

ANNEX D

ORAL STATEMENTS OF PARTIES AT THE SECOND SUBSTANTIVE MEETING

Contents		Page
Annex D-1	Executive Summary of the Statement of Korea	D-2
Annex D-2	Executive Summary of the Statement of the European Communities	D-7

ANNEX D-1

EXECUTIVE SUMMARY OF THE STATEMENT OF KOREA

(10 January 2005)

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

I. INJURY ISSUES

2. The EC argues that the *only* obligation set forth under Articles 15.1 and 15.2 of the SCM Agreement is that the national authority "examine" and "consider" the evidence. Korea believes that to satisfy the obligations of Article 15.1 and 15.2, the investigating authority must demonstrate that its determination is, in fact, based on *positive evidence* and reflects *objective examination*. Moreover, under Article 11 of the DSU the Panel must be allowed to examine whether the evidence underlying a determination is credible. The EC also asserts that Korea has not raised arguments under Article 15.1. This assertion is wrong. Korea raised this claim in its Request for the Panel Establishment and in its First Submission. In our Second Submission, we elaborated on those arguments.

Volume, Price Effects and the Condition of the Industry

3. On the issue of volume, Korea believes "significant" has both qualitative and quantitative dimensions. By misrepresenting the LG Semiconductor figures, the EC improperly relied upon figures for overall imports, inconsistent with Article 15.2. The inconsistent treatment of shipments by LG Semiconductor and Hyundai Electronics also created a violation of Article 15.1, since the EC approach simply cannot be considered objective examination.

4. Korea further believes that as a matter of law, the EC's indexed figure of a 155 per cent increase in this case cannot be considered "significant" given the nature of the industry. More importantly, the evidence before the EC demonstrates unequivocally that, when analyzed properly to include LG shipments, Hynix's market share *did not increase at all*, but rather decreased over the period examined.

5. With respect to price effects, we are forced to look at the output from the EC's "black box." The EC avoids the heart of the Korean argument – that the methodology was inherently unfair by comparing a transaction price to an average price. The approach taken by the EC is inherently biased and is thus inconsistent with Article 15.2, and is also a separate violation of Article 15.1.

6. The EC also found competition in the DRAM market takes place largely on price. Yet, the evidence showed that Hynix steadily lost its share in the EC market from 1999 through 2001. EC

speculation to remedy the inconsistency in its logic and the facts does not satisfy the obligations of Article 15.2. The EC approach also does not satisfy Article 15.1.

7. With respect to the condition of the domestic industry, Article 15.4 of the *SCM Agreement* establishes that the national authority must examine all of the enumerated injury factors. But the EC did not address wages, a specific factor under Article 15.4, and it did not make sufficient data available to be able to analyze what a proper analysis of "wages" would have produced. The EC also effectively states it does not have to consider statements of its own domestic industry that have a direct bearing on the Article 15.4 factors, throwing out any sense of accountability. Finally, the EC has not explained adequately why just three of 13 enumerated factors under Article 15.4 compel its conclusion that the domestic industry was suffering material injury.

Causation and Non-Attribution

8. The EC injury analysis rests in large part on an erroneous and inappropriate finding of an absolute increase in subject imports, with or without including LGS. Even if this approach somehow complies with Article 15.2, it does not comply with Article 15.5 read in light of Article 15.1. And even if Article 15.5 were read so narrowly as to permit a finding of causal relationship in this situation, the analysis is still not objective, representing another aspect of the EC determination that is inconsistent with Article 15.1.

9. On non-attribution, the EC has yet to explain how it separated and distinguished a number of other causal factors raised in the underlying proceeding. For example, the EC erroneously dismissed the role of the drop in demand for 2001, along with the accompanying "inventory burn." The EC also ignored evidence on changes in relative capacity that confirmed the dominant role of other suppliers who increased their capacity much more than Hynix. Although the EC tried to address the role of unsubsidized imports, it either ignored or distorted the key evidence. The EC's response is merely to assert that it did consider these causal factors and ensured that they were separated and distinguished from subject imports, but mere assertions do not satisfy Article 15.5.

II. SUBSIDY ISSUES

10. The EC argues that this Panel should not consider the evidence relied upon by the authorities. This approach is just wrong. Pursuant to Article 11 of the DSU, this Panel must consider the evidence provided by the EC authorities with respect to each element of a subsidy. The EC also argues that every piece of evidence is relevant to every actor and every transaction. But this Panel has the job of reviewing that evidence, and deciding whether a reasonable and objective authority could have reached the decision that it did.

11. In their determinations, the EC authorities discussed individual transactions and individual banks. The EC now tries to hide behind the "totality" of the facts, in an effort to obscure the reality that the "facts" actually address much less than the authorities would like. The EC tries to avoid the question of which banks were entrusted or directed to do what. The legal standard for entrustment or direction requires the EC authorities to answer these questions; they did not.

12. The EC also tries to defend its use of adverse inferences, but the EC fails to distinguish between inference that may turn out to be adverse, and inferences that are intentionally adverse. Having identified a particular fact, the EC then proceeds to draw inferences with no limits. The EC also tries to blur the distinctions between parties to the investigation and third parties who might have relevant information. In sum, the EC drew intentionally adverse inferences, beyond the permissible scope of Article 12.7.

Financial Contribution

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

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

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

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

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

18. May 2001 Restructuring. The EC implies it need not show entrustment or direction. The fact that two lenders may have been public bodies, however, does not address the numerous other lenders that were not public bodies. For these private bodies, the EC must show entrustment or direction. But the EC instead brushes aside fairly decisive evidence of Hynix' creditors making rational decisions and protecting their decisions through the financing they formulated. In particular, nowhere does the EC mention the GDR when it addresses financial contribution and the May 2001 restructuring package.

19. October 2001 Restructuring. The EC implies it need not show entrustment or direction. The fact that two lenders may have been public bodies, however, does not address the fact that other banks were not public bodies. For these private bodies, the EC must show entrustment or direction. The EC stresses the degree of government ownership of the banks. Again, such evidence simply cannot establish entrustment or direction. The EC also cites to banks taking into account public policy considerations. This approach reflects a flawed understanding of the legal standard. There is nothing unusual about banks taking into account a wide range of factors when making a loan. The EC also alleges a "pattern of continuous involvement," but in doing so misstates the facts. Finally, the EC turns to an analysis of evidence for several specific banks. This discussion of "evidence," however,

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

Benefit

20. With respect to benefit, as a legal matter, if the EC's findings on financial contribution are found inconsistent with the *SCM Agreement*, then the EC findings on benefit must also fail. Korea has also properly challenged both the finding and measurement of benefit under both Articles 1.1(b) and 14 of the *SCM Agreement*.

21. Looking at benchmarks, Article 14 applies very concrete terms focused on the "usual" or "prevailing" conduct in the market under investigation, or "comparable" conduct. With respect to the amount of benefit, Article 14(b) and (c), in particular, state that the amount of benefit conferred "shall be the difference" in the costs of the instruments compared. With respect to the provision of goods, Article 14(d) requires a comparison of the goods or services provided versus the adequate remuneration for such goods or services, which "shall be determined in relation to prevailing market conditions." The EC wants to escape these terms, claiming they are mere guidelines and nothing in Article 14 specifies a particular methodology measuring benefit. But the guidelines are still mandatory; they must still be considered and authorities may not use methodologies inconsistent with these guidelines.

22. In *US – Softwood Lumber*, the Appellate Body found that "the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is *very limited*." An authority may do so only when "it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods." Moreover, even if it establishes market distortion, an authority must still validate an alternative benchmark. The EC claims that the Appellate Body's holding in *US – Softwood Lumber* is distinguished by the fact that it only dealt with the language of Article 14(d), and must be restricted to Article 14(d) on that basis. But such a reading completely ignores the clear preference for primary benchmarks (i.e., those present in the market under investigation) found in the other paragraphs of Article 14.

23. The EC has tried to explain the dramatic changes between the provisional and definitive regulations, but this explanation just underscores the defects in the EC approach. The EC uses the "totality" of the facts to obscure the important distinction between "financial contribution" and "benefit" under the *SCM Agreement*. Even if one assumes there might have been some basis to reevaluate the determination of financial contribution, the EC has offered not explanation for why it changed its approach to benefit and market benchmarks.

24. The EC also challenges the relevance of considering the perspective of inside investors. The relevant treaty text focuses on the "usual investment practice." When the facts of a particular case show that inside investors took into account their existing stake in a company, then the authority cannot ignore this factual reality. The EC says that it rejects the inside-investor analysis. If this approach is the "usual investment practice" in a particular country – as it was in Korea during these debt restructurings – then it is legal error for the EC to reject this approach.

25. The EC seems to think that perfect "undistorted" commercial markets exist. The reality is that every market is distorted to some extent. Governments exist, and they take actions that influence the market. Nothing in the *SCM Agreement* requires a perfect "undistorted" commercial market to allow for market benchmarks. Moreover, the EC can point to no linkage between an alleged GOK commitment to Hynix and the asserted serious distortion in the Korean capital markets.

26. The EC argument on benefit is reduced to the proposition that Hynix could not raise capital without GOK pressure on lenders. But this EC argument focuses on Hynix' financial condition in

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

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

Calculation Errors

28. The EC ignored timely Hynix comments regarding the obvious double counting of alleged benefit from the KDB programme bonds and the overstatement of the debt roll over as part of the October 2001 restructuring. The EC's failure to correct the errors plainly identified by Hynix is inconsistent with Articles 1.1(b) and 14. Another fundamental error in the EC's approach to both the KDB programme and the October 2001 restructuring programme was the treatment of interest-bearing instruments as grants. If the EC was committed to this flawed approach, it should have, at a minimum, deducted interest from any subsidy calculation to remain consistent, at some level, with Article 1.1(b) and 14.

Specificity

29. As a legal matter, to the extent that the EC's findings on financial contribution are found inconsistent with the *SCM Agreement*, then its findings on specificity must also fail. But even if financial contribution is presumed, the EC's specificity findings are inconsistent with Articles 1.2 and 2. With respect to the KDB Programme, the EC suggests that it considered all the factors outlined in Article 2, but this is not obvious in the lone paragraph cited from its *Provisional Regulation*. With respect to May and October, the EC argues that it does not consider that what happened to Hynix happened was according to the normal application of generally applicable bankruptcy laws. This is correct. What happened to Hynix was according to the normal application of a generally applicable bank "work-out" framework, as an alternative to traditional bankruptcy. But under the EC approach, one would find the application of traditional bankruptcy laws to be no less specific.

Articles 19.4, 10 and 32.1 of the SCM Agreement and Article VI:3 of GATT 1994

30. In choosing to use Hynix' unconsolidated sales, the EC confused the scope of the investigation (DRAMs) with the question of which product and entity benefited from the alleged subsidies. It is not because the EC investigated the DRAMs market that subsidies granted to Hynix can automatically be viewed as benefiting only Hynix as a parent entity and only with regard to DRAMs. By taking this approach, the CVD duties imposed by the EC exceed the limits imposed by Article 19.4 of the *SCM Agreement* and Article VI:3 of GATT 1994. Moreover, every violation of the specific provisions of the *SCM Agreement* identified above triggers a parallel violation of Articles 10 and 32.1, once the decision to impose duties was made.

ANNEX D-2

EXECUTIVE SUMMARY OF THE STATEMENT OF THE EUROPEAN COMMUNITIES

(9 December 2004)

Mr. Chairman, Members of the Panel,

I. INTRODUCTION

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

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

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

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

5. Fortunately, none of us have to make that choice. The investigating authority made it for us. The only thing that we need to discuss in these proceedings is whether or not that choice was so outlandish, so unreasonable, so lacking in objectivity, that it leaves no choice for this Panel – indeed *any* Panel considering the matter – but to intervene and rule against the investigating authority. I must confess that, based on the totality of the facts and evidence available, I simply find it impossible to understand how anyone could reasonably come to that conclusion. I simply cannot accept that the *effect* of everything that the GOK did amounted to **nothing**, when it so obviously rescued Hynix from oblivion. In fact I do not think that, given the evidence, *any* even-handed and objective investigating authority could reasonably do anything other than find that the GOK subsidised Hynix.

II. SUBSIDY

6. With regard to subsidy, Korea again resorts in its rebuttal to repeatedly making various assertions about the alleged "intent" of the investigating authority. Apart from being nonsensical and inappropriate, such assertions will not advance Korea's case. Nor should this Panel be fooled by Korea's attempts to mask the weakness of its case with such rhetoric.

7. The investigating authorities in this case had no "zeal to protect the EC producers".¹ They simply conducted an objective and even-handed investigation. On the contrary, the record facts and evidence overwhelming support the view that the GOK had a policy that Hynix was too big fail, which policy it pursued zealously. Thus, the trade distorting measure in this case is the GOK subsidy, imposed in pursuit of government policy. The countervailing duty is only the remedy, imposed after an objective examination of the totality of the facts and evidence by an objective and even-handed investigating authority.

A. FACTS AVAILABLE

8. This Panel must give due weight to the fact that there was systematic non-cooperation by the Korean respondents in this case, leaving the investigating authority with no alternative but to make its determinations on the basis of the totality of the facts and evidence available, as provided in Article 12.7 of the *SCM Agreement*, where appropriate drawing inferences, which inferences could be adverse.

9. Korea asserts repeatedly and at length that the European Communities' position is that Article 12.7 of the *SCM Agreement* is "punitive" – an assertion of which Korea attempts to make a great deal.² However, that assertion is simply false. The European Communities has never made any such statement. Korea is now driven to make the inevitable admission that Article 12.7 of the *SCM Agreement* allows an investigating authority to draw inferences³, if information is missing. Logically, that must mean that the inference might be adverse (it is impossible to be certain, because the relevant information is missing). This is confirmed by Annex II of the *Anti-Dumping Agreement*, which both parties have agreed is relevant context. Korea's attempts to draw a distinction with Annex V of the *SCM Agreement* are therefore misplaced.⁴ The provisions of Annex V of the *SCM Agreement* do no more than confirm the approach adopted by the investigating authority in this case.

10. The European Communities is absolutely confident that, having read the questions repeatedly posed by the European Communities⁵, having read the answers given by Korea, and having reviewed the documents, the Panel will agree that the investigating authority was entitled in this case to rely on

¹Korea rebuttal, para 118.

² See, for example, Korea rebuttal, para 130 and following.

³ For example, Korea rebuttal, para 139.

⁴ Korea rebuttal, paras 131 to 133.

⁵ EC replies to questions 58 and 9.

the "facts available". Words are just an abstract representation of reality - so there is always some residual degree of "ambiguity"⁶ in all language. That does not entitle respondents in a subsidy investigation to be endlessly disingenuous. The questions posed were sufficiently precise – indeed right on the point, and the answers given fell woefully far short of the requirements of good faith co-operation required by Article 12.7 of the *SCM Agreement*.

11. Korea asserts that the European Communities would leave the application of "facts available" entirely at the discretion of the investigating Member, without any consideration of "the underlying facts".⁷ Both of these assertions are simply false. The European Communities has never made any such assertions. On the contrary, the European Communities has explained in detail the kind of criteria an investigating authority will apply when weighing the totality of facts and evidence before it.⁸ It has also explained how it took into consideration all the facts and evidence before it in this case.⁹ It is Korea, not the European Communities, that seeks to ignore the mountain of facts and evidence about, for example, Hynix's dire financial state, the dire state of the DRAMs market and the dire state of the Korean financial markets.

12. Korea asserts that any inferences drawn on the basis of Article 12.7 of the *SCM Agreement* can only be drawn in relation to a specific "transaction".¹⁰ That assertion is manifestly erroneous as a matter of law. There is no such obligation in Article 12.7 of the *SCM Agreement* or otherwise. The inferences to be drawn will simply depend in each case on the facts and evidence in question.¹¹ Korea's concept of "transaction" is arbitrary and self-serving, and there is no basis in the *SCM Agreement* for imposing it on investigating authorities¹².

13. Contrary to what Korea asserts, the European Communities took a very balanced and moderate approach to the issue of facts available in this case, affording the Korean respondents repeated and full opportunity to respond. The conduct of the investigating authority was exemplary. The Korean respondents have only themselves to blame for the inevitable consequences of their own actions.

14. Korea continues to assert that the documents relating to the Economic Ministers' meetings, which expressly refer, *inter alia*, to direct subsidies to Hynix (such as the KEIC guarantee), were not germane to the investigation and were not requested by the investigating authority.¹³ This entirely counter-factual assertion requires no further comment. It is a fact that the investigating authority repeatedly and expressly requested all information about the attendance of GOK officials at meetings; and it is a fact that the information regarding the 10 March 2001 creditors' meeting was withheld. Furthermore, the record evidence indicates that there were at least two high level officials present. No proper written record of what was said or done by such officials has ever been produced by any of the Korean respondents. A full copy of the Arthur Andersen Report was repeatedly requested but not provided, including at verification. An investigating authority cannot be expected to verify what has not been provided and what is not on the record. Citibank refused to permit a proper verification at its premises. Interested parties are not required to make "overtures"¹⁴ to an investigating authority. They are required to co-operate. They are required to answer questions completely and truthfully. They are required to provide necessary information. They are required not to impede the investigation by refusing access to premises or documents. Absent co-operation, investigating authorities have no

⁶ Korea rebuttal, para 123.

⁷ Korea rebuttal, para 123.

⁸ EC replies to questions 63 and 64.

⁹ EC replies to questions 7 and 9.

¹⁰ Korea rebuttal, para 124.

¹¹ EC reply to question 63.

¹² EC rebuttal, paras 10 to 31.

¹³ Korea rebuttal, para 135 and following.

¹⁴ Korea rebuttal, para 151.

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

B. SUBSIDY

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

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

17. The parties agree that the concepts of subsidy and benefit are legally distinct, but that the same facts and evidence may be relevant to both. However, despite paying lip-service to this general statement, it is Korea, not the European Communities, that continues to run the two legal concepts together. Thus, Korea repeatedly asserts that an investigating authority can only determine that a loan or a guarantee is a "financial contribution" within the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement* if it confers a benefit.¹⁵ That assertion is manifestly false as a matter of law. According to the express terms of the *SCM Agreement*, once it is established that a government (including a public body) has granted a loan or guarantee, that is a financial contribution. Whether or not there is a benefit involved is an entirely different matter.

18. Korea asserts that entrustment or direction by a public body does not fall within Article 1 of the *SCM Agreement*.¹⁶ That assertion is false. Article 1.1 of the *SCM Agreement* defines "government" for the purposes of the entire agreement as "a government or any public body within the territory of a Member". Consequently, the word "government" in Article 1.1(a)(1)(iv) of the *SCM Agreement* necessarily encompasses a public body.

19. Korea again asserts that what this Panel must do is re-cast the *SCM Agreement*, testing the measure at issue against only the "core" meaning of the words "entrusts or directs"¹⁷, by which it means the meaning that best serves Korea's interest in this case. That assertion is false. This Panel must, where appropriate, assess the measure at issue against the words "entrusts or directs", giving those words their full ordinary meaning. Last week a stranger stopped me in the street and asked me for directions to the Grand Place, in Brussels. I gave him directions. Did I command him? Certainly not. Did he follow my directions? I haven't a clue. Did I direct him? I most certainly did.

¹⁵ See, for example, Korea rebuttal, para 190 and following; and para 194 and following.

¹⁶ Korea rebuttal, para 168.

¹⁷ Korea rebuttal, para 157.

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

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

22. Korea asserts that it "goes through the EC evidence, piece by piece".¹⁹ That assertion is false, insofar as Korea ignores the great body of facts and evidence set out in the regulations²⁰, electing only to discuss certain isolated facts and evidence. What *is* true is that Korea proceeds "piece by piece" – an admission that its entire case simply fails to address what the investigating authority did in this case – that is, consider the totality of facts and evidence before it.

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

III. INJURY

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

25. With regard to LG Semicon, as with most of this case, the simple facts settle the matter in the European Communities' favour. On March 2001 HEI was merely *renamed* Hynix (the underlying legal person remained unchanged). HEI first *acquired* LGS on 7 July 1999. HEI was then re-named HME and *then* merged with HEI effective 13 October 1999.²² So, tracing backwards in time, the European Communities followed Hynix/HEI (the same legal person, with a different name). It was not required to follow the LGS production facility prior to its acquisition by Hynix/HEI, and there were very good reasons for not doing so.²³ The table and chart (which is not even before the Panel) in

¹⁸ Korea rebuttal, para 167.

¹⁹ Korea rebuttal, para 120.

²⁰ See, for example, EC replies to questions 7 and 9.

²¹ Korea rebuttal, para 14.

²² EC FWS, para 67.

²³ EC rebuttal, paras 32 to 47.

the complaint to which Korea alludes²⁴ make no reference to LGS – the investigating authority based itself on the data provided by the Korean respondents, as verified. Finally, Korea's assertion²⁵ that appropriate data were submitted in a timely manner is false – the true facts are set out in the European Communities first written submission.²⁶ In any event, a 155 per cent increase in the volume of subsidised imports is, on any view, and certainly in the circumstances of this case, significant.

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

Thank you for your attention.

²⁴ Korea rebuttal, para 31.

²⁵ Korea rebuttal, para 33.

²⁶ EC FWS, paras 74 to 85.