EUROPEAN COMMUNITIES – COUNTERVAILING MEASURES ON DRAMS FROM KOREA

WT/DS299

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION

OF THE

UNITED STATES OF AMERICA

June 25, 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. We trust 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.[1]

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

[1] 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.

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 behavior 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.

IV. 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.