigating authorities to objectively examine the volume of the subsidized imports. The investigating authorities established that Hynix received subsidies but they did not and could not examine whether LGS received any subsidies because LGS did not exist during the IP. Thus, the investigating authorities could not consider LGS' imports in 1998 and 1999 as "subsidized imports".

9. Third, Korea's suggestion that the approach followed by the investigating authorities with respect to LGS's exports is somehow inconsistent with their approach regarding Micron's acquisition of Texas Instruments is wrong. In both cases the investigating authorities followed exactly the same approach: in both cases, the investigating authorities took account of the respective acquisition once it had occurred; in both cases, the investigating authorities did not add the acquired company's volume and market share relating to the period prior to the acquisition to the acquirer's volume and market share. This, however, would be the consequence of Korea's suggested approach for LGS' volume and market share. Although the investigating authorities could not verify LGS' data due to Hynix's failure to timely and properly present appropriate data, the investigating authorities performed an alternative assessment of volume, market share, and the imports' effects in Regulation 1480/2003. Consequently, the investigating authorities' approach in respect of Micron's acquisition of Texas Instruments is fully in line with the approach pursued for Hynix's acquisition of LGS.

10. Should the Panel, notwithstanding the above observations, find that, by examining and considering the matter in the correct and reasonable manner it did, the European Communities somehow acted inconsistently with Article 15 *SCM Agreement*, then the European Communities submits, in the alternative, that it rightly did not take account of LGS' figures because Hynix did not provide them in a proper and timely manner.

11. As regards Korea's allegations concerning price undercutting, the European Communities submits that it is important to bear in mind the undisputed main characteristics of the DRAM market. First, competition takes place largely on price. The producer offering the lowest price will get the business. Second, there is great price flexibility. This means that prices vary constantly. Third, there is great price transparency. Price transparency enables buyers to immediately compare prices. Thus, if one producer decreases its prices, its competitors must promptly follow because otherwise they will not be able to sell.

12. It follows from the above that Korea is wrong insofar as it suggests that the producer with the largest market share dictates the price. Any producer with a significant production capacity can be the price leader and drive prices down.

13. The European Communities would also submit that it is important to take into account Hynix's specific situation. As is apparent from the subsidy discussion, Hynix was desperate for cash during the IP and, thus, desperate to sell as much as possible, irrespective of the price. Also, Hynix's production capacity exceeded the Community producers' capacity and, indeed, the total demand in the Community. Finally, Hynix received unlawful subsidies that enabled it to sell at even lower prices than those dictated by the market downturn.

14. The European Communities also submits that Korea presents the figures regarding the share of undercut and non-undercut transactions in a misleading manner.

15. Thus, paras. 152 to 156 of Korea's first written submission present the sequence of applied methodologies incorrectly. The sequence was : weighted average; monthly; and then daily comparison. The last comparison was performed at the request of Hynix and confirmed the monthly results in view of the share of comparable undercutting transactions. In fact, there were a significant amount of transactions that were not comparable and for which it was thus not possible to determine whether they were undercut or not. The data shows that Hynix's prices were undercutting Community prices in 47.2 per cent of all comparable transactions on a monthly basis and in 46.2 per cent of all comparable transactions on a daily basis.

16. Korea also fails to mention another distinctive feature of Hynix's undercutting strategy : the majority of Hynix's price undercutting occurred for the sales of high value added, advanced DRAMs. The Community industry focused on advanced DRAMs due to the Community industry's more advanced technology and because high value added DRAMs are important to finance next generation products. The daily and monthly comparison data show that Hynix's undercutting focused on the transactions of type 128 and 256 DRAMs. On the basis of a daily comparison, about 80 per cent of the transactions for which undercutting was found concerned high value added DRAMs, and, on the basis of a monthly comparison, about 75 per cent of the transactions for which undercutting was found concerned high value added DRAMs. In short, Hynix' undercutting strategy was particularly damaging for the Community industry.

17. The European Communities performed an objective examination when it compared the weighted average Community price with the weighted average Hynix price by product family, as well as when it compared the weighted average Hynix price to the Community industry's individual transactions by type.

18. The *SCM Agreement* leaves it to the investigating authority's discretion to apply a method objectively suited to establish undercutting, price depression, or prevention of price increases. First, Article 15.2 *SCM Agreement* requires that "...the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member ...". The *SCM Agreement* does not require that price undercutting be calculated on a weighted average or any other specific basis. This is confirmed by the findings of the Panel in *EC-Tube or Pipe Fittings*, which stated that "... an investigating authority [enjoys] a degree of discretion in carrying out the price undercutting assessment." The Panel explained that "[Article 3.2 of the *Anti-Dumping Agreement*]... does not set out any specific requirement relating to the calculation of a margin of undercutting, or provide a particular methodology to be followed in this consideration." Consequently, the comparison of weighted averages and individual transactions lies within the investigating authorities' discretion and cannot be non-objective as such.

19. The fact that in the present case the investigating authorities did not resort to their usual practice is also no indication that their method was not objective. The investigating authorities provided ample explanations for their approach to compare the weighted average Hynix price with individual transactions of the Community industry. Indeed, it is hardly possible to establish price undercutting on a weighted average basis in a market characterized by price transparency and flexibility because the competitors whose prices are undercut are obliged to quickly follow the lower price. These effects of price depression or the prevention of price increases, together with price undercutting, are expressly provided for in Article 15.2 *SCM Agreement* – consideration of any one of them would have been sufficient. The European Communities considered all three.

20. The investigating authorities also were not obliged to additionally consider undercutting with variations over the day or to compare on a transaction-by-transaction basis. First, the present case is an example of an especially detailed undercutting analysis. The investigating authorities compared weighted averages with weighted averages, and weighted averages with individual transactions on both a monthly and a daily basis. The investigating authorities also presented the undercutting margin as an overall weighted average (16.2 per cent) and as an undercutting range (12 to 32 per cent). Second, the European Communities is not aware that transactions can be determined at all by the hour. Third, it would have been impossible to find comparable transactions for three different points of time per day, still less for individual transactions on a transaction-by-transaction basis. The European Communities recalls that already for the daily comparison 38.2 per cent of the transactions were not comparable as opposed to 13 per cent in the case of a monthly comparison. This figure would likely have increased dramatically in the case of a comparison at three different points of time per day or in the case of a transaction-by-transaction comparison and, thus, rendered such comparison meaningless.

21. Finally, Hynix's undercutting qualifies as "significant undercutting". The *SCM Agreement* does not define the term "significant undercutting", and there is also no relevant case-law. In the European Communities' submission, it is also not possible to provide an abstract definition of the term because it depends on the specific circumstances of a case whether the undercutting is significant. Relevant facts include the margin of undercutting, the percent and type of transaction for which undercutting was found, and the price sensitivity of the market at issue. In the present case, the undercutting margin amounted to 16.2 per cent overall within an undercutting range of 12 to 32 per cent and about 47 per cent of all comparable transaction were undercut. Moreover, the vast majority of undercut transactions related to high value added DRAMs, which were crucial for the Community industry. Finally, the DRAM market is very transparent and characterized by substantial price competition. Thus, the European Communities correctly found that there was "significant undercutting".

22. Korea asserts that there are other factors that allegedly disprove the substantial correlation between the subsidization and the low price levels in the Community. The European Communities has the following observations.

23. First, Korea refers to the fact that DRAM prices dropped world-wide in the year 2001. This argument relates to the economic downturn and is dealt with in the context of causation.

24. Second, Korea asserts that larger importers, like Samsung, also practiced low prices and that Hynix could not be a price leader due to its smaller market share. The European Communities submits that Korea misses the point with its price leadership argument. To begin with, Hynix's market share amounted to 16.8 per cent and not to 15 per cent. Furthermore, competing suppliers were forced to meet any lower price offering irrespective of their market share. Finally, the investigating authorities assessed in detail the influence of other imports in recital 151 of Regulation 708/2003 and recitals 194 and 200 of Regulation 1480/2003. As the European Communities considers the reasoning in these recitals to be sufficiently clear, it will not repeat it here.

25. Third, there is no basis for Korea's allegation that the magnitude of the price drop in comparison to the subsidization level would disprove a substantial correlation. The magnitude of the price drop in comparison to the subsidization level merely suggests that the economic downturn might also have possibly caused some injury. It does not disprove the finding that Hynix's subsidized imports caused injury in the magnitude of the subsidization amount. The investigating authorities addressed both elements : they established that other factors might also have possibly caused some injury and that the injury elimination level was higher than the subsidization level.

26. Fourth, the finding that Hynix priced irrespective of cost is an important insight. It may be that pricing irrespective of cost is common behaviour in a cyclical industry. Hynix, however, was not pricing irrespective of cost due to the business cycle, but due to its desperate need for cash resulting from its financial situation. Hynix's prices during the boom year 2000 support the conclusion that its prices were not dictated by the business cycle : in comparison to 1998, the prices of other Korean importers had decreased by only 1 per cent and the Community prices by only 7 per cent, whilst Hynix's prices had already decreased by 23 per cent.

27. As regards the investigation period, there is nothing in Article 15.2 *SCM Agreement* on the fixing of the period of investigation. In any event, the European Communities submits that it was fixed objectively, and that the period of time that in fact elapsed in this case was reasonable and does not disclose any inconsistency.

28. As regards output, the European Communities agrees that "output" is a relevant factor for the injury assessment. The Oxford English Dictionary defines "output" as "the quantity or amount produced; production". The Commission assessed "production" in Regulation 708/2003 in recitals 125 and 126 and the preceding table. These findings were confirmed in recital 186 of Regulation 1480/2003. Korea's allegation that the European Communities failed to assess "output" is, thus, totally without merit.

29. As regards wages, the domestic producers' questionnaire responses contained information on wages. The investigating authorities examined this information and concluded that the factor "wages" was irrelevant for the injury assessment in the present case. Moreover, none of the parties, including Korea and Hynix, ever raised the issue of "wages". This is why the factor "wages" is not discussed in Regulation 708/2003 and Regulation 1480/2003.

30. In its assessment of the state of the domestic industry the European Communities did far more than just list the factors set out in Article 15.4 *SCM Agreement*. Rather, for each factor, the European Communities included in the Regulations available relevant data. And in each case the European Communities included an analysis or assessment in relation to such data, generally indicating that the factor was either a positive indicator, or a negative indicator, and drawing overall conclusions for the reasons set out in the Regulations. That constitutes an examination and evaluation. There is therefore no basis for any finding of inconsistency with Article 15.4 *SCM Agreement*.

31. Korea's elaborations on a causation analysis based on the addition of LGS' figures to Hynix's figures are entirely hypothetical, since the investigating authorities acted objectively when they examined imports on the basis of an approach that correctly and reasonably assessed Hynix's acquisition of LGS' in 1999 (see above). In any event, the "correlations" that Korea asserts exist (market share of the Community Industry *versus* market share of Hynix and market share of Hynix *versus* profitability of Infineon) would not have any particular value for the causation analysis, since the investigating authority needs to look at the whole picture. Market share, or the volume of subsidized imports, is only one piece of the overall picture – which also includes price effects and the state of the domestic industry. Thus, Korea's graphs are misleading, and its one-dimensional approach is incapable of establishing any inconsistency with the *SCM Agreement*.

32. Moreover, the European Communities submits that the conclusions on injury and causation would not differ, even if LGS' data were to be added to Hynix's data. First, even if LGS' data were to be added to Hynix's data, there would be a 155 per cent volume increase in absolute terms and this constitutes a significant increase in absolute terms within the meaning of Article 15.2 *SCM Agreement*. Second, Hynix's 16.8 per cent market share during the IP is sufficiently significant to justify the finding that Hynix's imports affected the domestic market and the domestic industry prices. Third, Korea's allegations in paras. 213 to 218 of its first written submission miss the point, since the European Communities based neither the injury nor the causation assessment on market share. Furthermore, market share tables lend no support to Korea's volume related reasoning.

## II. SUBSIDY

33. The European Communities acted at all times and in all respects consistently with Article 12.7 *SCM Agreement*.

34. Article 1.1(a)(1) *SCM Agreement* refers to a financial contribution by a government *or* any public body. The concept of a "public body" is to be juxtaposed to the concept of a "private body", referred to in Article 1.1(a)(1)(iv) *SCM Agreement*. Thus, in determining whether or not an entity is a public body, it is relevant to consider whether or not it is controlled, one way or another, in the long term or in the short term, by the state.

35. As regards the phrase "entrusts or directs", the European Communities would have the following observations. First, the text uses the word "direct", not, for example, the word "order". Whilst capable of including the notion of command, the word "direct" also has a wider connotation. That meaning includes "to regulate, conduct or control affairs"; "to give commands or orders with authority"; "to aim point or cause to move towards a goal". Thus, an indication – or as Korea puts it – a "nudge", as well as a command, is also a direction. Second, the word "entrusts" is different from the word "directs". It might include the sense of delegation, insofar as that indicates that the entrusted entity will be held responsible if the desired result is not achieved, but it also has a wider connotation. The concept of trust or entrust precisely indicates a particularly light control, or a certain distance on the part of the controlling authority. It includes the notions of "investing or charging", as well as the notion of putting something into the "care or protection" of someone. Thus, the meaning of this phrase "entrusts or directs" is generally wider than the meaning advanced by Korea.

36. In its submissions relating to the phrase "entrusts or directs" Korea confuses questions of fact and questions of evidence. The real issue before this Panel is not a nice legal discussion of what the words "entrust or direct" might mean. The real issue is an evidential one. The *US-Export Restraints* case, on which Korea seeks to rely so heavily, is therefore simply beside the point.

37. On the question of financial contribution, the European Communities relied on the totality of the facts, as set out in the Regulations.

38. With regard to the Syndicated Loan and generally, a substantial government contribution is, in itself, evidence of a long term commitment by government, such as to influence other participants. Time and the type and size of the contributions in relation to the company are important factors. A sufficiently large government commitment in the form of a loan will always persuade some lenders that the company will "weather the storm" and make the re-payments, or at least re-schedule them. All that such other lenders need to be persuaded of is that the company will survive. In this scenario, government participation in the loan is in the nature of a security or guarantee. There is, effectively, no way back for the government. Everyone is in the same, government sponsored, (life) boat. In fact, it makes participation in the loan for the other banks something of a "safe-bet". Thus, in this case, the European Communities did not see the participation of the other banks as evidence that Hynix was in great commercial shape and considered a sound investment by the market – an assertion that the European Communities considered implausible in all the circumstances. Rather, the

European Communities saw the participation of other banks as confirmation of the effectiveness of Korea's intervention in support of Hynix.

39. Korea does not appear to contest the determinations in relation to KDB, insofar as it was found to be a public body within the meaning of Article 1.1(a)(1) *SCM Agreement*. The relevant part of Korea's first written submission is silent on this point. On that basis, the Panel is not called upon to make any findings in this respect, and should refrain from doing so. Korea's bare assertions in relation to all banks are insufficient to rebut the detailed matters of fact referred to in Regulations 1480/2003 and 708/2003. In any event, Korea's assertions are not supported by the findings of the Panel in *US-Export Restraints*. That Panel was dealing with a different provision – Article 1.1(a)(1)(iv) *SCM Agreement*. The European Communities refers on this point rather to Article 1.1(a)(1) *SCM Agreement*. KDB was a "public body" within the meaning of that provision and it made a "financial contribution" – these facts not being seriously disputed by Korea.

40. Similarly, Korea does not contest the European Communities determinations that FSC was a public body within the meaning of Article 1.1(a)(1) *SCM Agreement*; nor that it was entrusted or directed by GOK, within the meaning of Article 1.1(a)(1)(iv) *SCM Agreement*, to grant the waivers.

41. With regard to KFB and KEB, the European Communities determined that the letter dated 28 November 2000 did more than merely "recommend" or "advise". It effectively ordered or "entrusted or directed" KEB to make the application for the extension of the credit ceilings, including on behalf of KFB and KDB. That fact is confirmed by the language of the letter itself.

42. With regard to the KEIC Guarantee, the European Communities recalls that it determined that KEIC was a public body within the meaning of Article 1.1(a)(1) *SCM Agreement*. Korea does not contest that determination. For this reason, the Panel must reject Korea's allegation of inconsistency with Article 1.1(a) *SCM Agreement* in relation to the KEIC guarantee – to do otherwise would be an error of law.

43. The European Communities additionally determined GOK entrustment or direction of KEIC within the meaning of Article 1.1(a)(1)(iv) *SCM Agreement*. Korea also does not contest this determination – even admitting expressly that the KEIC guarantee was made available at the direction of GOK ministers – and confining itself to an observation about benefit – a different point, which will be dealt with in the section of this submission relating to that subject.

44. Korea's submissions with regard to the KDB Debenture Programme are equally confused. Korea states that the determinations of the European Communities on this point are unclear. They are not. The European Communities found – quite clearly – that KDB was a public body making a financial contribution, within the meaning of Article 1.1(a)(1) *SCM Agreement*.

45. As regards the May 2001 Rescue Package, the European Communities invites the Panel to consider all the relevant facts set out in Regulations 708/2003 and 1480/2003. These facts, taken together, form part of an overall puzzle. It may certainly be correct that the investigated parties choose not to provide the investigating authority (or this Panel) with every piece of the puzzle. But the overall picture is clear enough, and justifies the determination of entrustment or direction, on the basis of a reasonable assessment of the totality of the facts.

46. As regards the October 2001 Rescue Package, the European Communities based its findings not on a single piece of evidence but on the totality of the facts and, to a certain extent, on information available. Thus, the European Communities submits that the relevant question is whether Korea has shown that the overall assessment of the evidence reveals any inconsistency with the *SCM Agreement*. Korea, however, never properly addresses this issue but instead deals, in isolation, with the various specific pieces of evidence relied on by the European Communities. The European Communities

submits that this is the wrong approach because it is irrelevant whether a single piece of evidence in itself and taken in isolation is sufficient evidence of government direction.

47. On the question of benefit, the European Communities observes that the words "any method" and "any such method" in Article 14 *SCM Agreement* indicate that different methods for assessing the amount of a subsidy, or, for that matter, whether or not there is a benefit, may be consistent with the *SCM Agreement*. That is confirmed by the use of the word "guidelines", again suggesting some latitude in the application of these provisions. Thus, investigating authorities have a certain degree of flexibility. The primary obligation is rather one of transparency and explanation.

48. It is highly significant that Article 14 (a) only indicates a basic rule. Article 14 (a) does not contain a specific calculation method. There is a very good reason for this. It is because the amount of the subsidy or benefit will depend on future risk – something that is problematic to assess.

49. This point is of central importance. The *SCM Agreement* imposes no express obligations on Members when it comes to calculating the amount of subsidy or benefit in a "risk" scenario, that is, one which involves assessing future risk. In accordance with the *Canada-Aircraft* case and the language of Article 14 *SCM Agreement*, the guiding principle should be that a benchmark for calculation should be based on the advantage obtained over finance available on the commercial market – if indeed any such finance is available.

50. In the methodology of the European Communities, one may say that the theoretical graph that relates future risk assumed by government against the amount of subsidy is not uniformly linear. To the extent that future risk could be measured and quantified from zero to 100 (where zero represents no risk of loss of capital and 100 certain loss), the market does not just add, for example, one percentage point of interest for each additional point of risk. Rather, there is a point at which the capital markets simply will not put any further money at risk. Capital usually has alternatives – and it will seek out the best balance between risk and reward. For all practical purposes, that balance will not lie anywhere towards risks approaching the 100 maximum referred to above. This is not really a controversial observation, being largely a question of common sense.

51. The European Communities takes the view that, beyond the point at which the market would no longer risk capital, if the government nevertheless provides capital, especially capital at risk, (whether labelled equity, debt, guarantee, or for that matter grant), the benefit to the company must be measured as being the full amount of the principal. Left to its own resources and the market the company would get nothing. Thanks to the government, the company gets, for example, capital of Euro 10 million. The benefit to the company resulting from government intervention is therefore Euro 10 million, and that is the amount that can be countervailed.

52. The European Communities considers that each of the specific measures assessed conferred a benefit, for all of the reasons set out in the Regulations.

53. Finally, contrary to what Korea asserts, all the relevant measures, including the KDB Debenture Programme, the May 2001 Rescue Package, and the October 2001 Rescue Package, were specific within the meaning of the *SCM Agreement*. There were no errors in the calculation of the subsidy amount, nor in the way in which the countervailing duty was calculated. The European Communities correctly allocated the subsidies over Hynix's non-consolidated sales.

## ANNEX A-3

### EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF JAPAN

(25 June 2004)

#### I. INTRODUCTION

1. The Government of Japan ("Japan") wishes to address crucial systemic issues raised by the Government of the Republic of Korea ("Korea") relating to the material injury determination and the subsidy determination by the European Communities (the "EC"). While Japan does not take any position with respect to the factual aspects of this case, Japan respectfully requests that this Panel carefully review both the legal and factual aspects of this case in light of the following arguments in this submission.

#### II. ARGUMENT

##### A. THE INJURY DETERMINATION

##### 1. **The EC Appears to Have Failed to Separate and Distinguish Injury Caused by Other Known Factors from That Caused by the Subsidized Imports**

2. Korea alleges that the EC conducted insufficient analysis to meet the obligation of the non-attribution rule under Article 15.5 of the SCM Agreement.<sup>1</sup> The EC's analysis appears to have failed to separate and distinguish effects of all other known factors on the domestic industry from effects of subsidization.

3. In *EC – Pipe Fittings*<sup>2</sup>, the Appellate Body reconfirmed that the authorities need to separate and distinguish the injury caused by dumped imports from that caused by other factors when determining injury under Article 3.5 of the AD Agreement which is equivalent to Article 15.5 of the SCM Agreement.

4. In this case, the EC based its injury determination on the significant price undercutting by Hynix's subsidized imports and the oversupply of DRAMs.<sup>3</sup> Although EC recognized that the overcapacity might have contributed to the severe downturn from which this industry is suffering<sup>4</sup>, it seems to have failed to examine the overcapacity of Samsung, a producer of non-subsidized DRAMs, separately from the overcapacity of Hynix.

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<sup>1</sup> See *First Written Submission by the Republic of Korea* ("Korea's First Written Submission"), 7 May 2004, para. 222.

<sup>2</sup> Appellate Body report, *European Communities - Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* ("*EC – Pipe Fittings*"), WT/DS219/AB/R, adopted 18 August 2003.

<sup>3</sup> Council Regulation (EC) No. 1480/2003 of 11 August 2003 Imposing a Definitive Countervailing Duty and Collecting Definitively the Provisional Duty Imposed on Imports of Certain Electronic Microcircuits Known As DRAMs (Dynamic Random Access Memories) Originating in the Republic of Korea, OJ 2003 L 212 (hereinafter "*Definitive Regulation*"), (GOK Exhibit 1), recital 192.

<sup>4</sup> *Id.*, recital 197.

5. Japan respectfully requests that this Panel carefully review whether the EC separated and distinguished injury caused by other known factors from that caused by subsidized imports in its injury determination pursuant to Article 15.5 of the SCM Agreement.

## B. THE SUBSIDY DETERMINATION

### 1. **The Panel Should Apply the Correct Evidentiary Standards to Review the Existence and the Extent of Entrustment or Direction by the Government of Korea under Article 1.1(a)(1)(iv) of the SCM Agreement**

6. The authorities may find that a subsidy was granted to a recipient only when a financial contribution within the meaning of Article 1.1 (a)(1) was made, and a benefit within the meaning of Article 1.1(b) was conferred, to a recipient. Article 1.1(a)(1)(iv) of the SCM Agreement sets forth that the authorities may determine that a privately-controlled bank provided a financial contribution, if the bank provided it in compliance with entrustment or direction by the government.

7. The panel in *US – Export Restraints*<sup>5</sup> analyzed the meaning of terms "entrust or direct" in Article 1.1(a)(1)(iv) that acts of entrusting and directing comprise 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."<sup>6</sup> Its analysis shows that Article 1.1(a)(1)(iv) provides these elements, which the authorities must find to conclude that the financial contribution was granted through a privately controlled bank. It also clarified that this Article does not require that the government's delegation or command must be so detail to instruct every step that the bank must follow.

8. The existence of these three elements may be shown by direct evidence such as the governmental letter to a commercial bank, or circumstantial or secondary evidence. 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 or commanded a privately controlled bank to provide certain financial supports to a specific company.

9. As Korea argues, the standard of review of this Panel is set forth in Article 11 of the Dispute Settlement Understanding.<sup>7</sup> This Article requires that this Panel review whether the EC's subsidy determination was based on "an objective assessment of the matter before it, including an objective assessment of the facts of the case".<sup>8</sup> Thus, this Panel must find that the facts are established consistently with the WTO rules so far as an objective assessment of evidence on the record would reasonably allow this Panel to reach the conclusion that the authorities reached. The evidentiary standards have no further requirements.

10. As such, Japan respectfully requests that this Panel carefully review the existence of entrustment or direction by the Government of Korea in light of the above-discussion.

### 2. **The Panel Should Review the EC's Application of Facts Available in Accordance with the SCM Agreement and the International Law**

11. The EC based its subsidy determination on facts from secondary sources, claiming that certain responding parties failed to provide necessary information or refused to accept on-the-spot

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<sup>5</sup> Panel report, *United States -- Measures Treating Export Restraints as Subsidies* ("US – Export Restraints"), WT/DS194/R, adopted 23 August 2001.

<sup>6</sup> *Id.*, para. 8.29.

<sup>7</sup> *Korea's First Written Submission*, paras. 26-32.

<sup>8</sup> Article 11 of the DSU.

verifications.<sup>9</sup> The general principle of good faith under international law and the specific requirements under Articles 12.7 and 12.11 of the SCM Agreement mandate that facts available are the last resort for the authorities.

12. As the Appellate Body has repeatedly recognized, Members are obliged to perform their WTO treaty obligations in good faith.<sup>10</sup> In *US – Hot-Rolled Steel*, for example, the Appellate Body stated that the "organic principle of good faith" is "a general principle of law and a principle of general international law".<sup>11</sup> In *US – Shrimp*<sup>12</sup>, the Appellate Body explained that this general principle "prohibits the abusive exercise of a state's rights"<sup>13</sup> and that the exercise of a state's right should be "fair and equitable as between the parties."<sup>14</sup> As such, the basic principle of good faith requires the authorities to act in an even-handed manner that respects fundamental fairness.<sup>15</sup>

13. Article 12.7 provides the authorities with the discretion to base their subsidy determinations on information from secondary sources as facts available. Considering Article 26 of the *Vienna Convention on the Law of Treaties*, any exercise of discretion under treaty provisions in force must be performed in good faith. The Appellate Body in *US – Hot-Rolled Steel* stated that "the discretion must be exercised in an even-handed way that is fair to all parties affected by an anti-dumping investigation."<sup>16</sup>

14. The provision of Article 12.7 sets forth specific obligations of both authorities and responding parties before the authorities resort to facts available. The authorities must use information submitted by the responding party and may not resort to facts available, if the party submitted the information "within a reasonable time" without significantly impeding the investigation. As to "within a reasonable period of time," the Appellate Body explained six factors that investigating authorities should consider.<sup>17</sup>

15. The provisions of Article 12.11 confirm the requirement of the two-way process between the authorities and the responding party. This Article provides that the authorities shall take due account of any difficulties experienced by interested parties in supplying information requested, and shall provide any assistance practicable. The Appellate Body stated that Article 6.13 of the AD Agreement, which is equivalent to the provision of Article 12.11 of the SCM Agreement, underscores that "cooperation" is a two-way process involving joint effort and that it requires investigating authorities to make certain allowances for, or take action to assist, interested parties in supplying information.<sup>18</sup>

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<sup>9</sup> The *Definitive Regulation*, recitals 16-18.

<sup>10</sup> See, e.g., Appellate Body report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("US – Line Pipe"), WT/DS202/AB/R, adopted 8 March 2002, para. 110 and n.117; Appellate Body report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ("US – Hot-Rolled Steel"), WT/DS184/AB/R, adopted 23 August 2001, para. 101.

<sup>11</sup> Appellate Body report, *US – Hot-Rolled Steel*, para. 101.

<sup>12</sup> Appellate Body report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("US – Shrimp"), WT/DS58/AB/R, adopted 6 November 1998.

<sup>13</sup> *Id.*, para. 158.

<sup>14</sup> *Id.* at n.156, quoting B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chap. 4, page 125 (emphasis added by the Appellate Body).

<sup>15</sup> See Appellate Body report, *US – Hot-Rolled Steel*, para. 148 and n.142. See also Appellate Body report, *EC Measures Concerning Meat and Meat Products* ("EC – Hormones"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 133.

<sup>16</sup> Appellate Body report, *US – Hot-Rolled Steel*, para. 148 (emphasis in original).

<sup>17</sup> *Id.*, para. 85.

<sup>18</sup> *Id.*, para. 104.

16. The authorities must satisfy the above requirements under Articles 12.7 and 12.11 of the SCM Agreement, and must exercise its discretion to identify facts available in an unbiased, objective, even-handed, and fair manner. Japan respectfully requests that this Panel review whether the EC applied facts available for the case in compliance with these requirements.

### **III. CONCLUSION**

17. For the reasons set forth above, Japan respectfully requests this Panel to carefully review the consistency of the injury determination with Articles 15.5 and the subsidy determination with Articles 1.1(a)(1)(iv), 12.7 and 12.11 of the SCM Agreement.

## ANNEX A-4

### EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF THE UNITED STATES

(25 June 2004)

#### I. GENERAL ISSUES

1. **Standard of Review:** The Panel's task is to determine whether a reasonable, unbiased person, looking at the same evidentiary record as the EC authorities, could have – not would have – reached the same conclusions as did those authorities. The United States trusts that the Panel will see Korea's arguments for what they are: nothing more than an impermissible request for this Panel to conduct a *de novo* review.

2. **Burden of Proof:** The burden is on Korea to prove that the EC acted in a WTO-inconsistent manner. The burden is not on the EC to prove that it acted in a WTO-consistent manner.

3. **Positive Evidence:** Korea's argument is not really about whether the evidence relied upon by the EC authorities was "positive evidence." Instead, and notwithstanding its repeated protestations to the contrary, what Korea wants is for the Panel to reweigh the evidence relied upon by the EC authorities.

#### II. ISSUES CONCERNING SUBSIDY IDENTIFICATION AND CALCULATION

4. **The "Entrusts or Directs" Standard:** Korea advocates a special evidentiary standard for "entrustment or direction." According to Korea, government action amounts to entrustment or direction only where it is "clear and unambiguous" or "specific and compelling." Furthermore, discerning whether government action amounts to entrustment or direction demands "increased scrutiny." However, neither Article 1.1(a)(1)(iv) itself nor any other provision of the WTO agreements supports the notion that some sort of special evidentiary standard exists for purposes of determining the existence of entrustment or direction.

5. Korea also argues that the evidence of entrustment or direction must take the form of an "explicit" government command. Korea's use of the term "explicit" suggests that government entrustment or direction may only be evidenced by a formal or official command.

6. The ordinary meaning of entrustment or direction includes, but is not limited to, an order or command. An interpretation of subparagraph (iv) that would rule out automatically, and in all cases, any government direction not expressed in writing would render Article 1.1(a)(1)(iv) virtually meaningless.<sup>1</sup>

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<sup>1</sup> Indeed the Appellate Body has cautioned against interpretations that "elevate form over substance and that permit Members to circumvent ... subsidy disciplines ... ." *Canada – Dairy Products*, para. 110. Although the Appellate Body was addressing export subsidy disciplines under the Agreement on Agriculture, its reasoning applies with equal force to the SCM Agreement.

7. Korea also asserts that the evidentiary standard of entrustment or direction under Article 1.1(a)(1)(iv) requires *a* government command to *an* explicitly named private body to take *an* explicitly identified action at *an* explicit point in time. It is obvious from the provision's text that Article 1.1(a)(1)(iv) imposes no such requirement. As a general evidentiary matter, any piece of evidence or fact can be relevant, provided it demonstrates, either individually or in conjunction with other evidence, whether or not a government entrusted or directed private bodies to provide financial contributions. The relative importance of each piece of evidence or fact can only be determined in the context of a particular case, and not on the basis of generalities.

8. Korea cites the use of the singular "a" financial contribution in the text of Article 1.1(a)(1). However, the text of Articles 1 and 2 of the SCM Agreement also use the singular "a" in referring to benefit, subsidy and specificity. If "a" financial contribution were interpreted to mean government direction to "a" particular bank, then specificity would be considered always in the context of, for example, an individual bank's loan to "a" beneficiary. The subsidy, therefore, would always be specific. Thus, Korea's "a"/singular argument would render Article 2 of the SCM Agreement a nullity, and, for that reason alone, should be rejected by the Panel.

9. Korea's "a"/singular argument also overlooks the fact that use of the singular does not rule out a meaning that encompasses the plural of that term. In particular, the definition of the term "body", as used in "a private body" in subparagraph (iv), provides that the term "body" may refer to a single entity or more than one entity. The ordinary meaning of the text of Article 1.1(a)(1)(iv), therefore, does not rule out government entrustment or direction to multiple private creditors as a group.

10. Korea's reliance on *US – Export Restraints* for its bank-by-bank, transaction-by-transaction evidentiary standard also is misplaced. The panel in *US – Export Restraints* addressed a very different issue, and the cited portion of the *US – Export Restraints* report is of limited (if any) relevance to the instant dispute. Even if this Panel should accept the premise that "the act of entrusting and that of directing 'necessarily carry with them the element of an explicit and affirmative action, be it delegation or command'", there is no basis in the SCM Agreement for transforming the general concept of an "element of an explicit and affirmative action" into a "strict" evidentiary standard calling for express proof of formal government action on a bank-by-bank, transaction-by-transaction basis.

11. The United States disagrees with the premise of Korea's argument that the behaviour of private parties is relevant in determining entrustment or direction. The focus of Article 1.1(a)(1), including subparagraph (iv), therefore, is on "the action of the government" in making the "financial contribution," and the existence of a government financial contribution – whether direct or indirect – is determined in reference to the actions of the government.

12. **Facts Available:** Korea's discussion of "facts available" and Article 12.7 of the SCM Agreement reflect several errors of interpretation. In cases where interested Members or interested parties frustrate the proceedings, either by withholding requested information or otherwise significantly impeding the investigation, Article 12.7 of the SCM Agreement provides for the use of the facts available, but does not instruct authorities as to which facts on the record must be relied upon in making determinations, nor how to assess or weigh the evidence on the record. It seems obvious, though, that where a party denies access to information, that fact would be part of the evidentiary record. Based upon a party's denial of access to information, the investigating authority can properly draw inferences concerning the reliability of other information provided by that party. Thus, an investigating authority can draw reasonable inferences from all of the facts on the record, and choose to rely, or place greater weight, upon information provided by other sources.

13. Korea's approach incorrectly assumes that the only facts available to authorities are those provided by the respondent party or government. However, other facts are often on the record, including publicly available information and information provided by domestic interested parties. In addition, Korea's approach improperly allows a respondent to pick and choose the information that an investigating authority must use in making a determination.

14. Concerning Korea's reliance on Annex II of the Antidumping Agreement, Annex II, like every other provision of the WTO agreements, may provide context for purposes of interpreting Article 12.7 of the SCM Agreement, although the conclusions to be drawn from considering Annex II as context can be debated. However, one contextual conclusion is beyond debate; namely, that no comparable annex exists in the SCM Agreement. The Panel, therefore, must give meaning to the express absence of any annex or any textual reference to the requirements contained in Annex II of the AD Agreement. In particular, the Panel should reject Korea's efforts to do what the drafters did not; namely, make select portions of Annex II applicable to determinations under Article 12.7 of the SCM Agreement.

15. Korea provides no support for its assertion that even if an investigating authority's application of facts available is justified under the circumstances, that application should be limited to be "proportionate to the alleged non-cooperation or impediment." Under Article 12.7, the use of facts available depends upon whether "necessary information" is provided. If necessary information is withheld, or an investigating authority is denied access to such information, the authority must draw inferences and reach conclusions using whatever facts are available in order to complete its investigation.

16. **Benefit:** Korea argues that for *every* type of financial contribution, the relevant market from which to source the benchmark is a "primary market benchmark"; *i.e.*, the market of the particular Member at issue. Korea's interpretation ignores the plain language of Article 14. Furthermore, Korea's reliance on *Softwood Lumber* in support of its argument is misplaced.

17. Subparagraphs (a) and (d) contain territorial limitations on the relevant benchmark; subparagraphs (b) and (c) do not. Nevertheless, Korea argues that it is "implicit" in the use of the term "comparable" in subparagraphs (b) and (c) that "comparisons be made using the experience of private actors *in the market of the Member*, since that experience is necessarily the most comparable" (emphasis added). The Panel should reject Korea's attempt to do read into subparagraphs (b) and (c) words that are not there.

18. Korea's reliance on *Softwood Lumber* is misplaced, because the Appellate Body's findings in that dispute were limited to subparagraph (d) of Article 14, which contains the phrase "in the country of provision or purchase." There is no such territorial limitation language in subparagraphs (b) and (c).

19. **Specificity:** Korea suggests that the EC was required to examine the size and capital of Hynix in relation to the size and capital intensity of all companies undergoing debt restructurings and to consider that debt restructuring aid allocated among participating creditors on a *pro rata* basis, taking into account their existing debt holdings. Article 2.1(c) does not contain *any* requirements regarding how a disproportionate use analysis is to be conducted, much less the specific analytical methods Korea asserts are required. Furthermore, carried to its logical conclusion, Korea's analytical approach would generate the absurd result that the more indebted a company is, the more subsidies it may receive without risking a finding of specificity.

### III. ISSUES CONCERNING THE DETERMINATION OF INJURY

20. **Import Volume:** Korea asserts that there was no such significant increase in market share. The United States is not familiar enough with the factual record of the EC's investigation to have a view as to whether there was such a significant increase. From a legal perspective, however, Korea's emphasis on the significance of any increase in market share is not justified by the text of Articles 15.1 and 15.2. For an injury determination, Article 15.1 requires, *inter alia*, an objective examination of "both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products" (footnote omitted). In turn, SCM Agreement Article 15.2 provides, in pertinent part, that:

[w]ith regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member.

Based upon the clear text of the SCM Agreement, which uses the disjunctive terms "either" and "or," analysis of the volume of subject imports should include consideration of the absolute volume of subsidized subject imports, as well as whether there was a significant increase in the volume of subsidized subject imports in absolute terms, a significant increase in the volume of subsidized subject imports relative to production in the importing Member, or a significant increase in the volume of subsidized subject imports relative to consumption in the importing Member. The last sentence of SCM Agreement Article 15.2 specifies that "no one or several" of the Article 15.2 factors "can necessarily give decisive guidance."

21. Thus, there is no requirement that there be an increase in subsidized import volume, let alone that an investigating authority find a "significant" increase in subsidized import volume relative to consumption. This is logical, because imports can have adverse price effects without gaining market share – for example, if they force the domestic industry to lower its prices in order to retain its share of the market. In a market for a fungible commodity where information is disseminated rapidly and prices can change frequently – as is the case with respect to DRAMs – it is quite possible that low-priced imports can have adverse price effects with little or no gain in market share.

22. **Price Undercutting:** Korea asserts that in this case, the EC departed from its usual approach to analyzing price undercutting without providing adequate explanation for doing so, and implies that even the frequencies of undercutting found by the EC are insufficient. However, other panels have found that it is for the investigating authorities in the first instance to select methodologies to analyze the price effects of subject imports. Articles 15.1 and 15.2 do not specify any particular methodology to be used in making this analysis.

23. Under the disjunctive language of Article 15.2, there is no requirement that the investigating authority find any price undercutting at all. Thus, there is certainly no requirement that subsidized subject imports undercut the domestic industry's prices or did so with a particular frequency or magnitude, let alone that investigating authorities find that subject imports were the lowest-priced product throughout the period examined. The conditions of competition and business cycle distinctive to the industry are factual circumstances specific to an investigation that are relevant in ascertaining the significance of undercutting in a given case, and that an investigating authority will explain in its injury determination the significance of any undercutting in the context of the particular case.

24. **Price Leadership:** Korea asserts that the EC largely ignored its own finding that there is no such thing as a price leader in this market. According to Korea, this finding "should have called into

serious doubt whether Hynix could really be the source of 'significant' price effects." Korea intimates that there was a need for evidence of Hynix's price leadership for an affirmative material injury determination. Notably, however, Korea fails to identify any requirement under Article 15 of the SCM Agreement to find price leadership, because there is no such requirement.