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UNITED STATES – COUNTERVAILING DUTY INVESTIGATION ON DYNAMIC RANDOM ACCESS MEMORY SEMICONDUCTORS (DRAMS) FROM KOREA (DS 296)

Report of the Panel

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TABLE OF KEY ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Full Title / Meaning
AD Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
ASP	Average Selling Price
BOK	Bank of Korea
CBO	Collateralized Bond Obligation
CHB	Choheung Bank
CLO	Collateralized Loan Obligation
CRA	Agreement of Financial Institutions for Promoting Corporate Restructuring (Corporate Restructuring Agreement)
CRPA	Corporate Restructuring Promotion Act
CVD	Countervailing Duties
D/A	Document against Acceptance
DDR	Double Data Rate
DOC	United States Department of Commerce
DRAM	Dynamic Random Access Memory Chips
DRAMS	Dynamic Random Access Memory Semiconductors
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
EC	European Communities
FAB	Fabrication Facilities or Plants
FSC	Financial Supervisory Commission
FSS	Financial Supervisory Service
GATT 1994	*General Agreement on Tariffs and Trade 1994*
GDS	Global Depositary Shares
GOK	Government of Korea
H&CB	Korea Housing and Commercial Bank
HSMA	Hynix Semiconductor Manufacturing America
HYNIX	Hynix Semiconductor, Inc.
IAS	International Accounting Standards
IBK	Industrial Bank of Korea
IMF	International Monetary Fund
ITC	United States International Trade Commission

Abbreviation	Full Title / Meaning
KCGF	Korea Credit Guarantee Fund
KDB	Korea Development Bank
KEB	Korea Exchange Bank
KEIC	Korea Export Insurance Corporation
KFB	Korea First Bank
KRW	Korea Won
MOU	Memorandum of Understanding
OEM	Original Equipment Manufacturer
Panel Request	Request for the Establishment of a Panel contained in document WT/DS296/2
ROA	Return on Assets
ROK	Republic of Korea
SEC	United States Securities and Exchange Commission
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
SSB	Salomon Smith Barney
Vienna Convention	*Vienna Convention on the Law of Treaties*
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation of Case
Argentina - Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515 Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Brazil – Aircraft (Article 21.5 – Canada II)	Panel Report, *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW/2, adopted 23 August 2001, DSR 2001:X, 5481
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, as upheld by the Appellate Body Report, WT/DS70/AB/R, DSR 1999:IV, 1443
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC - Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by the Appellate Body Report, WT/DS219/AB/R
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
Mexico - Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345
Thailand - H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701 Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, DSR 2001:VII, 2741

Short Title	Full Case Title and Citation of Case
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003 Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, adopted 8 January 2003, as modified by the Appellate Body Report, WT/DS212/AB/R
US - Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, 5767
US - Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
US - Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US - Steel Safeguards	Panel Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, adopted 10 December 2003, as modified by the Appellate Body Report, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R
US- Softwood Lumber VI	Panel Report, United States – Investigation of the International Trade Commission in Softwood Lumber from Canada ("US – Softwood Lumber VI "), WT/DS277/R, adopted 26 April 2004.
US - Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
US- Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323.

I. INTRODUCTION

A. COMPLAINT OF KOREA

1.1 On 30 June 2003, Korea requested consultations with the US pursuant to Article 4 of the *DSU*, Article 30 of the *SCM Agreement*, and Article XXII of the *GATT 1994*, with regard to the DOC Preliminary and Final subsidy determinations on Dynamic Random Access Memory Semiconductors from Korea, published in the Federal Register on 7 April 2003 and 23 June 2003, respectively, the ITC Preliminary injury determination published in the Federal Register on 27 December 2003, and any subsequent determinations made during the ITC's injury investigation on DRAMS and DRAM Modules from Korea.[1]

1.2 On 18 August 2003, Korea requested further consultations with the US pursuant to the same provisions cited in its initial request, with regard to the ITC's Final determination of material injury, and the DOC's Final countervailing duty order, both published in the Federal Register on 11 August 2003. According to Korea, both of these actions relate to the same underlying measures at issue in Korea's initial request for consultations.[2]

1.3 Korea and the US held consultations on 20 August 2003 and 1 October 2003, but failed to reach a mutually satisfactory resolution of the matter. With respect to the ITC preliminary injury determination and the DOC countervailing duty order, the US maintained that Korea's consultation requests did not conform with Article 4.4 of the *DSU* because Korea did not identify any provisions with which the preliminary determination or order were inconsistent. The US asserted that, as a result, it did not agree to consult on either the preliminary determination or the order.[3]

1.4 On 19 November 2003, Korea requested the establishment of a Panel to examine the matter.[4]

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.5 At its meeting on 23 January 2004, the DSB established a Panel in accordance with Article 6 of the *DSU* and pursuant to the request made by Korea in document WT/DS296/2.

1.6 At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> [t]o examine, in the light of the relevant provisions of the covered agreements cited by Korea in document WT/DS296/2, the matter referred by Korea to the DSB in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements

1.7 On 23 February 2004, Korea requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the *DSU*. This paragraph provides:

> If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with

[1] WT/DS/296/1.
[2] WT/DS296/1/Add.1
[3] The Panel notes that the ITC's *Preliminary Determinatio*n is not covered by Korea's request for establishment of a panel.
[4] WT/DS296/2.

> any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

1.8 On 5 March 2004, the Director-General accordingly composed the Panel as follows:[5]

Chairman: Mr. Hardeep Puri

Members: Mr. John Adank
Mr. Michael Mulgrew

1.9 China, the European Communities, Japan and Chinese Taipei reserved their third-party rights.

C. PANEL PROCEEDINGS

1.10 The Panel met with the parties on 23-24 June 2004 and on 21-22 July 2004. The Panel met with third parties on 24 June 2004.

1.11 The Panel submitted its Interim Report to the parties on 17 November 2004. The Panel submitted its final report to the parties on 21 December 2004.

II. FACTUAL ASPECTS

2.1 This dispute arises out of a countervailing duty investigation by the US on imports of DRAMS and Memory Modules containing DRAMS[6] from Korea. Korea alleges that both the determination of existence of a countervailable subsidy by the DOC and the determination of material injury by the ITC, which led to the US countervailing duty order against DRAMS from Korea, and the order itself, are inconsistent with certain US obligations under the *SCM Agreement* and the *GATT 1994*.

2.2 On 1 November 2002, Micron Technology, Inc. filed a petition with the investigating authorities of the US (DOC and ITC) regarding imports of allegedly subsidised DRAMS from Korea. On 8 November 2002, the ITC published a notice of initiation of an investigation of the injury allegations.[7] The ITC's final injury determination covered the full years 2000, 2001 and 2002, as well as the first quarters of 2002 and 2003.[8] On 27 November 2002, the DOC initiated an investigation of the subsidy allegations. The DOC investigation covered the period of 1 January 2001 through 30 June 2002.[9]

2.3 The two products concerned by the investigations were (1) DRAMS, subheading 8542.21.80 of the Harmonized Tariff Schedule of the US (HTSUS); and (2) Memory modules containing DRAMS, subheading 8473.30.10 of the HTSUS[10] as described more specifically in the DOC's countervailing duty order.

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[5] WT/DS296/3.
[6] These products will be referred hereinafter simply as DRAMS.
[7] Exhibit GOK-1.
[8] Exhibit GOK-10.
[9] Exhibit GOK-2.
[10] Exhibit GOK-1, p. 68176, Exhibit GOK-2, p. 70927.

2.4 Exporters concerned were Hynix Semiconductor, Inc. and Samsung Electronics Co., Ltd.[11]

2.5 The ITC published a Preliminary injury determination on 27 December 2002[12] and a Final injury determination on 11 August 2003.[13] The DOC published a Preliminary Determination on 7 April 2003 with an affirmative finding for Hynix Semiconductors, Inc. (provisional duties of 57.37 per cent) and a negative finding for Samsung Electronics Co., Ltd.[14] The DOC published a Final subsidy determination on 23 June 2003[15], amended on 28 July 2003, with an affirmative finding for Hynix Semiconductors, Inc. (final countervailable subsidy of 44.29 per cent) and a negative finding for Samsung Electronics Co., Ltd. (*de minimis* countervailable subsidy of 0.04 per cent).[16] Because of the DOC's negative finding for Samsung Electronics Co., Ltd., the ITC's final injury determination concerned subject DRAMS produced by Hynix Semiconductor Inc.[17] On 11 August 2003, the DOC published a final countervailing order[18], requiring at the same time as importers would normally deposit estimated duties, a cash deposit equal to a net subsidy rate of 44.29 per cent, for all entries of DRAMS from Korea, except Samsung entries, as described more specifically in the countervailing duty order.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. KOREA

3.1 In its first submission[19], Korea requests the Panel to make findings that the US acted inconsistently with its obligations under Articles 1, 2, 10, 12, 14, 15, 19, 22 and 32 of the *SCM Agreement*, as well as Article VI:3 of the *GATT 1994*. Specifically, Korea requests the Panel to find that the US acted inconsistently with:

(a) Article 15.1 because *inter alia*, the ITC injury determinations and causation were not based on positive evidence and an objective assessment of the effects of allegedly subsidized imports;

(b) Article 15.2 because *inter alia*, the ITC injury determinations improperly assessed the significance of the volume effects of subject imports;

(c) Article 15.2 because *inter alia*, the ITC injury determinations improperly assessed the significance of the price effects of subject imports;

(d) Article 15.4 because *inter alia*, the ITC failed to consider all factors relevant to the overall condition of the domestic industry;

(e) Article 15.5 because *inter alia*, the ITC failed to demonstrate the requisite causal link between subject imports and injury;

(f) Article 15.5, because *inter alia*, the ITC improperly assessed the role of other factors, and improperly attributed the effect of other factors to the allegedly subsidized imports;

[11] Exhibit GOK-4, p. 16782
[12] Exhibit GOK-3.
[13] Exhibit GOK-7.
[14] Exhibit GOK-4, p. 16782.
[15] Exhibit GOK-5.
[16] Exhibit GOK-6, p. 44291.
[17] Exhibit GOK-10.
[18] Exhibit GOK-8.
[19] Korea First Written Submission, para. 598.

(g) Article 15.2 and 15.4 because *inter alia*, the ITC improperly and inconsistently defined the domestic industry;

(h) Article 22.3 because *inter alia,* the ITC's injury determination did not set forth in sufficient detail the ITC's findings and conclusions on all material issues of fact and law;

(i) Article 1.1 because *inter alia,* the DOC failed to demonstrate the existence of a financial contribution by the Government of Korea with respect to the October 2001 restructuring at issue in its subsidy investigation;

(j) Article 1.1 because *inter alia*, the DOC failed to demonstrate the existence of a financial contribution with respect to the other discrete transactions at issue;

(k) Article 1.1 because *inter alia*, the DOC erroneously assumed that every Korean private financial institution involved in its subsidy investigation was under the direction or entrustment of the Government of Korea even without sufficient evidence regarding that particular bank;

(l) Articles 1.1 and 14 because *inter alia,* the DOC failed to demonstrate that a benefit was conferred on the respondent Hynix, given available market benchmarks among Hynix's creditors;

(m) Articles 1.1 and 14 because *inter alia*, the DOC disregarded market benchmarks for measuring benefit established by a foreign bank operating in the Korean market that extended financing to Hynix during the period of investigation;

(n) Articles 1.1 and 14 because *inter alia*¸ the DOC failed to utilize relevant Korean market benchmarks in determining whether Hynix was "creditworthy" or "equityworthy," and otherwise applied an improper "uncreditworthy" benchmark and discount rate in calculating the benefit to Hynix in this case;

(o) Article 2 because *inter alia,* the DOC disregarded the fact that many Korean companies underwent debt restructuring similar to that undergone by Hynix, and therefore, the DOC did not establish that all of the alleged subsidies were specific on the basis of positive evidence;

(p) Articles 1 and 2 because *inter alia,* the DOC imposed an improper burden of proof on respondents, that is the Government of Korea and Hynix, and thereby failed to base its decision on affirmative, objective, and verifiable evidence;

(q) Article 12.6 because *inter alia,* the DOC conducted various private verification meetings in the territory of Korea, at which the Government of Korea had no representatives, over the explicit objection of the Government of Korea;

(r) Article 19.4 of the *SCM Agreement* and Article VI:3 of the *GATT 1994* because *inter alia,* the DOC's failure to measure the benefit in accordance with the principles of Article 14 of the *SCM Agreement* resulted in countervailing duties levied in excess of the amount allowed under the *SCM Agreement* and the *GATT 1994*;

(s) Articles 10 and 32.1 because *inter alia,* the CVD order imposed by the US against DRAMs from Korea was not in accordance with the relevant provisions of the *SCM Agreement* or the relevant provisions of the *GATT 1994*.

3.2 Korea also requests the Panel to recommend that the US terminate the countervailing duty order immediately.[20]

B. UNITED STATES

3.3 In its first submission, the United States requests that the Panel reject Korea's claims in their entirety. With respect to Korea's request for a specific recommendation by the Panel, the US responds that should the need for recommendations arise, the Panel should reject the recommendations requested by Korea. [21]

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties as submitted, or as summarized in their executive summaries as submitted to the Panel, are attached as Annexes (see Table of Annexes, page iv).

4.2 The parties' answers to questions from the Panel, their comments on each other's answers, and other documents submitted at the request of each other are also attached as Annexes.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of those third parties which have made submissions to the Panel, as submitted or as summarized in their executive summaries, are attached as Annexes (see Table of Annexes, page iv).

VI. INTERIM REVIEW

6.1 On 17 November 2004, we submitted the Interim Report to the parties. Both parties submitted written requests for the review of precise aspects of the Interim Report. Parties also submitted written comments on the other party's comments. Neither party requested an interim review meeting.

6.2 We have briefly outlined our treatment of parties' requests below. Where necessary, we have also made certain technical revisions to our report.

A. US COMMENTS

6.3 The US made a number of comments regarding typographical and clerical errors contained in our Interim Report. We are grateful for those comments, and have made the necessary corrections. The US also made additional comments, to which we respond below.

DOC Preliminary Determination

6.4 The US objects to findings made by the Panel regarding the DOC's Preliminary Determination. Since Korea states in its reaction to the comments by the US on the Panel's Interim Report that it "agrees that it has not made any separate claim against the DOC preliminary determination, as such", we have deleted those findings from our Final Report.

GATT 1994

6.5 The US objects to the inclusion of a recommendation concerning the GATT 1994 in the Interim Report. Since we have not found any violation of the GATT 1994, we have deleted that reference.

[20] Korea First Written Submission, para. 599.
[21] US First Written Submission, paras. 497 and 498.

DOC reliance on record evidence (para 7.90 and note 101 of the Interim Report)

6.6 The US requests a revision to accurately reflect the fact that the DOC's reliance on certain evidence did appear in the *Decision Memorandum*. In order to avoid any error in this regard, we have deleted the relevant parts of the Interim Report.

Demand (para. 7.368 of the Interim Report)

6.7 The US argues that Korea's handling of the "demand" issue prevented the Panel from adequately exploring it. We disagree. As noted at para.7.368, we understand Korea's argument to be based on a decrease in the rate of growth of demand for DRAMs, caused by a drop in demand for products that use DRAMs, such as personal computers.

6.8 As noted at para. 7.367 *infra*, we consider that Korea established a *prima facie* case that the ITC improperly evaluated the impact of slowing demand on price. Since the US failed to rebut Korea's prima facie case, we upheld Korea's claim regarding this matter. We therefore make no changes to our Interim Report in respect of this issue.

Section VII.F (para. 7.410 of the Interim Report)

6.9 The US claims that it addressed Korea's argument regarding burden of proof during the DOC's investigation at para. 243 of its first written submission. Although we do not find any explicit reference to this argument in that part of the US first written submission, we have decided to delete para. 7.410 in order to avoid any error regarding the US response to Korea's argument.

B. KOREAN COMMENTS

Para. 7.8 (of the Interim Report)

6.10 Korea asks the Panel to make explicit that any financial contribution by a public body is not a subsidy unless it provides a "benefit" within the meaning of the *SCM Agreement*. We do not consider it necessary to amend our report. Since the element of "benefit" is part of the definition of "subsidy", there is no need to list that element separately.

Paras 7.8 and 7.62 (of the Interim Report)

6.11 Korea suggests that the Panel should be very circumspect in making any statements regarding the possibility of a 100 per cent government-owned entity being treated as a public body. Korea asserts that this issue was not discussed in either the DOC determination, or the deliberations of this Panel. Since we do not make any findings that 100 per cent government-owned entities will necessarily constitute public bodies, we do not consider it necessary to amend the statements that we have made regarding this matter.

Para. 7.42 (of the Interim Report)

6.12 Korea asks the Panel to clarify this paragraph. We have done so by deleting the words "and affirmative".

Para. 7.46 (of the Interim Report)

6.13 Korea asks the Panel to amend the reference to the "three restructurings at issue in these proceedings". According to Korea, the Panel's language presupposes some common definition of

when a particular transaction arises to the level of a "restructuring". In a order to avoid any uncertainty, we have referred to "financial contributions" instead.

Paras 7.88 and 7.90 (of the Interim Report)

6.14 Korea asks the Panel to clarify its judgment regarding evidence that it did not consider. We decline to do so, however, precisely because we have not considered the evidence at issue. In any event, we note that we deleted para. 7.90 of our Interim Report in response to a comment made by the US.

Para. 7.212 (of the Interim Report)

6.15 Korea asks the Panel to rule that the ITC's injury determination was inconsistent with Article 15 of the *SCM Agreement* because it rested on a WTO inconsistent finding of subsidy. Since this issue was not raised by Korea in the proceedings leading up to the preparation of our Interim Report, we see no reason to amend our Interim Report in the manner suggested by Korea. The interim review phase is not an opportunity for complaining parties to introduce new issues for review by the Panel.

VII. FINDINGS

A. STANDARD OF REVIEW

7.1 Article 11 of the *DSU* sets forth the appropriate standard of review for panels for all covered agreements, including the *SCM Agreement*. Article 11 calls for panels to "make an objective assessment of the matter before [them], including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ... ."

7.2 The Appellate Body provided the following guidance regarding the application of Article 11 of the *DSU* in *US – Lamb*. The Appellate Body stated:

> As regards the standard of review contained in Article 11 of the DSU…the "applicable standard is neither *de novo* review as such, nor total deference, but rather the objective assessment of the facts.[22]
>
> Thus, an "objective assessment" of a claim under Article 4.2(a) of the *Agreement on Safeguards* has, in principle, two elements. First, a panel must review whether competent authorities have evaluated *all relevant factors*, and, second, a panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination. Thus, the panel's objective assessment involves a *formal* aspect and a *substantive* aspect. The formal aspect is whether the competent authorities have evaluated "all relevant factors." The substantive aspect is whether the competent authorities have given a reasoned and adequate explanation for their determination.[23]
>
> We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities. To the contrary, …, a panel can assess whether the competent authorities' explanation for its determination is reasoned and

[22] Appellate Body Report, *US – Lamb* at para. 101.
[23] *Id.* at para. 103 (emphasis in original).

> adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an "objective assessment"…, panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate.[24]

7.3 On the basis of Article 11 of the *DSU*, and the above guidance offered by the Appellate Body, we consider that our standard of review is to determine whether the DOC and ITC evaluated all relevant factors, and provided a reasoned and adequate explanation of how the facts support their determination. In doing so, we shall consider whether an objective and impartial assessment of all relevant facts on the record could properly support the DOC and ITC's determinations of subsidization and injury respectively. In other words, we shall determine whether an objective and impartial investigating authority, looking at the same evidentiary record as the DOC and ITC, could properly have reached the same conclusions as did those agencies. In applying this standard of review, we are conscious that we must not conduct a *de novo* review of the evidence on the record, nor substitute our judgment for that of the DOC or ITC.

B. BURDEN OF PROOF

7.4 It is now well established in WTO dispute settlement proceedings that the party claiming a violation of a provision of a WTO Agreement by another Member must assert and prove its claim. Thus, we note that the Appellate Body stated in *US – Wool Shirts and Blouses* that:

> the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[25]

7.5 In this dispute Korea, which has challenged the consistency of certain US determinations and measures, thus bears the burden of demonstrating that the measures are not consistent with the relevant provisions of the *SCM Agreement* and *GATT 1994*.

C. DOC'S SUBSIDY DETERMINATIONS

7.6 The disciplines of the *SCM Agreement* apply to subsidies that are specific to an enterprise or industry or groups of enterprises or industries. A subsidy arises when there is a "financial contribution" by a government, public body or private body entrusted or directed by a government, that confers a "benefit."

7.7 The DOC's subsidy determinations covered a number of individual financial contributions by Hynix's creditors, including an 800 billion won syndicated loan, the KDB Fast Track Programme, the May 2001 restructuring package, and the October 2001 restructuring package. The DOC found that "these actions are appropriately examined as part of a single programme that occurred over a short,

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[24] *Id.* at para. 106 (emphasis in original).
[25] Appellate Body Report, *US – Wool Shirts and Blouses*, page 14.

ten-month period",[26] the objective of which "was the complete financial restructuring of Hynix in order to maintain the company as an ongoing concern."[27]

7.8 The DOC found that these financial contributions were provided by four public bodies and a larger number of private bodies entrusted or directed by the GOK. We shall refer to Hynix's public body creditors as Group A creditors.[28] The DOC also found that these financial contributions were provided by a number of GOK owned or controlled banks, which were not found by the DOC to be public bodies. For all but one of these creditors, GOK was either the sole or largest single shareholder. We shall refer to these creditors as Group B creditors.[29] In addition, the DOC found that the financial contributions were provided by other private entities, in which the GOK had much smaller, or even non-existent, shareholdings. We shall refer to these as Group C creditors. We recall that financial contributions by public bodies (i.e., Group A creditors) necessarily fall within the scope of the *SCM Agreement* (although they do not necessarily constitute specific subsidies), whereas transactions by private bodies (i.e., Group B and C creditors) only fall within the scope of the *SCM Agreement* to the extent that such private bodies were entrusted or directed by a government.

7.9 Korea does not challenge the DOC's determination that participation in the four financial contributions by public body, Group A, creditors falls within the scope of the *SCM Agreement*. However, Korea claims that the DOC improperly found that Hynix's Group B and C creditors were entrusted or directed by GOK to participate in the financial contributions, and argues that their participation therefore falls outside the scope of the *SCM Agreement.* Korea also claims that the DOC improperly found that the financial contributions conferred a benefit. Korea further claims that the DOC improperly found that the alleged subsidies (i.e., financial contributions conferring a benefit) were specific to an enterprise. We shall first consider Korea's claims regarding the alleged entrustment or direction of Hynix's Group B and C creditors.

1. Entrustment or Direction

7.10 In the context of its complaints regarding the DOC's determination of government entrustment or direction, Korea claims that the US violated Article 1.1 of the *SCM Agreement* because:

- the DOC failed to demonstrate the existence of a financial contribution by the GOK with respect to the October 2001 restructuring;
- the DOC failed to demonstrate the existence of a financial contribution with respect to the other discrete transactions at issue; and
- the DOC erroneously assumed that every Korean private financial institution involved in its subsidy investigation was under the direction or entrustment of the GOK even without sufficient evidence regarding that particular bank.

7.11 Korea's claims raise general issues regarding the interpretation of Article 1.1(a)(1)(iv) of the *SCM Agreement.* In particular, Korea's claims raise the issue of whether, in order to find that a

[26] *Decision Memorandum*, page 48 (Exhibit GOK-5).
[27] *Id.*
[28] See Figure US-4.
[29] A number of Group B creditors were 100 per cent owned by GOK. Depending on the circumstances, 100 per cent government ownership might well have justified the treatment of such creditors as public bodies. If they had been treated as public bodies, the DOC would not have needed to determine whether or not such Group B creditors were entrusted or directed by GOK in order to find that their participation in the four financial contributions at issue fell within the scope of the *SCM Agreement*. On the basis of the criteria provided for in US law, however, the DOC treated these 100 per cent owned Group B creditors as private bodies.

private body is entrusted or directed by the government, an investigating authority must demonstrate an explicit and affirmative government action addressed to that particular private body, entrusting or directing a particular task or duty. If we find that Article 1.1(a)(1)(iv) does not require an explicit act addressed to a particular entity entrusting or directing a particular task or duty, Korea's claims also require us to consider the more factual issue of whether the DOC properly found that there was sufficient evidence to support a generalized finding of entrustment or direction of all Group B and C creditors in respect of each of the four financial contributions identified by the DOC.

(a) Is an investigating authority required to demonstrate an explicit and affirmative government action addressed to a particular entity, entrusting or directing a particular task or duty?

(i) Arguments of the parties

7.12 Korea asserts that, pursuant to Article 1.1(a)(1)(iv) of the *SCM Agreement*, the disciplines of the *SCM Agreement* only cover the acts of private bodies when they have been "entrusted or directed" by a government to take those acts. Korea asserts that the plain meaning of "entrustment or direction" required the DOC to demonstrate an explicit and affirmative government action addressed to a particular party to perform a particular task or duty. According to Korea, the use of the singular "a financial contribution" in Article 1.1 implies that an authority must examine each distinct transaction by source and measure. Korea submits that authorities cannot meet this standard with generalized findings of entrustment or direction. According to Korea, 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.

7.13 Korea asserts that the words "entrust[] or direct[]" do not describe tepid or ambiguous government action. According to Korea, the dictionary defines the term "entrust" as, *inter alia*, to "give (a person, etc.) the responsibility for a task . . . Commit the . . . execution of (a task) to a person."[30] Korea therefore submits that the government must already have something that is going to be "entrusted" to the private body. Korea asserts that this meaning of "entrusts" is reinforced by the later phrase "which would normally be vested in the government", such that what is being "entrusted" is whatever would normally be a function vested in the government.

7.14 Korea submits that the word "direct" is defined as, *inter alia*, to "[g]ive authoritative instructions to; order (a person) to do . . . order the performance of." Korea submits that the term "direct," when followed by "to" plus an infinitive (*i.e.*, a verb), means to "give a formal order or command to"[31] do a thing. Korea notes that both the French text "ordonnent" (from the verb "ordonner") and the Spanish text "ordene" (from the verb "ordenar") most directly translate as "order." According to Korea, if one looks for other French and Spanish words that correspond to "direct," one finds many other words -- not used in the text of the *SCM Agreement* -- that convey softer meanings. Korea therefore submits that, in light of the French and Spanish versions, the most appropriate interpretation of the English word "directs" must be the meaning that conveys the idea of ordering the private body to take some action, and not the looser idea of mere guidance or suggestions.

7.15 Korea asserts that the context of these terms supports its interpretation. Korea notes that all of the four sub-provisions of Article 1.1(a) refer to "government" action, and concludes from this that the proper interpretation of "entrusts or directs" therefore requires government action so clear and unambiguous that the actions of private bodies can be imputed to the government itself. Korea asserts that anything other than such a strict reading would not be consistent with the overall context of Article 1.1(a). Korea submits that the additional phrase in Article 1.1(a)(1)(iv) reinforces this reading.

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[30] *The New Shorter Oxford English Dictionary*, Fourth Edition, Clarendon Press, Oxford (1993), at 831 (Exhibit GOK-38).

[31] *The Concise Oxford Dictionary*, Ninth Edition, Clarendon Press, Oxford (1995) (Exhibit GOK-37).

In this regard, Korea notes that the provision goes on to clarify that the actions of the private body can only be imputed to the government if "the practice, in no real sense, differs from practices normally followed by governments." According to Korea, therefore, the "entrusts or directs" needs to be so specific and compelling that the private body is not really making the decision at all -- the private body has become the instrument of the government. Korea submits that any discretion left to the private body transforms the situation, and the action can no longer properly be imputed to the government.

7.16 Korea asserts that its reading of the language and context of Article 1.1(a)(1)(iv) finds further support in the underlying purpose of this provision. Korea considers that the language of Article 1.1(a)(1)(iv) seeks to narrow the scope of indirect subsidies, since it is not broad, but rather very narrow. Korea argues that the provision does not speak of government suggestions, or other passive acts, nor of private bodies trying to win the favor of a government, or trying to act on their own concepts of the national interest.

7.17 Korea submits that its interpretation of Article 1.1(a)(1)(iv) is supported by the reasoning of the *US – Export Restraints* panel, which found:

> It follows from the ordinary meanings of the two words 'entrust' and 'direct' that the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction). To our minds, both the act of entrusting and that of directing therefore necessarily 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. In other words, the ordinary meanings of the verbs 'entrust' and 'direct' comprise these elements – *something* is necessarily delegated, and it is necessarily delegated to *someone*; and, by the same token, *someone* is necessarily commanded, and he is necessarily commanded *to do something*. We therefore do not believe that either entrustment or direction could be said to have occurred until all of these three elements are present.[32]

7.18 According to Korea, the findings of the panel in *US – Export Restraints* make clear that 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. Korea asserts that, instead, each alleged government delegation or command must be examined with respect to each party, and with respect to each task or duty. Korea asserts that the use of the singular "a financial contribution" in Article 1.1 implies that an authority must examine each distinct transaction by source and measure. According to Korea, therefore, an authority must demonstrate an explicit and affirmative government action addressed to a particular party to perform a particular task or duty. Although Korea acknowledges that entrustment or direction can arise absent formal acts of government, Korea does not believe that either entrustment or direction can be implicit, in the sense of a private party being left to wonder precisely what it is being entrusted or directed to do.

7.19 The US submits that there is no basis in Article 1.1(a)(1)(iv) of the *SCM Agreement* for the type of bank- and transaction-specific analysis advocated by Korea. The US submits that the word "entrust" is defined in relevant part as "[i]nvest with a trust; give (a person, etc.) responsibility for a task .... Commit the execution of (a task) to a person ... ."[33] According to the US, therefore, if a government gives a "private body" responsibility to carry out what might otherwise be a governmental subsidy function of the type listed in subparagraphs (i)-(iii) of Article 1.1(a)(1), there would be a financial contribution within the meaning of Article 1.1(a)(1).

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[32] Panel Report, *US – Export Restraints*, para. 8.29 (emphasis in original).
[33] *The New Shorter Oxford English Dictionary* (1993) (Exhibit US-89).

7.20 The US asserts that definitions of the word "direct" include "Cause to move in or take a specified direction; turn towards a specified destination or target"; "Give authoritative instructions to; to ordain, order (a person) to do (a thing) to be done; order the performance of"; "Regulate the course of; guide with advice"; and "Inform or guide (a person) as to the way; show or tell (a person) the way (to)"; and "govern the actions ... of."[34] According to the US, there is entrustment or direction by the government when a government "gives responsibility to", "orders", or "regulates the activities of" a private body such that one or more of the type of functions referred to in subparagraph (iv) is carried out.

7.21 The US submits that, although Korea cites essentially the same dictionary definitions, it does not proffer an interpretation of the meaning of "entrusts or directs" based on those definitions. The US asserts that Korea instead advocates an evidentiary standard for "entrustment or direction", since it argues that government action amounts to entrustment or direction only where it is "clear and unambiguous"[35] or "specific and compelling."[36] The US accepts that whether a particular government action amounts to entrustment or direction always will present an evidentiary question, but denies that there is a special evidentiary standard for entrustment or direction distinct from the general evidentiary standard that applies in any dispute governed by Article 11 of the *DSU*, which is whether there is a "reasoned and adequate" explanation of how the facts support the investigating authority's determination.[37]

7.22 The US notes that Korea argues that the evidence of entrustment or direction must be in a particular form; *i.e.*, an "explicit" government command.[38] The US understands Korea to argue that the use of the term "explicit" suggests that government entrustment or direction may only be evidenced by a formal or official command. The US considers that subparagraph (iv) cannot be limited in the manner Korea suggests, since the plain meaning of entrustment or direction encompasses, but is not limited to, an order or command. According to the US, 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.

7.23 The US asserts that Korea misconstrues the applicable evidentiary standard when it argues that the evidentiary standard of entrustment or direction requires a government command to an explicitly named private body to take an explicitly identified action at an explicit point in time. The US submits that there is no obligation that the DOC have express proof of bank-by-bank, transaction-by-transaction government direction since, as an 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 US considers that 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. According to the US, the evidentiary question in this dispute is whether a reasonable, objective decision-maker, looking at *all* the evidence on the investigation record, could have concluded that the GOK's actions *in toto* evince entrustment or direction.

7.24 The US notes that Korea claims textual support for its bank-by-bank, transaction-by-transaction standard by citing the use of the singular "a" financial contribution in the text of Article 1.1(a)(1). According to the US, following this logic through the text with respect to each of the elements of a countervailable subsidy reveals a fatal flaw in this approach, since the text of Articles 1 and 2 of the *SCM Agreement* also use the singular "a" where it refers to benefit, subsidy and

[34] *The New Shorter Oxford English Dictionary* (1993) (Exhibit US-89).
[35] Korea First Written Submission, para. 374.
[36] Korea First Written Submission, para. 375.
[37] The US refers in this regard to paras. 276-78 of the Appellate Body Report in *US - Steel Safeguards*.
[38] Korea First Written Submission, para. 366.

specificity. The US therefore asserts that 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, with the result that the subsidy would always be specific. The US submits that the Panel should reject Korea's "a"/singular argument because it would render Article 2 of the *SCM Agreement* a nullity. The US also asserts that Korea's "a"/singular argument overlooks the fact that use of the singular does not rule out a meaning that encompasses the plural of that term. The US notes in particular that the definition of the term "body", as used in "a private body" in subparagraph (iv), provides that the term "body" may refer to a singular entity or more than one entity.[39] According to the US, therefore, the plain meaning of the text of Article 1.1(a)(1)(iv), does not rule out government entrustment or direction of a particular "group" of private bodies.

7.25 The US submits that Korea's reliance on *US - Export Restraints* for its bank-by-bank, transaction-by-transaction evidentiary standard also is misplaced, since *US - Export Restraints* addressed a very different issue; *i.e.*, whether a hypothetical restriction on exports could constitute entrustment or direction under Article 1.1(a)(1)(iv). According to the US, the *US - Export Restraints* report is therefore of limited (or no) relevance to the instant dispute, in which there is a voluminous body of evidence that the GOK affirmatively caused, and gave responsibility, to private entities to provide loans, equity infusions, and debt forgiveness to save Hynix from bankruptcy.

7.26 The US disagrees with Korea's argument that the phrase in subparagraph (iv) – "in no real sense, differs from practices normally followed by governments" – means that the private body must, in effect, become "the instrumentality of the government" and that "any discretion" left to the private body would mean that "the action can no longer be imputed to the government."[40] The US understands Korea to argue that one must gauge the behaviour of private bodies to know whether there was government entrustment or direction. The US submits that Korea's focus on the motives of Hynix's creditors is incongruous with its recognition that the "perceived" or "confirmed" reaction by private entities "cannot be the basis on which the Member's compliance with its treaty obligations under the WTO is established."[41] The US asserts that the existence of a government financial contribution – whether direct or indirect – is determined with reference to the actions of the government.

(ii) Evaluation by the Panel

7.27 The parties disagree as to the circumstances under which an investigating authority could properly determine that a government has entrusted or directed a private body to make a "financial contribution" in the sense of Article 1.1(a)(1)(iv).[42] Korea submits that an authority must demonstrate an explicit and affirmative government action addressed to a particular party to perform a particular task or duty. The US considers that there is no need to have express proof of private body-by-private body, transaction-by-transaction, entrustment or direction, arguing that entrustment or direction can be established on the basis of broader evidence.

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[39] *See The New Shorter Oxford English Dictionary* (1993). (The US notes that "body" may refer to the singular, *e.g.*,"an individual, a person," or the plural, *e.g.*, "an aggregate of individuals") (Exhibit US-89); *see also* Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003, para. 108 [hereinafter "*US – Countervailing Measures on Certain EC Products*"] (the US notes that, while discussing "a benefit" to "a recipient", the Appellate Body stated that "a recipient" could mean more than one entity).

[40] Korea First Written Submission, para. 375.

[41] Korea First Written Submission, para. 383.

[42] There is no disagreement between the parties concerning the DOC's determination that the relevant acts that private bodies were allegedly entrusted or directed to undertake constitute "financial contributions."

7.28 We recall that Article 3.2 of the *DSU* recognizes that interpretative issues arising in WTO dispute settlement are to be resolved through the application of customary rules of interpretation of public international law. It is well settled that the principles codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*") are such customary rules.[43] Thus, we shall first examine the parties' arguments regarding the terms "entrusts or directs". Thereafter, we shall examine their arguments regarding the context, and object and purpose of those terms.

The terms "entrusts or directs"

7.29 Article 1.1(a)(1) of the *SCM Agreement* provides:

> there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as 'government'), i.e., where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) [footnote omitted];
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods; (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.

7.30 We note that the terms "entrusts or directs" were interpreted by the *US – Export Restraints* panel. That panel found:

> The dictionary meaning of the word "entrust" is, *inter alia*, to "give (a person, etc.) the responsibility for a task . . . Commit the . . . execution of (a task) *to* a person . . . ." The word "direct" is defined, *inter alia*, as to "[g]ive authoritative instructions to; order (a person) *to do* . . . order the performance of". In this regard, we consider significant the fact that, for "direct" when followed by "to" plus an infinitive (i.e., a verb), the dictionary gives as a meaning to "give a formal order or command to", as this is precisely the construction used in subparagraph (iv) (" . . entrusts or directs a private body *to carry out* . . .").
>
> 8.29 It follows from the ordinary meanings of the two words "entrust" and "direct" that the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction). To our minds, both the act of entrusting and that of directing therefore necessarily 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. In other words, the ordinary meanings of the verbs "entrust" and "direct" comprise these elements – *something* is necessarily delegated, and it is

[43] Article 31(1) of the *Vienna Convention* provides in relevant part that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

> necessarily delegated *to someone*; and, by the same token, *someone* is necessarily commanded, and he is necessarily commanded *to do something*. We therefore do not believe that either entrustment or direction could be said to have occurred until all of these three elements are present.
>
> 8.30 Having said that, it is clearly the first element – an explicit and affirmative action of delegation or command – that is determinative. The second and third elements – addressed to a particular party and of a particular task – are *aspects* of the first. Any assessment of whether delegation or command has occurred would necessarily be in reference to that which has been delegated or commanded and in reference to the one to whom it has been delegated or commanded. As aspects of and flowing from the first element of the definition, the second and third elements provide further support for our view that the action must be an explicit and affirmative act of delegation or command. We note, in this regard, that the "entrusts or directs" language in subparagraph (iv) is followed by the language "a private body to carry out . . . ", which is similar to that which we have used to describe the second and third elements of the definition of entrustment or direction. Thus, the subsequent language in subparagraph (iv) confirms our view of the requirement of an explicit and affirmative action.[44]

7.31 As noted by the panel in *US – Export Restraints*, the dictionary meaning of the word "entrust" is, *inter alia*, to "give (a person, etc.) the responsibility for a task . . . Commit the . . . execution of (a task) *to* a person . . . ."[45] The word "direct" is defined, *inter alia*, as to "[g]ive authoritative instructions to; order (a person) *to do* . . . order the performance of."[46] We agree with the *US – Export Restraints* panel that "[i]t follows from the ordinary meanings of the two words "entrust" and "direct" that the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction)."[47]

7.32 The *US – Export Restraints* panel also found that "both the act of entrusting and that of directing therefore necessarily 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."[48] The parties disagree on this aspect of the panel's findings. Korea relies on this finding to argue that there can be no finding of entrustment or direction in the absence of an explicit act whereby a particular task or duty is delegated to a specific person, or whereby a specific person is commanded to perform a particular task or duty. The US denies that the act of delegation or command need be explicit, or addressed to a specific person.

7.33 Regarding the first element identified by the *US – Export Restraints* panel, we agree that the delegation or command inferred by the terms "entrustment" and "direction" must take the form of an affirmative act. The object of a Member's responsibility should be its acts, as such, rather than the reactions to or consequences of those acts, as these reactions and consequences may simply be the result of happenstance or chance.[49] That being said, we see nothing in the text of Article 1.1(a)(1)(iv) that would require the act of delegation or command to be "explicit". Although the particular facts of the *US – Export Restraints* case may have caused that panel to employ the term "explicit", no such

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[44] *US – Export Restraints*, paras 8.28-8.30, (footnotes omitted).
[45] *The New Shorter Oxford English Dictionary*, Volume 1, 1993, Clarendon Press, Oxford.
[46] *Id.*
[47] *US – Export Restraints*, para. 8.29.
[48] *Ibid*.
[49] Like the *US – Export Restraints* panel, "we do not see how the reaction of private entities to a given governmental measure can be the basis on which the Member's compliance with its treaty obligations under the WTO is established" (see *US – Export Restraints*, para. 8.34).

qualification is included in the terms of Article 1.1(a)(1)(iv). In our view, the affirmative act of delegation or command could be explicit or implicit, formal or informal. [50]

7.34 As to the issue of whether or not the act of delegation or command must be addressed to a specific individual, we agree with the *US – Export Restraints* panel that, of the three elements it identified in the extract cited above, the first element, *i.e.* the affirmative action of delegation or command, is determinative. As the panel noted, the second and third elements – addressed to a particular party and of a particular task – are aspects of the first, in the sense that assessment of whether delegation or command has taken place would of necessity involve an examination of both who allegedly has been entrusted or directed to act, and what the action or task in question is.

7.35 Since the second and third elements identified by the *US – Export Restraints* panel are aspects of the first element, we consider that the manner, or degree of detail in which the addressee and object of the act of delegation or command is specified will depend on the form that the act of delegation or command may take. Thus, while a greater degree of specificity may be expected in respect of explicit or formal acts of delegation or command,[51] this will not necessarily be the case in respect of implicit or informal acts. In our view, the fact that the addressee and object of the act of delegation or command is described in less detail does not preclude a finding of entrustment or direction, as a matter of law. Rather, it raises evidentiary issues. While the fact that an act of delegation or command is specifically addressed to a particular private body may make it easier, in terms of evidence, for a complainant or investigating authority to establish the existence of entrustment or direction, the fact that an act of delegation or command is not specifically addressed to a particular private body does not necessarily mean that a finding of entrustment or direction in respect of that private body is precluded. It simply means that, as an evidentiary matter, it will be more difficult for a complainant or investigating authority to properly demonstrate that such private party was entrusted or directed.[52] Similarly, the fact that an act of delegation or command does not specify in great detail what must be done does not necessarily preclude a finding of entrustment or direction. It simply makes it more difficult for a complainant or investigating authority to properly demonstrate that a transaction undertaken by a private body was the object of governmental entrustment or direction. Thus, although the plain meaning of entrustment and direction requires that something must be delegated to someone, or that someone must be commanded to do something, the plain meaning of those terms does not require that such someone or something must necessarily be specified in great detail.[53] That being said, the evidence of entrustment or direction must in all cases be probative and compelling. Thus, whatever the nature or form of the affirmative acts of delegation or command at

[50] Indeed, the utility of Article 1.1(a)(1)(iv) would be undermined if an "explicit and affirmative action of delegation or command" were required. That provision operates as a catch-all, so that indirect government action does not fall outside the scope of the *SCM Agreement*. We are not prepared to read into Article 1.1(a)(1)(iv) terms that would allow such indirect government action to circumvent the WTO's subsidy disciplines.

[51] Of course, explicit and formal acts of delegation or command could also be drafted in very general terms, and addressed to a broadly defined group.

[52] Korea argues that, because Article 1.1(a)(1)(iv) refers to the entrustment or direction of "a" private body, the relevant act of delegation or command must be specifically and explicitly addressed to "a" particular private body. We disagree, since there may be factual circumstances where it is possible for an investigating authority to properly conclude that "a" particular private body has been entrusted or directed, even though the relevant act of delegation or command was not specifically and explicitly addressed to that private body.

[53] We note that Korea has argued that the French and Spanish versions of Article 1.1(a)(1)(iv) confirm its view that "the English word 'directs' ... conveys the idea of ordering the private body to take some action" (para. 21 of Korea's Second Written Submission, emphasis in original), and that the English word "entrust" "conveys the idea of being definitely told something must be done" (para. 22, Korea's Second Written Submission). While this may be correct, Korea has not made any argument on the basis of the plain meaning of the text regarding the degree to which the "some action" or "something" must be specified in order to entrustment or direction to arise.

issue, the evidence must demonstrate that each private entity allegedly providing, or participating in, a financial contribution was entrusted or directed by the government to do so.[54]

The context of the terms "entrusts or directs"

7.36 Korea states that it has stressed the "who" that is being entrusted or directed because the entrustment or direction must apply to "a private body". According to Korea, this contextual language makes clear that some kinds of entrustment or direction simply will not fall within the meaning of Article 1.1(a)(1)(iv) because the government has not been targeting a "private body". Korea argues that if the government orders a public body to take some action, that entrustment or direction of that public body is legally irrelevant to the issue of whether a private body has been directed. We do not agree with this broad statement, since it excludes the possibility of indirect entrustment or direction of a private body by a government via a public body.[55] Thus, if a government were to instruct a public body to entrust or direct a private body, such entrustment or direction would fall within the scope of Article 1.1(a)(1)(iv). Korea also argues that if a government expresses a generalized wish that something happens, that is not entrustment or direction of a private body, since there is no specific private body that is the object of the action. As noted above, we do not consider that the addressee of the alleged entrustment or direction need be specified in detail in order for Article 1.1(a)(1)(iv) to apply. We would agree with Korea's argument that an expression of a generalized wish does not amount to entrustment or direction, however, but on different grounds, namely that the expression of a generalized wish does not amount to an affirmative act of delegation or command.

7.37 Korea also notes that a private body must be entrusted or directed "to carry out" something. Korea argues that "[t]he object of the verbs 'entrusts' or 'directs' must be something concrete that can be carried out. A Korean bank can 'carry out' making a loan, but it cannot 'save' a company."[56] Article 1.1(a)(1)(iv) actually provides that a private body must be entrusted or directed "to carry out one or more of the type of functions illustrated in [sub-paragraphs] (i) to (iii)."[57] In our view, if a private body were entrusted or directed to carry out one of those functions, or to carry out an act that would necessarily entail the execution of one of those functions, then Article 1.1(a)(1)(iv) would in

[54] Whatever the nature or form of the affirmative acts of delegation or command, and whatever the type of evidence relied upon, there must always be a determination to the effect that each of the private entities at issue was entrusted or directed by the government.

[55] We note that, according to Article 1.1(a)(1), the word "government" in Article 1.1(a)(1(iv) would cover both governments and public bodies.

[56] Korea's Second Written Submission, para. 29.

[57] Article 1.1(a)(1)(iv) further provides that the functions covered by the entrustment or direction must "normally be vested in the government and the practice [must], in no real sense, differ[] from practices normally followed by governments." We note that the "in no real sense" language was addressed by the panel in *US – Export Restraints*. That panel referred to the report of the Group of Experts on the Calculation of the Amount of a Subsidy, which in turn referred to a 1960 panel report (see MTN.GNG/NG10/W/4, "Subsidies and Countervailing Measures – Note by the Secretariat", 28 April 1987, Section 4.1.A). Like the *US – Export Restraints* panel, we too "find very significant the Group of Experts' interpretation that the 1960 Panel's reference to 'practice . . . in no real sense different from those normally followed by governments' was a general reference to the delegation to private parties of the particular government functions of taxation and expenditure of revenue" (para. 8.72). We note that the reference to functions "normally vested in the government" textually mirrors the reference to "practices normally followed by governments." Accordingly, we consider that the reference to functions "normally vested in the government" should also be understood to mean functions of taxation and revenue expenditure. Thus, a function may be said to be "normally vested in the government" if that function involves the levy of taxation or the expenditure of revenue. We are therefore not persuaded by Korea's argument (para. 24, Korea's Second Written Submission) that "conventional" loans and restructuring measures, i.e., those not made pursuant to some government programme, are not "normally vested in the government", and therefore fall outside the scope of Article 1.1(a)(1)(iv). To the extent that loans and restructuring measures involve taxation or revenue expenditure, they are capable of falling within the scope of that provision.

principle apply. Since this issue would need to be resolved on the basis of the facts of a particular case, we see no merit in discussing in the abstract whether or not a particular task might be sufficiently "concrete" for the purpose of Article 1.1(a)(1)(iv).

7.38 Korea also argues that Article 1.1(a)(1)(iv) would not apply if a private body were merely entrusted or directed to consider some action, or to assist some action, rather than "carry out" some action. According to Korea, any discretion being left to the private body is fundamentally at odds with this notion of "carry out". Korea asserts that any time private bodies have a choice, it is hard to imagine how they can have been entrusted or directed to "carry out" an action. However, we do not consider that leaving discretion to a private body is necessarily at odds with entrusting or directing that private body. In particular, it is possible that a government could entrust or direct a private body to make a loan, but leave the terms of that loan to the discretion of the private body. While there may be cases where the breadth of discretion left to the private body is such that it becomes impossible to properly conclude that that private body has been entrusted or directed (to carry out a particular task), this is a factual/evidentiary matter to be addressed on a case-by-case basis.

The object and purpose of the terms "entrusts or directs"

7.39 Korea submits that its reading of the language and context of Article 1.1(a)(1)(iv) finds further support in the underlying purpose of this provision. According to Korea, this language seeks to narrow the scope of indirect subsidies by narrowing the scope of private actions that can be imputed to the government.

7.40 The US asserts that Members did not intend that governments be able to evade the subsidy disciplines by using less formal – but no less effective – forms of entrustment or direction over private parties to grant subsidies.

7.41 Although Article 31(1) of the *Vienna Convention* provides that a treaty interpreter may have regard to the object and purpose of the provisions at issue, in this case we note that the parties have both identified plausible object and purpose arguments in support of their respective interpretations of Article 1.1(a)(1)(iv). Thus, while it is important that Article 1.1(a)(1)(iv) should not be interpreted so broadly that it covers the conduct of private bodies acting independently of governmental delegation or command, neither should that provision be interpreted so narrowly that it allows Members to escape the disciplines of the *SCM Agreement* by acting indirectly through private bodies. Since there is no compelling object and purpose argument requiring us to adopt either party's interpretation, we shall focus our interpretation on the plain meaning of the text, as set out above.

7.42 As a matter of law, therefore, we do not consider that the plain meaning of Article 1.1(a)(1)(iv) of the *SCM Agreement* requires an investigating authority to demonstrate an explicit government action addressed to a particular entity, entrusting or directing a particular task or duty.

(b) Did the DOC properly find that there was sufficient evidence to support a generalized finding of entrustment or direction with respect to private bodies spanning multiple creditors and multiple transactions over the period of investigation?

7.43 Korea submits that the only evidence relied upon by the DOC relates to narrow circumstances that do not support the DOC's broad theory of entrustment or direction. Korea asserts that, at best, DOC's case constitutes a finding of entrustment or direction by inference. Korea submits that inference is not a substitute for establishing explicit and affirmative government action of delegation or command.

7.44 The US submits that the DOC's determination of entrustment or direction was supported by ample record evidence. According to the US, the evidence before the DOC demonstrated (1) that the GOK pursued a policy to support Hynix and prevent its failure; (2) that the GOK exercised the control over Hynix's creditors necessary to implement its policy; and (3) that, where necessary, the GOK used its power and influence to coerce Hynix's creditors to adhere to the GOK's policy.

7.45 Each party's submissions regarding the sufficiency of the evidence of entrustment or direction relied on by the DOC are structured differently. For the most part, we shall follow the structure of arguments adopted by the US, since that more closely follows the structure of the DOC's determination on entrustment or direction.[58] We shall begin by addressing the parties' arguments concerning GOK's alleged policy to support Hynix and prevent its failure. In doing so, we are conscious that the DOC relied on the totality of the evidence before it, without attaching particular importance to one or several evidentiary factors. We shall adopt the same approach in our review of the DOC's determination. In order to do so, however, we must consider the DOC's assessment of the probative value of each evidentiary factor separately.

7.46 Before reviewing that evidence, we note that, for the most part, the DOC does not rely on any explicit affirmative act of government delegation or command in respect of the financial contributions at issue in these proceedings. Instead, its determination is largely based on alleged implicit and informal acts of delegation or command. For this reason, most of the evidence relied on by the DOC is circumstantial in nature. There is no reason why a case of government entrustment or direction should not be premised on circumstantial evidence, provided that such evidence is probative and compelling, in the sense that it demonstrates that each of the private creditors participating in the financial contributions was entrusted or directed to do so.

(i) Policy to Support Hynix and Prevent its Failure

7.47 The DOC found that:

> the GOK had a policy to prevent Hynix' failure. The GOK attached such great importance to Hynix' survival because it feared that the company's collapse would have serious repercussions for the ROK's corporate, labour and financial markets, and because Hynix was part of an industry sector considered to be of 'strategic' importance to the GOK.[59]

7.48 Korea objects to the DOC's reliance on policy considerations. Korea submits that this approach ignores all of the warnings of the panel decision in *US-Export Restraints*, since government actions and interventions for various policy reasons suddenly become actionable as entrustment or direction, without any regard for the nature of those actions. Korea also asserts that, particularly with regards to timing, the US theory has no limits, because once a government has made clear its hope to "save" a company, that original intention goes on forever.

7.49 The US submits that the GOK established a policy to save Hynix because of the strategic status of the Korean semiconductor industry. The US asserts that, in January 2001, a Blue House[60] official stated that, "Hyundai's semiconductors and constructions are Korea's backbone industries, and these businesses are deeply-linked with other domestic companies. Thus, these firms should not

[58] This does not mean that the Panel is placing the burden of proof on the US. It simply means that, for the most part, the Panel is considering the parties' arguments on Korea's claims against the DOC's determination of government entrustment or direction in the order set out in the US First Written Submission.

[59] *Decision Memorandum*, page 49 (Exhibit GOK-5).

[60] The Panel understands that this is a reference to the official residence of the President of ROK.

be sold off just to follow market principles."[61] The US asserts that in May 2001, a senior KEB official stated that, "[i]f Hynix is placed under receivership, Korea's exports will be severely battered [because] Hynix accounts for 4 per cent of exports. As far as I know, the government is now working out a series of powerful measures to ensure the survival of Hynix Semiconductor."[62] The US asserts that a Chong Wa Dae[63] official stated that, "[w]e are doing what is deemed necessary to save companies leading the countries [sic] strategic industries."[64] According to the US, the perception in the Korean banking community was that Hynix was "too big to fail".[65]

7.50 The US submits that the DOC considered this and other evidence of the GOK's policy to prevent the failure of Hynix. The US asserts, for example, that the DOC noted that Economic Ministers held several meetings in late 2000 and early 2001 where senior government officials determined what measures could be taken by the government to assist Hynix. According to the US, the evidence before the DOC indicated that as early as November 2000, the GOK began pursuing a policy (and taking specific actions) to prevent the failure of Hynix.

7.51 We find that an objective and impartial investigating authority could properly have found that the GOK had a policy to save Hynix on the basis of the evidence described above. Although this policy may well explain the participation of public body, Group A, creditors in the four financial contributions at issue, it is not sufficient to attribute to GOK the participation of the private body, Group B and C, creditors by virtue of Article 1.1(a)(1)(iv) of the *SCM Agreement*. Article 1.1(a)(1)(iv) is not concerned with the establishment of government policy. It is concerned with affirmative governmental acts of delegation or command. Although the DOC may have relied on the existence of a GOK policy to save Hynix as context for evaluating the alleged affirmative government acts at issue, the existence of a GOK policy to save Hynix in and of itself could not properly be treated as evidence of government entrustment or direction. Something more is required, in the sense of evidence of implementation of that policy *vis-à-vis* private bodies through affirmative government acts of delegation or command. We consider that the DOC was of the same view, since it first examined whether or not there was a GOK policy to support Hynix's restructuring, and then considered whether there was a pattern of practices on the part of GOK to act upon that policy.[66]

(ii) GOK Control Over Hynix's Creditors

7.52 Korea submits that the DOC failed to establish that GOK exercised control over Hynix's creditors. The US asserts that GOK did exercise such control, through its multiple roles as lender, owner, legislator and regulator.

The GOK's role as lender/signalling

7.53 Korea notes that the DOC found that:

> "[t]he Fast Track programme was [] vital to the success of Hynix' and other Hyundai companies financial restructuring, and the KDB's involvement sent a clear signal that

[61] *The State Activism toward the Big Business in Korea, 1998-2000: Path Dependence and Institutional Embeddedness*, Jiho Jang, University of Missouri-Columbia (April 2001) (Exhibit US-17).

[62] *Creditors Deny Hynix Receivership Rumors*, KOREA TIMES (4 May 2001) (Exhibit US-26).

[63] The Panel understands that this is a reference to the official residence of the President of ROK, also known as the Blue House.

[64] *Chong Wa Dae Defends Hyundai Rescue*, KOREA TIMES (7 February 2001) (Exhibit US-27); *see also The State Activism toward the Big Business in Korea, 1998-2000: Path Dependence and Institutional Embeddedness*, Jiho Jang, University of Missouri-Columbia (April 2001) (Exhibit US-17).

[65] *Financial Experts Report*, Meeting 2, at 7 (Exhibit GOK-30).

[66] *Decision Memorandum*, page 49 (Exhibit GOK-5).

> the government stood behind the programme and would take dramatic steps to ensure the restructuring effort moved forward."[67]

7.54 Korea submits that evidence of government signalling (through the provision of KDB loans) is legally irrelevant to the issue of entrustment or direction. According to Korea, the fact that a government may desire and approve of a certain outcome does not and cannot establish entrustment or direction.

7.55 The US submits that KDB is a public body, and that the KDB's role as Hynix's primary lender significantly underscored the GOK's support for the company. According to the US, the KDB's presence as a lender was a signal to Korean "private" banks that a particular investment decision had the GOK's blessing, and that a company was backed by the GOK. The US asserts that the KDB also played a critical role in managing the KDB Fast Track Programme. The US argues that only six companies participated in the KDB Fast Track Programme, four of which were current or former Hyundai affiliates.[68]

7.56 In considering the DOC's analysis of the GOK's role as lender, we note the US statement that "[t]he DOC never found that signalling in and of itself amounted to entrustment or direction. Rather, the DOC considered the government's creation of the KDB Fast Track Programme – which benefited a limited pool of users – as a relevant piece of evidence."[69] In our view, the DOC properly found that signalling in and of itself did not amount to entrustment or direction. We consider the fact that GOK and/or public bodies made loans to Hynix to be of very limited probative value in an investigation of alleged government entrustment or direction, since the provision of a loan to Hynix by GOK and/or public bodies does not, in and of itself, entail any affirmative acts of delegation or command. Indeed, it does not even entail any interaction between the GOK and/or public bodies and Hynix's private creditors. Even when viewed in conjunction with other evidentiary factors, we consider that an impartial and objective investigating authority would have refrained from attaching undue importance to the lending practices of public bodies when considering evidence of alleged government entrustment or direction of private bodies in the circumstances at issue.

The GOK's role as owner

Arguments of the parties

7.57 Korea asserts that the DOC relies extensively on the fact that the GOK held ownership interests in certain banks involved in Hynix's restructuring over the course of the period investigated.[70] According to Korea, however, this fact does not constitute evidence of an explicit and affirmative delegation or command by the GOK to entrust or direct credit to Hynix. Korea asserts that the GOK obviously has complete or majority ownership in some of the banks involved in the Hynix restructuring. Korea argues that even if this shareholding somehow constituted evidence of an explicit and affirmative delegation or command by the GOK to the banks in which it held a controlling stake, it is affirmatively not evidence of an explicit and affirmative delegation or command to all banks.

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[67] *Decision Memorandum*, page 52 (Exhibit GOK-5). The KDB Fast Track Programme provided for the repackaging and refinancing of maturing bonds. Eligible companies enrolled by their creditors in the Programme were required to cover the immediate costs of 20 per cent of their maturing bonds. The remaining 80 per cent of the bonds were re-issued through KDB.

[68] *Decision Memorandum* at 23 (Exhibit GOK-5).

[69] US First Written Submission, Note 86.

[70] Korea refers, for example, to pages 53-54 of the *Decision Memorandum* (Exhibit GOK-5).

7.58 Korea asserts that the standard set out in the *US - Export Restraints* case makes clear that a government holding shares in a private body alone is not sufficient evidence to presume that a measure adopted by the private body has been 'directed" by the government-shareholder. Korea submits that this is true even if the shareholding allows the government to exercise a decisive influence over the private body's operations. According to Korea, direction can be found to be present only if it is positively established that the government has actually exercised its control to direct the bank in some specific way as set forth in *US - Export Restraints*.[71]

7.59 The US asserts that "the GOK's role as owner was crucial in its exercise of control over Hynix's creditors."[72] The US argues that the DOC found that the government-owned and controlled banks played a "dominant role"[73] in the Hynix restructuring, particularly in the October 2001 restructuring.[74] The US asserts that the DOC's views were consistent with the views of private financial experts interviewed by the DOC.

Evaluation by the Panel

7.60 In its *Decision Memorandum*, the DOC stated that "[t]he GOK's ownership or control of these banks, which held a majority throughout all critical phases of the Hynix bailout, allowed the GOK to entrust the financial aspects of the bailout to these GOK owned or controlled banks, operating through the Hynix creditors council."[75] The DOC continued that "[t]hrough its control and influence over these banks, ... the government was able to establish its dominant position over Hynix' Creditors' Council, influence the outcome of the council meetings, and entrust the continuation of its policies to the council."[76]

7.61 The DOC's findings on government ownership therefore relate to two issues. First, it relates to the alleged entrustment or direction of Group B (government owned or controlled) creditors. Second, it relates to the GOK's alleged ability, through ownership or control of the Group B creditors, to control proceedings within the Creditors' Councils, and therefore dictate terms to the Group C creditors. Since we address the second issue elsewhere in this report[77], we shall concentrate on the first issue at this juncture.

7.62 We recall that the DOC found that GOK ownership or control of Group B creditors "allowed the GOK to entrust the financial aspects of the bailout to these GOK owned or controlled banks."[78] Thus, the DOC did not find that government ownership or control in and of itself amounted to entrustment or direction. We agree with this approach, because whereas government entrustment or direction refers to affirmative acts of delegation or command, government ownership is a state. Although that state, depending on the degree of government ownership, might facilitate government entrustment or direction, the existence of that state *per se* is not indicative of any affirmative acts on delegation or command on the part of the government. That being said, we note that the DOC in its *Preliminary Determination* stated that "banks that are owned, in whole or in part, by the GOK are subject to the influence of their majority or minority shareholders."[79] We would emphasise that a

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[71] Korea also asserts that provisions of the Public Fund Oversight Act and various Memoranda of Understanding ensured that GOK-owned banks took day-to-day decisions independently. These arguments are addressed in the next section of our report.

[72] US First Written Submission, para. 62.

[73] *Decision Memorandum*, page 53(Exhibit GOK-5) .

[74] *Id.*, page 54.

[75] *Id.*, page 53.

[76] *Id.*, page 54.

[77] *See* paras. 7.82 to 7.87 *infra.*

[78] *Decision Memorandum*, page 53 (Exhibit GOK-5).

[79] This statement by the DOC is inconsistent with its statement in the *Decision Memorandum* (Exhibit GOK-5) that "[t]he GOK's ownership ... allowed the GOK to entrust the financial aspects of the bailout to these

government's influence as a shareholder is not *per se* evidence of entrustment or direction, since government influence does not necessarily entail affirmative acts of delegation or command.[80] Whereas all affirmative acts of delegation or command will result in influence, the converse is not true. If it were, financial contributions by any private entity in which a government held shares would fall within the scope of Article 1.1(a)(1)(iv) of the *SCM Agreement*.

7.63 Furthermore, in finding that the GOK was able to entrust or direct Group B creditors to participate in the Hynix restructuring as a result of its shareholder influence, we consider that the DOC overlooked record evidence[81] indicating that certain Group B creditors did not actually participate in one of the financial contributions at issue in these proceedings. In particular, the DOC failed to explain how the KFB, a Group B creditor in which GOK had a 49 per cent shareholding, was able to exercise appraisal rights and subsequently seek mediation in respect of the October 2001 restructuring.[82] Faced with the same factual circumstances, we do not consider that an objective and impartial investigating authority could properly have found, on the basis of the reasoning advanced by the DOC, that government ownership, either in isolation or in conjunction with other factors, constituted compelling evidence of government entrustment or direction of Group B creditors.

The GOK's role as legislator

Arguments of the parties

7.64 Korea submits that the DOC and US ignored the various procedural safeguards imposed by GOK to ensure that GOK ownership in certain banks did not turn into *de facto* control of day-to-day operations. Korea submits that the DOC mischaracterized the following legislative measures: Prime Minister's Decree No. 408, the Public Funds Oversight Act, and the CRPA.

7.65 Korea submits that the US mischaracterizes Article 1 of the Prime Minister's Decree No. 408, which provides that the Decree seeks to "exclude unfair outside intervention in the management of financial institutions."[83] Korea acknowledges that the Decree envisages the GOK exercising its rights as a shareholder. Korea asserts that, much like other shareholders that do not intervene in the day-to-day decisions, the GOK does not intervene in the day-to-day decisions of Korean banks. Korea states that the US has never articulated the ways in which exercising standard shareholder rights constitutes -- either in general or this specific case -- any intervention in the particular decisions to grant loans to certain customers. Korea accepts that those banks with substantial GOK shareholding might be influenced by the Korean Government, but argues that influence is not entrustment or direction. The fact that banks with substantial GOK shareholding might be more likely to make loans, or might consider a broader range of economic factors, does not represent entrustment or direction.

GOK owned ... banks," (emphasis supplied) since it implies that government ownership necessarily constitutes entrustment or direction, rather than merely allowing (or facilitating) entrustment or direction.

[80] We recall that, in our view, the DOC may well have been entitled under the *SCM Agreement* to treat 100 per cent GOK-owned Group B creditors as public bodies. In the absence of any such finding, the DOC was required to demonstrate that they were entrusted or directed, through affirmative GOK acts of delegation or command, to participate in the four financial contributions at issue.

[81] Including the Financial Notes to the Hynix 2001 Audit Report set forth in Exhibit US-125, which included the following statement:

> According to [CRPA], any creditor financial institutions who is dissatisfied with the creditor banks resolution is entitled to apply for mediation to Mediation Committee. Based on this clause, three creditor banks, including Korea First Bank, raised objection to the terms of reimbursement of remaining debts after debt to equity swap and debt exemption, five-year debentures with no interest. Accordingly, [Hynix] recognized [won] 80,100 million of other payables as current liabilities."

[82] The issue of mediation under the CRPA is addressed at para. 7.85 *infra*.

[83] Exhibit GOK-45.

7.66 Regarding the Public Funds Oversight Act, Korea submits that the US mischaracterizes the role of the MOU. According to Korea, the MOUs were about improving transparency, and ensuring some degree of prudential management over the banks that had to receive public funds. As the DOC's verification report makes clear, the purpose of the MOUs is to ensure that the banks are operated in accordance with sound business principles. Korea submits that the GOK is acting to ensure that the public funds that have been injected in the bank are put to good use and the bank is placed on a sound financial footing. Korea asserts that, far from being an instrument of government control, the MOUs are a means to limit and ultimately eliminate GOK involvement. Korea also argues that the MOUs did not allow for intervention in the day-to-day decisions of the banks. Korea also submits that many Korean banks simply did not have any such MOU. In particular, Korea notes that Kookmin did not have an MOU, despite the US argument to the contrary.

7.67 Korea submits that the US makes several serious mischaracterizations regarding the CRPA. Korea asserts that the US argument that the Creditors' Council gave only limited options ignores the context of the restructuring. According to Korea, in the context of restructuring, the creditors either hammer out an agreement that most can accept, or the company goes into bankruptcy. Korea asserts that this is the whole point of the restructuring -- to preserve more value by hammering out compromises rather than allowing the company to fail. Korea understands the core US argument to be that creditors did not have any real choices because in any event they had to forgive some debt. Korea asserts that this US argument in fact represents a *per se* rule that distressed companies must declare bankruptcy, and that restructuring is never allowed.

7.68 Korea submits that the definitive factual history of the Hynix creditors exercising appraisal rights confirms the procedural fairness of the CRPA process. Korea asserts that, on 31 October 2001, the Creditors Council passed a resolution for those creditors having chosen to exercise their appraisal rights under option 3. Korea states that, in response to this decision, dissenting creditors asked for resolution of the matter by a mediation committee as provided under the CRPA. According to Korea, the mediation committee decided that 100 per cent of these creditors' secured debts and 25 per cent of their unsecured debts are to be paid in cash by 31 May 2002. Korea asserts that where the creditor agrees, the term of payment may be adjusted accordingly, in which case 6 per cent interest shall be paid on any payments after 1 June 2002. Korea states that both the Creditors Council and the option 3 creditors accepted the outcome of this mediation without further recourse to court litigation as provided under the CRPA. According to Korea, the Creditors Council therefore made respective lump sum cash payments to Kwangju, Kyungnam and HSBC on 31 May 2002. Korea states that two payments were made to KFB on 3 October 2002 and 3 December 2003, respectively, with 6 per cent interest paid on the latter. Korea submits that this concrete history shows that the CRPA fully guarantees the legal rights of creditors opting for appraisal rights thereunder.

7.69 The US submits that the legislative action taken by the GOK actually enhanced its ability and the ability of Hynix's creditors to effectuate the GOK's policy to save Hynix.

7.70 Regarding Prime Minister Decree No. 408, the US disagrees that the measure was introduced to diminish the GOK's authority to intervene in the decisions of Korean banks. The US refers to the DOC's finding that the Decree contained "sufficient ambiguities which would allow the GOK to become involved in the banking system."[84] The US asserts that Article 5 of Prime Minister Decree No. 408 permits supervisory agencies to request "cooperation" from financial institutions for the purpose of the stability of the financial market, or to attain the "goals of financial policy." The US asserts that Article 6 provides the government with the flexibility to intervene on a company's behalf, stating that: "The Minister of MFE and KDIC shall, *unless they exercise their rights as shareholders of any of the Financial Institutions*, procure that the Financial Institution which was invested by the Government or KDIC, can be operated independently under the direction of the Board of Directors

[84] *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).

thereof" (emphasis added). The US submits that the Decree legalized the GOK's rights to intervene under the guise of stabilizing financial markets or exercising its shareholder rights to elect and appoint the banks' decision makers and to make credit policy decisions.

7.71 The US asserts that the DOC also found that the GOK was able to leverage its control of the financial sector to assist Hynix through enactment of the Public Fund Oversight Act. According to the US, this law required Korean private banks to sign MOUs in exchange for the massive recapitalizations they received from the government. The US submits that these MOUs provided the government with a contractual right to intervene in the day-to-day business and credit decisions of Korean banks. The US notes that the DOC concluded that, by entering into MOUs, "[t]he GOK in this manner can be directly involved in the fiscal operations of the bank."[85] The US asserts that, in particular, MOUs allowed the GOK to "require that the bank management be changed or the bank be restructured" such that "employees can be fired, the bank can be restructured, or the KDIC can order that the bank be merged with another healthier bank."[86] According to the US, many of Hynix's creditors, suffering from capital shortages and seriously over-exposed with respect to Hynix, had no choice but to accept the strict requirements of the MOUs. The US asserts that such legislatively-mandated contractual agreements provided the GOK with substantial control in directing credit to Hynix.

7.72 The US submits that another important step in furtherance of the GOK's policy towards Hynix was the enactment of the CRPA. The US asserts that the DOC concluded that this law essentially permitted a handful of Hynix's creditors, most of whom were majority owned by the GOK, to dictate the terms of the October 2001 restructuring to other Hynix creditors. The US asserts that the CRPA permits the creditors of a distressed Korean company to form a council and jointly manage the company through its restructuring. The US asserts that, according to Article 27(1) of the CRPA, the "principal transactions bank" (i.e., the KEB in this case) is nominally head of the council, which makes decisions "with a concurrent vote of the creditor financial institutions retaining ¾ or more of the gross amount of credit extension by the creditor financial institutions (including the loans converted into investments pursuant to the plans for management normalization)."[87]

7.73 The US accuses Korea of mischaracterizing the CRPA, since it implies that Hynix's creditors could "choose" their own path and "walk away" from Hynix restructuring and recapitalization measures taken under the CRPA. According to the US, the CRPA gave Hynix's largest creditors – *i.e.*, the specialized banks and those owned and controlled by the GOK – the power to dictate restructuring terms to all other Hynix creditors. The US asserts that Hynix's Creditors' Council, dominated by specialized banks and government-owned and -controlled banks, determined that: (1) no creditor would have the option to call in its debt, (2) no creditor would have the option to walk away without penalty, and (3) no creditor would have the option to remain an interest-earning creditor without the extension of new loans or forgiving significant debt on terms favourable to Hynix. The US argues that the DOC found that these "choices" were extremely limited and highly favourable to Hynix, essentially keeping Hynix from complete bankruptcy. According to the US, the terms of those "choices" were dictated by Hynix's government-owned and -controlled creditors.

7.74 The US submits that the three options presented to Hynix's creditors as part of the October restructuring and recapitalization measures were: (1) extend new loans, convert a majority of their debt to equity, and extend maturities and lower interest rates on the remainder of outstanding loans; (2) decline to extend new loans, convert a still significant portion of their debt to equity, and forgive the remainder; or (3) decline to extend new loans or convert debt to equity, and exercise their appraisal rights on small part of their debt. The US asserts that these three options do not offer much

[85] *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).
[86] *Government of Korea Verification Report*, at 4 (Exhibit US-12).
[87] Exhibit US-51.

of a real choice, since each of the three was structured to maximize benefits to Hynix and to minimize the creditors' abilities to exercise basic creditor rights. The US argues that even the third option was highly favourable to Hynix because it required creditors to forgive their debt on very unfavourable terms. Specifically, creditors that exercised the third option could only exercise their appraisal rights for 25 per cent of the unsecured debt; they had to forgive the rest, *i.e.*, they had to forgive 75 per cent of that debt. The US asserts in addition that the few banks that selected the third option not only had to write-off 75 per cent of Hynix's debt, but also did not even actually receive the proceeds from having exercised their appraisal rights on the remaining 25 per cent. According to the US, this is because they were forced under the terms of the Creditors' Council agreement to convert this portion into zero coupon (i.e., interest free) debentures with a five-year maturity, whereby option 3 banks will not actually receive what they were able to salvage from their loans to Hynix until 2006, and will not earn any interest on the money that is owed to them by Hynix.

Evaluation by the Panel

Prime Minister's Decree No. 408

7.75 The DOC's findings regarding the Prime Minister's Decree No. 408 are set forth in the *Preliminary Determination*. In this document, the DOC determined that:

> the *de jure* measures contain sufficient ambiguities which would allow the GOK to become involved in the banking system. For instance, the *Prime Minister's Decree* at Article 5 states that the financial supervisory agencies can request cooperation from financial institutions for the purpose of the stability of the financial market, or to attain the goals of financial policies. As noted above, the financial system in the ROK has been going through a crisis that could be the type of situation in which this exception would be applied. A further exception that would allow GOK influence over the banks is included in Article 6 of the *Prime Minister's Decree*. Article 6 states that the Minister of MOFE and KDIC shall, *unless they exercise their rights as shareholders of any of the Financial Institutions*, procure that the Financial institution, which was invested by the {GOK} or KDIC, can be operated independently under the direction of the Board of Directors thereof" (emphasis added). As noted above, because the GOK is part-owner in many commercial banks, an exercise of its shareholder rights could allow the GOK an opportunity to become involved in the operations of the banks.[88]

7.76 The DOC therefore focused on Articles 5 and 6 of Prime Minister Decree No. 408. We are not persuaded by the DOC's analysis of Article 5 of Prime Minister Decree No. 408. The DOC determines that Article 5 allows financial supervisory agencies to "request cooperation" from financial institutions. We do not consider that an objective and impartial investigating authority could properly determine that a request for co-operation amounts to evidence of affirmative acts of delegation or command. Requesting co-operation in a matter is not the same as delegating a task, or commanding someone to do something. In addition, even if Article 5 did enable the GOK to entrust or direct private bodies, the DOC has not provided any evidence that any such authority under Article 5 was actually exercised in this way. Instead, the DOC merely asserts that a financial crisis "could be the type of situation in which [Article 5] would be applied." We do not consider that an objective and impartial investigating authority could treat such a conditional statement as evidence that affirmative acts of delegation or command were actually taken by the GOK pursuant to Article 5 of the CRPA.

7.77 Regarding Article 6 of Prime Minister Decree No. 408, the DOC's analysis merely establishes the legal authority of the GOK to intervene in the activities of government-owned banks through the

[88] *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).

exercise of its shareholder rights. We do not consider that an objective and impartial investigating authority could properly have determined that this amounts to evidence of affirmative acts of delegation or command. The exercise of shareholder rights does not necessarily entail affirmative acts of delegation or command. In our view, a finding of entrustment or direction must be based on affirmative acts going beyond the simple exercise of shareholder rights. Otherwise, the acts of any companies with government shareholdings could be attributed to Members under Article 1.1(a)(1)(iv) of the *SCM Agreement*.

Public Funds Oversight Act

7.78 The DOC found that the use of MOUs allowed the GOK to "set financial soundness, profitability, and asset quality targets"[89], and review implementation of such targets.[90] Although the DOC may have been correct in determining that MOUs therefore allowed the GOK to become "directly involved in the fiscal operations of the bank", the DOC failed to establish that such involvement would entail anything other than ensuring compliance with the abovementioned targets. Neither the DOC's evaluation (in the *Preliminary Determination*), nor the *GOK Verification Report* (referred to by the US), suggest that GOK intervention under the MOUs would have resulted, or in fact did result, in government entrustment or direction of banks to invest in (what the US considers to be) an unsound company. We fail to see how an objective and impartial investigating authority could properly have determined that there was evidence of government entrustment or direction on the basis of the limited DOC analysis of the Public Funds Oversight Act set forth in the *Preliminary Determination*.

CRPA

7.79 The DOC found that:

> [d]ecisions made by the October Creditors' Council were subject to the newly enacted CRPA. Under this Act, banks holding 75 per cent of a company's debt may set the financial restructuring terms for all of a company's creditors. Hynix' government-owned and controlled creditors accounted for a substantial majority of [Hynix's] outstanding debt at that time, an amount sufficient to set the terms for all banks ....[91]

7.80 We understand the DOC to have found that the GOK was able to control the participation of Group C creditors in the October 2001 restructuring because, pursuant to the CRPA, Group C creditors were constrained by decisions of the Creditors' Council, which in turn was controlled by Group A and B creditors (owned or controlled by the GOK). The parties' arguments regarding the DOC's finding give rise to two issues. First, whether the DOC could properly have found that the Creditors' Council was controlled by Group A and B creditors. Second, whether the DOC could properly have found that Group C creditors were constrained by decisions of the Creditors' Council.

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[89] *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).

[90] During the second substantive meeting with the parties, a dispute arose as to whether a copy of an MOU submitted by Korea regarding MOUs was admissible. The US asserted that it was not, because such MOU was not on the DOC's record, even though the DOC had requested a copies of MOUs. Korea disputed this, arguing that para. 83 of the US First Written Submission shows that the DOC reviewed such documents. We do not consider that para. 83 of the US First Written Submission shows that the DOC reviewed an MOU during its investigation. In particular, the GOK Verification Report (Exhibit US-12) referred to by the US does not indicate that this was the case, since the discussion appears to have concerned MOUs in the abstract. Accordingly, we do not have regard to the MOU submitted by Korea when reviewing this part of the DOC's determination.

[91] *Decision Memorandum*, page 54 (Exhibit GOK-5).

Control of the Creditors' Council by Group A and B Creditors?

7.81 The clear implication of the DOC's finding was that Group A and B creditors held at least 75 per cent of the voting rights. Korea queries whether the Group A and B creditors held 75 per cent of the votes. Korea refers to Exhibit US-37, which contains a document prepared by the US Embassy in Seoul, at the request of the DOC. That document indicates that those "institutions where [GOK] is the first shareholder" held 63.3 per cent of the voting rights. Furthermore, in Figure US-4, the US reported that the share of the Creditors Council vote held by Group A and B creditors at the time of the October 2001 restructuring was "above 65 [per cent]."[92] It would appear, therefore, that the Group A and B creditors did not hold at least 75 per cent of the votes. This would mean that there is not a proper factual basis for the DOC's finding that the Group A and B creditors had sufficient votes to "set the terms for all banks."[93]

Constraints on Group C Creditors?

7.82 Second, even if the Group A and B creditors did hold 75 per cent of the votes, we are not persuaded that an objective and impartial investigating authority could properly have found that this would have allowed them to "set the terms for all banks."[94] We note that creditors were presented with three options[95], and that four creditors, including both Group B and C entities, exercised their appraisal rights pursuant to the third option established by the Creditors Council. In this regard, the DOC found that "the terms on which these creditor banks terminated their relationship with Hynix were dictated by the banks that mattered in this case, namely the large government-owned and controlled creditors."[96] Although the terms of the payment and buyout price under option 3 were crafted by the Creditors' Council, the DOC overlooked the fact that, under the terms of the CRPA, option 3 creditors exercising their appraisal rights were entitled to decline those terms of payment and buyout price proposed by the Creditors' Council if those conditions were deemed unreasonable or otherwise unacceptable. In such circumstances, Article 29.5 of the CRPA[97] provides that creditors exercising appraisal rights may refer the matter for mediation, whereby those creditors and the Creditors' Council appoint an accounting firm to calculate a mutually agreeable buyout price. More importantly, the DOC overlooked record evidence indicating that three of the four creditors exercising appraisal rights under option 3 actually exercised their right to seek mediation in respect of the October 2001 restructuring.

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[92] The shares of Group A and B creditors at the time of the May 2001 restructuring was reported as "above 75%." The share was reported as "above 70%" at the time of the syndicated loan and KDB Fast Track Programme. This would suggest that the US reported data in 5 per cent increments, such that the reference to "above 65" per cent means something between 65 and 70 per cent, but in any event less than 75 per cent.

[93] *Decision Memorandum*, page 54 (Exhibit GOK-5). Although the Group A and B creditors appear to have had sufficient votes (i.e., more than 25 per cent) to block decisions within the Creditors Council, a blocking minority does not have the same effect as a deciding majority.

[94] *Decision Memorandum*, page 54 (Exhibit GOK-5).

[95] The three options were: (1) extend new loans, convert some debt to equity, and extend maturities and lower interest rates on the remainder of outstanding loans; (2) decline to extend new loans, convert a portion of their debt to equity, and forgive the remainder; or (3) decline to extend new loans or convert debt to equity, and exercise their appraisal rights on part of their debt.

[96] *Decision Memorandum*, page 61 (Exhibit GOK-5).

[97] Article 29(5) of the CRPA provides:

"[w]here the consultation under paragraph (4) is not attained, the mediation committee under Article 31(1) shall make a decision on the price of purchase or redemption of claims and conditions thereof. In such case, the mediation committee shall take into consideration the price computed by an accounting specialist selected under a consultation between the council and opposing creditors by evaluating the value of the relevant enterprise with insolvency signs and the possibility for implementing the agreement, as well as the situation of funds of purchase institutions."

7.83 The US asserts that neither Hynix nor the GOK informed the DOC that option 3 creditors could, or indeed had, sought mediation under the CRPA, despite a specific request for detailed information on option 3. The US asserts that, in the underlying investigation, the GOK stated in its questionnaire response that option 3 banks received a zero coupon debenture based on the value of their secured debt and the liquidation value of their unsecured debt. The US submits that the Panel is precluded from considering the fact that three of the four option 3 banks sought mediation, and from reviewing the terms offered under that mediation. The US considers that this is new information that was not on the record before the DOC.

7.84 We agree with the US that our review of the DOC's determination should be confined to facts actually recorded on the DOC's record of investigation. Although there is no evidence to suggest that the DOC record contained information regarding the terms ultimately agreed under the mediation procedure, the record clearly did contain the CRPA, and the possibility of mediation is clearly set forth in Article 29(5) of that statute. With Article 29(5) on the record, at the very least we would expect an impartial and objective investigating authority to take that provision into account, and explain how, notwithstanding the possibility of Article 29(5) mediation, "controlling" creditors were still able to "set the terms for all banks."

7.85 In addition to Article 29(5) of the CRPA indicating the possibility of mediation, there was also evidence on the DOC's record indicating that the mediation provisions had actually been invoked by three creditors in respect of the October 2001 restructuring. In particular, the last paragraph of page 40 of the Notes to Financial Statements attached to Hynix's 2001 Audit Report, which was on the DOC record (and submitted to the Panel by the US in Exhibit US-125), provides:

> According to [CRPA], any creditor financial institutions who is dissatisfied with the creditor banks resolution is entitled to apply for mediation to Mediation Committee. Based on this clause, three creditor banks, including Korea First Bank, raised objection to the terms of reimbursement of remaining debts after debt to equity swap and debt exemption, five-year debentures with no interest. Accordingly, [Hynix] recognized [won] 80,100 million of other payables as current liabilities.

7.86 In our view, this statement should have put the DOC on notice that a request for mediation had been filed, and that the terms offered to the three option 3 creditors might be changed. Again, this evidence is inconsistent with the DOC's determination that creditors "controlling" the Creditors' Council were able to "set the terms for all banks."

7.87 Although the GOK questionnaire response should perhaps have made a reference to the request for mediation by three of the four option 3 creditors, we consider that there was in any event sufficient information on the record to bring into question the DOC's determination that creditors "controlling" the Creditors' Council were able to "set the terms for all banks." In these circumstances, we do not consider that an objective and impartial investigating authority could properly have found, on the basis of the CRPA, that "the terms on which these creditor banks terminated their relationship with Hynix were dictated by the banks that mattered in this case, namely the large government-owned and controlled creditors."[98]

[98] US First Written Submission, para. 88. Indeed, we note that such a conclusion is contradicted by other record cited by the DOC in its *Decision Memorandum* (Exhibit GOK-5). Thus, at page 55 of the *Decision Memorandum*, the DOC refers to expert testimony in the following terms: "At one point, however, a number of commercial banks, including Kookmin, Hana, and Shinhan, were no longer willing to provide fresh capital to Hynix and decided to take losses on their exposure instead. The expert stated that had this happened before the financial crisis, the GOK would have forced all of Hynix's creditors to provide fresh capital to the company. In this case, however, the GOK influenced only government-owned banks." According to that expert, therefore,

7.88 At para. 71 of its replies to the Second Set of Panel Questions, the US seeks to support its arguments regarding the CRPA by referring to an article published in the Dong-A Daily. However, the US has not referred to any part of either the *Preliminary Determination*, the *Final Determination* or the *Decision Memorandum* where the DOC addresses this article. Nor have we been able to find any reference to this provision in these documents. Accordingly, we consider that the US argument in respect of this article constitutes *ex post* rationalization which, in accordance with our standard of review, we decline to consider.

7.89 In addition, the US seeks to rely on two alleged statements by GOK officials regarding the purpose of the CRPA.[99] One statement was allegedly made by GOK officials at verification. The other statement was allegedly reported in the Korea Times. We do not consider that statements regarding the purpose of the CRPA should take precedence over our interpretation of the provisions thereof. Thus, even if statements were made to the effect that the purpose of the CRPA was to prevent banks from being able to avoid participating in restructurings, this does not change the fact that Article 29(5) of the CRPA provides a meditation mechanism that undermines the ability of dominant creditors in the Creditors' Council to dictate the terms on which other creditors participate in the restructuring. In this regard, we agree with the statement by the panel in *Brazil – Aircraft (Article 21.5 – Canada II)*:

> In our view, a conclusion that PROEX III *could* be applied in a manner which confers a benefit, or even that it was intended to be and *most likely would* be applied in such a manner, would not be a sufficient basis to conclude that PROEX III as such is mandatory legislation susceptible of inconsistency with Article 3.1(a) of the *SCM Agreement*.[100]

7.90 The US also argues that, pursuant to Article 14 of the CRPA, the FSS prevented creditors from placing Hynix into liquidation. However, we can find no reference to Article 14 of the CRPA in any of the DOC documents under review in these proceedings. For this reason, we shall not take Article 14 of the CRPA into account in making our findings.

7.91 In light of the above considerations, we find that the DOC could not properly have found that Group A and B creditors controlled the Creditors' Council at the time of the October 2001 restructuring. Nor could the DOC properly have found that Group C creditors were constrained by the decisions of the Creditors' Council.

<u>The GOK's role as regulator</u>

Arguments of the Parties

7.92 The parties have submitted arguments regarding two regulatory interventions by the GOK. The first concerns events surrounding certain meetings of the Economic Ministers in late 2000 and early 2001. The second concerns the allegedly selective enforcement of bankruptcy principles by the FSC in respect of the October 2001 restructuring. Korea submits that the DOC read too much into these regulatory interventions, whereas the US refers to them as evidence of government entrustment or direction.

Economic Ministers' meetings

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certain creditors were able to act independently within the framework of the CRPA. At a minimum, the DOC should have sought to reconcile this expert testimony with its conclusions regarding the CRPA.

[99] See US reply to Question 2 after the second substantive meeting, para. 68.

[100] Panel Report in *Brazil – Aircraft (Article 21.5 – Canada II)*, para. 5.43

7.93 The DOC found that meetings of the Economic Ministers resulted in communications to KEIC and KEB, with an instruction that the results should be "carried out perfectly."[101] According to the DOC, "[t]hese results included a 'resolution of special approval' by the FSC to increase certain banks' ceiling limits for single borrowers, as requested by the KEB on behalf of Hynix' creditors."[102] The DOC found that the FSC subsequently provided loan limit waivers. One loan limit waiver was for KDB, KEB and KFB to participate in the December 2000 syndicated loan. Another was a blanket waiver provided for any bank that participated in the KDB Fast track Programme. A third waiver was for Woori Bank relating to its D/A financing to Hynix. The DOC concluded that, through these meetings, the GOK "took early and affirmative steps to secure Hynix' survival."[103] The DOC also concluded that "[t]hese meetings signalled the GOK's determination that Hynix would not be allowed to fail."[104]

7.94 Korea submits that the DOC read too much into the Ministers' meetings and resulting actions in reaching the conclusion that they reflected the beginning of a ten-month conspiracy by the GOK to restructure Hynix. Korea asserts that, as the DOC acknowledges, the actions taken resulted in communications only to: (1) KEIC to resume export insurance (*i.e.*, make available export insurance) for Hynix; and (2) the KEB, that it proceed with an application to the Financial Supervisory Commission for a waiver of the applicable lending limits on KEB with respect to Hynix.[105]

7.95 According to Korea, the communication to KEIC constituted a command or delegation by one government entity (the Economic Ministers) to another government entity (KEIC). As such, Korea asserts that it cannot constitute evidence of entrustment or direction, which concerns government action vis-à-vis private bodies. The Ministers simply resolved a regulatory issue about the permissibility of insuring certain kinds of transactions.

7.96 With regard to the communication to KEB, Korea asserts that the guidance offered by the GOK was for KEB to seek a lending limit waiver in respect of KEB's desire to participate in the December 2000 syndicated loan. Korea asserts that the communication did not command KEB or any other Hynix creditor to provide financing to Hynix. According to Korea, the syndicated loan had already been fully contemplated by KEB and other Hynix creditors, with Citibank organizing the effort from early November 2000, well before the date of the Economic Ministers' documents. Korea submits that, at most, DOC has identified evidence of KDB, KEB and KFB being allowed to do something. There is no evidence that these banks were being forced by the GOK to extend new credit to Hynix.

7.97 The US asserts that in a November 2000 meeting, the Economic Ministers concurred on a "resolution of special approval" by the FSC to increase certain banks' ceiling limits for single borrowers, as requested by the KEB on behalf of Hynix's creditors.[106] The US argues that the FSC approved three credit limit increases for Hynix' creditors "in order to allow them to participate in the Hynix restructuring process."[107] The US argues that the first waiver was for the KDB, KEB and KFB, thereby ensuring the existence of enough participants to raise the 800 billion won December 2000 syndicated loan. The US argues that the second was a blanket waiver provided for any bank that participated in the KDB Fast Track Programme. The US asserts that the FSC granted this blanket waiver without any regard to the commercial considerations pertaining to the individual banks. The

[101] *Decision Memorandum* at 50 (Exhibit GOK-5)
[102] *Id.*
[103] *Id.*
[104] *Id*.
[105] *Id.* at 50-51.
[106] *Results of Discussions at the Economic Ministers' Meeting*, letter from Ministry of Finance and Economy (28 November 2000) (translated version) (Exhibit US-28).
[107] *Decision Memorandum* at 50-51 (Exhibit GOK-5); *Government of Korea Verification Report* at 16 (Exhibit US-12).

US asserts that the third waiver was a March 2001 waiver for Woori Bank relating to its D/A financing to Hynix.

7.98 The US further asserts that, in a November 2000 letter to the Presidents of the KEIC and the KEB, the Minister of Finance relayed the "results on alleviating the cash crunch of Hyundai Electronics" reached at a 28 November 2000 meeting of the Economic Ministers.[108] According to the US, the measures, which were "initiated by" the Financial Supervisory Service (FSS), included an instruction to seek a waiver of the ceiling on loans extended to a single borrower (which otherwise would prevent certain lenders from providing new loans to Hynix) and a command to the KEIC to resume the insurance for the balance of the non-negotiated D/A transactions[109], valued at $550 million. The US asserts that the letter instructs the Presidents of the KEIC and KEB to make sure these results "are carried out perfectly."[110] The US submits that these events were reported in the Korea Economic Daily.

Evaluation by the Panel

7.99 As a preliminary matter, we note that the instruction to the KEIC to resume export insurance for Hynix, and the instruction to the FSC to grant loan limit waivers, were addressed to government entities (i.e., the KEIC and FSC). These instructions, therefore, could not properly be relied on as evidence of government entrustment or direction of private bodies.

7.100 Regarding alleged instructions to private bodies, we note the US argument that the FSC's November 2000 letter "included an instruction to seek a waiver of the ceiling on loans extended to a single borrower",[111] namely the KEB. We understand the US to infer that KEB was thereby instructed to seek a loan limit waiver. Upon examination of that letter[112], we note that it refers to the pursuit of "a resolution of special approval by the [FSC] upon the request of the [KEB] representing creditor financial institutions." The DOC *Decision Memorandum*[113] also refers to such special resolution being "requested by" the KEB. For this reason, we do not consider that the US is correct to argue that the letter included an "instruction" to seek a loan limit waiver. If there is no factual basis for the US argument that the KEB was instructed to seek a loan limit waiver, we fail to see how the facts could support a determination that the KEB was entrusted or directed to not only seek a loan limit waiver, but to actually participate in the syndicated loan. We do not consider that the DOC determination contains an adequate explanation of how an instruction to a government entity to respond to a request

[108] *Results of Discussions at the Economic Ministers' Meeting*, letter from Ministry of Finance and Economy (28 November 2000) (translated version) (Exhibit US-28).

[109] The US asserts that D/As or "documents against acceptance" are trade bills promising future payments for delivered goods that exporters frequently negotiate with banks to obtain financing for the amount of the D/A in advance of the scheduled maturity of the trade bill. According to the US, the D/As that Hynix negotiated with its creditor banks related to export transactions between Hynix and its foreign subsidiaries. The US asserts that, because Hynix was in a state of technical insolvency, the KEIC had suspended guarantees of D/A loans to Hynix. *See Direct Intervention by the Government in Supporting Hynix*, The Korea Economic Daily (28 August 2001) (Exhibit US-29); *Results of Discussions at the Economic Ministers' Meeting*, letter from Ministry of Finance and Economy (28 November 2000) (translated version) (Exhibit US-28).

[110] *Results of Discussions at the Economic Ministers' Meeting*, letter from Ministry of Finance and Economy (28 November 2000) (translated version) (Exhibit US-28). In a subsequent letter from the Ministry of Commerce, Industry, and Energy ("MOCIE") to the KEIC, MOCIE informed the KEIC that Economic Ministers had decided to provide temporary support of export insurance for the D/A transactions between the main office and branch offices of Hyundai Electronics and requested that the KEIC "take actions accordingly." *Regarding the provision of Export Insurance for the Hyundai Electronics' D/A transaction*, letter from Ministry of Commerce, Industry and Energy (November 30, 2000) (translated version) (Exhibit US-30).

[111] US First Written Submission, para. 48.

[112] *Results of Discussions at the Economic Ministers' Meeting*, letter from Ministry of Finance and Economy (28 November 2000) (translated version) (Exhibit US-28).

[113] *Decision Memorandum* at 50 (Exhibit GOK-5).

for a loan limit waiver from the KEB could properly be treated as evidence of government entrustment or direction of the KEB to participate in the syndicated loan. The US submits that commercial principles were not applied by the FSC in granting the loan limit waivers. While this may have been the case, this concerns relations between the GOK and FSC, and could not properly be treated as evidence that private bodies were somehow entrusted or directed to do something.

7.101 Even though the US may be correct in arguing that certain creditors would not have been able to participate in the syndicated loan without the loan limit waiver, we do not consider that the DOC could properly have inferred from this that creditors were entrusted or directed to participate in the syndicated loan. In order to properly draw such a conclusion, we consider that the DOC would have had to demonstrate that the KEB was entrusted or directed to request a loan limit waiver in respect of a loan that it would otherwise not wish to participate in. The DOC failed to show this. The US also argues that entrustment or direction to the banks to assist Hynix would be meaningless if the banks were legally precluded from complying with the GOK's directives. While this may be the case, this does not mean that there is government entrustment or direction every time that a loan limit waiver is provided.

7.102 The US has also sought to rely on reporting of the events surrounding the Economic Ministers' meeting by an article in the Korea Economic Daily. We have not been able to find, and the US has not pointed us to, any reference to this article in either the *Preliminary* or *Final Determinations*, or the *Decision Memorandum*. Thus, even though that article may have been on the DOC's record, we consider that US reliance on that article in these proceedings constitutes *ex post* rationalization, which we will not consider.

7.103 Thus, even if the US is correct to argue the loan limit waivers demonstrate that the GOK "took early and affirmative steps to secure Hynix's survival", there was no evidence that such steps included instructing creditors to seek loan limit waivers or participate in the syndicated loan. Furthermore, while the DOC found that the Economics Ministers' meetings "signalled the GOK's determination that Hynix would not be allowed to fail"[114], we recall the US assertion in these proceedings that "[t]he DOC never found that signalling in and of itself amounted to entrustment or direction."[115] Thus, even if the US argument regarding signalling was correct, that alone was not sufficient for the DOC to properly treat the circumstances surrounding the Economic Ministers' meetings as evidence of government entrustment or direction.

7.104 In light of the above, we consider that the DOC failed to properly demonstrate that the circumstances surrounding the Economic Ministers' meetings constituted evidence of government entrustment or direction of private creditors to participate in the restructuring of Hynix.

Allegedly selective enforcement of bankruptcy principles

7.105 The parties also made arguments regarding Article 14 of the CRPA, and the fact that the FSS requested creditors to refrain from exercising their liquidation rights. We recall[116] that the US has not referred to any part of either the *Final Determination* or the *Decision Memorandum* where the DOC addresses the existence or application of Article 14 of the CRPA, and that we therefore declined to make findings in respect of this issue.

(iii) GOK Coercion

[114] *Id.*
[115] US First Written Submission, Footnote 86.
[116] See para. 7.90 *supra.*

7.106 Korea challenges the DOC's reference to alleged GOK threats against KFB, KorAm and Hana Bank. Korea also challenges the US allegation that GOK disciplined credit rating agencies, and mandated attendance at creditor meetings.

Threats against creditors

KFB

7.107 The DOC found that "[t]here were also numerous statements on the record relating to the GOK's pressure on KFB [] to participate in the Fast Track programme."[117]

7.108 Korea raises questions regarding the reliability of the press accounts relied upon by the DOC to make this finding. In particular, Korea submits that ultimately KFB declined to participate in the Fast Track Programme, and in fact did not participate in the Fast Track Programme, and exercised its appraisal rights in the October restructuring. Korea asserts that the behaviour of KFB undermines the credibility of the US allegations. According to Korea, KFB's actions are hardly consistent with the US theory of coercion from the Government of Korea.

7.109 The US asserts that the DOC considered "numerous statements on the record relating to the GOK's pressure on KFB (which was, at that time, 51 per cent owned by Newbridge Capital, a US company) to participate in the Fast Track Programme."[118] The US argues that on 4 January 2001, KFB had rejected a government call for participation in the Hynix bailout, reflecting its assessment that increased credit to Hynix was not commercially warranted. The US asserts that Wilfred Horie, Chief Executive Officer of KFB, observed at the time that KFB's "opposition is the result of sticking to strict principles for profit making. All told, [the KFB directors] said the purchase of the bonds of insolvent firms would push the bank into further managerial hardship."[119] The US asserts that Horie viewed the GOK's request for participation in the Hynix restructuring and recapitalization measures as coercive, complaining that "[i]t is nonsense for the government to force the banks to undertake the corporate bond. Such issue should be left to the banks' discretion."[120] According to the US, the FSS bluntly responded that, "[a]t the moment, we will ask [KFB] to undertake Hyundai's bond one more time. But if the bank rejects again, leading to the collapse of related companies, we will hold the bank responsible."[121] The US asserted that Yong-hwa Chong, Information Director at the FSS, openly threatened that "[s]evere sanctions will be imposed by adding the banks' willingness to support public policy as a category to the evaluation of bank management."[122]

7.110 The US submits that a *BusinessWeek* article indicated that "[t]he next day [after KFB rejected the government demand], a government agency pulled, then redeposited, $77 million from a Korea First account."[123] According to the US, this followed at least ten angry phone calls between the FSS and the KFB.[124] The US argues that *BusinessWeek* reported that: "Word spread that all government

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[117] *Decision Memorandum*, page 59 (Exhibit GOK-5).
[118] *Decision Memorandum* at 59-60 (Exhibit GOK-5).
[119] *KFB Changing Fast Under Profit-First Management*, KOREA TIMES (29 January 2001) (Exhibit US-56).
[120] *Government's Compulsory Allotment of Corporate Bond Causes a Stir*, KOREA ECONOMIC DAILY (6 January 2001) (Exhibit US-57).
[121] *Id*.
[122] *FSS-Korea First Bank Collide Head-on Over Corporate Debentures*, THE KOREA DAILY NEWS (6 January 2001) (Exhibit US-58).
[123] *This Banker Breaks Rules: Wilfred Horie Riles the Establishment*, BUSINESSWEEK ONLINE (9 April 2001) (Exhibit US-59).
[124] *American Boss Dispenses With Protocol at South Korean Bank*, WALL STREET JOURNAL (29 January 2001) (Exhibit US-14).

agencies would cut ties with Korea First."[125] The US submits that, according to Bloomberg, the government even threatened to demand that one of KFB's main corporate customers (the SK Group) cease doing business with the bank.[126]

7.111 According to the US, the press reported that Wilfred Horie later confirmed that "[t]here was someone [at the FSS] who was very angry with the bank's decision. And it's true that someone within the government was talking to our clients."[127] Horie further elaborated, explaining that "[a]t some point he [the FSS official] can make our life very miserable. Their comment directly to me was: 'We have no desire nor do we have the right to insist that you do things against your will, but this is Korea and you should cooperate as much as you can'."[128]

7.112 The US asserts that, in its *Final Determination*, the DOC noted there were multiple press reports on the record indicating that the KFB had resisted the purchase of the Hynix bonds because it considered Hynix to be a high credit risk. For example, the US asserts that the DOC cited to a 29 January 2001 *Wall Street Journal* article, stating that Korean banks have "been more accustomed to following government orders than making sound credit decisions."[129]

7.113 The US further asserts that the DOC also observed that the article explained that when KFB refused to participate in the government programme at the request of the FSS, the FSS applied pressure to KFB and "strongly urged" KFB to participate in the plan lest it risk losing some of its clients.[130] The US argues that the article was quite specific, identifying the FSS official as Lee Sung No, a director at the FSS Credit-Supervision Department, and the KFB official as Lee Soo Ho. According to the US, the DOC also noted that the article quoted an executive at a government-owned bank as stating that the nationalized banks were "green with envy," as "nobody wants to increase their exposure to these corporations that still have a long way to get their acts together." The US notes that the article stated that the FSS asked creditor banks to participate in this programme, and only KFB refused.[131]

7.114 The US asserts that, notwithstanding the KFB's initial resistance, it ultimately surrendered to the GOK's pressure by agreeing to participate in the bailout. The US argues that Horie committed to share about $38 million among $1.5 billion funding for Hynix's D/As after a personal meeting with a high-level FSS official. The US notes that, in fact, KFB ultimately participated in a number of the Hynix restructuring and recapitalization measures. According to the US, such capitulation by a foreign majority-owned bank simply underscores the even more precarious position of Korean-owned banks when it came to GOK pressure.

7.115 The US submits that not only did the GOK threaten to impose sanctions on KFB, it also, through the FSC and FSS, threatened to terminate banks' relationships with either the government or their existing customers. According to the US, the GOK threatened KFB with the loss of its customers, interceding directly with them, and raised the possibility of losing tens of millions of dollars in government business unless the bank complied with government demands. The US asserts that the DOC specifically noted a 29 January 2001 *Wall Street Journal* article stating that when KFB

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[125] *This Banker Breaks Rules: Wilfred Horie Riles the Establishment*, BUSINESSWEEK ONLINE (9 April 2001) (Exhibit US-59.

[126] *Korea First Bank Shuts Government 'Wallet' Under New Management*," BLOOMBERG (31 January 2001), at 2 (also issued as a news release by KFB on 5 February 2001) (Exhibit US-60).

[127] *Cooperate or be Damned*, EUROMONEY (February 2001) (Exhibit US-61).

[128] *Korea First Bank Shuts Government 'Wallet' Under New Management*, KFB NEWS RELEASE (5 February 2001) (Exhibit US-60).

[129] *American Boss Dispenses With Protocol at South Korean Bank*, WALL STREET JOURNAL (29 January 2001) (Exhibit US-14).

[130] *Id*.

[131] *Id*.

refused to participate in the GOK programme at the request of the FSS, the FSS applied pressure to KFB and "strongly urged" KFB to participate in the plan lest it risk losing some of its clients.[132] According to the US, other Hynix creditors facing similar pressure from the GOK are likely to have capitulated, as did KFB.

7.116 While the US has cited from a number of articles on the DOC record, we note that the DOC only made express reference to a limited number of these articles.[133] We shall therefore focus on the evidence that the DOC actually referred to in its *Preliminary* and *Final Determinations*, and *Decision Memorandum*.

7.117 We note that the DOC referred to a newspaper article in which Mr. Lee, reportedly an executive vice president and chief credit officer at the KFB, stated that the FSS had expressed "extreme displeasure" towards the KFB's failure to participate in the Fast Track Programme.[134] That same article quoted an FSS official as saying that he had "strongly urged" the KFB to participate, and also warned the KFB that "by not complying, it may be putting itself at a risk of losing its clients."[135] There is nothing on the record to suggest that the FSS disputed the accuracy of these quotes. Nor does Korea challenge their accuracy. In our view, these quotes, and in particular the implied threat that there would be an adverse impact on KFB's relationship with its clients if it did not cede to the wishes of the GOK, are sufficient for an objective and impartial investigating authority to properly find government entrustment or direction in respect of KFB.[136]

KorAm

7.118 The DOC stated that a June 2001 Dow Jones article "reported that KorAm Bank, a bank without substantial GOK ownership, reversed its decision not to participate in the Hynix June 2001 convertible bond offering that was part of the May restructuring programme after the FSS warned of a possible sanction against KorAm if it did not participate."[137]

7.119 Korea submits that the press reports of alleged coercion of KorAm relied upon by the DOC are inaccurate, and denied at the time by KorAm officials. Korea asserts that the mistaken press reports and the KorAm denials were provided to the DOC, but were brushed aside.

7.120 The US submits that the DOC found that the GOK made threats against KorAm Bank when the bank refused to participate in the May 2001 restructuring. The US asserts that the bank had refused, contending that Hynix had failed to deliver a written pledge to use its best effort to reduce its debt. According to the US, the FSS severely rebuked KorAm, with one FSS official stating: "If KorAm does not honour the agreement, we will not forgive the bank."[138] The US asserts that the same FSS official further threatened stern measures against the bank, such as disapproving new financial instruments and subjecting the bank to a tighter audit. According to the US, another FSS

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[132] *American Boss Dispenses With Protocol at South Korean Bank*, Wall Street Journal (29 January 2001) (Exhibit US-14).

[133] For example, the DOC did not make express reference to the Euromoney articles referred to at note 196 to the US First Written Submission.

[134] *Decision Memorandum*, page 60 (Exhibit GOK-5).

[135] See Exhibit US-14.

[136] Korea notes that the KFB ultimately did not participate in the KDB Fast Track Programme, and that it exercised appraisal rights under option 3 in the October 2001 restructuring. Our analysis at this stage is concerned first and foremost with the acts of the GOK, rather than private entities' reaction to those acts. The issue of the evidentiary value of the coercion of KFB in respect of the alleged entrustment or direction of other private creditors is addressed in our concluding remarks at paras 7.175- 7.177 *infra*.

[137] *Decision Memorandum*, page 59 (Exhibit GOK-5).

[138] *KorAm Reluctantly Continues Financial Support for Hynix*, KOREA TIMES (21 June 2001) (Exhibit US-64).

official predicted that the bank would extend credit to Hynix even without the Hynix memorandum pledging to reduce its debt: "We don't think KorAm will break the agreement. In particular, the bank yesterday expressed its intention to extend financial support to the semiconductor maker even if Hynix fails to submit the memorandum."[139] The US submits that, as a result of the threats, KorAm Bank capitulated and reversed its decision in a single day.

7.121 While the US has referred to a number of quotes in newspaper articles regarding the alleged coercion of KorAm, only one of those articles was referred to by the DOC.[140] That was a June 2001 article published by Dow Jones. According to the DOC, that article "reported that KorAm Bank, a bank without substantial GOK ownership, reversed its decision not to participate in the Hynix June 2001 convertible bond offering that was part of the May restructuring programme after the FSS warned of a possible sanction against KorAm if it did not participate."[141]

7.122 Considered in isolation, such a report might well enable an objective and impartial investigating authority to properly find government entrustment or direction. In the instant case, however, we note that the DOC record contained an alternative explanation of KorAm's conduct, and evidence from a KorAm official that KorAm had not refused to participate in the convertible bond offering. In particular, the record contained a submission by Hynix[142] to the effect that:

> the issue was simply whether Hynix had provided KorAm with the necessary legal documentation to complete the convertible bond transaction. At one point, Hynix apparently had not provided the necessary paperwork and KorAm at that point delayed its purchase of its portion of the convertible bonds that it had committed to buy. But once Hynix provided the necessary legal paperwork, KorAm followed through on its promise to buy a portion of the convertible bonds. In fact, the *Korea Times* article that seems to have been the original source for all the reports *(sic)* that a KorAm official specifically denied the allegation that they refused to buy the convertible bonds, and made clear the dispute was basically about the legal paperwork requirement.[137] (emphasis in original)

[137] Kim, KorAm Reluctantly Continues Financial Support for Hynix, *Korea Times*, 21 June 2001 (Petition, at tab 52).

7.123 We note that the *Korea Times* article[143] referred to in the above extract stated *inter alia*:

> "We called on the chipmaker to turn in the memorandum in return for underwriting the CBs," one KorAm official explained. "But Hynix failed to produce it."
>
> Denying allegations that the bank refused to provide financial support to Hynix, he said, "We will not break the agreement reached among creditors."

7.124 Despite the existence of such evidence on the DOC record, the DOC failed to address, or even mention, this alternative explanation of Kookmin's conduct. Nor did it refer to the denial by a KorAm official referred to in the abovementioned *Korea Times* article, which was also on the DOC record.[144] In our view, an objective and impartial investigating authority would have acknowledged the

[139] *Id*.
[140] We therefore shall not have regard to the other articles relied on by the US.
[141] *Decision Memorandum*, page 59 (Exhibit GOK-5).
[142] See Exhibit GOK-49.
[143] See Exhibit US-64.
[144] This is evidenced by the reference to "Petitioner, at tab 52" in the abovementioned Hynix submission.

existence of such conflicting evidence, and sought to explain how nevertheless its finding of government entrustment or direction was warranted. The DOC failed to do this.

Hana Bank

7.125 Korea challenges the DOC's reliance on a press report which, according to the DOC, "notes that the FSS threatened to fine Hana Bank if it failed to provide emergency liquidity to [Hyundai Petrochemical]."[145] Korea submits that the allegations about Hana Bank's dealings with Hyundai Petrochemical have nothing to do with Hynix, or any specific transactions involving Hynix.

7.126 The US asserts that the DOC noted an April 2001 *Korea Herald* report that the FSS threatened to fine Hana Bank if it failed to provide emergency liquidity to Hyundai Petrochemical, which was a part of the Hyundai Group that was going through the corporate workout process. According to the US, while this report discussed Hyundai Petrochemical, the GOK's policies during this investigation period were aimed at the corporate and financial restructuring of the entire Hyundai Group.

7.127 Concerning the relevance of alleged coercion of Hana in respect of a company other than Hynix, we note that the DOC relied on the fact that "the GOK's policies during this period were aimed at the corporate and financial restructuring of the entire Hyundai Group, including Hynix's predecessor, HEI, which was part of that group."[146] Irrespective of the alleged scope of GOK's policies, however, we note that the financial contributions under review by the DOC related exclusively to Hynix. Although we consider that evidence of entrustment or direction in respect of one financial contribution concerning Hynix might also serve as evidence of entrustment or direction in respect of another financial contribution concerning Hynix, alleged entrustment or direction of Hana Bank in respect of its dealings with companies other than Hynix would generally be of less evidentiary value in the context of an investigation of Hana Bank's dealings with Hynix.

7.128 The value of such evidence becomes further diminished when one considers the form that the evidence took. In this regard, the *Korea Herald* report relied on by the US does not appear to have been on the DOC's record. We make this inference from the fact that, in these proceedings, the US merely submitted a paper in which the author has inserted a footnote referring to the relevant *Korea Herald* report. The US has not submitted the *Korea Herald* report itself. The relevant footnote refers to "a report that the [FSS] had threatened to fine Hana Bank KRW 6 billion if it fails to provide a promised KRW 11.9 billion of emergency liquidity to Hyundai petrochemical by 19 April 2001 (*Korea Herald*, 21 April 2001)."[147]

7.129 Since the Panel has no reason to believe that the DOC had the actual *Korea Herald* article before it when making its determination, we proceed on the basis that the DOC relied on the footnote contained in the abovementioned paper. If that is so, we note that the DOC had no means of gauging the accuracy of the report, and was unaware of the context in which the alleged threat was made. In addition, we note that the footnote provided no details of the powers that the FSS could allegedly exercise against renegade creditors. An objective and impartial investigating authority would not have treated a simple reference to a footnote in an article as sufficient proof of such a significant issue as government entrustment or direction.

7.130 In light of the above, we consider that the DOC's analysis could not properly support a finding of widespread coercion of Hynix's creditors. While the DOC could properly find coercion in

[145] *Decision Memorandum*, page 60 (Exhibit GOK-5).
[146] Id..
[147] See footnote 5 in *Corporate Structuring and Reform: Lessons from Korea*, William P. Mako, Exhibit US-70.

respect of the KFB, an objective and impartial investigating authority would have treated this isolated incident of coercion regarding a single creditor as being of limited probative value in respect of the alleged entrustment or direction of other private creditors.

Disciplining credit rating agencies

7.131 Korea denies US allegations that GOK disciplined credit rating agencies. Korea asserts that the alleged pressure against the credit rating agencies has nothing to do with decisions by banks to lend or not lend to Hynix. Korea also submits that many of these allegations were denied at the time. Korea also submits that the three credit rating agencies mentioned by the US have been allied with major international credit rating agencies in terms of management or capital investment.

7.132 The US submits that the GOK disciplined credit rating agencies for giving Hynix a low credit rating. The US asserts, for example, that on 22 January 2001, the Korea Investors Service, one of three local rating firms, downgraded Hyundai Electronics' corporate bonds to a speculation-grade credit rating. The US argues that the FSC, concerned that this lower rating might endanger Hynix's eligibility for the KDB Fast-Track programme, reacted swiftly. According to the US, on that very day, at approximately 4:00 p.m., an FSS official called one of the credit rating agency officials responsible for Hyundai Electronics (now Hynix) and was told to attend a meeting of the three credit rating agencies and the FSS on 26 January 2001. The US asserts that the agency official commented that "it was his first time to receive such a call in his more than 10 years of employment at a credit agency."[148]

7.133 The US also asserts that, on 26 January 2001, FSS officials met with eight representatives from the three local credit rating agencies: Korea Investors Service, Korea Ratings, and National Information and Credit Evaluation. According to the US, the participants at the meeting who were later interviewed reported that the FSS had stated that: "[I]t was caught off guard by the downgrading of Hyundai Electronics' credit without prior consultation when the company's financial situation is improving. [Credit agencies] should look at the market as a whole rather than insisting upon the earlier positions."[149] The US asserts that one report stated that the FSS had used the meeting to express its strong dissatisfaction[150], while another report stated that the agency officials received a "reprimand" and "lecture."[151] According to the US, an exasperated agency official remarked: "Where in the world does the government call in credit agency's employees and apply pressure?"[152] The US asserts that, as a result of the meeting, one agency reportedly cancelled its plans to follow the lead of Korea Investor Service and downgrade the credit rating of Hyundai Electronics.

7.134 The US also alleges that on 7 January 2001, the National Information and Credit Evaluation agency, "buckling under government pressure," upgraded the credit rating for Hyundai Engineering and Construction.[153] The US submits that the upgrade was due to GOK pressure.

7.135 We note that the US arguments concern the alleged coercion of credit rating agencies, rather than creditors participating in the Hynix restructuring. Such arguments are therefore not relevant to the question of whether or not creditors were entrusted or directed by GOK to participate in the Hynix

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[148] *Not an Outright Order of Do-this-Do-that, but a Subtle Pressure*, DONG-A ILBO (6 March 2001) (translated version) (Exhibit US-71).

[149] *Id*.

[150] *Does the FSS Peddle Influence even on Credit Ratings?* HANKYOREH SHINMUN (14 February 2001) (translated version) (Exhibit US-74).

[151] *Corporate Credit Rating' 'Wobbles' Under the Sway of Government Influence*, DONG-A ILBO (1 March 2001) (translated version) (Exhibit US-75).

[152] *Id*.

[153] *'Corporate Credit Rating' 'Wobbles' Under the Sway of Government Influence*, DONG-A ILBO (1 March 2001) (translated version) (Exhibit US-75).

restructuring. Indeed, it is presumably for this reason that there is no reference to the alleged coercion of credit rating agencies in the findings of the DOC set forth in the *Preliminary Determination*, the *Final Determination*, or the *Decision Memorandum*.[154] Since considerations regarding the alleged coercion of credit rating agencies were not relied upon by the DOC in its determinations, they fall outside the scope of these proceedings.

Mandating attendance at creditor meetings

7.136 Korea notes that the DOC found that an FSS[155] official attended a creditors' meeting "at the request of the lead creditor bank 'to urge creditor banks to execute resolutions made by creditors'."[156] Korea challenges the accuracy of press reports relied on by the DOC in respect of this finding. Korea asserts that the March 2001 meeting of Hynix creditors was convened by the creditors to reconfirm past financial commitments and to establish a "creditors' council" to better manage their continuing and mutual commercial interests in Hynix. Korea notes that the DOC found the presence of the FSS official to be "support [for] the conclusion that there was a pattern of practices by the government to direct banks' lending decisions with regard to Hynix."[157] Korea further notes that the DOC also cited documents provided by the GOK at verification and generated for the Korean National Assembly indicating that the reason for the FSS official's attendance was to "urge creditor banks to execute resolutions made by creditors."[158] Korea submits that this statement is hardly a smoking gun of entrustment or direction, and is better understood in light of a press release issued by the FSS three days after the March meeting to respond to erroneous press speculation that the FSS was exerting undue pressure on the banks to extend new credit to Hynix.

7.137 According to Korea, the facts before the DOC reflected that there was hardly anything sinister about the FSS's presence at the March meeting. Korea asserts that a disagreement arose among the banks concerning their commitments, and it was therefore logical for the FSS to be present at the meeting to witness discussion of the prior commitments of the banks involved.

7.138 The US asserts that another method used by the GOK to coerce Hynix's creditors was requiring attendance at meetings with government officials. The US asserts that in early 2001, Hynix's increasingly poor financial condition prompted several banks to retract their earlier promises to increase purchase limits on Hynix's export bills of exchange ("D/A loans"). The US argues that, on 2 February 2001, the FSS responded by inviting officials from two of these banks (Shinhan Bank and Hanmi Bank) to a meeting with FSS officials to "request their cooperation."[159] The US asserts that the FSS called a general meeting of the Hynix creditor bank presidents on 10 March 2001, when the banks continued to resist. According to the US, creditors at the meeting were pressured to:

- Sign a written agreement pledging to maintain the D/A export ceiling at $1,450 million (overturning an earlier decision in January 2001 to reduce the ceiling to $640 million by year's end);

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[154] Although the alleged influence of Korean credit rating agencies was listed as an argument of the Petitioner at page 105 of the *Decision Memorandum* (Exhibit GOK-5), we can find no reference to this issue in the statements of the Department's Position.

[155] Although the DOC referred to an FSC official, Korea asserts that the official actually worked for the FSS. Korea asserts that FSS is not a governmental organization, but a special public corporation affiliated with FSC functioning as an executive arm of the FSC. In light of our finding regarding the DOC's treatment of this issue, we do not consider it necessary to resolve this particular disagreement between the parties.

[156] *Decision Memorandum*, page 59 (Exhibit GOK-5).

[157] *Id.*

[158] *Id.*

[159] *Creditor Group Conflicts With Government Over Supporting Hyundai Group*, MAEIL ECONOMIC DAILY (2 February 2001) (Exhibit US-68).

- Maintain the letter of credit-based export credit line at $530 million until the end of 2001;

- Agree to a one-year grace period for bank credits of 300 billion won, including bank account based loans and general fund loans;

- Sign a written "covenant" that they would assist Hynix;[160] and

- Confirm their intention to aid the Hyundai firms.[161]

7.139 The US notes that during verification the DOC confirmed that at least one FSC official was present at the March 2001 meeting, and that the official was invited by the KEB "to urge creditor banks to execute the resolutions made by creditors."[162] The US submits that the verification report further explains that the FSC attended the meeting to exert pressure on the banks. It states:

> The creditors felt that, if an FSS person was there, it might facilitate a resolution .... According to the FSC/FSS, the creditors thought that, if there was a regulator there, the other creditors who no longer wanted to participate in the restructuring plan might change their minds and go along with the wishes of the rest of the creditors.[163]

7.140 The US submits that the GOK itself stated that the FSC official attended the meeting to "act as a witness" so that "creditors could no longer back out" of any prior commitments they had made.[164] According to the US, the evidence before the DOC therefore indicates that GOK officials from the FSC were present at this meeting for the express purpose of pressuring Hynix's creditors to comply with the GOK's policy of assisting Hynix. The US also asserts that record evidence suggests that there were at least three additional meetings where GOK officials met directly with one or more of Hynix's creditors to obtain their agreement on assisting Hynix.

7.141 We note that many of the arguments and evidence advanced by the US in these proceedings were not referred to in any of the DOC documents before us. In particular, the DOC did not find that creditors were required to sign written agreements, to agree to a one-year grace period, or to attend meetings with the FSS. Such US arguments/evidence therefore constitute *ex post* rationalization which we shall also exclude from our review.[165] In its *Decision Memorandum*, the only reference made by the DOC to the March 2001 meeting was a statement that the FSS[166] official attended the

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[160] *The Grace Period Decision for Three Affiliates of Hyundai Group - Stories of Inside and Outside*, KOREAN SEOUL ECONOMIC DAILY (11 March 2001) (translated version) ("The Financial Supervisory Service (FSS) and Korea Exchange Bank talked to individual banks, but talks did not work. Hence the FSS told the bank presidents to sign on the support plan to enforce it in the form of a covenant.") (Exhibit US-79).

[161] *See Never-ending Aid for Hyundai*, KOREA TIMES (12 March 2001) ("A high-ranking official of the Financial Supervisory Commission attended a meeting of creditor bank presidents on Saturday, an unusual occurrence in itself, and *confirmed one by one their intention to aid the Hyundai firms*, proving the government's intention to help Hyundai.") (emphasis added) (Exhibit US-80).

[162] *Government of Korea Verification Report* at 19 (Exhibit US-12).

[163] *Government of Korea Verification Report* at 18 (Exhibit US-12).

[164] *Decision Memorandum* at 41 (Exhibit GOK-5).

[165] Similarly, we note that Korea has not disputed an argument by the US that the abovementioned FSS press release relied upon by Korea (see para. 7.136 *supra*) was not on the record of the DOC. Nor has Korea claimed that it was not on the DOC's record as a result of any oversight by the DOC. Accordingly, we also exclude the contents of that press release from our review.

[166] Although the DOC referred to an FSC official, Korea asserts that the official actually worked for the FSS. Korea asserts that FSS is not a governmental organization, but a special public corporation affiliated with FSC functioning as an executive arm of the FSC. In light of our finding regarding the DOC's treatment of this issue, we do not consider it necessary to resolve this particular disagreement between the parties.

meeting "at the request of the lead creditor bank 'to urge creditor banks to execute resolutions made by creditors'."[167] In our view, the fact that a regulatory authority attends a meeting of creditors at the request of the lead creditor in order to urge – and not instruct – creditor banks to execute resolutions made by creditors would not allow an investigating authority to properly conclude that such attendance amounted to governmental entrustment or direction of creditors to participate in the restructuring. The fact that the resolutions at issue in these proceedings had already been "made by creditors" prior to the attendance of any FSS/FSC officials would indicate to an impartial and objective investigating authority that the officials' attendance could not have caused those resolutions to be adopted.

(iv) The DOC's single programme approach

7.142 The DOC found:

> Rather than view each of the measures taken by the financial institutions that participated in Hynix' restructuring as separate events, these actions are appropriately examined as part of a single programme that occurred over a short, ten-month period. The objective of this programme was the complete financial restructuring of Hynix in order to maintain the company as an ongoing concern. Each of the measures taken over the period from December 2000 through October 2001 [] reflected a pattern of GOK practices to ensure the continued viability of Hynix. Many of these events were overlapping and had the effect of reinforcing each other with respect to the goal of keeping Hynix operating. (footnote deleted)[168]

7.143 The DOC's decision to treat all four financial contributions as part of a "single programme" is important, as it effectively enabled the DOC to rely on evidence of alleged entrustment or direction of a creditor in respect of one financial contribution as evidence of alleged entrustment or direction of that creditor in respect of the three other financial contributions.

Arguments of the Parties

7.144 According to Korea, the timing of the different events contradicts the DOC theory of a single programme. Korea asserts that the most significant aspect of Hynix's restructuring -- Hynix's October 2001 restructuring -- occurred almost one year after the initial financial transactions. Korea submits that the October 2001 restructuring had no meaningful connection to the earlier transactions. According to Korea, at the time of the May 2001 restructuring, Hynix advisors, industry experts, and the global financial markets all expected the DRAM market to recover, as it had in prior cycles, rather than develop as the worst year in DRAM market history. Korea asserts moreover that no one expected the downturn to be reinforced and exacerbated by the terrorist attack of 11 September 2001, and what it refers to as the consequent economic turmoil in the US economy. Korea submits that the DOC should have made discrete findings of financial contribution, and therefore entrustment or direction of private creditors, in respect of the October 2001 restructuring.

7.145 The US submits that the DOC was entitled to conclude that the abovementioned transactions, including the October 2001 restructuring, formed part of a "single subsidy programme" because early in the countervailing duty investigation, both the GOK and Hynix conceded – in fact argued – that the various bailout phases were part of a single overall restructuring programme for Hynix. During each phase, the creditor banks rescheduled over and over again their existing loans with Hynix, while providing additional liquidity whenever Hynix needed more. Furthermore, each phase of the Hynix bailout involved essentially the same banks. Eventually, the majority of the loans were converted into

[167] *Decision Memorandum*, page 59 (Exhibit GOK-5).
[168] *Decision Memorandum* at 48 (Exhibit GOK-5).

equity as part of the October restructuring package. The US asserts that the DOC gave a reasoned explanation of how the various aspects of the bailout were part of an overall programme, since it found that they were all driven by the same GOK policy to support Hynix; they occurred over a relatively short period of time; they were overlapping and interrelated; and the GOK's role was evident at each stage.

Evaluation by the Panel

7.146 We recall that the DOC identified four alleged financial contributions. The first three of those alleged financial contributions formed part of a restructuring proposal prepared by Citibank and Salomon Smith Barney (SSB) in September 2000. The fourth financial contribution, the October 2001, was not part of the Citibank/SSB proposal. Furthermore, the US has not contested Korea's assertion that the October 2001 restructuring was not envisaged at the time that the Citibank/SSB proposal was implemented. Indeed, the October 2001 restructuring was effected some five months after the third and final alleged financial contribution envisaged in the Citibank/SSB proposal (i.e., the May 2001 restructuring).

7.147 The US asserts that support for the DOC's finding of a "single programme" lies in the fact that the four alleged financial contributions were "overlapping and interrelated." In this regard, we note that the DOC referred to the fact that "many of [the] events were overlapping and had the effect of reinforcing each other."[169] Thus, the DOC did not find that all of the relevant financial contributions were overlapping and mutually-reinforcing. This would suggest that the DOC actually considered that certain financial contributions were not overlapping or mutually-reinforcing. Accordingly, the fact that many financial contributions overlapped and were mutually-reinforcing does not necessarily provide a sufficient for concluding that all four of the financial contributions formed part of a "single programme."

7.148 The US also argues that both the GOK and Hynix "conceded – in fact argued – that the various bailout phases were part of a single overall restructuring programme for Hynix."[170] In this regard, note 12 of the DOC's *Decision Memorandum* states that Hynix and the GOK stressed throughout the course of the proceeding that Hynix was taking part in an overall "restructuring plan." The DOC asserts that Hynix stated in its January 2003 questionnaire response that, in September 2000, "Citibank and SSB, Hynix' financial advisors retained to devise a financial restructuring plan, presented a fully integrated proposal to completely realign the financial structure of Hynix . . .The important point, for purposes of this submission, is that many of the financial transactions that are separately identified in the [Department's] questionnaire (each with their own sub-heading) were, in fact, all part of Citibank's and SSB's original integrated plan for a complete financial restructuring of Hynix."

7.149 We note that Hynix's questionnaire response goes on to argue that "the proper framework for examining the Hynix restructuring is to divide the financial transactions into two time periods: (I) those financial transactions from the fourth quarter of 2000 through the first half of 2001, and which were all part of the master SBS/Citibank plan; and (II) those financial transactions that were needed later in 2001 when the unprecedented collapse of the DRAM market required further restructuring measures."[171] Thus, there was no basis for the DOC to state that Hynix "stressed ... that [it] was taking part in an overall 'restructuring plan'." Rather, Hynix had clearly argued that the October 2001 restructuring should be distinguished from the earlier transactions. The DOC failed to account for this important nuance in Hynix's position.

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[169] *Decision Memorandum*, page 48 (Exhibit GOK-5), emphasis supplied.
[170] US Second Written Submission, para. 12.
[171] Exhibit GOK-21, page 15.

7.150 Regarding the GOK, the DOC notes that the GOK's February 2003 questionnaire response referred to "a several stage financial plan developed and implemented by SSB over the 2000-2001 period."[172] However, since the October 2001 restructuring was not part of the SSB plan, any reference by the GOK to the SSB plan should not have led to any inferences by the DOC regarding the GOK's position vis-à-vis the October 2001 restructuring.

7.151 There is therefore no basis for the US argument that "GOK and Hynix conceded – in fact argued – that the various bailout phases were part of a single overall restructuring programme for Hynix." While the GOK and Hynix may have argued that three of the financial contributions were part of an overall restructuring programme, the US has not produced evidence to the effect that the GOK and Hynix argued that the October 2001 restructuring was part of an overall restructuring programme.

7.152 Furthermore, we note that a number of creditors that had participated in the initial Citibank/SSB restructuring proposal did not participate in the October 2001 restructuring, or at least not in the same manner. We have already noted that certain Group B and C creditors sought mediation under option 3. Furthermore, certain creditors that had provided new funds under the initial Citibank/SSB proposal declined to provide new funds under the October 2001 restructuring (by choosing option 2). This indicates that at least certain creditors were operating under different conditions in respect of the October 2001 restructuring compared to the three earlier financial contributions under the Citibank/SSB proposal. This would suggest that these creditors did not consider themselves to be acting under a "single programme" in respect of all four financial contributions.

7.153 In addition, we note that the DOC found that the objective of the "single programme" was the complete financial restructuring of Hynix, and essentially included any act of restructuring within that programme. However, it is not necessarily true that any act of restructuring will form part of the same "programme" as other acts of restructuring, simply because they all pursue the same objective. Indeed, the DOC's argument is circular, since it determines that certain acts are part of a "single programme" on the basis of the objective of that programme, even before the very existence of the programme has been established.

7.154 Finally, we note the DOC's assertion that each of the financial contributions could be linked by the fact that they "reflected a pattern of GOK practices to ensure the continued viability of Hynix."[173] On the basis of the *Decision Memorandum*, we understand such "pattern of GOK practices" to be a reference to GOK entrustment or direction.[174] In light of the preceding analysis, however, we consider that the DOC determination contained little evidence of GOK entrustment or direction of private bodies to participate in the Hynix restructuring. This is therefore a further reason for doubting the DOC's justification for treating the four financial contributions as being part of a "single programme."[175]

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[172] *Decision Memorandum*, pages 48-49, note 12 (Exhibit GOK-5).

[173] *Decision Memorandum*, page 48 (Exhibit GOK-5).

[174] The DOC refers at page 49 of the *Decision Memorandum* (Exhibit GOK-5) to "a pattern of practices on the part of the GOK to act upon that policy to entrust or direct lending decisions as part of the restructuring" (emphasis supplied).

[175] We also consider the DOC's reasoning to be self-serving. The DOC claimed widespread GOK entrustment or direction as justification for identifying a "single programme", while the decision to identify a "single programme" enabled the DOC (by using evidence of alleged GOK entrustment or direction in respect of one financial contribution as evidence of GOK entrustment or direction in respect of other financial contributions) to demonstrate the existence of alleged GOK entrustment or direction.

7.155 For the above reasons, we do not consider that the evidence relied on by the DOC was sufficient to permit an objective and impartial investigating authority to properly conclude that the financial contributions at issue all formed part of a same "single programme."

(v) The Kookmin Prospectus

Arguments of the Parties

7.156 Korea challenges the DOC's reliance on a filing made by Housing and Commercial Bank (H&CB) and Kookmin banks in September 2001 to the US Securities and Exchange Commission ("SEC"). That filing contained the following statement:

> The {GOK} has promoted, and, as a matter of policy may continue to attempt to promote lending to certain types of borrowers. It generally has done this by requesting banks to participate in remedial programmes for troubled corporate borrowers and by identifying sectors of the economy it wishes to promote and making low interest loans available to banks and financial institutions who lend to borrowers in these sectors. The government has in this manner promoted low-income mortgage lending and lending to technology companies. We expect that all loans made pursuant to government policies will be reviewed in accordance with {Kookmin's} credit review policies. However, we cannot assure you that government policy will not influence {Kookmin} to lend to certain sectors or in a manner in which {Kookmin} otherwise would not in the absence of the government policy.[176]

7.157 Korea submits that the statement is speculative as regards future action by the GOK. Korea also asserts that a generalized acknowledgement by Kookmin of GOK "promotion" hardly constitutes an indictment of lending to Hynix by numerous commercial banks during the period of investigation. According to Korea, nothing within the statement establishes an affirmative and explicit GOK action, whether delegation or command, to direct commercial bank lending to Hynix, whether generally or specifically with respect to certain transactions transpiring across the entire period of investigation in this case. Korea also asserts that the DOC failed to address a detailed statement by the specific lawyers who drafted the prospectus, which made clear that the language was in no way meant to imply GOK control over Kookmin lending decisions.[177]

7.158 The US notes that the DOC actually referred to two filings by Kookmin Bank with the SEC. The US asserts that the first filing, made in September 2001, contained a statement that:

> The Korean government promotes lending to certain types of borrowers as a matter of policy, which New Kookmin may feel compelled to follow ... . In addition, the Korean Government has, and will continue to, as a matter of policy, attempt to promote lending to certain types of borrowers. It generally has done this by identifying qualifying borrowers and making low interest loans available to banks and financial institutions who lend to those qualifying borrowers. The government has in this manner promoted low-income mortgage lending and lending to technology companies. We expect that all loans made pursuant to government policies will be reviewed in accordance with New Kookmin's credit review policies. However, we cannot assure you that government policy will not influence New Kookmin to lend to

[176] *See Decision Memorandum*, at 57-58 (Exhibit GOK-5).

[177] *See DRAMs from Korea* -- CVD Investigation: Documentation Supporting Papers on the Directed Credit Issue and Independence of Korean Banks and Other Relevant Documents, 14 April 2003 (hereinafter "Hynix Supporting Document"), at Vol. III, Tab 2 (Exhibit GOK-28-(a)).

> certain sectors or in a manner in which New Kookmin otherwise would not in the absence of the government policy.[178]

7.159 The US submits that the second filing, made in June 2002, contained the following statement:

> The Korean government promotes lending to certain types of borrowers as a matter of policy, which we may feel compelled to follow. The Korean Government has promoted, and, as a matter of policy, may continue to attempt to promote lending to certain types of borrowers. It generally has done this by requesting banks to participate in remedial programmes for troubled corporate borrowers and by identifying sectors of the economy it wishes to promote and making low interest loans available to banks and financial institutions who lend to borrowers in these sectors. The government has in this manner promoted low-income mortgage lending and lending to high technology companies. We expect that all loans made pursuant to government policies will be reviewed in accordance with our credit review policies. However, government policy may influence us to lend to certain sectors or in a manner in which we would not in the absence of the government policy.[179]

7.160 According to the US, the filing of these prospectuses in September 2001 and June 2002 link the statements therein, concerning government influence over bank lending decisions, to the DOC's period of investigation. The US asserts that the DOC found that they were "very telling with regards to GOK influence over bank lending decisions."[180]

7.161 The US submits that the prospectuses constitute direct evidence from one of the Hynix creditors that, notwithstanding the protestations of the GOK and Hynix to the contrary, the GOK was still in the business of directing the lending decisions of banks. The US also submits that the prospectuses refute arguments made by the GOK and Hynix during the investigation that the banks with lower levels of government ownership, such as Kookmin, were not subject to government direction.

7.162 The US notes Korea's arguments that, according to the lawyers that drafted the Kookmin prospectus, the language "was in no way meant to imply government control over Kookmin lending decisions",[181] and that the DOC "did not even attempt to address this evidence."[182] The US submits that Korea is wrong on both accounts. The US asserts that the DOC explicitly addressed Hynix's and the GOK's arguments that the language in Kookmin's US SEC prospectus was not meant to imply government control over Kookmin's lending decisions:

> Hynix and the GOK attempt to discredit the meaning of the Kookmin US SEC prospectus by arguing that the language was not meant to imply GOK control over Kookmin's lending decisions, that it relates to potential future actions, and that Kookmin's statements are totally unrelated to the Hynix restructuring. The timing of the September 2001 US SEC prospectus, however, clearly links the statements about government influence over bank lending decisions to the POI. Moreover, the plain reading of these documents, along with documents examined at verification, connect the government's influence over Kookmin and the government objective to rescue

[178] *Kookmin Bank Prospectus* (10 September 2001) at 24 (Exhibit US-45).
[179] *Kookmin Bank Prospectus* (18 June 2002) at 22 (Exhibit US-46).
[180] *Decision Memorandum* at 58 (Exhibit GOK-5).
[181] Korea First Written Submission, para. 438.
[182] Korea First Written Submission, para. 438.

> Hynix from financial collapse. Kookmin's reference to "troubled corporate borrowers" and "technology companies" alone establish such a link.[183]

Evaluation by the Panel

7.163 The US asserts that the DOC based its review of the prospectuses on the basis of a "plain reading" of the language used. The US asserts that when companies, whether foreign or domestic, issue securities on US securities markets, they are required to warn prospective investors of all material risks associated with the proposed investment. According to the US, the SEC mandates the use of "plain English" in that section and requires that risk factors be "clear, concise and understandable."[184]

7.164 We are not persuaded that a plain reading of the two Kookmin prospectuses indicates government entrustment or direction. Rather, a plain reading of those documents indicates that the GOK has sought to promote lending to certain types of borrowers, and that it has done so by requesting banks to participate in remedial programmes, and making low interest loans available to them for this purpose.[185] The plain language therefore indicates the pursuit of government policy through requests to banks, and the making available of low interest loans. Such conduct is indicative of a generalized government policy, rather than affirmative acts of delegation or command. We are therefore not persuaded that an objective and impartial investigating authority could properly have found that the abovementioned submissions in the two Kookmin prospectuses constitute evidence of GOK entrustment or direction.[186]

7.165 We also note that the DOC referred to documents concerning the approval of Kookmin's participation in the December 2000 syndicated loan. According to the DOC, these documents demonstrated "the nexus ... regarding Kookmin's lending to Hynix and the government's policies to ensure that banks 'participate in remedial programmes for troubled corporate borrowers'."[187] The relevant documents were made available to the Panel by Korea, in the form of Exhibit KOREA-64. According to Korea, the summary of the rationale for making the loan includes nine different reasons for making the loan. Korea argues that this summary, when read in its entirety and in context, does not support the DOC characterization of Kookmin as making this loan because they were told they must. Korea asserts that the first eight items stress the purely commercial reasons for the loan, including the ongoing Hynix restructuring, the strong cash flow, and the possibility of inducing new foreign capital. Korea asserts that the fact that one of the nine reasons acknowledges a broader national policy to encourage debt restructuring of otherwise viable companies in no way undermines the core commercial rationale for this loan.

7.166 The US has not disputed that the first eight stated reasons for Kookmin's participation in the December 2000 syndicate loan relate to commercial considerations. The US relies, however, on the ninth reason as evidence of government entrustment or direction. The DOC's interpreter noted the following translation of that ninth reason at the time of verification:

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[183] *Decision Memorandum* at 58 (Exhibit GOK-5).

[184] *See* Letter from Hale & Dorr Corporate Department Partner (23 April 2003) (Exhibit US-92) (discussing the use of "plain English" in the risk factor sections of prospectuses and responding to the statement from the lawyers who drafted the Kookmin prospectus (attached by Korea as Exhibit GOK-28-(a)).

[185] The fact that the prospectuses refer to action actually taken by GOK causes us to reject Korea's argument that the statements are merely speculative as regards future action.

[186] The US also argues that record evidence indicated that the GOK had a significant role in selecting the president of Kookmin. First, we consider this issue to be more relevant to the private/public status of Kookmin, rather than the government entrustment/direction thereof, since appointing the president of Kookmin could not properly be treated as an affirmative act of delegation or control. Second, we consider this argument to be *ex post* rationalization, since we can find no consideration of it by the DOC.

[187] *Decision Memorandum*, page 59 (Exhibit GOK-5).

[BCI: Omitted from public version [188]]

7.167 Korea contests the accuracy of the DOC's translation. This is not an issue that we need resolve, however, since the above statement appears to refer to an overarching government policy relating to financial institutions participating in remedial restructuring, rather than affirmative government acts of delegation or command made pursuant to GOK's stated policy[189] to save Hynix. Furthermore, we note that the DOC linked this statement to "the government's objectives cited in"[190] the Kookmin prospectuses. We have already found that such objectives, including "requests" to banks to participate in remedial programmes for troubled corporate borrowers and the identification of sectors of the economy the GOK wishes to promote, could not properly be treated as evidence of affirmative government acts of delegation or command.[191] A determination of government entrustment or direction requires more than finding that private bodies act with regard to generalized governmental policy requests.

7.168 In addition, we do not consider that an objective and impartial investigating authority could properly have relied on the above reference to a generalized policy "request" from the government as evidence of government entrustment or direction when confronted with a further eight reasons explaining Kookmin's participation in the loan on the basis of commercial considerations. The US argued during the second substantive meeting that such commercial considerations were not legitimate given critical evaluation reports from brokerage houses at that time. In our view, however, an objective and impartial investigating authority could not properly have determined that conduct with an ostensibly commercial rationale should be attributed to a government simply on the basis of a reference to a generalized governmental policy request. As noted above, we do not consider that the mere existence of a government policy is sufficient to establish government entrustment or direction. Rather, there must be evidence that the government has taken affirmative acts of delegation or command to implement that policy. Furthermore, we note that at least two experts[192] indicated that Kookmin had acted independent of the government during the Hynix restructuring. In our view, given the alternative commercial rationale for Kookmin's participation in the December 2000 syndicated loan, and given expert opinion to the effect that Kookmin acted independently during the Hynix restructuring, we do not consider that the ninth reason set forth above could properly be treated as proof of any affirmative GOK act of delegation or control in respect of Kookmin.

(vi) Expert Opinion

Arguments of the Parties

7.169 Korea submits that the only evidence the DOC provides to link the motives of all the banks involved in the October restructuring to its alleged GOK action is the unverified assertions of an

[188] **[BCI: Omitted from public version]**
[189] See para. 7.51 *supra*.
[190] *Decision Memorandum*, page 59 (Exhibit GOK-5).
[191] See para. 7.163 *supra*.
[192] See reports of Meetings 1, 4 and 5, Exhibit GOK-30. Regarding Meeting 1, the DOC reported "[a]t one point, however, a number of commercial banks, including Kookmin ..., were no longer willing to provide fresh capital to Hynix and decided to take losses on their exposure instead. The expert stated that had this happened before the financial crisis, the GOK would have forced all of Hyxnix's creditors to provide fresh capital to the company. In this case, however, the GOK influenced only government-owned banks. According to the official, the future fate of Hynix now rests with the state-owned banks, i.e., the KEB, KDB, Chohung, and Woori." For Meeting 4, the DOC reported "[t]he official stated that the case of Hynix is different because some of the company's creditors got out. When Kookmin ... pulled out, for example, there was no intervention by the government." In respect of Meeting 5, the DOC reports that "[t]he expert stated that other creditors with foreign ownership, such as Hana and Kookmin, are very different from the KEB and other government-owned banks."

anonymous "expert" the DOC interviewed in Seoul. In discussing the October restructuring package, the DOC notes the following in its *Decision Memorandum*:

> The independent experts interviewed by the Department noted the important role played by these [GOK owned or controlled] banks in Hynix' restructuring and the GOK's influence in this process through them. According to one expert:
>
> {T}he government was aware of the {Hynix} workout process and could influence the government-owned banks and the {KDB}. In the creditors' meetings, the other state owned banks and the specialized banks persuaded other creditor banks to participate in the various restructuring decisions. At one point, however, a number of commercial banks, including Kookmin, Hana, and Shinhan, were no longer willing to provide fresh capital to Hynix and decided to take losses on their exposure instead. The expert stated that had this happened before the financial crisis, the GOK would have forced all of Hynix' creditors to provide fresh capital to the company. In this case, however, the GOK influenced only government-owned banks. According to the official, the future fate of Hynix now rests with the state-owned banks, i.e., the KEB, KDB, Chohung, and Woori. He further noted that management level officers at the KEB, Hynix' lead bank, talk with government officials, so there is an indirect channel through which the government can influence these creditors.[193]

7.170 Korea submits that government "influence" does not amount to entrustment or direction in the meaning of Article 1.1(a)(1)(iv) of the *SCM Agreement*. In addition, Korea asserts that the above expert statement actually undercuts the DOC's theory, since it provides further evidence that (even if "influence" does amount to entrustment or direction) the GOK could not and did not "influence" commercial banks such as Kookmin Bank, Hana Bank, and Shinhan Bank. Korea submits that, at the very best, the DOC has perhaps established some link between alleged GOK action and the GOK-owned and -controlled banks involved in the October restructuring, but it has established no link with respect to the wholly private banks and those banks without controlling government ownership. Korea notes that the expert specifically said the "GOK influenced only government-owned banks," confirming the absence of influence over the other banks.

7.171 Korea further notes that one of the experts consulted by the DOC in fact identified the complexity of the workout process in which Hynix was engaged as a barrier to GOK control: "In the case of Hynix's creditor council, the expert stated that because of the complex structure of these groups it is difficult for the government to have any control over the decisions made by the councils."[194] According to Korea, therefore, the DOC's claim that the GOK dictated the terms of the October restructuring, or the banks decisions, is immediately contradicted by one of its own experts.

Evaluation by the Panel

7.172 We understand that Korea does not contest the DOC's reliance on the experts' views to determine that government-owned (Group B) creditors "were very much subject to government influence." Instead, we understand Korea to argue that influence is not entrustment or direction, and that the experts did not provide evidence of GOK influence over private, non government-owned (Group C) creditors. We reject Korea's second argument, however, since we do not consider that the DOC did rely on the experts' opinions to find that GOK influenced non government-owned (Group C)

[193] *Decision Memorandum*, page 55 (Exhibit GOK-5).
[194] Exhibit GOK-30, page 16.

creditors. Indeed, the DOC acknowledged that the one expert it quoted in its *Decision Memorandum* "did not state that bank *(sic)* not owned by government were subject to the GOK influence."[195]

7.173 However, we agree with Korea's first argument that evidence of government "influence" does not amount to evidence of government entrustment or direction. Government entrustment or direction is a higher standard than government influence. A government may "influence" creditors in a number of ways, without necessarily engaging in affirmative acts of delegation or command.[196] Furthermore, at least one expert stated that GOK "does not control" government-owned banks.[197] In these circumstances, we do not consider that an impartial and objective investigating authority could properly have relied on expert evidence of nothing more than mere GOK "influence" over Group B creditors as evidence of GOK entrustment or direction of Group B creditors.

7.174 In light of the above, we find that the DOC was not entitled to rely on the experts' opinions as evidence of government entrustment or direction.

(vii) Conclusion

7.175 We recall that the DOC could properly have established that the GOK had a policy to save Hynix. We recall that although this policy may well explain the participation of public body, Group A, creditors in the four financial contributions at issue, it is not sufficient to establish GOK entrustment or direction of Group B and C creditors pursuant to Article 1.1(a)(1)(iv) of the *SCM Agreement*.

7.176 In order to meet the requirements of that provision, the DOC was required to gather evidence of affirmative GOK acts of delegation or command vis-à-vis the Group B and C private creditors. In this regard, the DOC established that the GOK had the means to influence certain Group B creditors through government shareholdings. The DOC also established that the GOK had certain regulatory authority over Group B and C creditors. However, the DOC has not properly established that the GOK actually exercised such influence or regulatory authority so as to entrust or direct Group B and C creditors to participate in the four restructuring financial contributions. Furthermore, although the DOC purported to demonstrate that the GOK could dictate the terms of the October 2001 restructuring by virtue of the statutory framework of the CRPA, we consider that the DOC's analysis of the operation of this legal instrument is flawed, and could not have been properly relied upon by an objective and impartial investigating authority. In addition, we consider that the DOC improperly found that Kookmin Bank was entrusted or directed by GOK, despite expert evidence to the contrary, and despite an ostensibly commercial rationale for Kookmin's participation in the restructuring of Hynix. The DOC also purported to demonstrate that a number of other Group C creditors had been coerced by GOK to participate in the four financial contributions. Ultimately, however, we consider that the DOC only properly established that one such creditor had been coerced by GOK. Furthermore, the DOC found that all four financial contributions should be treated as a "single programme." This enabled the DOC to treat evidence of alleged entrustment or direction in respect of one financial contribution as evidence of alleged entrustment or direction in respect of other financial contributions. We consider that the DOC's justification for adopting such an approach is also flawed.

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[195] *Decision Memorandum*, page 55, note 22 (Exhibit GOK-5).

[196] For example, the DOC's report of Meeting 6 indicates that "[t]he expert further stated that the 'too big to fail' mentality no longer prevails. Since the crisis, the policymakers and the banks are more keenly aware of and affected by foreign interests. Any intervention on the part of the government is much more indirect, so that it may state publicly that a company such as Hynix is important for the country and the economy in the hope that creditors would go alone. But he stressed that the government no longer pressures banks directly the way it did in the past (pages 2 and 7, Exhibit GOK-30).

[197] See DOC report of Meeting 7, Exhibit GOK-30, page 15.

7.177 In sum, although the DOC established that the GOK had a policy to save Hynix, and that the GOK had a certain capacity to influence Group B and C creditors, we consider – on the basis of a thorough and global review of all the reasoning set forth by the DOC in light of the standard set forth in Article 1.1(a)(1)(iv) of the *SCM Agreement* - that the DOC did not properly demonstrate that the GOK availed itself of that capacity to entrust or direct all Group B and C creditors to participate in all four of the financial contributions at issue. For this reason, we consider that the DOC could not properly have found that there was sufficient evidence to support a generalized finding of entrustment or direction with respect to private bodies spanning multiple creditors and multiple transactions over the period of investigation. There are simply too many irregularities and shortcomings in the DOC's reasoning to properly sustain such a broad determination.

7.178 For the above reasons, we conclude that the DOC's determination of GOK entrustment or direction of Hynix's Group B and C creditors is inconsistent with Article 1.1(a)(1)(iv) of the *SCM Agreement*.

2. Benefit

7.179 It is now well established that a financial contribution confers a "benefit" within the meaning of Article 1.1(b) of the *SCM Agreement* when it is made available on terms that are more favourable than the recipient could have obtained on the market. In order to determine the existence of "benefit", therefore, one must identify an appropriate market benchmark against which to assess the terms of the financial contribution at issue.

7.180 In considering potential market benchmarks for determining whether (a) the restructuring loans and (b) the restructuring debt-for-equity swaps undertaken by the Group A, B and C (except Citibank) creditors were made available on terms more favourable than Hynix could have obtained on the market, the DOC determined that the participating Group B and C private creditors were not suitable benchmarks. The DOC considered that the Group B and C (except Citibank) creditors were unsuitable market benchmarks because of its finding that they were entrusted or directed by the GOK to participate in the four financial contributions. Citibank was rejected as a market benchmark because, although it had not been found to have been entrusted or directed by the GOK, the DOC determined that it had acted on motivations not shared by the average, market lender. Instead of using the private Group B and C creditors as market benchmarks, the DOC treated Hynix as uncreditworthy and unequityworthy, and constructed uncreditworthy and unequityworthy benchmarks.

7.181 Korea raises claims regarding the DOC's use uncreditworthy and unequityworthy benchmarks. In particular, Korea submits that the DOC's determination of "benefit" is inconsistent with Articles 1.1 and 14 because *inter alia*:

- the DOC failed to demonstrate that a benefit was conferred on the respondent Hynix, given available market benchmarks among Hynix's creditors;

- the DOC disregarded market benchmarks for measuring benefit established by a foreign bank (i.e., Citibank) operating in the Korean market that extended financing to Hynix during the period of investigation; and

- the DOC failed to utilize relevant Korean market benchmarks in determining whether Hynix was "creditworthy" or "equityworthy," and otherwise applied an improper "uncreditworthy" benchmark and discount rate in calculating the benefit to Hynix in this case.

(i) Arguments of the parties

7.182 Concerning Hynix's creditworthiness, Korea notes that Hynix's creditors included Korean and foreign private bodies. Korea asserts that the DOC incorrectly found that the Korean private bodies were entrusted or directed by GOK to participate in the Hynix restructuring. Korea asserts that these Korean private bodies should, therefore, have been used by the DOC as market benchmarks for the purpose of assessing whether or not the "financial contributions" by public bodies conferred a "benefit." Failing that, Korea argues that the DOC should at least have used Citibank, a foreign creditor, as a market benchmark, since the DOC did not find that Citibank had been entrusted or directed by GOK to participate in the Hynix restructuring.

7.183 Regarding Hynix's equityworthiness, Korea asserts that the DOC dismissed as irrelevant the fact that in June 2001 Hynix made a successful equity offering of $1.2 billon. Korea acknowledges that if market circumstances had changed between June 2001 and October 2001, such change might provide some reason to reject the specific prices paid for equity at an earlier point in time. Korea argues, however, that whatever one thinks about the price level of the GDS issuance, the fact that Hynix was able to raise $1.2 billion in equity from the international capital markets is a relevant fact that the DOC should have considered.

7.184 Korea also complains that the DOC dismissed out of hand all of the third party studies conducted by the Hynix creditors to assist them in deciding what to do.[198] According to Korea, the DOC's analysis ignores the single most critical fact: these studies were done for existing creditors, not new outside investors. Korea argues that the DOC's analysis allows the existing creditor to consider only one thing: the future prospects of the investment. Korea asserts that this view is fundamentally inconsistent with the concrete evidence on the record of the underlying case. Korea argues that the DOC 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 survival and to maximize the recovery of the existing investment. According to Korea, this perspective is completely rational for an existing creditor, and is the only conclusion supported by the evidence before the DOC when deciding these issues.

7.185 Korea asserts that the DOC improperly rejected the common sense notion supported by the facts of the underlying case that existing creditors consider their existing investment when making new investments. Korea states that the DOC insisted that rational investors do not let the value of past investments affect present or future investment decisions.[199] Korea submits that, as a matter of law and fact, this approach is just wrong, since the text of Article 14(a) provides that an equity infusion will normally be deemed to confer a "benefit" only if the investment decision is inconsistent with "the usual investment practice. . . of private investors in the territory of that Member." Korea asserts that Hynix's creditors were acting, based on a substantial amount of evidence prepared both internally and by outside consultants, in the manner most likely to preserve the maximum return on their existing capital in Hynix. Korea asserts that this behaviour is entirely consistent with the actions of normal private investors.

7.186 The US submits that the DOC was entitled not to use Korean private creditors as market benchmarks because they had been entrusted or directed by GOK to participate in the Hynix restructuring. The US submits that Citibank was excluded as a market benchmark because Citibank's involvement was small in absolute and percentage terms compared to the involvement of the government-owned and controlled banks; Citibank itself acknowledged that its participation was only a symbolic gesture; there was substantial record evidence that Citibank's risk assessment of Hynix was influenced by the GOK's policy to support Hynix and prevent its failure; record evidence showed

[198] Korea asserts that Hynix submitted to the DOC a wide range of third party reports commissioned by creditors for various purposes, including a Monitor Group Report, SSB Discussion Documents, and an Arthur Andersen Report.

[199] *Decision Memorandum*, at 92 (Exhibit GOK-5).

that Citibank was influenced by the significant and continuing involvement of the GOK in propping up Hynix, rather than by its belief that Hynix was a commercially worthy credit risk in its own right; Citibank and SSB were the exclusive financial advisors to Hynix, and reaped significant fees from this engagement; and evidence showed that Citibank's involvement with Hynix was viewed by Citibank as a stepping stone toward a larger and more lucrative role in helping the GOK to resolve other structural problems in the Korean financial market. The US submits that other "unusual aspects" relevant to Citibank's decision to participate in the syndicated loan include the fact that despite its long involvement in the Korean financial market dating back to the 1960s, Citibank was not a lender to Hyundai Electronics or Hynix prior to the December 2000 Syndicated Loan. The US further asserts that Citibank did not extend any financing to Hynix other than in GOK entrusted and directed restructurings (and was not a participant in the KDB Fast Track Program). The US also submits that Citibank's participation in those restructurings was on the same terms as were applicable to government entrusted and directed participants, and that Citibank also did not seek internal credit approval for its portion of the syndicated loan until after Korean banks had committed to the arrangement. The US further submits that Citibank did not base its lending decisions on independent credit analyses that a commercial bank normally would consider, but rather upon the assessment of Hynix that SSB prepared for purposes of advancing a plan to restructure Hynix's debt.

7.187 The US asserts that the DOC properly determined that the June 2001 GDS issuance did not demonstrate that Hynix was equityworthy at the time of the October 2001 restructuring, as a result of the "extreme differences in the condition of the global DRAMs market ... and Hynix's financial state at the time of the two equity infusions."[200]

7.188 Regarding Korea's argument that Hynix should not be considered unequityworthy because its creditors relied upon reports prepared by Salomon Smith Barney, the Monitor Group, and Arthur Anderson, the US asserts that the DOC found that these studies, prepared at the request of Hynix or its creditors, were not a reasonable basis for determining that Hynix was equityworthy. The US submits that the DOC determined that the SSB and Monitor Group studies were not prepared to answer the question of whether Hynix was equityworthy, but focused instead on presenting options for ensuring Hynix's survival, which is different than assessing whether Hynix would provide its investors with a reasonable rate of return within a reasonable period of time. The US asserts that the DOC also found that the SSB study was based upon assumptions regarding the DRAM market that were inconsistent with the consensus view held by neutral industry analysts, which viewed the DRAM industry as being in a significant slump, with no recovery imminent. The US argues that, accordingly, the reports could not reasonably be used as evidence of whether investment in Hynix was consistent with the usual practice of private investors and could not have been reasonably relied upon by the government and government-directed banks in deciding whether to convert debt into equity. The US also asserts that Hynix's creditors could not have relied on the Arthur Anderson report, as the report was not finished until two months after the creditors agreed to the October 2001 restructuring package. The US also argues that the Arthur Anderson report does not establish that the investment by Hynix's creditors was consistent with the usual practice of private investors, as the report was drafted from the perspective of a creditor rather than an equity investor.

7.189 The US submits that the Expected Utility Model of explaining commercial behaviour, which is the basis for the DOC's rational investor standard, holds that a private investor will look upon any past investments, including its own, as sunk costs that are not relevant to its analysis of whether to make additional investments. The US asserts that, in other words, a private investor will evaluate whether to make additional investments based upon the expected rate of return on the additional investment, regardless of the value of past investments. The US argues that the Prospect Theory relied on by Korea, on the other hand, posits that investors will continue to make investments in a particular project or entity in hopes of minimizing past losses, even if the investment would not be

[200] *Decision Memorandum*, pages 90-91(Exhibit GOK-5).

justified based only the potential for future return. The US asserts that the DOC has considered and rejected on many occasions the argument that inside investors should be held to a different investment standard than outside investors, since the prevailing economic theory for explaining normal commercial behaviour holds that an investor makes its decision on the margin, seeking to maximize the return on incremental outlays. The US argues that if the Prospect Theory were carried to its logical conclusion, this would support the untenable notion that the more the banks invest in Hynix, the more the additional investments are justified, such that a company could never be unequityworthy from the perspective of an inside investor.

(ii) Evaluation by the Panel

7.190 In reviewing the DOC's benefit analysis (in respect of both creditworthiness and equityworthiness), we note that it was predicated almost entirely upon the DOC's determination that Group B and C (except Citibank) creditors were entrusted or directed by GOK to participate in the four financial contributions at issue. In other words, these creditors were rejected as market benchmarks (for both the loans and debt-for-equity swaps) because the DOC found that they were acting pursuant to government entrustment or direction, rather than market principles, when participating in the Hynix restructuring.[201] Since we have found that the DOC could not properly have found that these private creditors had been entrusted or directed by the GOK, government entrustment or direction of these creditors could not have been a proper basis for the DOC to reject them as market benchmarks.[202] As a result, we find that the DOC's benefit determination is inconsistent with Article 1.1(b) of the *SCM Agreement*.

7.191 In light of the above finding, it is not necessary for us to examine other issues raised by the parties regarding market benchmarks. Even if we were to find, for example, that the DOC could properly have rejected Citibank as a market benchmark for assessing the restructuring loans, or the GDS offering and/or expert reports as benchmarks for determining whether or not Hynix was equityworthy in October 2001, our finding that the DOC improperly rejected the Group B and C (except Citibank) creditors as potential market benchmarks would still remain, as would the issue of whether or not Hynix might be found to be creditworthy or equityworthy on the basis of such potential market benchmarks.[203] For this reason, we shall not consider the additional issues raised by the parties concerning the DOC's benefit analysis.

3. Specificity

7.192 According to Article 1.2 of the *SCM Agreement*, a subsidy is only subject to Part V of the *SCM Agreement*, and therefore countervailable, if it is "specific" in the meaning of Article 2.1. Article 2.1 provides that the following principles shall apply for determining whether a subsidy is specific to an enterprise or industry or group of enterprises or industries within the jurisdiction of the granting authority:

> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

[201] *Decision Memorandum*, pages 3-5 (Exhibit GOK-5).

[202] We recall that certain Group B creditors might otherwise have been treated as public bodies in the meaning of Article 1.1(a)(1) of the *SCM Agreement*. We are not finding that the DOC should have used those Group B creditors as market benchmarks. (Indeed, we are precluded from engaging in such *de novo* review.) We are simply finding that the DOC could not properly have rejected the Group B and C (except Citibank) creditors as market benchmarks on the basis of the reasoning advanced by the DOC.

[203] These are issues that we are precluded from examining *de novo*.

> (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
>
> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

(i) Arguments of the parties

7.193 Korea submits that the DOC's determination of specificity is inconsistent with Article 2. Korea asserts that the DOC supports its finding of specificity with respect to Hynix's financial restructuring over the period investigated on three fundamental grounds: The first ground relates to largely secondary evidence of the GOK's interaction, at various stages, with Hynix creditors and Hynix's financial restructuring. The second ground offered by the DOC relates to the level of financial restructuring occurring at Hynix and other Hyundai Group companies under the CRPA, relative to other CRPA companies. The third and final ground relates to the level of lending to Hynix and other Hyundai Group Companies by KDB and KEB, specifically. Korea argues that none of these grounds withstand serious scrutiny.

7.194 Korea asserts that because the DOC's analysis of entrustment or direction was flawed, it cannot support a finding of specificity. Korea also argues that the DOC's analysis attempts to collapse two distinct requirements, whereas the obligation in Article 1.2 to find specificity is separate and distinct from the obligation in Article 1.1(a)(1) to find a "financial contribution." Korea acknowledges that the same facts might be relevant to both inquiries, but the decision by the competent authorities must clearly and explicitly discuss how the facts satisfy each of these obligations. Korea argue that none of the four factors listed in Article 2.1(c) justifies the DOC decision to turn a finding of "financial contribution" into a finding of specificity. According to Korea, these factors relate to the extent to which the subsidy at issue has been utilized, and are irrelevant to alleged government plans to "save" a company.

7.195 Korea also submits that the level of financing received by Hynix under the CRA/CRPA framework, by itself, is irrelevant to the issue of specificity. Korea notes the DOC's argument that the debt restructuring data provided by GOK covering CRPA workouts revealed that Hynix and Hyundai Group companies accounted for "a disproportionately large share of the debt restructurings for all companies" under the CRPA.[204] Korea asserts that the quantitative level of Hynix restructuring (whether grouped with Hyundai Group companies or not) is, by itself, irrelevant to the issue of specificity. Korea argues that, to avoid ridiculous outcomes, the term *use* in Article 2.1 of the *SCM Agreement* must be read to have both a quantitative and qualitative component. In this regard, what is being *used* under the CRPA is not the amount of debt restructuring specifically, but the framework itself. Korea asserts that Hynix was just one company out of over 100 different companies ushered

[204] *Decision Memorandum*, at 18-19 (Exhibit GOK-5).

through the framework by its creditors. According to Korea, the difference between the companies involved constitute the qualitative distinctions by which any quantitative measure of specificity must be tempered. Korea submits that the DOC's one-dimensional quantitative exercise does not capture any of the qualitative distinctions among the various restructurings under the CRPA. For example, Korea notes that no effort was made by the DOC to examine the size or capital intensity of the CRPA companies to determine if Hynix's debt restructuring under the CRPA was truly disproportionate. Korea also asserts that the DOC overlooked two textually explicit considerations provided for in Article 2.1(c), namely the "extent of diversification of economic activities," and "the length of time" the programme has been in existence.

7.196 Korea also submits that the DOC's focus on the level of lending by KEB and KDB over the 2000-2002 period as a measure of specificity is also without merit, as it merely identifies creditors with whom Hynix had a long-standing business relationship, and who therefore might naturally hold more Hynix debt than other creditors. Korea argues that, in focusing on KEB's and KDB's lending, DOC also neglected the fact that much of the new lending and refinancing at issue in its investigation was allocated among participating creditors on a *pro rata* basis, taking into account their existing debt holdings. Korea argues that under such a system, both KDB and KEB would be expected to extend a higher level of financing over the period investigated, since they were already among the larger Hynix creditors.

7.197 The US submits that, because the subsidy programme is directed at a particular company – Hynix – it is specific within the meaning of Article 2 of the *SCM Agreement*. The US asserts that, in addition, the DOC confirmed the specificity of the Hynix bailout through an analysis of corporate usage of the CRA/CRPA.

7.198 The US argues that, although the existence of a financial contribution and the existence of specificity are two separate determinations that must be made, the nature of the financial contribution can impact the specificity analysis under Article 2. The US refers, for example, the situation in which the government provides a grant to a single, financially distressed manufacturer. The US asserts that there is no law or regulation providing for such grants; this is *sui generis* government assistance to a particular company. The US asserts that the subsidy is specific because there is a limited number of users – one. The US argues that in the present case, as in the case of company-specific grants, the nature of the subsidy – a government-directed bailout – impacts the specificity analysis. The US asserts that, as a result, much of the evidence establishing that the GOK directed and entrusted the banks to provide the bailout, is also relevant to the specificity analysis. Thus, the US claims that reliance on that evidence in its specificity analysis is therefore not an effort to "collapse" distinct requirements to find financial benefit and specificity. Rather, it is a natural consequence of the nature of the subsidy. The US further asserts that the DOC record of the investigation is replete with positive evidence of a government-directed bailout of Hynix. According to the US, the evidence demonstrates the GOK's commitment and actions taken specifically to prevent the collapse of Hynix.

7.199 The US submits that the DOC's analysis of the CRA/CRPA confirms the specificity determination. The US asserts that record data, which was provided by the GOK, demonstrates that the Hyundai Group companies received an extraordinarily large percentage of financial restructuring and recapitalization aid and that Hynix alone received a very high percentage of such aid. The US argues that, although Korea states that its own objective, credible data on use of the CRA/CRPA is irrelevant to the specificity analysis, the relevance of the data, however, should be beyond question given that disproportionate use is expressly listed in Article 2 as a factor that may be considered in a specificity analysis.

7.200 According to the US, nothing in the text of Article 2.1(c) requires the broader analysis advocated by Korea; *i.e.*, one that looks beyond use of the subsidy at issue. The US asserts that nothing in the *SCM Agreement* dictates a methodology for determining disproportionate use of a

subsidy, contrary to Korea's argument that the term "use" *must* be read to have both a "quantitative and qualitative component."[205] The US argues that the ordinary meaning of the term "use" is, however, the "act of using, fact of being used"[206], and that nothing in the ordinary meaning of the term "use" suggests either a quantitative or qualitative component. The US also asserts that, while there is no reference to "qualitative" factors in examining use, Article 2.1(c) contains explicit references to "quantitative" factors related to use; *i.e.*, the "number" of users, "predominant" use and "disproportionate" use. The US argues that there is no requirement in Article 2.1(c) to "temper" those quantitative factors based on "qualitative distinctions," and there is no basis for Korea's assumption that a qualitative analysis is necessary to avoid "ridiculous outcomes."[207]

7.201 The US also notes there is no basis in the text of Article 2 to support Korea's argument that what is being "used" is not the vast amount of debt restructuring aid, but rather the CRPA "framework" itself, and that Hynix was only one of over 100 different companies "ushered through" the CRPA.[208] The US asserts that, assuming *arguendo* that Korea is correct, the GOK's own data demonstrate that members of the Hyundai Group – and Hynix in particular – were granted disproportionately large amounts of the restructuring and recapitalization aid through those frameworks. According to the US, therefore, even if one were to accept, for the sake of argument, that 100 companies received restructuring aid and that 100 companies is not a "limited number," the receipt by Hynix of a disproportionate amount of restructuring aid makes the subsidy specific.

7.202 The US also notes Korea's argument that the DOC 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. The US asserts that 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. The US also argues that, carried to its logical conclusion, the analytical approach Korea claims is required would imply the untenable notion that the Members intended that the more indebted a company is, the more additional subsidies it may receive without being subject to the subsidy disciplines because the disproportionately large subsidies could never be specific. The US asserts that Korea's proffered interpretation of Article 2 is therefore directly at odds with the object and purpose of the *SCM Agreement.*

7.203 The US asserts that Korea's argument that the DOC's specificity analysis failed to take into account "the extent of diversification of economic activities" and the "length of time" the programme has been in existence, as required under Article 2(c) of the *SCM Agreement* misapprehends the nature and relevance of these two requirements. The US also asserts that these issues were considered in the context of the DOC's investigation.

(ii) Evaluation by the Panel

7.204 The US argues that "because the subsidy programme is directed at a particular company – Hynix – it is specific within the meaning of Article 2 of the *SCM Agreement*."[209]

7.205 For its part, the DOC found that "record evidence in this proceeding indicates that the GOK only directed or provided loans and other benefits to a specific company or group of companies."[210] The DOC also referred to the "substantial record evidence demonstrating the GOK's commitment,

[205] Korea First Written Submission, para. 570.
[206] *The New Shorter Oxford English Dictionary* (1993) (Exhibit US-89).
[207] Korea First Written Submission, para. 570.
[208] *Id.*
[209] See para. 236 of the US First Written Submission.
[210] *Decision Memorandum*, page 17 (Exhibit GOK-5).

and actions taken, to prevent the collapse of the Hyundai Group, and Hynix in particular",[211] and the fact that it found "a number of indicators of ROK activity specifically focused on aiding Hynix and the Hyundai Group of companies."[212]

7.206 The DOC's finding of specificity related to the alleged subsidies provided by Group A, B and C creditors respectively. Whereas we understand the DOC's reference to GOK "direct[ion]" of loans and other benefits to relate to the participation of Group B and C creditors, we consider that the reference to GOK "provid[ing]" such loans and other benefits relates to the participation of Group A creditors. On this basis, we understand that the DOC found that the alleged subsidies provided by Group B and C creditors are specific because of the role allegedly played by the GOK in entrusting and directing those creditors to save a specific entity, i.e., Hynix. In other words, the DOC's finding of specificity in respect of Group B and C creditors was based on its finding of GOK entrustment or direction of private creditors to participate in the single programme of Hynix restructuring. We recall, however, that we have found that the DOC's determination of government entrustment or direction is factually flawed, and inconsistent with Article 1 of the *SCM Agreement*. In the circumstances, the DOC's finding of GOK entrustment cannot provide a proper basis for a determination of specificity in respect of alleged subsidies provided by Group B and C creditors.[213]

7.207 To the extent that the DOC's finding of specificity in respect of Group A creditors was based on GOK "activity specifically focused on" Hynix, however, we consider that such finding of specificity is consistent with Article 2 of the *SCM Agreement*. We recall in this regard that the DOC properly found that Group A creditors provided financial contributions to Hynix pursuant to a GOK policy to save Hynix. We consider that such policy meant that such financial contributions by Group A creditors were necessarily specific to Hynix. The fact that such financial contributions were provided pursuant to a restructuring package tailor-made for Hynix confirms the specific nature thereof. In these circumstances, we consider that an objective and impartial investigating authority could properly have found that the alleged subsidies provided by Group A creditors were specific within the meaning of Article 2 of the *SCM Agreement*.

7.208 For these reasons, we find that the DOC's finding of specificity is inconsistent with Article 2 of the *SCM Agreement* in so far as it relates to alleged subsidies by Group B and C creditors, but consistent with Article 2 in so far as it relates to alleged subsidies provided by Group A creditors.

4. Conclusion

7.209 For the above reasons, we find that the DOC did not properly determine that the four financial contributions at issue constitute specific subsidies. Accordingly, we conclude that the DOC's *Final Subsidy Determination*, and the *Final Countervailing Duty Order* based thereon, are inconsistent with Articles 1 and 2 of the *SCM Agreement*, and that the US is therefore in violation of those provisions.

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[211] *Decision Memorandum*, page 18 (Exhibit GOK-5).

[212] *Id*.

[213] In finding specificity, the DOC also referred to "a list of the largest recipients of KDB and [KEB] financing" (*Decision Memorandum*, page 18, Exhibit GOK-5). The DOC further referred to "the magnitude of monies involved with corporate restructurings under corporate restructuring laws in the ROK" (*Decision Memorandum*, page 18). While the DOC referred to these additional elements, there is nothing in its *Decision Memorandum* to suggest that the DOC considered that its specificity analysis could be upheld purely on the basis of them. We are of course precluded from considering this issue *de novo*. There is, therefore, no basis for upholding the DOC's specificity analysis (in respect of Group B and C creditors) on the basis of its consideration of these additional elements. Accordingly, we need not address the parties' arguments concerning this issue.

D. ITC INJURY INVESTIGATION

7.210 Korea claims that the US acted inconsistently with:

- Article 15.1 because *inter alia*, the ITC determinations on injury and causation were not based on positive evidence and an objective assessment of the effects of allegedly subsidized imports;
- Article 15.2 because *inter alia*, the ITC determinations improperly assessed the significance of the volume effects of subject imports;
- Article 15.2 because *inter alia*, the ITC determinations improperly assessed the significance of the price effects of subject imports;
- Article 15.4 because *inter alia*, the ITC failed to consider all factors relevant to the overall condition of the domestic industry;
- Article 15.5 because *inter alia*, the ITC failed to demonstrate the requisite causal link between subject imports and injury;
- Article 15.5, because *inter alia*, the ITC improperly assessed the role of other factors, and improperly attributed the effect of other factors to the allegedly subsidized imports; and
- Article 15.2 and 15.4 because *inter alia*, the ITC improperly and inconsistently defined the domestic industry.

7.211 In light of our findings in respect of subsidization, it is not strictly necessary for us to consider Korea's claims against the ITC's *Final Injury Determination*. We shall do so, however, in case our findings on this issue might be of use to the Appellate Body, or in the context of the implementation of any recommendation by the DSB.

7.212 In order to rule on Korea's claims, we must resolve the following issues:

- Did the ITC properly assess the volume of subject imports?
- Did the ITC properly assess the price effects of subject imports?
- Did the ITC properly consider all factors relevant to the overall condition of the domestic industry?
- Did the ITC properly demonstrate the requisite causal link between subject imports and injury?
- Did the ITC properly comply with its obligation not to attribute to subject imports injury caused by other factors?
- Did the ITC properly define domestic industry, subject imports and non-subject imports?

7.213 Before turning to the parties arguments concerning the substantive issues raised by Korea’s claims under sub-paragraphs 2, 4 and 5 of Article 15 of the *SCM Agreement*, we shall first consider the application of Article 15.1.

7.214 Article 15.1 of the *SCM Agreement* provides:

> A determination of injury for purposes of Article VI of *GATT 1994* shall be based on positive evidence and involve 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)

7.215 Accordingly, an investigating authority must ensure that its determination of injury, and more specifically, its findings under SCM Articles 15.2, 15.4, and 15.5, are made on the basis of "positive evidence" and involve an "objective examination." In this regard, we note that the Appellate Body has interpreted "positive evidence" as follows:

> The term 'positive evidence' relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination. The word 'positive' means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.[214]

7.216 We also note that the Appellate Body has defined an "objective examination":

> The term 'objective examination' aims at a different aspect of the investigating authorities' determination. While the term 'positive evidence' focuses on the facts underpinning and justifying the injury determination, the term 'objective examination' is concerned with the investigative process itself. The word 'examination' relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word 'objective,' which qualifies the word 'examination,' indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness.[215]

The Appellate Body summed up the requirement to conduct an "objective examination" as follows:

> In short, an 'objective examination' requires that the domestic industry, and the effects of [subsidized] imports be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an 'objective examination' recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.[216]

7.217 We also note that the Appellate Body in *Thailand – H-Beams* confirmed the fundamental nature of a provision analogous to Article 15.1 and its importance as a guiding principle underlying all aspects of an injury determination. Thus, in respect of Article 3.1 of the *AD Agreement*, the Appellate Body stated:

> Article 3 as a whole deals with obligations of Members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs. These obligations concern the

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[214] Appellate Body Report, *United States –Hot-Rolled Steel*, para. 193 (emphasis added); Appellate Body Report, *Thailand – H-Beams*- para. 106.

[215] *US – Hot-Rolled Steel*, para. 193 (footnote omitted).

[216] *US – Hot-Rolled Steel*, para. 193.

> determination of the volume of dumped imports, and their effect on prices (Article 3.2), investigations of imports from more than one country (Article 3.3), the impact of dumped imports on the domestic industry (Article 3.4), causality between dumped imports and injury (Article 3.5), the assessment of the domestic production of the like product (Article 3.6), and the determination of the threat of material injury (Articles 3.7 and 3.8). The focus of Article 3 is thus on *substantive* obligations that a Member must fulfil in making an injury determination.[217]

7.218 The parties agree that our interpretation and application of Article 15.1 should be guided by the abovementioned Appellate Body rulings. The parties also agree that Article 15.1 informs the more detailed obligations set forth in the remainder of Article 15. We shall be guided by these statements by the Appellate Body in determining whether or not the ITC's injury determination is consistent with paragraphs 2, 4 and 5 of Article 15 of the *SCM Agreement*.

1. Did the ITC properly assess the volume of subject imports?

7.219 Article 15.2 of the *SCM Agreement* provides in relevant part:

> With 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.

(i) Arguments of the parties

7.220 Korea submits that the ITC's finding of a significant increase in subject imports was not based on an objective examination of positive evidence, contrary to Articles 15.1 and 15.2 of the *SCM Agreement.* Korea asserts that, pursuant to Article 15.2, the competent authorities must do more than simply find an increase. Korea asserts that the competent authorities have a specific obligation to find a "significant" increase, and to explain why they deemed the increase to be significant. Korea argues that there was no "significant" increase in imports, since the data shows that the Hynix brand lost market share over the period of investigation, and that subject imports changed only slightly in reaction to the temporary shutdown of the Hynix US operations at HSMA.

7.221 Korea acknowledges that the ITC properly adopted the industry practice of calculating "billion bits" of DRAMs memory when assessing the volume of DRAMs sold. Korea asserts, however, that the continual movement to higher and higher densities (e.g., the 64MB chip was replaced with the 128MB chip, which was replaced with the 256MB chip) has meant that total bits supplied and total bits consumed have always been increasing. According to Korea, as measured in billion bits of DRAMs memory, the total consumption (and supply) of DRAMs has increased dramatically every year over the previous year's consumption. Korea asserts that, in the DRAMs market, the simple fact that an actual increase in imports (on a billion bit basis) occurred from a particular supplier is meaningless. According to Korea, what is important when analzying the volume of DRAMs shipments is to examine the increased shipments relative to consumption and relative to other suppliers. Korea submits that the best measure of any volume effects of the subsidized imports is therefore to examine market share data. Korea asserts that any methodology that does not focus on market share bears a very high burden of persuasion to be considered "objective."

7.222 Korea states that the following chart was made available to the ITC concerning respective DRAM market shares for each of the major suppliers in the Americas market:

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[217] *Thailand – H-Beams* at 160 (emphasis in original).

Figure 8 America's Market Share by Supplier Brand

	1998	*1999*	*2000*	*2001*	*2002*	*Change '98-02*
Micron	17.9%	21.0%	27.0%	26.2%	25.7%	+7.8
Infineon	3.5%	6.7%	7.4%	11.5%	14.8%	+11.3
Combined	21.4%	27.7%	34.4%	37.7%	40.5	+19.1
Samsung	22.7%	22.5%	23.7%	28.3%	34.4%	+11.7
Hynix	15.8%	15.2%	13.6%	10.6%	10.4%	-5.4
All Others	40.1%	35.7%	28.2%	23.3%	13.5%	

7.223 Korea asserts that the data show that over the past few years the Hynix brand has been losing market share in the Americas market. Korea also asserts that the market share data show absolutely no correlation between shipments from Hynix and any deterioration of Micron's and Infineon's US market positions, since Micron and Infineon gained significant market share, while Hynix lost market share.

7.224 Korea also asserts that, even focusing on subject import data (as opposed to data concerning the Hynix brand, which includes both Hynix's US domestic and imported shipments), the evidence before the ITC establishes that the market share of subject imports remained small throughout the investigation period, and actually declined at the end of the period. Korea submitted the following chart to the Panel. Korea asserts that the chart is based on the evidence before the ITC that presents the respective market shares of US producers, Hynix and non-subject suppliers. According to Korea, the data in the chart consists of the public market share data contained in the ITC's determination (at page C-3) for US production plus a Hynix market share calculated from the volume of Hynix's shipments to the US from Korea, which Hynix has agreed to make public in order to assist the Panel's analysis. Korea states that the total market share of non-subject suppliers was simply derived by the following calculation: 100 per cent minus US producers' market share minus Hynix's market share.

Figure 9. US Market Shares

	1999	*2000*	*2001*	*2002*	*1Q 2003*
US Shipments of Domestic Producers	45.8%	43.4%	34.3%	30.7%	29.8%
US Shipments of Hynix Subject Product	8.5%	6.7%	9.0%	8.9%	5.8%
US Shipments of Non-Subject Products	45.7%	49.9%	56.7%	60.4%	64.4%

7.225 According to Korea, the above data demonstrates the following facts about trends in market share based on US shipments from these different sources:

- The market share of Hynix's imported DRAMs was 6.7 per cent in 2000, increased to 9.0 per cent in 2001, decreased to 8.9 per cent in 2002 and decreased again to 5.8 per cent in 2003;

- The consistently small volume of Hynix's imports was dwarfed by both domestic production and non-subject imports. In 2002 domestic producers' shipments

were more than three times larger than Hynix's imported volume; and non-subject imports were more than six-and-a half times larger than Hynix's imports;

- Although the market share of Hynix's imports did increase over the three year (2000-2002) period, the increase was only two percentage points;

- All of the increase in Hynix import market share occurred from 2000 to 2001, prior to Hynix receiving the bulk of the alleged subsidies in the 4th quarter of 2001. In fact, the data demonstrate that after Hynix received the vast majority of the alleged subsidies, the market share of Hynix's imports actually decreased from 2001 to 2002, and then decreased again from interim 2002 to interim 2003; and

- The increase in market share by non-subject imports from 2000 - 2002 was nearly five times larger than the increase in market share by Hynix's imports.

7.226 Korea submits that it is not an objective assessment of subject import volume to focus on the small nominal increase in market share and largely to ignore these other critical facts that put that small change in market share in proper context. According to Korea, any objective assessment would have found that in light of the fact that (1) Hynix import market share fell in both 2002 and the beginning of 2003, (2) non-subject imports consistently dwarfed subject imports, and that (3) the increase in non-subject imports was almost five times larger than the increase of subject imports, the small increase in subject imports could not be considered significant. Korea submits that the ITC did not make an objective assessment of these facts.

7.227 Korea submits that, even focusing on the absolute volume of subject imports, the evidence before the ITC demonstrates that the increase in imported Hynix DRAMs was solely the result of the temporary closure of Hynix's US manufacturing facility, HSMA. Korea asserts that HSMA temporarily suspended all production in July 2001 to hasten a planned upgrade of HSMA's production facility. Korea states that the upgrade was completed in January 2002, and that full-scale commercial production began in September 2002. Korea submits that the apparent "increase" in Hynix imports found by the ITC is really just a data aberration, and therefore has little significance. According to Korea, the increased volume of imported Hynix DRAMs simply replaced the volume previously produced by the Hynix US manufacturing facility, and therefore such volume did not displace sales from Micron or Infineon.

7.228 The US submits that the ITC's conclusions about the significance of the volume of subsidized subject imports from Korea on an absolute basis, as well as the increase in that volume relative to production and consumption, are based on positive evidence and an objective examination. The US asserts that the ITC's analysis of the volume of subsidized imports is also otherwise consistent with US obligations under Articles 15.1 and 15.2 of the *SCM Agreement*.

7.229 The US argues that the ITC relied on a single consistent set of data from questionnaire responses for its examination of the volume of subsidized subject imports, whereas Korea refers to a varying set of data sources. In light of these alleged problems with the data, as presented by Korea, the US calls attention at the outset to several trends in the data used by the ITC in its final determination:

- The ITC discussed the volume of subsidized subject imports in terms of billions of bits, as a ratio to domestic production, and as a share of apparent US consumption. It found the absolute volume of subsidized subject imports was significant in and of itself;

- Subsidized subject import volume increased over the period of investigation;

- In terms of billions of bits, subsidized subject imports increased between 2000 and 2001 and between 2001 and 2002;

- In terms of their market share, subsidized subject imports increased between 2000 and 2001, then declined between 2001 and 2002 to a level that the ITC observed was still significantly higher than in 2000;

- Compared to US production, the ratio of total subsidized subject imports increased between 2000 and 2001, and then declined between 2001 to 2002 to a level that was still significantly higher than in 2000; and

- Thus, in addition to an increase in subsidized subject imports over the period of investigation in absolute terms, the volume of subsidized subject imports relative to US consumption and relative to US production also increased over the period of investigation.[218]

7.230 The US submits that there are multiple ways under Article 15.2 of the *SCM Agreement* to examine subsidized subject import volume. The US asserts that, based upon the clear text of Article 15.2, 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, 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 US argues that, in the DRAMs investigation, the ITC found that the volume of subsidized subject imports was significant and that the increase in that volume absolutely and relative to production and consumption in the US was significant. The US asserts that the ITC therefore examined volume in each of the ways contemplated by Articles 15.1 and 15.2. The US disagrees with Korea's argument that " the only objective means of assessing the volume impact of subject imports is by examining relative changes in market share."[219] The US asserts that Korea's approach directly contravenes the last sentence of Article 15.2, which specifies that "no one or several" of the Article 15.2 factors "can necessarily give decisive guidance." The US argues that the ITC tied its volume analysis to the relevant conditions of competition in this industry and put the data in context by explaining why subsidized subject import volume was significant in the DRAMs investigation. The ITC stated that its "findings about the volume of subject imports are reinforced by the substantial degree of substitutability between subject imports and domestic shipments," and it noted that "[t]he commodity-like nature of domestic and subject imported DRAM products magnifies the ability of a given volume of imports to impact the domestic market and industry."[220] The US submits that it was reasonable for an investigating authority to consider substitutability in its volume analysis. Whether the product is fungible and price sensitive, or whether the market is highly differentiated, can be relevant in assessing the significance of a given import volume or a given increase in import volume absolutely or relative to consumption or production.[221]

7.231 Regarding Korea's argument that subject imports increased market share because Hynix's US manufacturing facility, HSMA, was closed between July 2001 and January 2002, the US asserts that Korea would have this Panel believe that, in large measure, the increased subject imports were entering the US market to replace other Hynix-brand products while the HSMA facility was being upgraded. The US submits that this argument is flawed for many reasons: first, because even if this

[218] *See, e.g., Final Injury Determination,* at 20-22 (Exhibit GOK-10); *see also, e.g.*, Hearing Transcript at 243-245 (Exhibit US-94).

[219] Korea First Written Submission, para. 89.

[220] *See, e.g., Final Injury Determination (USITC Pub. 3616) at 21 (Exhibit GOK-10).*

[221] *See, e.g., US First Written Submission, paras. 311-314.*

explanation of the circumstances were accurate, it does not detract from the fact that a domestic producer was losing sales to subsidized subject imports; second, because the ITC in its final determination explicitly identified a missing (confidential) factual basis to Hynix's argument; and third, because Korea's argument is premised on the notion that the ITC should have examined the impact of subsidized subject imports on a "brand-name" basis (i.e., excluding from subject import volume those imports of subsidized subject DRAM products that it alleges "merely replaced" DRAM products produced by Hynix's Eugene facility). The US submits that Korea's brand-name approach would not be consistent with the *SCM Agreement*, since it does not focus on the impact of subsidized imports on the condition of the domestic industry (including Hynix's Oregon facility). In contrast to Korea's suggested brand-name analysis, the US argues that the ITC analyzed the volume data consistent with the requirements of SCM Articles 15.1, 15.2, and 15.4. First, the data used by the ITC concerned "the volume of the subsidized imports from Korea." Second, the ITC analyzed the significance of the volume of subsidized subject imports and increases in that volume relative to indicators for "the domestic industry." [222]

7.232 The US notes Korea's argument that "all of the increase in Hynix import market share occurred from 2000 to 2001, *prior to* Hynix receiving the bulk of the alleged subsidies in the 4th quarter of 2001. In fact, the data demonstrate that *after* Hynix received the vast majority of the alleged subsidies, the market share of Hynix's imports actually decreased from 2001 to 2002, and then decreased again from interim 2002 to interim 2003."[223] The US asserts that it is incorrect that "all of the increase" in Hynix's market share occurred between 2000 and 2001, because subsidized subject imports' market share in 2002 was significantly greater than in 2000, as the ITC noted. The US also asserts that some of the subsidies that the DOC found benefited Hynix predated the period for which the DOC made its subsidy finding. The US submits that Korea's argument therefore lacks both legal and factual foundation.

(ii) Evaluation by the Panel

7.233 There are three ways in which an investigating authority may comply with the Article 15.2 requirement to "consider whether there has been a significant increase in subsidized imports."[224] First, the investigating authority may consider whether there has been a significant increase in the volume of subsidized imports in absolute terms. Second, the investigating authority may consider whether there has been a significant increase in the volume of subsidized imports relative to domestic production. Third, the investigating authority may consider whether there has been a significant increase in the volume of subsidized imports relative to domestic consumption. Article 15.2 provides that "[n]o one or several of these factors can necessarily give decisive guidance."

7.234 In the case at hand, the ITC determined that "the absolute volume of subject imports and the increase in that volume over the period of investigation relative to production and consumption in the US is significant."[225] Thus, the ITC undertook two of the three considerations envisaged by Article 15.2 of the *SCM Agreement*. In particular, the ITC found that the increase in the volume of subsidized imports was "significant" (1) relative to domestic production, and (2) relative to domestic consumption. Although the ITC found that "the absolute volume of subject imports ... is significant" ,

[222] *See, e.g., US First Written Submission, paras. 328-332.*

[223] Korea First Written Submission, para. 107.

[224] Article 15.2 does not require a determination that there has been a significant increase in subsidized imports. It simply requires investigating authorities to "consider" whether there has been such an increase. Although this issue is not disputed by the parties in this case, we note that the language of Article 15.2 would seem to suggest that an injury determination may be consistent with Article 15 of the *SCM Agreement* even in the absence of a determination that (as opposed to consideration whether) there has been a significant increase in the volume of subsidized imports.

[225] *Final Injury Determination*, page 20, (Exhibit GOK-10).

it did not determine that the increase in the absolute volume of subsidized imports was significant.[226] Since Article 15.2 provides that "[n]o one or several of these factors can necessarily give decisive guidance", the fact that the ITC did not find that there was a significant increase in the absolute volume of subsidized imports is not *per se* inconsistent with Article 15.2 of the *SCM Agreement*.

7.235 Korea challenges the entirety of the ITC's determination regarding volume effects. However, given the scope of Article 15.2, we shall focus on Korea's claims concerning the ITC's determination that "the increase in th[e] volume [of subsidized imports] over the period of investigation relative to production and consumption in the US is significant."[227] We shall not consider the ITC's determination that the absolute volume (but not any increase therein) of subsidized imports was significant.

7.236 Since Korea argues that "what is important when analyzing the volume of DRAMs shipments is to examine the increased shipments relative to consumption",[228] we shall begin by examining Korea's claim against the ITC's determination that the volume of subsidized imports was "significant" relative to domestic consumption.

The volume of subject imports relative to domestic consumption

7.237 The first point to be made in respect of Korea's arguments is that Article 15.2 of the *SCM Agreement* is concerned with the volume of "the subsidized imports", or "subject imports" in ITC parlance. This is because Part V of the *SCM Agreement* provides relief for injury caused by subsidized imports. It does not provide relief for injury caused by non-subsidized imports. Nor does it provide for relief from injury caused by goods that are not imported at all. In contrast, many of Korea's arguments concerning market share relate to the volume of Hynix shipments by brand, i.e., including both Hynix subject imports and Hynix's US production. Since Korea's brand analysis does not focus on the relative market share of "subsidized imports", as required by Article 15.2 of the *SCM Agreement*, it provides no basis for finding that the ITC's determination that the volume of subject imports was "significant" relative to domestic consumption is inconsistent with Article 15.2.

7.238 That being said, we acknowledge that, in addition to its brand analysis, Korea also argues that the volume of subject imports (rather than subject brand) was not "significant" relative to domestic consumption. Korea submits that Hynix's import market share fell in both 2002 and the beginning of 2003, that non-subject imports consistently dwarfed subject imports, and that the increase in non-subject imports was almost five times larger than the increase of subject imports. The factual basis for Korea's arguments is contained in Figure 9 of Korea's first written submission, set forth at para. 7.224 *supra*. The US disputes the reliability of the Figure 9 data, whereas Korea asserts that it represents a reliable proxy given the US failure to provide the Panel with the confidential information actually relied on by the ITC.

7.239 Before turning to the substantive issue at hand, we note that Korea has not raised any claims under Article 12.4 of the *SCM Agreement* concerning the designation of the relevant information by the ITC as confidential. We also note that, pursuant to that provision, the US is precluded from disclosing confidential information "without specific permission of the party submitting it." We considered it would only be appropriate and necessary[229] to request the relevant confidential

[226] The US argues at para. 303 of its First Written Submission that the ITC found that "the increase in th[e] volume [of subsidized subject imports] absolutely ... was significant." We see no such finding in the ITC's *Final Injury Determination*, however.

[227] *Final Injury Determination*, page 20, (Exhibit GOK-10).

[228] Korea's First Written Submission, para. 93.

[229] We note that Article 13.1 of the *DSU* provides in relevant part that "[a] Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate."

information from the US if Korea had established a basis for its case using the "proxy" data set forth in the abovementioned Figure 9. However, we consider that Korea failed to do so.[230]

7.240 We note that the data submitted by Korea in Figure 9 shows that the market share of US shipments of Hynix subject imports ranged from 6.7 to 9.0 to 8.9 per cent from 2000 to 2001 to 2002, falling to 5.8 per cent in the first quarter of 2003.

7.241 Korea asserts that the nominal increase in subject imports' market share (relative to apparent domestic consumption) should not have been determined by the ITC to be "significant" for three reasons. First, because Hynix import market share fell in both 2002 and the beginning of 2003. Second, because non-subject imports consistently dwarfed subject imports. Third, because the small increase in subject imports could not be considered significant in light of the much larger increase in non-subject imports.

7.242 Regarding the alleged decrease in the market share of subject imports from 2002 to the first quarter of 2003, we note that Korea has not challenged the ITC's finding that the weight accorded to the 2003 data should be reduced because it "is related to the pendency of this investigation."[231] In light of this finding, which undermines the relevance of the 2003 data, we consider that the ITC could properly have reduced the weight it accorded to interim 2003 data. Accordingly, we shall not consider Korea's interim 2003 data in our findings. Instead, we focus our findings on Korea's 2000 – 2002 data, which show an increase in subject imports' market share from 6.7 to 8.9 per cent.

7.243 Concerning Korea's argument that non-subject imports "dwarfed" subject imports, we recall that Article 15.2 requires (in relevant part) a consideration of whether there is a significant increase in the volume of subsidized imports relative to domestic consumption. Since non-subject imports are only one part of total domestic consumption, the volume of subject imports relative to the volume of non-subject imports is not determinative of the relevant issue.[232] The same is true in respect of Korea's argument concerning the rate of increase in subject imports compared to the rate of increase in non-subject imports. Neither the volume of non-subject imports, nor the increase in the volume of non-subject imports, detracts from the fact that there was an increase in the market share of subject imports. Furthermore, we agree with the US that, in emphasizing the increase in subject import market share of 2.2 percentage points, Korea is focusing on the percentage-point increase, ignoring that this was equivalent to an increase in market share of a certain percentage magnitude over the period of investigation. Indeed, the 2000 – 2002 increase of 2.2 percentage points represents an increase in subject import market share of 32.8 per cent.[233] We do not consider that Korea has established that an increase in subject import market share of this magnitude could not properly be considered significant.

7.244 Korea argues instead that the increase in market share of subject imports should be viewed in the context of the closure of HSMA. In other words, Korea considers that the ITC should have taken into account the fact that the increase in market share of subject imports (by comparison to domestic consumption) was largely accounted for by the fact that Hynix's subject imports were replacing sales

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[230] In assessing Korea's arguments concerning Figure 9, we do not take into account the US arguments that such data is unreliable. In the absence of confidential data being made available by the US, we consider that Korea is entitled to build its case as best it may. It is unrealistic to expect Korea to use data of a quality equivalent to that available to the ITC.

[231] *Final Injury Determination*, page 21, (Exhibit GOK-10).

[232] It would appear that Korea's arguments regarding non-subject imports really concern the issue of whether the ITC improperly attributed injury caused by non-subject imports to subject imports. Our analysis of Korea's non-attribution arguments is set forth at paras 7.350-7.371 *infra*.

[233] In addition, Korea has not rebutted the US argument that subsidized subject imports maintained their market share better than domestic producers. In the context of Article 15.2, which concerns the impact of imports on the domestic industry, this is a relevant consideration.

made by Hynix's Eugene facility. We do not accept this argument, however, because Article 15.2 of the *SCM Agreement* is concerned with the volume of subsidized imports.[234] Furthermore, the Korean argument is factually flawed, **[BCI: Omitted from public version [235]]** It was not, therefore, a simple case of swapping customers between Hynix's Korean and US facilities.

7.245 Korea also argues that all of the increase in subject imports' market share occurred from 2000 to 2001, prior to Hynix receiving the bulk of the alleged subsidies in the fourth quarter of 2001. However, Article 15.2 does not require an investigating authority to demonstrate that all of the subject imports covered by the period of injury investigation are subsidized. As noted by the panel in *Argentina – Poultry Anti-Dumping Duties*, "the period of review for injury need only 'include' the entirety of the period of review for dumping."[236] It is not necessary that the period of review for subsidization must mirror the period of review for injury.

7.246 In light of the above, we do not consider it necessary or appropriate to request confidential information from the US. Even accepting the data set forth in Korea's Figure 9, Korea has failed to persuade us that the ITC could not properly have found that the increase in the volume of allegedly subsidized imports was "significant" relative to domestic consumption.

The volume of subject imports relative to domestic production

7.247 In support of its determination that the increase in the volume of subject imports relative to domestic consumption was significant, we note that the ITC found that:

> [c]ompared to US production of uncased DRAMs, the ratio of total subject imports increased from *** per cent in 2000 to *** per cent in 2001, then declined to *** per cent in 2002, a level that was still *** that of 2000, and was *** per cent in interim 2003 compared to *** in interim 2002.[237]

7.248 Korea has not challenged any of the underlying data relied on by the ITC. Nor has Korea denied that there was an increase in subject imports relative to domestic production. In fact, Korea only addressed the ITC's determination regarding the volume of subject imports relative to domestic production at the Panel's second substantive meeting with the parties. At para. 13 of its oral statement at that meeting, Korea stated:

> The US tries to shift focus away from this small change in share of domestic consumption by citing subject imports relative to domestic production. But this alternative approach has only limited usefulness in this particular case, and therefore was not a focus of our earlier submissions. This measure actually says more about changes in the denominator – the domestic production – than the numerator. As US based companies become more global, it is quite natural that more of US consumption comes from offshore sources. All four of the major DRAM companies producing in the US also have major operations overseas. Moreover, domestic

[234] We note Korea's argument that the closure of HSME is relevant to the ITC's determination regarding the causal link between the allegedly subsidized imports and injury suffered by the domestic industry (see para. 236 of Korea's First Written Submission, and para. 194 of Korea's Second Written Submission). In certain circumstances, the closure of HSME (and therefore the reason for the increase in subject imports) may well have had a bearing on causation. However, since the ITC determined that **[BCI: Omitted from public version]**, we consider that the ITC could properly have decided not to revert to this issue in its causation analysis.

[235] Korea has not rebutted the US argument, based on Exhibit GOK-41, that **[BCI: Omitted from public version]**.

[236] Panel Report, *Argentina – Poultry Anti-Dumping duties*, para. 7.287.

[237] *Final Injury Determination*, page 21 (footnotes omitted), (Exhibit GOK-10).

> production in 2001 is understated because the Hynix Oregon facility shut down for much of that year. Finally, under this approach of measuring imports relative to domestic production, the non-subject imports also become much more important. The non-subject imports surged from about 59 per cent of domestic production in 2000 to 102 per cent of domestic production in 2001. Even if by this measure subject import share doubled from a much smaller initial level, the non-subject share in 2001 was still more than six times as large. (footnotes omitted)

7.249 Korea's statement was made in response to assertions made by the US at para. 117 of its Second Written Submission. At no time did Korea initiate any discussion of the ITC's determination regarding the volume of subject imports relative to domestic production. Indeed, Korea itself acknowledged at our second substantive meeting with the parties that this issue "was not a focus of [its] earlier submissions."[238] Considering that the burden is on Korea to establish a prima facie case in support of its claim against the ITC's determination that the volume of subject imports relative to domestic production is significant, we find this surprising. We also note that Korea has entirely failed to substantiate its assertion that US production declined as a result of US production being moved offshore. Nor has Korea argued that any such relocation of production facilities, if true, was not properly addressed by the ITC. Regarding Korea's argument concerning the volume of non-subject imports relative to domestic production, we recall that Article 15.2 only requires (in relevant part) consideration of the volume of subsidized (as opposed to non-subsidized, or non-subject) imports relative to domestic production.[239] For these reasons, we do not consider that Korea's arguments provide sufficient basis for finding that the ITC could not properly have found that the increase in the volume of subject imports relative to domestic production was significant.

2. Did the ITC properly assess the price effects of subject imports?

7.250 Article 15.2 of the *SCM Agreement* provides in relevant part that:

> With regard to the effect of the subsidized imports on prices, 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, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

7.251 The ITC determined that there was significant price undercutting by the subsidized imports, and that the effect of such imports was to depress prices to a significant degree. Korea challenges both determinations by the ITC on the basis of Article 15.1 and 15.2 of the *SCM Agreement*.

(i) Arguments of the parties

7.252 Korea asserts that the central premise of the ITC's determination was that Hynix's DRAMs were sold in the US market at low prices, and that these low prices somehow injured the US domestic industry. Korea argues that economic logic for the market-pricing dynamics of a commodity product demonstrate that the ITC's conclusion is not an objective examination.

7.253 First, Korea states that, at the height of the alleged subsidization of Hynix in 2001, Hynix was losing market share in the US market, not gaining share. According to Korea, this steady loss of

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[238] See para. 13 of Korea's oral statement at the second substantive meeting with the parties.

[239] To the extent that the volume of non-subject imports may be relevant to the issue of causation, this is addressed at paras 7.350-7.371 *infra*.

market share simply cannot be reconciled with the ITC's conclusion that Hynix's prices significantly undersold US market prices, particularly at the end of the period being investigated. Korea argues that, given that DRAMs are a commodity product, if that were true, Hynix would have increased its market share significantly, which it did not.

7.254 Second, Korea argues that the ITC's conclusion is also contrary to basic economic theory. Korea asserts that because Hynix was neither the highest cost producer nor the lowest cost producer, simple economics dictates that Hynix could not have determined the market price. Korea argues that this is confirmed by the fact that, when responding to the ITC questionnaire, not a single purchaser/customer identified Hynix as the price leader in the DRAM market.

7.255 Regarding the ITC's price-comparison analysis, Korea acknowledges that Article 15.2 does not impose any specific methodology for analyzing prices. However, Korea argues that a lowest price analysis is the most appropriate type methodology for commodity products such as DRAMs. Korea asserts that a lowest price analysis shows that, overall, Hynix subject imports were the lowest price source only a small per cent of the time and that, the overwhelming majority of time, other suppliers were offering lower prices than Hynix. Korea asserts that the ITC disregarded a lowest price analysis, and attached greater importance to a weighted-average subject import price to a weighted-average US producer price comparison instead.

7.256 According to Korea, the ITC tries to dismiss the role of non-subject import pricing by saying that the frequency of underselling by such imports was smaller and growing more slowly than underselling by subject imports. Korea asserts that this argument glosses over two fundamental flaws. First, these patterns of underselling reflect average non-subject import prices, not individual non-subject suppliers. According to Korea, that the average non-subject price may be higher than domestic prices does not mean very much if there is an individual non-subject supplier that is underselling and offering the lowest price. Second, these patterns of underselling need to be considered together with trends in market share. Korea argues that if non-subject imports were large and significantly gaining market share as acknowledged by the ITC, the only objective conclusion is that the non-subject imports are having a significantly greater impact on the market. Korea asks the Panel to request the ITC's confidential price underselling analysis from the US.

7.257 Korea states that the ITC's determination makes a half-hearted attempt to proclaim that even the lowest-price analysis (what the ITC calls a "disaggregated analysis") supports its conclusion that subject imports had adverse price effects. The ITC states that the lowest-price analysis demonstrated that Hynix's price was the lowest-price some of the time, "or more often than" any other source. According to Korea, the ITC's statement ignores the fact that the data distinguished import and domestic supply sources for the other suppliers whereas, on a combined (import plus domestic supply) brand basis, other suppliers had the lowest price more frequently. Korea also argues that the ITC's statement analyses each of the other suppliers individually, ignoring their combined effect.

7.258 Korea submits that the ITC's price depression analysis is flawed because it defies common sense to say that, for this commodity product, the absence of subject imports would allow domestic prices to be "substantially higher," even though the volume of non-subject imports in the market was six to seven times the volume of subject Hynix imports.

7.259 The US submits that the ITC's analysis of the price effects of subsidized subject imports is based on an objective examination and positive evidence and is otherwise consistent with the requirements of Articles 15.1 and 15.2 of the *SCM Agreement*. The US asserts that, however measured, there was significant underselling by subsidized subject imports from Korea.

7.260 The US argues that its weighted-average analysis was based on representative data that have not been challenged by Korea. The US argues that, for the majority of possible comparisons,

subsidized subject imports undersold domestic like product at high margins (often over 20 per cent), and at increasing frequencies (from 51 per cent of possible comparisons in 2000 to 56 per cent in 2001 and 70 per cent in 2002). The US asserts that the conclusions drawn from this analysis are incontrovertible. The US argues that the ITC explained that in a commodity-type market that adjusts quickly (even biweekly) to price changes, significant price disparities between suppliers would not usually be expected. According to the US, the ITC therefore found the patterns of frequent, sustained high-margin underselling by subsidized subject imports was especially significant in this industry, and could be expected to have particularly deleterious effects on domestic prices.

7.261 The US asserts that the ITC's methodology for its underselling analysis was reasonable. The US notes Korea's statement that the ITC's weighted-average pricing analysis was "wrong for this industry."[240] According to the US, the fact that Korea would have preferred the ITC to apply a different methodology is simply irrelevant, since it is for the investigating authorities in the first instance to select methodologies to analyze the price effects of subject imports. The US submits that there is no requirement in the *SCM Agreement* to analyze price effects on a brand-name basis, nor does Korea identify one.

7.262 The US submits that it was entirely reasonable for the ITC to analyze the pricing data using a weighted-average pricing analysis that segregated pricing on a country-specific basis, since the use of the disaggregated analysis by brand name urged by Hynix would not reflect the source country of the DRAM products and would be utterly inconsistent with the requirement under the *SCM Agreement* to examine the effect "of the subsidized imports" on the "like product," the product produced by the domestic industry. According to the US, Korea's disregard for distinctions between subsidized imports and the domestic like product eliminates the single most basic and fundamental distinction underlying the injury framework of the *SCM Agreement*.

7.263 The US submits that Korea ignores that the ITC also examined the pricing data on a disaggregated basis (broken down both by brand-name and by source). The US asserts that the ITC found that even a disaggregated analysis showed that subsidized subject imports were the lowest-priced product "more often than DRAM products from any other source."[241]

7.264 The US also argues that the ITC properly found that subsidized subject imports depressed prices to a significant degree. The US asserts that product-specific data showed price declines of 70 to 90 per cent from late 2000 through 2001, a modest rebound in early 2002, then a further decline over the course of 2002. The US argues that the ITC noted that the price decline in 2001 was the most severe in history, and pricing continued to decline in 2002. The US asserts that the ITC pointed to significant quantities of subsidized subject imports that competed in the same product types at increasing frequencies of underselling, noted that the underselling corresponded with the substantial price decline over this period, and found that domestic prices would have been substantially higher without such significant quantities of low-priced products. The US argues that confirmed lost sales/lost revenue allegations reinforce the ITC's findings concerning subject imports' price effects.

(ii) Evaluation by the Panel

7.265 Article 15.1 provides that an injury determination must involve an objective examination of "the effect of the subsidized imports on prices in the domestic market for like products." Article 15.2 provides that, "[w]ith regard to the effect of the subsidized imports on prices, 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, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases,

[240] Korea First Written Submission, para. 149.
[241] *See, e.g.*, *Final Injury Determination*, at 24 (Exhibit GOK-10).

which otherwise would have occurred, to a significant degree." Under Article 15.2, therefore, competent authorities may choose whether to examine the price effects of subsidized imports on the basis of price underselling, price depression, or price suppression.

7.266 In its determination, the ITC considered both price underselling and price depression. The ITC determined that "there is significant price underselling by subject imports, and that the effect of such subject imports has depressed prices to a significant degree."[242]

Price underselling

7.267 In respect of price underselling, the ITC employed two methodologies. First, it compared a weighted average import price to a weighted average US producer price. Second, the ITC performed a disaggregated lowest-price analysis.

7.268 Korea does not challenge the factual data used by the ITC in its price underselling analyses, nor the ITC conduct of those analyses. Nor does Korea claim that Article 15.2 imposes any specific methodology for analysing prices. Nor, indeed, does Korea claim that the ITC failed to examine the price effects of subsidized imports. Instead, Korea challenges the ITC's weighted average methodology because it ignored the price effects of non-subject imports, and the ITC's lowest-price analysis because it was not done on a combined, aggregated brand basis (i.e., all non-subject import plus domestic sources combined together).

7.269 Article 15.2 of the *SCM Agreement* requires the competent authority to analyse "the effect of the subsidized imports on [domestic] prices." In light of the plain meaning of this text, the competent authority is only required to examine the price effects of subsidized imports. It is not required to also examine the price effects of non-subsidized imports, or pricing on a combined brand basis.[243] Such examinations would extend beyond the price effects of subsidized imports, and therefore are not required by Article 15.2.[244] For this reason, Korea's arguments regarding the price effects of non-subsidized imports, or pricing on a combined brand basis, provide no basis for finding that the ITC could not properly have found that "there is significant price underselling by subject imports."[245]

Price depression

7.270 The ITC found:

> prices for nearly every pricing product and channel of distribution declined substantially over the period of investigation. Prices for domestic products and subject imports followed the same general trends and were generally similar for sales to PC OEMs across all products. The product-specific data show price declines of 70 to 90 per cent from late 2000 through 2001, a modest rebound in early 2002, then a further decline over the course of 2002. The parties agreed that the price decline in 2001 was the most severe in DRAMs history, and pricing continued to decline in

[242] *Final Injury Determination*, page 25, (Exhibit GOK-10).

[243] We note that the ITC did in fact analyse the price effects of non-subject imports on a weighted average basis, and that it also performed a disaggregated analysis (i.e., broken down both by brand-name and by source). We further note that Korea conceded at our second substantive meeting with the parties that the ITC performed a "better than usual analysis."

[244] Of course, the price effects of non-subject imports could impact on causation / non-attribution. This issue is addressed at paras 7.350-7.371 *infra*.

[245] *Final Injury Determination*, page 25, (Exhibit GOK-10).

> 2002. ... The increasing frequency of underselling by subject imports from 2000 to 2002 corresponds with the substantial decline in US prices over these same years.[246]

7.271 Korea's arguments concerning the ITC's determination on price depression are mainly concerned with the role of non-subject imports. In other words, Korea argues that the reason prices were depressed was not because of subject imports, but because of a much larger volume of non-subject imports. However, Korea does not deny that there may be multiple causes of injury suffered by a domestic industry. Thus, the fact that non-subject imports may have had negative price effects does not preclude a finding that subject imports also had negative effects on prices. Even if Korea's arguments regarding the role of non-subject imports were correct, therefore, Korea's arguments do not necessarily mean that the ITC could not properly have found, nevertheless, that "the effect of [] subject imports [] depressed prices to a significant degree."[247]

7.272 Korea does focus on the price effects of subject imports when challenging the ITC's analysis of price leadership. In this regard, the ITC determined:

> Most purchasers did not identify a price leader in the US market. This is not surprising in a commodity industry characterized by frequent (even biweekly) price changes such as the DRAM product market. Nevertheless, *** purchasers of DRAM products contacted by staff regarding lost sales and lost revenue allegations identified Hynix as a source of low-priced DRAM products, and confirmed that the domestic industry lost sales and/or revenues due to competition from Hynix.[248]

7.273 The US argues that confirmed lost sales/lost revenue allegations reinforced the ITC's findings concerning subject imports' price effects. In its arguments regarding price leadership, Korea emphasises the fact that Hynix was not identified by purchasers as a price leader. This confirms the ITC's finding to that effect.[249] However, Korea overlooks the ITC's finding that purchasers "identified Hynix as a source of low-priced DRAM products, and confirmed that the domestic industry lost sales and/or revenues due to competition from Hynix."[250] Nor does Korea rebut the US argument that confirmed lost sales/lost revenue allegations reinforced the ITC's findings concerning subject imports' price effects.

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[246] *Final Injury Determination*, page 24, (footnotes omitted), (Exhibit GOK-10).

[247] *Final Injury Determination*, page 25, (Exhibit GOK-10). In this regard, we note in particular the ITC's determination that "[t]he increasing frequency of underselling by subject imports from 2000 to 2002 corresponds with the substantial decline in US prices over these same years." (*Final Injury Determination*, page 25, (Exhibit GOK-10)). Other than its challenge against the ITC's price underselling analysis, which we have already rejected, Korea does not dispute this important finding by the ITC.

[248] *Final Injury Determination*, page 25, (footnotes omitted), (Exhibit GOK-10).

[249] In this regard, we note the US argument that "Korea fails to identify any requirement under Article 15 to find price leadership, because there is no such requirement" (US First Written Submission, para. 391). Since Korea failed to rebut this argument, we have no reason to disagree with the US that Article 15 does not require a finding of subject import price leadership.

[250] In response to Question 29 from the Panel after the first substantive meeting with the parties, Korea states that the ITC's questionnaire "asks only for an indication of which firm[s] is having a 'significant impact' on price. Thus, when customers responded to this question, and failed to identify Hynix as the price leader, the customers were basically indicating that the effects of Hynix imports were not to depress prices to a significant degree." This does not undermine the ITC's determination, however, since it was not based on Hynix being a price leader. To the contrary, the ITC explicitly acknowledged that Hynix was not identified as a price leader. However, the ITC's determination that subject imports caused significant price depression was based on other considerations that have not been addressed by Korea in respect of its claim against the ITC's finding on price depression.

7.274 In short, Korea's arguments provide no basis on which to find that the ITC could not properly have determined that "the effect of []subject imports []depressed prices to a significant degree."[251] As a result, we reject Korea's arguments that the ITC failed to properly assess the price effects of subject imports.

3. Did the ITC properly consider all factors relevant to the overall condition of the domestic industry?

7.275 Korea submits that the ITC violated Articles 15.1 and 15.4 of the *SCM Agreement* because it failed to address and assess all relevant economic factors having a bearing on the state of the domestic industry.

7.276 Article 15.4 of the *SCM Agreement* provides:

> The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

(i) Arguments of the parties

7.277 Korea asserts that the ITC did not adequately consider the "boom-bust" business cycle of the DRAMs industry when analysing the condition of the domestic industry and the relative impact of subject imports. Korea asserts that the business cycle is the single most important characteristic in the DRAM market.

7.278 Korea acknowledges that the ITC recognized the existence of the business cycle in the DRAM industry, but argues that the ITC completely ignored the implication of this business cycle when analyzing the causes of the deterioration of the domestic industry's financial condition over the period examined. Korea asserts that this omission is demonstrated by the fact that, except for a quotation of the statutory language, there is not a single reference to term "business cycle" in the section of the ITC *Determination* dealing with the "Impact of Subject Imports." Korea states that this omission is particularly egregious because the evidence before the ITC made clear that the DRAM industry went from the top of the boom to the trough of the bust during the very period being investigated.

7.279 Korea also submits that the ITC failed to take into account the domestic industry's own definition of success when analyzing the condition of the domestic industry. Korea asserts that the ITC's determination of material injury was based primarily on an examination of the following factors: capacity utilization, production, commercial shipments and operating profit. Korea argues that these factors ignore the criteria that US DRAM producers themselves use to measure success in this industry in light of the severe boom/bust cycles, namely (1) ability to continue capital spending; (2) ability to continue R&D efforts; (3) strong market share to spread out costs; (4) strong cash flow to fund investments; and (5) access to capital markets to supplement cash flow. In this regard, Korea asserts that the ITC record contains Micron's 2001 year in review (issued in 2002) that provides Micron's own definition of "financial strength":

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[251] *Final Injury Determination*, page 25, (Exhibit GOK-10).

> A strong cash position, coupled with our ability to access capital markets, giving Micron operational flexibility. With minimal debt, and a reputation as a leading edge manufacturer, Micron has the resources to continue investing in technology and to meet our customers' growing demand for Micron products.[252]

7.280 Korea asserts that the record also contains a later statement by Micron CEO Steve Appleton in which many of these key themes for defining success were reiterated:

> We have a good cash balance. We are able to keep investing in the technology. We have enough market share to spread out our cost, and we are able to focus on technology innovation. I think we're in as good a shape as anybody.[253]

7.281 The US argues that Korea does not dispute the positive evidence supporting the ITC's conclusions, and that it makes only two limited arguments regarding the ITC's impact analysis. First, the US understands Korea to assert that the ITC did not consider the business cycle in its analysis of the impact of the subsidized subject imports on the domestic industry. Second, the US understands Korea to argue that the ITC should have weighed the factors differently, and that in this industry there are only five key indicia.

7.282 The US notes Korea's argument that the final determination did not meet the obligation under *SCM Agreement* Article 15.4 to examine the business cycle distinctive to the DRAMs industry as an "other" "relevant factor."[254] The US asserts that the panel in *Thailand – H Beams*, in a finding subsequently explicitly endorsed by the Appellate Body[255], contrasted the requirement to examine the enumerated factors with "other" relevant economic factors," in the context of the *AD Agreement* provision that is substantively identical to Article 15.4 of the *SCM Agreement*, stating:

> We thus read the Article 3.4 phrase "shall include an evaluation of all relevant factors and indices having a bearing on the state of the industry, including ..." as introducing a mandatory list of relevant factors which must be evaluated in every case. We are of the view that the change that occurred in the wording of the relevant provision during the Uruguay Round (from "such as" to "including") was made for a reason and that it supports an interpretation of the current text of Article 3.4 as setting forth a list that is not merely indicative or illustrative, but, rather, mandatory. Furthermore, we recall that the second sentence of Article 3.4 states: "This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance." Thus, in a given case, certain factors may be more relevant than others, and the weight to be attributed to any given factor may vary from case to case. Moreover, there may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required.[256]

7.283 The US notes that the industry's "business cycle" is not an enumerated factor under Article 15.4. The US asserts that, whether or not the Panel finds that the business cycle distinctive to

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[252] *See* Prehr. Br., at 24 *citing Micron 2001 Year in Review*, at 4, provided as Exhibit 8 in the same submission (Exhibits GOK-18, 18-(f)).

[253] *See* Prehr. Br., at *Id. citing Electronic Engineering Times*, 8 July 2002, at 1, provided as Exhibit 2 in the same submission (Article No. 25 (Mike Clendenin, *Don't Count Out Korean DRAM Deal, Says Micron CEO - Hynix Still Looks Good*)) (Exhibit GOK-18-(a)).

[254] Korea First Written Submission, paras. 32-48, 178-189.

[255] Appellate Body Report, *Thailand –H-Beams*, para. 125.

[256] Panel Report, *Thailand – H Beams*, para. 7.225.

the DRAMs industry is an "other" "economic factor" for purposes of Article 15.4, the ITC's examination of this factor in this investigation is also consistent with US obligations under Article 15.4. The US asserts that the ITC did analyze the business cycle, ascertaining that because growth in demand for DRAM products has been continuous, but supply increases are sporadic, supply and demand in this industry tend to be chronically out of equilibrium, giving the market its characteristic "boom" and "bust" business cycle. According to the US, the ITC also determined that largely because of the perpetual improvements in production efficiencies experienced by this industry, prices are usually declining. The US asserts that, based on its evaluation of the record evidence in this investigation, the ITC determined that "[w]hile slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor."[257] The US asserts that, although much of the ITC's evaluation of this issue appears in the "price effects" section of the final determination, the ITC expressly cross-referenced this analysis in its evaluation of the "impact" of the subsidized subject imports on the domestic industry.[258]

7.284 The US asserts that Korea's argument regarding the five main criteria suffers from two major defects. First, the US asserts that Article 15.4 contains a non-exhaustive list of enumerated factors for evaluation, specifies that no one or several of these factors is determinative, and, as evident in the reports of other panels and the Appellate Body, it is the investigating authorities that are to weigh the factors in any given investigation, not interested parties or other Members.[259] The US also asserts that, while Korea focuses on a select set of criteria, the ITC's final injury determination reflects evaluation of positive evidence concerning a variety of factors showing changes in the industry's condition, as illustrated above. According to the US, the ITC evaluated these factors based on the time period from 2000 to 2002 and interim 2003, the same time period it used for its analysis of the volume and price effects of subject imports, while Korea uses different time periods depending on the point that it seeks to make.

7.285 Second, the US asserts that even the select criteria that Korea asserts are important in this industry[260] showed declines during at least part, if not the entire, period of investigation. The US argues that even these criteria therefore do not support Korea's assertion that the domestic industry was in a strong condition. Furthermore, the US asserts that while Korea cites bits of data about individual producers in its submission, the ITC examined the domestic industry, as well as the record, as a whole, consistent with Article 15.4. The US relies on the panel reports in *Mexico – Corn Syrup*[261] and *EC – Tube or Pipe Fittings*[262] to support its argument regarding the need to examine the state of the "domestic industry" as a whole.

7.286 The US also asserts that, in any event, Korea's specific arguments about individual domestic producers are also flawed. For example, the US argues that some of the data that Korea cites in its submission pertain to the global DRAMs market or the global operations of Micron or Infineon, not just their US operations or their DRAMs operations, whereas the ITC's impact analysis focused on the domestic industry's performance in the US market and on its operations concerning DRAM products, as opposed to other products. The US also argues that, with respect to the excerpts from public statements by Micron and Infineon to the financial community that were submitted by Hynix during the ITC's investigation, when read in context, these statements support, rather than detract

[257] *Final Injury Determination*, pages 24-25, (Exhibit GOK-10).
[258] The US refers in this regard to pages 24 -25 and 27 of the *ITC Final Injury Determination*.
[259] The US refers, for example, to the Appellate Body Report in *EC – Tube or Pipe Fittings* paras. 160-166.
[260] *See* Korea First Written Submission, paras. 190-218.
[261] Panel Report, *Mexico –Corn Syrup*.
[262] Panel Report, *EC - Tube or Pipe Fittings*.

from the ITC's findings in this investigation. The US asserts that neither statement establishes, or was intended to suggest, that the identified factors show that Micron or the domestic industry did not suffer injury. According to the US, they rather show that, because of good management practices, Micron expected to survive, despite the significant injury it had suffered.

(ii) Evaluation by the Panel

7.287 Korea's Article 15.4 claim raises two issues. First, did the ITC properly consider the DRAM industry business cycle when analysing the condition of the domestic industry? Second, should a proper consideration of the five criteria that Korea alleges are key to measuring the success of the domestic DRAM industry necessarily have resulted in a finding of no injury?

Did the ITC properly consider the DRAM industry business cycle when analysing the condition of the domestic industry?

7.288 In addressing Korea's arguments[263], we note that the US does not contest that the "boom-bust" business cycle was a "relevant economic factor ... having a bearing on the state of the industry" in the meaning of Article 15.4. We will therefore proceed on that basis.

7.289 The ITC assessed the business cycle in its discussion of the price effects of subsidized imports on the domestic industry.[264] Having explained the nature of the business cycle earlier in the *Final Injury Determination*, the ITC stated:

> While slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicates that supplier competition was an important factor.[265]

7.290 Although Korea acknowledges that the ITC recognized the existence of the business cycle in the DRAM industry, Korea claims that the ITC ignored the implication of the business cycle when analyzing the causes of the deterioration of the domestic industry's financial condition. Korea claims that this is evidenced by the fact that there is no reference to the business cycle in that part of the *Final Injury Determination* entitled "Impact of Subject Imports." Korea does not challenge the ITC's treatment of the business cycle as a potential cause of injury to the domestic industry. Korea argues that the ITC's consideration of the business cycle as a potential cause of injury to the domestic injury does not satisfy the requirement of Article 15.4, since the business cycle was also a critical part of understanding the condition of the domestic industry. Korea argues that trends that might otherwise seem negative in the abstract could in fact be signs of strength when viewed in the context of the business cycle.

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[263] In its submissions, Korea referred to alleged inconsistencies between the ITC's injury determination in this investigation and its approach in another investigation. Since we are concerned with the conformity of the ITC's DRAM injury determination with the *SCM Agreement*, the ITC's practice in other investigations is not relevant to our analysis.

[264] We do not consider that the fact that this issue was addressed in that part of the ITC determination dealing with price effects, as opposed to the impact of subject imports, in and of itself gives rise to a violation of Article 15.4. In this regard, we agree fully with the statement of the panel in Panel Report, *US - Softwood Lumber VI*, para. 7.136 that:

> [it did] not mean to suggest that all aspects of the investigating authorities' determination must be entirely contained in the specific parts of the report dealing with particular issues. Certainly, in dispute settlement, a Member may argue the consistency of an anti-dumping or countervailing duty determination based on the entirety of that determination.

[265] *ITC Final Injury Determination*, page 25, (Exhibit GOK-10).

7.291 It is by no means clear to us that the ITC failed to review the state of the domestic industry in the context of the business cycle. In particular, the above determination indicates that the ITC acknowledged that poor performance by the domestic DRAM industry was not necessarily indicative of injury, but could simply be attributed to a downturn in the DRAM business cycle. However, it is clear from the determination that the ITC concluded that this was not the case in the present case, since the principal indicator of injury, i.e., price declines, could not be attributed to the business cycle (because "the price decline in 2001 was the most severe in the DRAMs history", and was therefore greater than had been caused by the business cycle in the past).[266]

7.292 Korea argues that "[u]nder [the ITC] an approach any industry in the 'bust' phase will always be deemed 'injured,' which is not an objective examination"[267]. Korea's argument would seem to be premised on its view that the ITC should have concluded that negative trends resulted from the operation of the business cycle. In other words, we understand Korea to argue that the ITC was only able to find injury because it failed to view the state of the domestic industry in the context of the business cycle. However, to the extent that the ITC demonstrated that negative trends – such as price declines - were caused by factors unrelated to the business cycle, viewing those trends in the context of the business cycle would not have precluded a finding of injury. Thus, the fact that the ITC found injury does not necessarily mean that it failed to view the state of the industry in the context of the business cycle. Korea's argument ignores the possibility that, even during the "bust" phase of the business cycle, a domestic industry could properly be found to be suffering injury caused by subsidized imports.

7.293 We do not attach any relevance to the fact that the ITC's consideration of the business cycle is set forth in a part of the report of the *Final Injury Determination* other than the "Impact of Subject Imports" section.[268] Our analysis is based on the ITC's *Final Injury Determination* as a whole, rather than particular sections thereof.

7.294 In light of the above, we reject Korea's argument that the ITC failed to properly consider the DRAM industry business cycle when analysing the condition of the domestic industry.

Should a proper consideration of the five criteria that Korea alleges are key to measuring the success of the domestic DRAM industry necessarily have resulted in a finding of no injury?

7.295 Korea claims that the ITC failed to properly consider the following five criteria: (1) ability to continue capital spending; (2) ability to continue R&D efforts; (3) strong market share to spread out costs; (4) strong cash flow to fund investments; and (5) access to capital markets to supplement cash flow. Korea asserts that the ITC ignored these criteria, even though they are used by US DRAM producers themselves to measure success. Korea submits that these criteria actually show a well-positioned domestic industry.

7.296 The US does not deny that the five criteria identified by Korea are "relevant economic factors" having a bearing on the state of the domestic industry. The US argues that the ITC assessed these factors appropriately. We shall examine the ITC's assessment of each of these factors in light of Korea's arguments.

Capital spending

[266] We note that the ITC also compared the state of the domestic industry in the 2001/2002 downturn to the state of the domestic industry in the 1996-1998 downturn (see note 180 of the *Final Injury Determination*), (Exhibit GOK-10).

[267] *See* Korea's first oral Statement, para. 22.

[268] See note 264 *supra*.

7.297 The ITC stated that "[b]oth fabbing operations and assembly operations warrant continuing ... capital spending to keep up with the latest product and process developments."[269] The ITC also found that, although the domestic industry "continued to make substantial capital expenditures," such capital expenditures were "at increasingly lower levels, with reported capital expenditures decreasing from $1.8 billion in 2000 to $1.6 billion in 2001 and $*** in 2002; capital expenditures in interim 2003 were $*** compared to $*** in interim 2002."[270] This finding demonstrates both that the ITC assessed capital expenditures by the domestic industry, and that such capital expenditures were decreasing. Indeed, Korea has not disputed that the domestic industry's capital expenditures were "at increasingly lower levels." Although Korea submitted record evidence in support of an argument that Micron and Infineon continued capital spending during the downturn, this is not inconsistent with the ITC's finding that the domestic industry as a whole reduced capital expenditures over the period of investigation.

Research and development

7.298 The ITC examined the research and development expenditures of specific companies and by production process, and for the domestic industry as a whole. The ITC found that "R&D expenses decreased from 2000 to 2001 and then increased in each subsequent comparative period."[271] During part of the period of investigation, therefore, there was a downward trend in R&D expenditure. Again, Korea refers to evidence regarding an increase in Micron's R&D spending, but does not explain how this consideration alone means that the ITC could not properly have found (on the basis of a downward trend in R&D expenditure by the domestic industry as a whole during part of the period of investigation) that the domestic industry as a whole was suffering material injury.

Market share

7.299 The ITC found that the domestic industry's market share "declined from 43.4 per cent in 2000 to 34.3 per cent in 2001 and 30.7 per cent in 2002, while its market share in interim 2003 was 29.8 per cent compared to 30.4 per cent in interim 2002."[272] Korea has not disputed the accuracy of the market share data relied on by the ITC. Instead, Korea has submitted evidence concerning Micron and Infineon's world market shares. However, since such global evidence is not an indicator of the performance of the domestic industry, we see no reason why the ITC should have taken it into account.

Cash flow

7.300 The US argues that, according to record evidence, the domestic industry's cash flow (net operating profit plus depreciation) also declined over the period of investigation. Korea has not rebutted this argument. Instead, Korea has submitted evidence regarding Micron's cash flow. This, however, does not indicate the state of the domestic industry as a whole.

Access to capital markets

7.301 The US asserts that the domestic industry's cash flow problems were exacerbated when domestic producers' credit ratings were lowered. The US asserts that, for example, the ITC emphasized that Micron's credit rating was lowered in December 2002 by Standard and Poor's, and in January 2003 by Moody's. Since the ITC only considered that the credit rating of one domestic

[269] *See Final Injury Determination* at 9 (Exhibit GOK-10).
[270] *See Final Injury Determination* at 27 (Exhibit GOK-10).
[271] *See, e.g., Final Injury Determination* at 9, 16 & n.40, Tables VI-4, C-1 (Exhibit GOK-10); Exhibit GOK-44(a) at Question III-8.
[272] *Final Injury Determination*, page 26 (Exhibit GOK-10).

producer had been downgraded, whereas Korea has pointed to record evidence to the effect that two domestic producers apparently had ready access to capital markets at least in 2000 and 2001, there may be some basis for reasonable disagreement regarding the ITC's analysis of the domestic industry's access to capital markets. However, we do not consider that the fact that two domestic producers may have had continued access to capital markets is sufficient to overturn the ITC's determination, based on a multitude of factors, that the domestic industry was suffering material injury. This is especially so as the last sentence of Article 15.4 makes it clear that no single economic factor having a bearing on the state of the domestic industry necessarily gives decisive guidance, and Korea has not established why domestic producers' access to capital should be considered decisive. Accordingly, we are not persuaded that an objective and impartial investigating authority could not properly have found material injury in these circumstances.

7.302 Before concluding on the ITC's assessment of the five criteria identified by Korea, we note Korea's argument that the ITC's finding of material injury was at odds with the domestic industry's own perception of its performance. Korea refers to two statements in this regard. First, Korea refers to a statement in Micron's 2001 year in review (issued in 2002) that:

> A strong cash position, coupled with our ability to access capital markets, giving Micron operational flexibility. With minimal debt, and a reputation as a leading edge manufacturer, Micron has the resources to continue investing in technology and to meet our customers' growing demand for Micron products.[273]

7.303 Second, Korea refers to a later statement by Micron CEO Steve Appleton:

> We have a good cash balance. We are able to keep investing in the technology. We have enough market share to spread out our cost, and we are able to focus on technology innovation. I think we're in as good a shape as anybody.[274]

7.304 We note, however, that the ITC record also contained statements by Micron officials to the effect that Micron was encountering difficulties, and that these difficulties were not exclusively linked to the particular stage of the DRAM business cycle. For example, Wilbur Stover, VP, Finance and CFO, Micron Technology stated: "[a]s you appreciate, the ongoing price pressure stems from the continued supply of subsidized Korean parts in the market."[275] In addition, Michael Sadler, VP, Worldwide Sales, Micron Technology Inc. commented, "[a] general over supply of DRAM attributed primarily to the Korean government subsidization programme continues to supply the industry. The resulting economics present obvious challenges. We are facing up to those challenges by advancing the technology, browsing the entire product offering, and doing so with the focus on cost reduction."[276] We consider that an objective and impartial investigating authority could properly have concluded from these comments that Micron was experiencing financial difficulties, and that those difficulties did not result exclusively from factors other than the subject imports.

7.305 In light of the above, we are not prepared to accept Korea's argument that evidence it has produced regarding the five alleged "key" criteria reflects a well positioned domestic industry. Much of the evidence relied on by Korea relates to only a single domestic producer.[277] In addition, Korea

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[273] *See* Prehr. Br., at 24 *citing Micron 2001 Year in Review*, at 4 provided as Exhibit 8 in the same submission (Exhibits GOK-18, 18-(f)).

[274] *See* Prehr. Br., at *Id. citing Electronic Engineering Times*, 8 July 2002, at 1, provided as Exhibit 2 in the same submission (Article No. 25 (Mike Clendenin, *Don't Count Out Korean DRAM Deal, Says Micron CEO - Hynix Still Looks Good*)) (Exhibit GOK-18-(a)).

[275] Micron's Posthearing Brief at Exhibits 5, 6 (Exhibit US-96).

[276] *Ibid*.

[277] In this regard, we agree with the statement by the panel in *EC – Tube or Pipe Fittings* that "an injury assessment under Article 3.4 deals with the state of the domestic industry as a whole. The Anti-Dumping

does not challenge the accuracy of the domestic industry data relied on by the ITC. Nor are we prepared to accept Korea's argument that these five criteria were ignored by the ITC, since the ITC's *Final Injury Determination* contains data and discussion concerning each of them. Furthermore, although evidence adduced by Korea might suggest that the ITC's treatment of one factor identified by Korea, i.e., access to capital, was not properly assessed by the ITC, we do not consider that Korea's arguments regarding access to capital would have precluded an impartial and objective investigating authority from properly finding that the domestic industry suffered injury.

7.306 In light of the above, we do not consider that a proper consideration of the five criteria that Korea alleges are key to measuring the success of the domestic DRAM industry should necessarily have resulted in a finding of no injury.

4. Did the ITC properly demonstrate the requisite causal link between subject imports and injury?

7.307 Korea submits that the ITC's final injury determination did not comply with the causal relationship requirement of Article 15.5 of the *SCM Agreement*. Article 15.5 provides:

> It must be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry. (footnote omitted)

(i) Arguments of the parties

7.308 Korea asserts that the first and second sentences of Article 15.5 serve to connect the examinations required under Article 15.2 with respect to import trends, including volume and price effects, and under Article 15.4, with respect to indicia of domestic industry performance. According to Korea, a correlation should be established between import trends on the one hand, and industry performance on the other, if a "causal relationship" is to be proved. Korea argues that this inter-linkage has been explored more closely in the context of Articles 3.2, 3.4 and 3.5 of the *AD Agreement* containing virtually identical language. Korea argues that the panel in *Thailand – H-Beams* found that inconsistencies between the analyses required under Article 3.2 concerning import trends, and Article 3.4 concerning indicia of industry performance, render an analysis under Article 3.5 with respect to establishing a causal relationship WTO inconsistent.

7.309 Korea asserts that the Appellate Body has also offered useful guidance on what "causal relationship" really means. Korea argues that in *US – Line Pipe*, a safeguards case, the Appellate Body elaborated on the nearly identical term "causal link" found in the causation language of Article 4.2(b) of the Agreement on Safeguards:

Agreement provides that "injury" means "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry" (para. 7.326).

> … the causal link required by Article 4.2(b), first sentence, of the *Agreement on Safeguards* is "a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury." More specifically, we said there that "{t}he word 'causal' means 'relating to a cause or causes', while the word 'cause', in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, 'brought about', 'produced' or 'induced' the existence of the second element." We also explained that the word "link" indicates "that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal 'connection' or 'nexus' between these two elements."[278]

7.310 Korea asserts that in *US – Steel Safeguards*, the panel set forth a useful framework for testing the existence of a causal link. Korea argues that, first, the panel examined trends in import volumes, charting those trends against various indicia of industry performance, including those specifically referenced under Article 4.2(a) of the *Agreement on Safeguards* (similar to those listed in Article 15.4 of the *SCM Agreement*), to discern any correlation. Second, where the correlation was not clear, the panel looked to other evidence of a causal relationship, including any relationship based on import pricing and other factors of competition. Korea believes this approach, well grounded in Appellate Body jurisprudence on "causal link" for trade remedies, provides a useful framework for this case.

7.311 Korea submits that the ITC's *Final Injury Determination* did not establish any correlation between import volume and decline in domestic industry performance. Korea argues that although the presence of a correlation may not be dispositive, as there may be other more significant factors that are causing material injury, the *absence* of a proper correlation between the subsidized imports and material injury strongly suggests that the subsidized imports are not the cause of the material injury.[279] According to Korea, the evidence before the ITC demonstrated that there was no correlation between the trends in subject imports and either the domestic industry's market share or the domestic industry's financial performance. Korea argues that, to establish the requisite correlation, the data would need to demonstrate that the market shares of subject imports and domestic producers moved in opposite directions; that is, subject imports were gaining market share while domestic producers were losing. According to Korea, the evidence before the ITC, however, actually demonstrate just the opposite: Hynix was losing market share (on a brand basis) while Micron and Infineon gained market share. Korea argues that the ITC may have thought the domestic industry was losing market share, but only because Micron and Infineon were choosing to produce more outside the US, and were winning more overall market share in the US by doing so. Similarly, Korea asserts that the ITC may have thought Hynix was gaining market share, but only because the shutdown of the Oregon facility forced Hynix to temporary increase imports from Korea.

7.312 The US submits that the ITC's causation analysis is also based on positive evidence and an objective examination and is otherwise in accordance with US obligations under Articles 15.1 and 15.5 of the *SCM Agreement*.

7.313 The US asserts that Korea's arguments concerning the ITC's causation analysis in this investigation are predicated largely on Appellate Body reports issued in the context of the *Safeguards*

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[278] Appellate Body Report, *US – Line Pipe* at para. 209, Appellate Body Report, *US – Wheat Gluten* at para. 67.

[279] Korea asserts that in *Argentina–Footwear (EC)*, the Appellate Body ruled that that national trade authorities are required to find a correlation between the increased imports and any deterioration in the performance of the domestic industry before finding a causal link: "In practical terms, we believe therefore that this provision means that if causation is present, an increase in imports normally should coincide with a decline in the relevant injury factors. While such a coincidence by itself cannot *prove* causation…its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation is still present." Appellate Body Report, *Argentina – Footwear(EC)* at paras. 144-145.

Agreement. The US argues that these are not useful in examining causation in a different type of investigation governed by a different agreement with a different object and purpose, since the injury inquiry in a countervailing (and antidumping) duty investigation has many critical distinctions from an inquiry in a safeguards investigation. The US asserts that in a countervailing duty investigation, an affirmative determination of "material injury" is based on an 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. In a safeguards investigation, the standard is whether the product is being imported into the Member's territory "in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces the like or directly competitive products."[280] The US also notes that "serious injury" is defined under Article 4.1(a) of the *Safeguards Agreement* as "a significant overall impairment in the position of a domestic industry", and that the Appellate Body stated in *US – Lamb* that "serious injury" is a much higher standard than "material injury."[281] The US also argues that the "causal relationship" of the *SCM Agreement* is thus different from the "causal link" requirement of the *Safeguards Agreement*. According to the US, therefore, there is no basis for importing a causation standard associated with a "serious" injury requirement into a countervailing duty investigation, which is governed by a "material" injury requirement.

7.314 The US asserts that the ITC integrated the causation discussion and its discussion of how it ensured that it did not attribute material injury from other factors to the subject imports into its analysis of the volume, price effects and impact of subject imports. The US argues the ITC did not analyze causation issues in a vacuum, but analyzed them in context to determine whether there was a causal relationship between subject imports and the material injury experienced by the domestic industry and to ensure that it did not attribute injury from other factors to the subject imports. The US asserts that the ITC's final material injury determination demonstrated that there was a causal relationship between the subject imports from Korea and the material injury to the domestic industry.

7.315 The US submits that Korea continues to make many of the same discredited arguments already addressed above. For example, the US notes that Korea argues that the volume of the subsidized imports from Korea (or their market share) declined over the period of investigation, even though that was not the case. The US further notes that Korea repeats its arguments about the methodology used by the ITC to analyze price effects, and misstates or ignores the results of that analysis, and ignores much of the ITC's evaluation of the impact of subject imports, and seeks to have this Panel reweigh other evidence. The US also asserts that Korea cites an ever-varying set of data sources and time periods.

7.316 The US submits that the ITC clearly analyzed trends in both injury factors and the volume and price effects of the subsidized subject imports, and explored the relationship between the factors indicative of the volume and price effects of the subject imports and the movements in injury factors. The US asserts that the ITC demonstrated an "overall" temporal relationship or coincidence between the subsidized subject imports and the material injury of the domestic industry, and in demonstrating a causal link between the subsidized subject imports and the injury to the domestic industry, the ITC

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[280] *Safeguards Agreement* Article 2.1.

[281] The US notes that the Appellate Body stated: "We are fortified in our view that the standard of 'serious injury' in the Agreement on Safeguards is a very high one when we contrast this standard with the standard of 'material injury' envisaged under the Anti-dumping Agreement, the Agreement on Subsidies and Countervailing Measures (the '*SCM Agreement*') and the *GATT 1994*. We believe that the word 'serious' connotes a much higher standard of injury than the word 'material.' Moreover, we submit that it accords with the object and purpose of the Agreement on Safeguards that the injury standard for the application of a safeguard measure should be higher than the injury standard for anti-dumping or countervailing measures ... ." *US – Lamb*, para. 124 (citations omitted).

evaluated the relevant factors in the context of the business cycle and conditions of competition distinctive to this industry.

(ii) Evaluation by the Panel

7.317 The US asserts that the ITC complied with its Article 15.5 obligations by conducting a "unitary" analysis, i.e., it did not separately analyze "material injury" and "causation." Instead of asking, in the abstract, whether a domestic industry was experiencing material injury and then, if the answer was affirmative, proceeding to a second determination of causation, the ITC asked whether a domestic industry was being materially injured "by reason of" subject imports as a unified question, and then issued a single determination that subsumed the causation question. Korea has not argued that such a unitary approach is *per se* inconsistent with Article 15.5.

7.318 Instead, Korea argues that the ITC failed to establish a temporal correlation between an increase in subject import market share and a decline in domestic industry performance. In this regard, Korea relies on the finding by the Appellate Body in *Argentina – Footwear (EC)* that the absence of a "coincidence" between an increase in imports and a decline in the state of the domestic industry "would create serious doubts as to the existence of a causal link, and would require a very compelling analysis of why causation is still present."[282] The US asserts that the ITC demonstrated an overall temporal relationship or coincidence between the alleged subsidized imports and the material injury of the domestic industry.

7.319 We note that the *Argentina – Footwear (EC)* case concerned the causation standard under Article 4.2 of the *Safeguards Agreement*. While the parties have made additional arguments concerning the relevance of findings by the Appellate Body in respect of safeguard cases to disputes involving countervailing duties, we do not consider it necessary to resolve this issue.[283] This is because, in any event, Korea has failed to establish that there was an absence of coincidence between import volume and the injury to the domestic industry.

7.320 Korea argues that there was an absence of correlation between an increase in the market share of subject imports and a decline in the market share and profitability of domestic producers. Korea asserts that the market share of subject imports was decreasing at the same time that the market share and profitability of domestic producers was decreasing. In making this argument, however, Korea relies on the brand-based market share analysis set forth at para. 7.224 *supra*. Article 15.5, however, does not require a brand-based analysis. Instead, it requires the investigating authority to determine that "subsidized imports" – as opposed to any subsidized brand - are causing injury. The ITC found that the market share of the alleged subsidized imports increased over the period of investigation. Korea does not dispute the accuracy of this finding (other than to argue that the ITC should have also undertaken a brand-based analysis). Since the ITC's analysis demonstrated that the market share of the alleged subsidized imports was increasing, there is no factual basis to Korea's argument that the market share of imports was declining at the same time as the market share and profitability of the domestic industry.

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[282] *Argentina – Footwear (EC)*, at paras. 144-145 (emphasis in original) (quoting Panel Report, *Argentina –Footwear (EC)*, at para. 8.238).

[283] We note, however, that a finding of increased imports is a necessary condition for the imposition of a safeguard measure. This appears not to be the case for countervailing measures, since Article 15.2 of the *SCM Agreement* provides that "[n]o one or several of these [volume and price effect] factors can necessarily give decisive guidance." This provision suggests that a countervailing measure may be imposed even in the absence of a significant increase in the volume of subsidized imports, provided the requisite price effects exist. If there is no need to demonstrate increased imports in all cases, one might conclude that there is no generalized requirement to establish any temporal correlation between increased imports and injury in the context of a countervail investigation.

7.321 In light of the above, we reject Korea's argument that the ITC failed to properly demonstrate the requisite causal link between subject imports and injury.

5. Did the ITC properly comply with its obligation not to attribute to subject imports injury caused by other factors ?

7.322 Korea submits that the ITC improperly assessed the role of other factors and therefore failed to ensure that it did not attribute the effects of other causes to subject DRAM imports in violation of Article 15.5 of the *SCM Agreement*. Article 15.5 provides:

> It must be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry. (footnote omitted)

(i) Arguments of the parties

7.323 Korea asserts that, beyond the need to establish through positive evidence a causal link, the competent authorities must also ensure that subject imports are not improperly blamed for problems caused by other factors. According to Korea, this obligation of "non-attribution" stands as a bedrock principle of WTO treaty text to avoid excessive trade remedies.

7.324 Korea notes that the non-attribution obligation is not unique to the *SCM Agreement*. Korea notes that there is identical language contained in Article 3.5 of the *AD Agreement* and Article 4.2(b) of the *Safeguards Agreement* concerning "dumped" imports and "increased" imports, respectively. Korea asserts that these provisions, and their treatment by the Appellate Body, provide an important analog and guidance in this dispute. Korea notes that in *US – Wheat Gluten*, a dispute under the *Safeguards Agreement*, the Appellate Body explained:

> The need to ensure a proper attribution of "injury" under Article 4.2(b) indicates that competent authorities must take account, in their determination, of the effects of increased imports *as distinguished from* the effects of other factors.[284]

7.325 Korea also notes that in *US – Lamb*, also a safeguards case, the Appellate Body offered further guidance:

> The primary objective of the process we described in *US – Wheat Gluten Safeguard* is, of course, to determine whether there is "a genuine and substantial relationship of cause and effect" between increased imports and serious injury or threat thereof. As part of that determination, Article 4.2(b) states expressly that injury caused to the domestic industry by factors other than increased imports "shall not be attributed to increased imports." In a situation where *several factors* are causing injury "at the same time", a final determination about the injurious effects caused by *increased*

[284] *US – Wheat Gluten*, at para. 70 (emphasis in original).

> *imports* can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it *assumes* that the other causal factors are *not* causing the injury which has been ascribed to increased imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports. In this way, the final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury.[285]

7.326 Korea submits that, given the virtually identical language of Article 15.5 of the *SCM Agreement* and Article 4.2(b) of the Agreement on Safeguards, it makes sense that the analytical framework should be the same. Korea notes that Article 3.5 of the *AD Agreement* imposes an identical non-attribution obligation before imposing anti-dumping duties. Korea notes that the Appellate Body explained in *US – Hot-Rolled Steel*:

> In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.[286]

7.327 Korea asserts that, given the plain meaning of Article 15.5 of the *SCM Agreement* , as well as the unambiguous guidance of the Appellate Body, an unmistakable framework exists within which to analyze an authority's compliance with the non-attribution requirement of Article 15.5 of the *SCM Agreement*. According to Korea, 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. Korea asserts that, as the Appellate Body in *US-Line Pipe* stated, an authority must also "establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports."[287] Korea argues that difficulty in performing the analysis is no excuse for omission, and that like all the provisions of Article 15, the non-attribution analysis must also be based on positive evidence and an objective examination as required under Article 15.1.

7.328 Korea asserts that the ITC failed to comply with the non-attribution requirement, because it provided either no analysis or insufficient analysis of the role of non-subject imports; the changes in relative capacity; the drop in demand for 2001; and Micron's own technical shortfallings.

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[285] *US – Lamb*, at para. 179 (emphasis in original).
[286] *US – Hot-Rolled Steel*, at para. 223.
[287] *US – Line Pipe*, para. 217.

The Role of Non-Subject Imports

7.329 Korea asserts that the ITC improperly dismissed the adverse effects of an increasing and much larger volume of non-subject imports. Korea asserts that DRAMs are a commodity product and the volume of non-subject imports in the US market dwarfed the volume of subject imports.

7.330 Korea refers in this regard to the abovementioned Figure 9 market share data (see para. 7.224 *supra*). Korea asserts that the evidence before the ITC demonstrated that non-subject imports accounted for a six to seven times greater share of the US market than subject imports from Hynix, and therefore had six to seven times the competitive effect of subject imports. Korea argues that the ITC effectively ignored these important facts about the non-subject imports when it stated:

> We acknowledge that the increasing volume of non-subject imports played an important role in the US market during the period of investigation. Non-subject imports were responsible for the bulk of market share lost by domestic producers during the period of investigation. A portion of the non-subject imports are RAMBUS and specialty DRAM products for which domestic producers had no significant production during the period of investigation. These facts and the fact, discussed above, that non-subject imports undersold domestic product at a lower frequency than subject imports did, provide some support for finding that non-subject imports had less impact than their absolute and relative volumes might otherwise indicate. While non-subject import market share grew, the primary negative impact on the domestic industry was due to lower prices, and on this point, subject imports, themselves, were large enough and priced low enough to have a significant impact. This is so regardless of the adverse effects caused by non-subject imports.[288]

7.331 Korea asserts that the ITC's attempt to imply that the non-subject imports compete less with the domestic industry production than do subject imports ("a portion of the non-subject imports are Rambus products . . . products for which the domestic producers had no significant production") is directly contrary to the undisputed evidence before the ITC. Korea notes that Micron's Vice President for Worldwide Sales, Mike Sadler, told the ITC that: "The vast majority of Micron's competitors, including specifically Samsung and Hynix from Korea, manufacture DRAMs that are equivalent in performance to our own."[289] Korea also asserts that Rambus DRAMs do not account for a significant portion of Samsung's overall DRAM production, and that Samsung's dramatic increase in market share since 200l was not related to Samsung's Rambus production. Korea asserts that the ITC did not address any of this contrary evidence, and simply dismissed it without any rationale.

7.332 Korea asserts that the ITC's statement that "non-subject imports undersold domestic product at a lower frequency than subject imports did" is a completely meaningless and misleading assertion given the manner in which the ITC undertook its underselling analysis. Korea argues that a proper lowest price analysis would have demonstrated that for an overwhelming per cent of the time individual suppliers other than Hynix had the lowest price in the market. Korea argues that it is not objective to dismiss contrary evidence without discussion, or to average and thus obscure the prices of individual domestic and non-subject suppliers. Korea asserts that, in addition to methodological flaws, the ITC finding had no sense of perspective, since the ITC stressed small differences between the frequency of underselling for subject and non-subject imports, which averaged about seven percentage points. Korea argues that these small differences could be random data fluctuations. Korea asserts that, for a commodity market, non-subject market share roughly seven times as large would dwarf any price effects from a much smaller volume of subject imports.

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[288] *Final Injury Determination*, at 27 (Exhibit GOK-10).
[289] Staff Conference Transcript, at 20 (emphasis added) (Exhibit GOK-12).

Capacity Increases

7.333 Korea asserts that the ITC completely ignored large increases in DRAM capacity undertaken by suppliers other than Hynix. Korea asserts that the ITC itself commented on the significance of capacity to the DRAM industry in the "Conditions of Competition" section of its determination. According to Korea, the ITC appropriately recognized that both the timing and quantity of capacity increases can affect DRAM market pricing, and therefore profitability. Korea argues, however, that the ITC then either completely forgot or deliberately ignored this very fact when analyzing the effect of other possible causes to the change in the domestic industry's financial condition. Korea asserts that, although the ITC received substantial information and data that demonstrated that other suppliers increased DRAM production capacity much more than did Hynix during the period examined, there is zero discussion of this information in the ITC discussion of factors that had an adverse impact on the domestic industry.

Micron's "Admitted" Technological and Production Difficulties

7.334 Korea asserts that the ITC completely ignored the "admitted" technological and production difficulties of Micron during the claimed period of injury.

7.335 Korea asserts that the ITC had substantial information before it concerning the extreme importance to DRAM manufacturers of handling the constant pressure to introduce DRAMs produced with the newest technology. According to Korea, the evidence before the ITC demonstrated that Micron gambled on future market positioning through an emphasis on 0.11 micron technology development, missing a stronger market for Double Data Rate (DDR) products based on the 0.13 geometry in 2002. Korea argues that, by Micron's own account, this was a significant mistake. According to Korea, the evidence on the record demonstrates that at its winter analyst meeting in late January 2003, Micron CEO Stephen Appleton admitted that Micron's most damaging misstep of 2002 was its failure to be positioned with 0.13 micron production for a strengthening market for 256M DDR products:

> I think we were caught off guard . . . . It turned out that was the sweet spot of the market . . . . At the time we made the decision to focus on 0.11 {Micron products}. As a result that impacted us quite a bit.[290]

7.336 Korea asserts that the ITC effectively ignored this important information in its analysis of other factors that affected the condition of the domestic industry during the period. Korea argues that, notwithstanding that Micron was the largest US DRAM supplier and notwithstanding that the evidence before the ITC contains admissions by Micron that its technological foibles harmed Micron's financial performance ("impacted us quite a bit"), the ITC only addresses the evidence in the three sentences of footnote 177 of its determination:

> Hynix argues that Micron was harmed by poor business decisions, noting in particular its failure to position itself to be able to capitalize on a pocket of strong demand in a particular market segment in 2002. {cite omitted} Whatever negative effect any particular decisions may have had on Micron, they could not explain the harm

[290] *See* Prehr. Br., at 124-28 and Exhibit 2 (Articles Nos. 1 (Anthony Cataldo, *Full of Remorse*, Micron Pins Hopes on 0.11-Micron Tech, Electronic Engineering Times, 27 January 2003 (hereinafter "*Full Remorse*") and 20 (Julie Howard, *Micron Blames '02 Losses on Product Misstep; Analysts Pose Tough Questions for Chip Maker*, Idaho Statesman, 25 January 2003 (hereinafter "*Micron Blames '02 Losses on Product Misstep*") (Exhibit GOK-18-(a)).

> experienced the DRAM products industry as a whole. This harm was not isolated to Micron and was due mainly to lower prices.[291]

7.337 Korea submits that the complete absence of any serious analysis concerning Micron's "admitted" business mistakes demonstrates that the ITC did not comply with the requirement of Article 15.5 that an investigating authority separate and distinguish injury caused by other factors so as not to attribute that injury to the subsidized imports, or the Article 15.1 requirement of an objective examination.

7.338 The US recognizes that the Appellate Body, when interpreting the language concerning the investigating authorities' obligation in antidumping duty investigations not to attribute injury caused by other factors to the subject imports, has referenced the *Safeguards Agreement*, as well as other reports reviewing determinations of competent authorities under the *Safeguards Agreement*. The US contends that in the DRAMs investigation, the ITC met the standards articulated by the Appellate Body in those other reports.

Non-subject imports

7.339 The US asserts that, although Korea would have this Panel believe that the ITC completely disregarded the absolute and relative increase of non-subject imports, the ITC evaluated the presence of non-subject imports, determining that non-subject imports were in the US market throughout the period of investigation and at absolute volumes that were higher than subsidized subject imports. The ITC also recognized that some domestic producers were responsible for some of the non-subject imports. The US asserts that, although the ITC determined that non-subject imports were responsible for "the bulk of the market share lost by domestic producers during the period of investigation",[292] it identified two reasons why it did not find the volume of non-subject imports as significant as otherwise would be suggested.

7.340 First, the US argues that the ITC determined, after examining the composition of non-subject imports, that a significant portion of non-subject imports were Rambus and specialty DRAM products for which domestic producers had no significant production during the period of investigation. The US asserts that, contrary to Korea's arguments, non-subject imports were not as substitutable with subject or domestic DRAM products for product mix reasons. The US notes that Hynix itself, in a joint submission filed with Korean producer Samsung, emphasized that Samsung, whose US shipments of DRAM products were an important portion of US shipments of non-subject imports during the period of investigation, offered products that "differ[ed] substantially"[293] from, were not interchangeable with, and thus did not compete with products made by US producers.

7.341 Second, the US asserts that even those non-subject imports consisting of "standard" products did not have the price effects that subsidized subject imports did during the period of investigation. The US argues that, although there is no requirement in the *SCM Agreement* for the investigating authority to collect such data, and, to US knowledge, most do not collect *any* pricing data on non-subject imports, the ITC collected pricing data on non-subject imports in this investigation. The US asserts that, according to that pricing data, while the frequency with which non-subject imports undersold domestic-produced DRAM products increased between 2000 and 2002, the underselling frequency by non-subject imports was lower than, and increased less than, the underselling frequency by subsidized subject imports between 2000 and 2002. The US argues in particular that non-subject imports undersold the domestic industry in 46.6 per cent of instances in 2000, 47.7 per cent in 2001, and 60.7 per cent in 2002 whereas subsidized subject imports undersold the domestic industry in

[291] *Final Injury Determination*, at 26, n. 177 (Exhibit GOK-10).
[292] *See, e.g.*, *Final Injury Determination*, at 27 (Exhibit GOK-10).
[293] 27 November 2002 Postconference Brief of Hynix and Samsung at 50-56 (Exhibit US-100).

51.0 per cent of instances in 2000, 56.0 per cent in 2001, and 69.8 per cent in 2002. The US asserts that, consistent with these figures, the ITC concluded that for these "standard" pricing products, subsidized subject imports undersold non-subject imports in a majority of instances. The US argues further that, even based on a disaggregated analysis of the pricing data on these "standard" products by brand name and source, subsidized subject imports were the lowest-priced source more often than DRAM products from any other source, contrary to Korea's assertions. The US argues that the ITC also found that, while non-subject imports' market share grew, the "primary negative impact" on the domestic industry was due to lower prices,[294] and that subsidized subject imports, themselves, were large enough in volume, and priced low enough, to have a significant impact, regardless of the adverse effects caused by non-subject imports.

7.342 The US submits that the ITC also evaluated other reasons for the price declines. The US asserts that Korea argues that the price declines during the period of investigation were due to other factors (such as product life cycles and business cycle changes in demand and supply that led to "boom" and "bust" periods characteristic of this industry).[295] The US submits that the ITC explicitly evaluated these factors in its determination.

Product Life Cycle

7.343 The US asserts that the ITC examined price trends in the DRAM industry and determined that they are generally correlated with the product life cycle, whereby prices start high for new, state-of-the-art products, decline rapidly as the product becomes a commodity, and continue to decline until the product is replaced by the next generation of technology, unless the product becomes a "legacy" product in short supply.

Demand

7.344 The US asserts that, contrary to Korea's repeated characterization of a "collapse" in demand (echoing Hynix's argument in the agency proceedings),[296] the ITC examined data received in response to questionnaires tailored to this investigation, and determined that apparent US consumption of DRAM products in terms of billions of bits increased from 98.8 million in 2000 to 146.7 million in 2001 and to 186.9 million in 2002, and was 55.3 million in interim 2003 compared to 42.8 million in interim 2002. According to the US, the ITC concluded that the "slowing in the growth of apparent US consumption" in the latter portion of the period of investigation might be due in part to a decline in the quantity of personal computers sold.[297] The US argues that the ITC identified 2001 as the first year for which the number of personal computers sold declined rather than increased, and it also examined other possible reasons identified by questionnaire respondents, such as a slump in the telecommunications and network industry and a general recession.[298]

Supply

7.345 The US asserts that, contrary to Korea's contention[299], the ITC did not "completely forget" or "deliberately ignore" supply increases or their contribution to prices in the DRAMs market. The US argues that the ITC's *Final Injury Determination* contains much of the supply data relied on by Korea in these proceedings. The US asserts that the ITC also evaluated data collected in questionnaire responses and determined that "[a]lthough the domestic industry's wafer starts declined

[294] *See, e.g., Final Injury Determination,* at 27 (Exhibit GOK-10).
[295] Korea First Written Submission, paras. 264-296.
[296] Korea First Written Submission, paras. 284-296.
[297] *See, e.g., Final Injury Determination,* at 24 (Exhibit GOK-10).
[298] *See, e.g., Final Injury Determination,* at 24, II-4 (Exhibit GOK-10).
[299] Korea First Written Submission, paras. 264-283.

over the period of investigation, production quantity in billions of bits increased as domestic producers produced more bits per wafer."[300]

Business Cycle

7.346 The US submits that the ITC also analyzed the business cycle, ascertaining that because growth in demand for DRAM products has been continuous, but supply increases are sporadic, supply and demand in this industry tend to be chronically out of equilibrium, giving the market its characteristic "boom" and "bust" business cycle. The US argues that the ITC also determined that largely because of the perpetual improvements in production efficiencies experienced by this industry, prices are usually declining.

7.347 The US asserts that, based on its evaluation of the record evidence in this investigation, the ITC determined that "[w]hile slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor."[301] The US argues that the ITC determined that the pricing declines were far greater than the 20 to 30 per cent that Micron or even the 40 per cent declines that Hynix, itself, reported would be expected on an annual basis.

Micron's Technological and Production Difficulties

7.348 The US rejects Korea's argument that the ITC never considered that the domestic industry was responsible for the injury. The US argues that, contrary to Korea's assertions,[302] the ITC specifically evaluated what Korea (and Hynix) refer to as "mis-steps" by domestic producer Micron. According to the US, the ITC collected pricing data on 256 Mb DDR266 SDRAMs (which are based on 0.13 micron technology) that indicated that volume demand for these products did not develop until the latter half of 2002, which was after Micron and the domestic industry had sustained their most significant losses. The US also argues that, as the ITC analyzed the data, it determined that whatever negative effect any particular decisions may have had on Micron, they "could not explain the harm" experienced by the domestic industry as a whole.[303] The US notes the ITC determination that this "harm was not isolated to Micron and was due mainly to lower prices."[304]

7.349 The US submits that the ITC therefore analyzed the nature and the extent of the injurious effects of domestic producers' actions, and evaluated this factor in the factual context of this investigation to ensure that it did not attribute injury to subsidized subject imports. The US asserts that, because the ITCs evaluation was also based on positive evidence and an objective examination, its analysis of this factor is consistent with US obligations under Articles 15.1 and 15.5.

(ii) Evaluation by the Panel

7.350 Article 15.5 of the *SCM Agreement* contains the following non-attribution requirement:

> The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and

[300] *See, e.g., Final Injury Determination*, at 16 & n.97 (Exhibit GOK-10).
[301] *See, e.g., Final Injury Determination*, at 24-25 (Exhibit GOK-10).
[302] Korea First Written Submission, paras. 297-313.
[303] *See, e.g., Final Injury Determination*, at 26 n.177 (Exhibit GOK-10).
[304] *See, e.g., Final Injury Determination*, at 26 n.177 (Exhibit GOK-10).

> prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

7.351 The non-attribution requirement in anti-dumping investigations has been addressed by the Appellate Body in several recent cases. Although it has not been specifically considered in a countervailing duty case, given that the relevant provisions in the two Agreements are identical, and in light of the "need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures" (*Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*), it is clear to us that the requirement is the same in the context of both anti-dumping and countervailing duty investigations.

7.352 In its most recent statement on the non-attribution requirement in anti-dumping cases, the Appellate Body explained that:

> "This obligates investigating authorities in their causality determinations not to attribute to dumped imports the injurious effects of other causal factors, so as to ensure that dumped imports are, in fact, "causing injury" to the domestic industry. In *US – Hot-Rolled Steel* we described the non-attribution obligation as follows:
>
> > … In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve *separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports*. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors.
>
> Non-attribution therefore requires separation and distinguishing of the effects of other causal factors from those of the dumped imports so that injuries caused by the dumped imports and those caused by other factors are not "lumped together" and made "indistinguishable."
>
> We underscored in *US – Hot-Rolled Steel*, however, that the *Anti-Dumping Agreement* does not prescribe the *methodology* by which an investigating authority must avoid attributing the injuries of other causal factors to dumped imports: . . . Thus, provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the "causal relationship" between dumped imports and injury."[305]

7.353 Neither party has suggested that we should not be guided by the Appellate Body's interpretation of the non-attribution requirement set forth in Article 3.5 of the *AD Agreement*. We shall therefore determine whether the ITC's *Final Injury Determination* complied with the requirements of Article 15.5 of the *SCM Agreement* by examining whether the ITC properly separated

[305] Appellate Body Report, *European Communities – Tube or Pipe Fittings*, paras. 188-189.

and distinguished the injurious effects of other known factors from those of the alleged subsidized imports. We note that the Appellate Body has clarified that the ITC was "free to choose the methodology it [would] use" to separate and distinguish the injurious effects of other factors from those of the alleged subsidized imports. We also note that Korea has acknowledged that the ITC was not required to quantify the injury caused by other factors in order to separate and distinguish it from the injurious effects of the alleged subsidized imports.

7.354 The US asserts that its analysis demonstrated that subsidized imports had their own injurious effects, independent from the injurious effects of other factors. Korea has not argued that such an approach would not comply with the requirements of Article 15.5. Instead, Korea effectively argues that, as a matter of fact, the ITC failed to demonstrate alleged subsidized imports had such independent injurious effects.

7.355 Korea asserts that the ITC attributed to subsidized imports injury caused by the following other "known factors":[306] non-subject imports; capacity increases by other suppliers; decline in demand; and technological and production difficulties admitted by Micron. We shall examine whether the ITC properly separated and distinguished the injurious effects of each of these other factors from the injury caused by alleged subsidized imports.[307]

Non-subject imports

7.356 Korea asserts that the ITC improperly dismissed the injurious effects of the increasing and much larger volume of non-subject/non-subsidized imports. Korea asserts that the relative market shares of subsidized and non-subject imports means that non-subject imports had six to seven times the competitive effect as did subject imports. The US asserts that the ITC took account of the injurious effects of non-subject imports, since it found that "[n]on-subject imports were responsible for the bulk of market share lost by domestic producers during the period of investigation."[308] The US argues, however, that the ITC also separated and distinguished injury caused by non-subject imports on the basis of product mix and price considerations.

7.357 Regarding product-mix, the ITC found that, because "[a] portion of the non-subject imports are RAMBUS and specialty DRAM products for which domestic producers had no significant production during the period of investigation",[309] "non-subject imports had less impact than their absolute and relative volumes might otherwise indicate."[310] Although the exact proportion of RAMBUS/specialty products is confidential, the US indicated during the course of the Panel proceedings that they account for approximately 20 per cent of non-subject imports. Korea has not disputed the accuracy of this figure.

7.358 Korea argues that even a specialized DRAM is still a DRAM and competes at some level. Korea relies on evidence before the ITC to the effect that Micron's Vice President for Worldwide Sales told the ITC that "[t]he vast majority of Micron's competitors, including specifically Samsung and Hynix from Korea, manufacture DRAMs that are equivalent in performance to our own."[311]

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[306] The US does not deny that the factors identified by Korea were "known" to the ITC. Indeed, at para. 111 of its Second Written Submission, the US asserts that "[t]he ITC also examined other **known** factors to ensure that it did not attribute injury from those factors to the subsidized subject imports" (emphasis supplied).

[307] In doing so, we note that the parties agree that, in law, subsidized imports need not be the sole cause of injury in order for countervailing measures to be imposed.

[308] *Final Injury Determination*, at 27, (Exhibit GOK-10). During the Panel proceedings, the US stated that the volume of non-subject imports was at least five times the volume of alleged subsidized imports.

[309] *Final Injury Determination*, page 27, (Exhibit GOK-10).

[310] *Ibid*.

[311] Staff Conference Transcript, at 20 (emphasis added) (Exhibit GOK-12).

Korea also relies on record evidence to argue that Samsung's RAMBUS DRAMs (which are non-subject imports) do not account for a significant proportion of its overall DRAM production. However, the ITC record also contained evidence (US reply to Question 17 from the Panel after the first substantive meeting) to the effect that Hynix and Samsung jointly submitted a brief to the ITC stating that non-subject imports included products that "differ[ed] substantially from and were not interchangeable with products made by US producers", and that "[n]o domestic producer makes Rambus chips."[312] In these circumstances, and especially on the basis of the joint submission by Hynix and Samsung, we consider that an objective and impartial investigating authority could properly have determined that (1) 20 per cent of non-subject imports were not interchangeable with either subject imports or domestic industry shipments, and (2) the effect of non-subject imports on the domestic industry relative to that of subject imports was less than a simple volume-based comparison of subject and non-subject imports would suggest.

7.359 Korea also argues that, even focusing on the remaining 80 per cent of non-subject imports, the directly competitive portion of non-subject imports had about 45 per cent and 48 per cent market share in 2000 and 2001 respectively. Korea asserts that, compared to subject imports, with about nine per cent market share in both years, non-subject imports are still five times larger, and gaining market share much faster. We note, however, that Korea's argument regarding the relative volumes of directly competitive subject and non-subject imports does not contradict the ITC's determination that, because of product-mix, "non-subject imports had less impact than their absolute and relative volumes might otherwise indicate." Korea's argument does, however, overlook the ITC's determination that "subject imports undersold non-subject imports in a majority of instances."[313] Korea has not disputed this conclusion, other than to challenge the underselling methodology applied by the ITC.[314] As noted above, however, we consider that the ITC's price underselling methodology is not inconsistent with the *SCM Agreement*.

7.360 Furthermore, we note that the ITC found that the "primary negative impact" on the domestic industry resulted from lower prices.[315] Korea has not disputed this ITC conclusion. In fact, Korea has stated that "[t]he key issue in this case is not whether prices fell, but why."[316] By ascertaining that the price underselling frequency by non-subject imports was lower than, and increased less than, the underselling frequency of alleged subsidized imports between 2000 and 2002, and that the injurious price effects of non-subject imports were less pronounced than their absolute and relative volumes might otherwise indicate, the ITC effectively separated and distinguished the injurious price effects of alleged subsidized imports from the injurious price effects of the larger volume of non-subject imports. In other words, the ITC demonstrated that alleged subsidized imports had injurious price effects independent of those of the larger volume of non-subject imports. Given that there is no obligation under Article 15.5 to quantify the amount of injury caused by alleged subsidized and non-subject imports respectively, the ITC has done all that it was required to do.

Capacity increase

7.361 Korea complains that there was no explanation by the ITC of how injury caused by capacity increases by suppliers other than Hynix was not attributed to subject imports. However, the ITC did explain that supply increases, resulting from capacity increases, were an important element of the

[312] Furthermore, although Korea argues that Micron's competitors make DRAMs that are equivalent in performance to its own, this does not preclude the possibility of Micron's competitors also making DRAMs that are different in performance.

[313] *Final Injury Determination*, note 164, (Exhibit GOK-10).

[314] See para. 256 of Korea's First Written Submission: "As discussed above in the discussion on the pricing evidence...."

[315] *Final Injury Determination*, 27, (Exhibit GOK-10).

[316] See para. 204 of Korea's Second Written Submission. In this regard, Korea argues that prices fell because of factors other than the alleged subsidized imports.

boom/bust business cycle and product life cycle, and that these business and product life cycles could not account for the totality of the price declines suffered by the domestic industry. The ITC's analysis of supply and capacity considerations, and their impact on the business cycle, is set forth in a section entitled "Supply Considerations." This analysis has not been challenged by Korea. Nor has Korea alleged that the capacity increase it refers to occurred outside of the normal business cycle.[317] In a later part of the report, entitled "Price Effects of the Subject Imports", the ITC determined that "[w]hile slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor."[318] In this way, the ITC explained that capacity increases, and the business cycle, could not account for the totality of the injury suffered by the domestic industry, because that injury was caused primarily by price declines that were not caused by the business cycle. In particular, the ITC determined that "product-specific data showed price declines of 70 to 90 per cent from late 2000 through 2001",[319] and noted that "[t]he parties agreed that the price decline in 2001 was the most severe in DRAMs history."[320] Furthermore, there was record evidence to the effect that such declines were greater than the 20 to 40 per cent average annual price declines reported by Hynix and Micron.[321]

7.362 In this way, we consider that the ITC properly separated and distinguished the injurious effects of alleged subsidized imports from the injurious effects of capacity increases by non-Hynix suppliers, since it showed that such capacity increases (inherent in the DRAM business cycle) did not account for the totality of the injurious price declines suffered by the domestic industry.[322]

7.363 In light of the above, we reject Korea's argument that the ITC ignored changes in relative capacity when analyzing other factors affecting the domestic industry.

Decline in demand

7.364 Korea argues that the domestic industry was adversely affected by a drop in demand for products that use DRAMs, such as personal computers, and that this drop in demand led to a decrease in the rate of growth of demand for DRAMs. Korea asserts that the injury suffered by the domestic industry was caused by such decrease in demand, rather than alleged subsidized imports. Korea argues that Hynix imports have virtually nothing to do with the level of demand. Korea submits that the ITC ignored record information regarding declining demand for products that use DRAMs.

7.365 The ITC acknowledged that there was a decline in the growth of US apparent DRAM consumption, and that such decline "may be due in part to a decline in the quantity of personal

[317] To the contrary, Korea's evidence of capacity increase is taken from findings made by the ITC concerning the boom-bust nature of the DRAM business cycle. See para. 264 of Korea's First Written Submission.

[318] *See, e.g.*, *Final Injury Determination*, at 24-25 (Exhibit GOK-10).

[319] *See, e.g.*, *Final Injury Determination*, at 24-25, I-11 (Exhibit GOK-10).

[320] *Final Injury Determination*, page 24, (Exhibit GOK-10). Korea has not challenged this statement.

[321] Hearing Transcript (Mr. Tabrizi, Hynix witness) at 267-68 (Exhibit US-94). At the first substantive meeting, Korea argued that Micron and Hynix had reported annual average declines, which could have included individual instances of price declines up to 90 per cent. Korea did not present any evidence in support of this argument. In its reply to Question 23 from the Panel after the first substantive meeting, the US demonstrated, with reference to Exhibit US-121, that none of the historical price data submitted by Hynix showed price declines as high as 90 per cent. Accordingly, Korea has failed to demonstrate that the ITC erred in finding that price declines ranged as high as 90 per cent.

[322] While Korea emphasises that other suppliers increased their capacity more than Hynix, we do not consider that the relative capacity increases of Hynix imports and non-subject imports are relevant to the extent that the ITC has shown that increased capacity (no matter what source) does not account for the totality of the injurious price effects suffered by the domestic industry.

computers sold."[323] The ITC also determined that "[w]hile slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor."[324]

7.366 Although the ITC clearly acknowledged the negative impact of slowing demand (in part resulting from the decline in demand for PCs), we do not consider that the ITC properly explained how it ensured that the injury caused by such decline in demand was not attributed to alleged subsidized imports. In particular, although the ITC acknowledged that it played "some role" in the state of the domestic industry, it did not explain what that "role" was, nor how that "role" differed from the impact of subject imports. Similarly, while the ITC's reference to supplier competition as "*an* important factor",[325] rather than "the" most important factor, does not preclude other factors – including slowing demand – from also being important factors in the causation of injury, the ITC failed to explain how slowing demand was a less important factor in terms of injurious impact on the domestic industry.

7.367 In terms of possible explanation, we note the ITC's assertion that "[h]istorically, there appears to be no clear correlation between the growth of the DRAMs market and price movements."[326] Korea argues that "the alleged lack of correlation is just wrong", and incorrectly based on trends in DRAM output/supply, rather than demand.[327] Korea's assertion is substantiated by reference to record evidence that, according to Korea, shows that "DRAM prices do reflect ups and downs in the rate of demand growth, and the decline in demand growth in 2001 played a major role in the price decline in 2001."[328] Korea refers to parts of Exhibits KOREA – 18 and 19 in this regard. Korea also refers to statements by representatives of domestic producers referring to "waning" demand, a "fundamental shift" in the demand profile, and "substantially decreased demand ... resulting in substantial price and volume declines".[329] We consider that Korea thereby establishes *prima facie* that the ITC improperly evaluated the impact of slowing demand on price. The US does not rebut Korea's arguments, or deny the existence of the record evidence relied on by Korea. In other words, the US does not rebut the *prima facie* case established by Korea. In light of the *prima facie* case established by Korea, and the absence of any rebuttal by the US, we find that the DOC did not properly address the issue of slowing demand on price, and could not properly have found that there was no clear correlation between demand and price movements. Since there was record evidence to the effect that slowing demand resulted in "substantial price … declines", and since the ITC emphasised the impact of decreasing prices on the domestic industry, it was important for the ITC to properly address this issue.

7.368 We understand the US to argue that Korea's arguments regarding demand are addressed by the ITC's determination concerning the injurious role of the business cycle, in the sense that the

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[323] *Final Injury Determination*, page 24 (Exhibit GOK-10).

[324] *See, e.g.*, *Final Injury Determination*, at 24-25 (Exhibit GOK-10). We note that the parties initially appeared to disagree on whether or not demand for DRAMs was actually declining during the period of investigation (as apparently argued by Korea), or merely increasing less rapidly than in the past (as argued by the US). At para. 219 of its Second Written Submission, however, we note that Korea refers to a "slowing of demand" for DRAMs. We understand that Korea therefore acknowledges that, while there may have been a decrease in demand for PCs, there was merely a slowing of demand for DRAMs. We also note that the US contests the data relied on by Korea (US First Written Submission, para. 455). However, our findings are based on the ITC's acknowledgement that there was "slowing demand" during the period of investigation.

[325] Emphasis supplied.

[326] *Final Injury Determination*, page 25, (Exhibit GOK-10).

[327] Para. 291 of Korea's First Written Submission.

[328] *Ibid.*

[329] Paras 293 and 294 of Korea's first written submission.

boom-bust nature of the business cycle is caused by discrepancies between supply and demand.[330] However, Korea's argument is different, in that it is addresses the injurious effects of a slowing of the growth in demand unrelated to the business cycle, i.e., caused by the decline in demand for products using DRAMs such as PCs. The fact that such slowing demand is distinct from the operation of the business cycle is confirmed by the ITC referring separately to "slowing demand" and "the operation of the DRAMs business cycle" in the same sentence. In the absence of any meaningful explanation of the nature and extent of the injurious effects of the slowing in demand, it is not apparent from the face of the *Final Injury Determination* whether, or how, the ITC separated and distinguished the injury caused by such slowing in the growth in demand from (a) the injury caused by the decline in demand inherent in the business cycle and, more importantly, (b) the injury caused by subject imports. This is a violation of the ITC's obligation under Article 15.5 of the *SCM Agreement* not to attribute to subsidized imports the injury caused by other factors.

Technological and Production Difficulties

7.369 The ITC addressed Micron's alleged technological and production difficulties in note 177 of its *Final Injury Determination*. In that note, the ITC asserted:

> Whatever the negative effect any particular decisions may have had on Micron, they could not explain the harm experienced by the DRAM products industry as a whole. This harm was not isolated to Micron and was due mainly to lower prices.

7.370 In our view, Korea has failed to rebut the ITC's finding that the injury to the domestic industry was "due mainly to lower prices." Nor has Korea established that Micron's alleged technological and production difficulties would have resulted in lower prices across the US industry. Although the US has not disputed Korea's assertion that Micron's decision to focus on 0.11 Micron products affected it "quite a bit", we consider that an objective and impartial investigating authority could properly have separated and distinguished the injury caused by Micron's alleged technological and production difficulties from the injury caused by other factors on the basis of price effects, in the sense that injurious price declines occurred that could not be explained by Micron's alleged technological and production difficulties.

7.371 In light of the above, we reject Korea's claim that the ITC failed to separate and distinguish the injury caused by alleged subsidized imports from the injury caused by Micron's alleged technological and production difficulties.

[330] We base our understanding on the US response to Question 23 from the Panel after the first substantive meeting, where the US argues: "[r]egardless of the label attached to these factors or if a particular factor encompassed 'sub-factors,' it is clear from the face of the ITC's determination that the ITC examined the *product life cycle* and the DRAMs *business cycle* that is characterized by repeated 'boom' and 'bust' periods (when *supply/capacity*, which increased during the period of investigation, outpaces *demand*, whose growth slowed at the end of the period of investigation) as other possible reasons for the price declines" (emphasis in original).

6. Did the ITC properly define domestic industry, subject imports and non-subject imports?

(i) Arguments of the parties

7.372 Korea claims that the ITC defined the subject imports and domestic industry inconsistently, preventing a proper examination of imports under Article 15.2, or the domestic industry under Article 15.4, of the *SCM Agreement*.

7.373 Korea asserts that the evidence before the ITC demonstrated that for some DRAM producers, the assembly/casing stage is often undertaken in a different country from where the design and wafer fabrication are done. Korea asserts that an important question in the case, therefore, became what was the appropriate country of origin of a DRAM for which production occurred in two countries; that is, whether a particular DRAM shipment is to be considered a Hynix product from Korea, a product of the US or a "non-subject" import from another country.

7.374 Korea notes that the DOC ruled that subject merchandise only includes those Hynix DRAMs for which the wafer was fabricated in Korea. The DOC ruled that if a Hynix DRAM was "fabbed" in Korea but underwent assembly/casing in another country, the finished DRAM would still be considered "subject merchandise" -- allegedly subsidized imported DRAMs from Korea. Korea notes that, with respect to US produced DRAMs, the ITC adopted the same "wafer fabrication controls" approach that the DOC utilized for defining subject merchandise. The ITC ruled that a DRAM would be considered "US produced" as long as the wafer was "fabbed" in the US, even if assembly/casing was done in another country before returning to the US to be sold. Korea argues that the ITC adopted a completely different approach for defining non-subject imports, relying on the country of assembly/casing, rather than the country of fabrication.

7.375 For non-subject imports, the ITC abandoned the "wafer fabrication controls" approach. Specifically, the ITC ruled that if DRAMs were "fabbed" in a third country, e.g. Italy or Germany, but then assembled/cased in the US before sale to a US customer, such DRAM sales would be considered sales of US produced DRAMs.

7.376 Korea asserts that, although in its *Preliminary Injury Determination* the ITC specifically admitted that "there is some inconsistency to this position",[331] in its *Final Injury Determination* the ITC adopted the same approach for defining and distinguishing between US produced and non-subject imports. According to Korea, such approach meant that the volume of US produced shipments were overstated and the volume of non-subject imports were understated in the ITC's causation analysis.

7.377 Korea submits that the ITC had an obligation to resolve this inconsistency, rather than to ignore the inconsistency. Korea claims that the ITC's failure to do so distorted the relative importance of subject imports, and thus violated Article 15.2. Korea also submits that the ITC's failure to do so distorted the assessment of the domestic industry, and violated Article 15.4.

7.378 The US submits that the ITC used consistent definitions of subject imports, domestic shipments and non-subject imports. The US notes that Korea does not contest the definition of subject imports used by the ITC in this investigation. The US asserts that, in light of the DOC's scope determination, the ITC defined subject import shipments as consisting of all DRAM products regardless of density, including cased and uncased DRAMs as well as DRAMs packaged into memory modules and including all DRAM product types, if the DRAMs or DRAM modules were made from subject Korean-fabricated dice (by the Hynix companies), regardless of casing location. The US argues that Hynix was pleased with this definition because it meant that DRAMs fabricated in the US

[331] *See Preliminary Injury Determination*, at 11 (Exhibit GOK-9**).**

at HSME, but cased in Korea (since Hynix had no casing facilities in the US), were not in the scope of the investigation or subject to any eventual countervailing duty order.

7.379 The US asserts that the ITC defined shipments of "domestic" products to include "DRAMs and DRAM modules made from (1) United States fabricated dice, regardless of assembly location, and (2) Samsung Korean-fabricated dice that were assembled in the United States (***), and (3) 3rd-source-fabricated dice that were assembled in the United States."[332] The US asserts that the ITC defined shipments of "non-subject" imports to include "Samsung Korean-fabricated and 3rd-source-fabricated dice that were not cased in the United States."[333]

7.380 The US claims that Korea is asking the Panel to find that the ITC was required to use a methodology that is not required by the *SCM Agreement* and that is internally inconsistent. The US asserts that the methodology used by the ITC in this investigation was consistent with the *SCM Agreement*, internally consistent, and avoided data errors. The US argues that the ITC, applying its normal six-factor test, examined whether certain production-related activities, if conducted in the US, were sufficient to warrant treating the companies engaging in those activities as domestic producers. The US asserts that, as part of this inquiry, the ITC considered whether assembly of uncased DRAMs into cased DRAMs constituted sufficient production-related activities to include companies that assembled uncased DRAMs into cased DRAMs in the domestic industry. The US asserts that the ITC found that assembly operations involved sufficient production-related activity to constitute domestic production, and noted the absence of any dispute that the output of DRAM assembly operations – cased DRAMs – were part of the domestic like product. The US submits that, in light of its finding that assembly operations were sufficient production-related activities to constitute domestic production, the ITC included companies that assembled DRAMs in the US in the domestic industry, and treated the output of those operations – cased DRAMs – as shipments of the domestic industry.

7.381 The US notes that Korea does not dispute the ITC's application of its six-factor test to determine what activities were sufficient to warrant treating the companies engaging in those activities in the US as domestic producers. The US also notes that Korea does not dispute the ITC's definition of the domestic industry as those producers that fabricate DRAMs in the US and those producers that assemble DRAMs in the US, but not module "packagers" or fabless design houses. The US notes, therefore, that Korea does not challenge the ITC's determination based on Article 16 of the *SCM Agreement*. The US argues that, instead, Korea would have the ITC define the domestic industry for certain purposes as "producers of the domestic like product," but then abandon that definition when it comes to calculating industry shipments. According to the US, however, having found what constituted domestic production, having defined the domestic industry as producers of the domestic like product engaged in those production activities, and having found no basis to exclude any producer from the domestic industry, it was objective for the ITC to have applied the same, rather than a different, definition of the domestic industry for purposes of calculating the shipments of the domestic industry. The US argues that including companies in the domestic industry and in turn relying on their compiled financial information for one purpose while applying a different definition of domestic production for purposes of assessing trade data (*i.e.*, US shipments, market share, etc.) would be anomalous.

(ii) Evaluation by the Panel

7.382 The ITC defined the domestic industry as the producers of a domestic like product. As a result, the question arose as to what activities constitute domestic production activities, i.e., when could an entity be said to be producing a domestic like product. The ITC determined that both fabbing and assembly/casing constitute domestic production activities. Such determination meant that

[332] *See, e.g.*, *Final Injury Determination*, at 6-11, 17 n.103, Table IV-5 n.1 (Exhibit GOK-10).
[333] *See, e.g.*, *Final Injury Determination*, at 6-11, Table IV-5 n.2 (Exhibit GOK-10).

when either fabbing or assembly/casing were undertaken by an entity in the US, that entity was treated as part of the domestic industry (excluding module packagers and fables design houses), and its fabbing or assembly/casing activities were treated as domestic shipments.[334]

7.383 Korea does not challenge the ITC's decision to treat assembly/casing as a domestic production activity. Nor does Korea challenge the ITC's definition of the domestic industry.[335] In other words, Korea does not contest that an entity fabbing or assembling/casing DRAMs in the US should be treated as a domestic producer.

7.384 What Korea challenges is the treatment of assembly/casing in the ITC's definition of the domestic industry, to the extent it results in differences in treatment of products depending on whether they were assembled/cased in the US or in a foreign country. In particular, Korea complains that assembly/casing activities by an entity in the US is sufficient for those activities to be treated as domestic shipments, even if the DRAMs were fabbed in a third country, whereas assembly of a US fabbed DRAM by a third country entity does not change the origin of the DRAM, i.e., it remains a US domestic product. Korea argues that if assembly/casing is sufficient to constitute a domestic production activity when undertaken by a US producer, it should also be sufficient to change the origin of the DRAM when undertaken by a foreign entity[336] (such that assembly/casing of a US fabbed DRAM by a third country entity would be treated as a non-subject import, rather than a domestic product). Korea alleges that this inconsistency results in an artificially reduced volume of non-subject imports, and an artificially increased volume of domestic production, thereby rendering the ITC's consideration of the importance of subject imports (relative to non-subject imports and domestic production) inconsistent with Article 15.2 of the *SCM Agreement*, and its consideration of the domestic industry inconsistent with Article 15.4 thereof.

7.385 In our view, the inconsistency identified by Korea is a consequence of the ITC's definition of the domestic industry as those producers that fabricate DRAMs in the US and those producers that assembly/case DRAMs in the US (excluding module packagers and fables design houses). In order to remedy this inconsistency, Korea would have to challenge the ITC's definition of the domestic industry, and its treatment of assembly/casing as a domestic production operation, by filing a claim under Article 16 of the *SCM Agreement*. However, Korea has not done so. There is therefore no basis for us to consider that the ITC's definition of the domestic industry is inconsistent with that provision.

7.386 We do not consider that an objective and impartial investigating authority could not properly have assessed the volume of subject imports or the state of the domestic industry on the basis of the results of the application of a WTO-consistent[337] domestic industry definition. Although an investigating authority might act inconsistently with these provisions in a number of ways, simply collecting subject import, non-subject import and domestic production data on the basis of a WTO-consistent domestic industry definition is not one of them. For this reason, we reject Korea's claim that the US violated Articles 15.2 and 15.4 of the *SCM Agreement* because the ITC improperly and inconsistently defined the domestic industry, subject imports, and non-subject imports. We recall that Korea could have challenged the ITC's definition of the domestic industry, but failed to do so.

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[334] Subject to adjustments made by the ITC to avoid double counting.

[335] Nor does Korea challenge the DOC's definition of subject merchandise.

[336] We note that, according to the ITC, US Customs considers the country of origin of DRAMs to be the country where the DRAMs were assembled, because Customs has determined that assembly operations constitute a substantial transformation of the merchandise (see *Decision Memorandum*, page 8, Exhibit GOK-5).

[337] In the absence of any legal claim by Korea, and any consequential finding by the Panel, that the ITC's domestic industry definition is inconsistent with the *WTO Agreement*, there is no basis for us to presume that it is WTO-inconsistent.

7. Conclusion

7.387 In light of the above, we find that the ITC's *Final Injury Determination* did not properly ensure that injury caused by one known factor other than the allegedly subsidized imports was not attributed to the allegedly subsidized imports, contrary to Article 15.5 of the *SCM Agreement*. We therefore conclude that the ITC's *Final Injury Determination*, and the *Final Countervailing Duty Order* based thereon, are inconsistent with Article 15.5 of the *SCM Agreement*, and that the US is therefore in violation of that provision.

7.388 We reject Korea's claims that the US violated:

- Article 15.2 because *inter alia*, the ITC determinations improperly assessed the significance of the volume effects of subject imports;
- Article 15.2 because *inter alia*, the ITC determinations improperly assessed the significance of the price effects of subject imports;
- Article 15.4 because *inter alia*, the ITC failed to consider all factors relevant to the overall condition of the domestic industry;
- Article 15.5 because *inter alia*, the ITC failed to demonstrate the requisite causal link between subject imports and injury; and
- Article 15.2 and 15.4 because *inter alia*, the ITC improperly and inconsistently defined the domestic industry;

7.389 Korea has also claimed that the US violated Article 15.1 of the *SCM Agreement*. However, Korea's Article 15.1 claim is entirely dependent on its claims under Article 15.2, 15.4 and 15.5.[338] Since there is no independent basis to Korea's Article 15.1 claim, we do not consider it necessary to rule on that claim. We therefore decline to rule on Korea's claim that:

- Article 15.1 because *inter alia*, the ITC determinations on injury and causation were not based on positive evidence and an objective assessment of the effects of allegedly subsidized imports.

E. VERIFICATION MEETINGS

(i) Arguments of the Parties

7.390 Korea asserts that the DOC conducted secret verification meetings in its territory with unnamed "experts" on the Korean financial markets. According to Korea, the DOC wanted such meetings to be secret, apparently because it believed that anonymity would encourage candour from such experts. Korea affirms that it did not object to the meetings themselves, but objected to the form or the meetings, *i.e.* with the need for anonymity. Korea points out that, without knowing the identity and background of the experts, it would not be in a position to comment on their degree of expertise or to identify possible biases in the experts. Korea notes that, without having observers at the meetings, it would have no way of knowing whether the DOC written report about the meetings was complete and objective.

[338] In this regard, we note Korea's assertion that "[e]ach of the specific inconsistencies (under Articles 15.2, 15.4 and 15.5] identified is necessarily an inconsistency under Article 15.1 and will be noted as such" (see para. 85 of Korea's First Written Submission). During its submission, Korea provides no other basis for "not[ing]" a violation of Article 15.1 other than the alleged violations of Articles 15.2, 15.4 and 15.5.

7.391 Korea asserts that it sought a compromise with the DOC on the conduct of verifications, whereby its counsel would be allowed to monitor the meetings. Under the arrangement proposed by Korea, counsel would only monitor the dialogue and would not interact with the experts or the DOC team involved in the interviews. Korea affirms that the DOC rejected this proposal and that, in response, it expressed its specific objection to the meetings in several communications with the DOC officials. Korea argues that the secret expert meetings were conducted in Korea over its specific objections. Korea further argues that the DOC offered it no alternative, since to affirmatively block the meetings would have resulted in adverse findings by the DOC to the detriment of the Korean DRAMS producers involved in the investigation. Korea affirms that it was not objecting to the substance of the verification, but that it had rather a procedural objection. Korea affirms that, otherwise, it was not consenting to that portion of the verification that involved secret meetings. According to Korea, its request to the DOC was quite modest: it requested only that counsel – not government officials, but counsel – be allowed to observe the meetings. Korea notes that the DOC has allowed counsel to attend such meetings as witnesses in other cases. Korea recalls that, ironically, the experts offered evidence largely at odds with the US theory in this case.

7.392 Korea submits that the DOC's action is inconsistent with Article 12.6, which gives Members the right to object to any verification meeting taking place within the territory of that Member. Korea is of the opinion that the DOC should have found some mutually agreeable compromise that met the needs of both parties, instead of simply insisting in doing the meetings its own way, without any regard to Korea's objections.

7.393 The US observes that Article 12.6 foresees the possibility of investigations in the territory of other Members, provided that they have been notified in good time and do not object to the investigation. The US recalls that Article 12.6 also provides for investigations on the premises of a "firm" in the territory of a Member and that it requires the explicit consent of firms to investigation in their premises and requires that the Members must be notified and not object. The US observes that, additionally, the investigating authorities are required to disclose or make available the results of its verifications of firms.

7.394 The US notes that DOC officials travelled to Korea to make verifications. Prior to the departure, according to the US, the DOC notified Korea of its intent to conduct such verification and provided Korea with the schedule of verifications of the respondent firms. The US further notes that the DOC also indicated in its schedule that concurrent with its verifications, it planned to meet with independent financial experts during its visit to Korea.

7.395 According to the US, Korea's only objection was related to the substance of the scheduled verification, i.e. Korea objected to the scheduled meetings between DOC officials and financial experts without the presence of Korea's counsel. The US notes that Korea did not withhold consent to investigations within its territory. Consequently, in order to gather information about the investigation, the DOC officials proceeded to meet with the financial experts, without the presence of Korea's counsel. The US asserts that the DOC disclosed and made publicly available its report of such meetings.

7.396 The US disagrees with Korea's argument that the DOC's actions were inconsistent with Article 12.6 because the DOC failed to accommodate Korea's request to allow its counsel to monitor the meetings. The US notes that the DOC's meetings with financial experts were in the context of gathering additional information to assist in its countervailing duty investigation and that transparency was preserved by placing the summaries of the meetings in public record.

7.397 The US sees no requirement in Article 12.6 that government officials must permit counsel for the government of the Member in question to be present at meetings with financial experts. The US notes that Korea's assertion that its counsel would ensure reliability of the written record fails to

account for the fact that representatives of the US domestic industry are never permitted to attend any part of the verification proceedings.

7.398 The US is of the view that, while Article 12.6 gives Korea the right to object to the investigations conducted within its territory, the right of denial cannot be extended to encompass the right to dictate the specific procedures to be followed in the conduct of verification proceedings. The US asserts that the DOC was not required to negotiate with Korea over the details of its investigatory proceedings. The US affirms that, if Korea wanted to, if could have chosen to withhold its consent to the investigations within its territory, and that it did not.

(ii) Evaluation by the Panel

7.399 Korea claims that the US acted inconsistently with the terms of Article 12.6, which gives Members the right to object to any verification meeting taking place within the territory of that Member. Korea insists that the DOC should have worked with it to find some mutually agreeable compromise on this issue.

7.400 Article 12.6 provides that:

> The investigating authorities may carry out investigations in the territory of other Members as required, provided that they have notified in good time the Member in question and unless that Member objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if *(a)* the firm so agrees and *(b)* the Member in question is notified and does not object. The procedures set forth in Annex VI shall apply to investigations on the premises of a firm. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain and may make such results available to the applicants.

7.401 We note that, in a letter dated 10 April 2003, the US notified Korea of the details of the investigation the DOC intended to carry out in the territory of Korea and informed Korea of the names of the firms and banks that had agreed to meet with DOC officials.[339] In the same letter, the US informed Korea that the DOC officials were to meet with "non-government entities."

7.402 In a letter of response to the US dated 14 April 2003, Korea, through its Counsel, notes that "there is one aspect of the verification schedule, however, that causes concern for the GOK."[340] In this letter, Korea notes that the DOC officials planned to conduct a series of private meetings with various banks and other third-party experts. Korea then states that it "strongly objects to the Commerce Department arranging meetings to gather information that will then be utilized as the factual basis for the final determination in this case." Korea further states that it "very much objects to the Department of Commerce having secret meetings with private firms in Korea as part of its CVD verification."

7.403 Nonetheless, in the same letter, Korea affirms that its objection is "very limited." It states that "the GOK does not object to the Commerce Department having meetings with any private firm. Nor does the GOK object to the Commerce Department having complete discretion in deciding with

[339] Exhibit GOK-27-(a) and Exhibit US-111.
[340] Exhibit GOK-27-(b) and Exhibit US-112.

whom it wants to meet. The Commerce Department can meet with whomever it wants. The only objection that the GOK has is to the Commerce Department holding these meetings in secret."[341]

7.404 In our view, Article 12.6 establishes two conditions for investigating authorities to carry out investigations in the territory of other Members: (1) the intention to carry out the investigations is notified in good time to the Member in question; and (2) that Member does not object to the investigation.[342] As far as the first condition is concerned, Korea does not question the fact that the US notified Korea of its intention to carry out an investigation in the territory of Korea. The issue at hand has to do with the second condition, *i.e.* whether Korea objected to the investigation – or whether Korea had the right to object to the format of the investigation, not to the investigation in itself.

7.405 We recall the assertion by the US that while Article 12.6 provides Korea with the right to object to the investigations conducted within its territory, such right of denial cannot be extended to encompass a right to dictate the specific procedures to be followed during the investigation proceedings.[343] We agree with the US. Korea could have prevented the investigation in its territory from taking place, but it chose not to do so. In its letter of response to the US, Korea does not object to the meetings, nor to the discretion of the DOC to meet "with whomever it wants."[344] Since Korea did not object to the DOC's on-site investigation, the DOC's decision to proceed with that investigation is not inconsistent with Article 12.6 of the *SCM Agreement*.

7.406 We note Korea's argument that it had no choice but to accept the DOC's on-site investigation, since to affirmatively block the meetings would have resulted in adverse findings by the DOC to the detriment of the Korean DRAMS producers involved in the investigation. We assume that Korea is referring to the possibility of the DOC using the "facts available" under Article 12.7 of the *SCM Agreement*. We are not persuaded by Korea's argument, however, since investigating authorities do not have *carte blanche* in their use of "the facts available." In particular, we agree with the panel in *Guatemala – Cement II* that, "[a]lthough there are certain consequences (under Article 6.8) for interested parties if they fail to cooperate with an investigating authority, [...] view such consequences only arise if the investigating authority itself has acted in a reasonable, objective and impartial manner (...)"[345]

7.407 Thus, we reject Korea's claim under Article 12.6.

F. BURDEN OF PROOF DURING THE DOC'S INVESTIGATION

7.408 Korea submits that the DOC's investigation in this case began with an effective presumption, based on past, unrelated investigations, that the GOK directed lending to "strategic" industries, including the Korean semiconductor industry (and consequently, to Hynix, a semiconductor company). Korea asserts that the use of such presumptions by investigating authorities is inconsistent with Articles 1 and 2 of the *SCM Agreement*, since these provisions require competent authorities to have a factual basis to establish the various elements of a countervailable subsidy.

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[341] *Ibid*.

[342] We note that the provisions in Annex VI of the *SCM Agreement*, which contains procedures for on-the spot investigations pursuant to Article 12.6, were not referred to by either Korea or the US in this dispute.

[343] US First Written Submission, para. 263.

[344] Nowhere in its letter of response to the US does Korea object to the investigation in itself. Rather, it only objects to the "arranging of secret meetings" or to the DOC "having secret meetings." See Exhibit GOK-27-(b) and Exhibit US-112. As Korea asserts in paragraph 247 of its Second Written Submission, it was not objecting to the substance of the verification; Korea had a "procedural objection."

[345] Panel Report, *Guatemala – Cement II*, para. 8.251.

7.409 Korea's claims concern the propriety of the DOC's investigation, and the consistency of the DOC's determinations of GOK entrustment or direction and specificity with Articles 1 and 2 of the *SCM Agreement*. Since we have already found that those determinations are in violation of those provisions, we do not consider it necessary to examine Korea's burden of proof claim.

G. ARTICLE 4.4 OF THE *DSU*

7.410 The US submits that the Panel should reject Korea's claims regarding the DOC countervailing duty order because Korea failed to comply with Article 4.4 of the *DSU* in respect to the inclusion of the final DOC countervailing duty order referred to in Korea's second request for consultations. The US submits that, notwithstanding the requirements of Article 4.4 of the *DSU*, Korea's second request for consultations did not include any indication of the legal basis of its complaint with respect to the DOC countervailing duty order.

7.411 The second sentence of Article 4.4 provides as follows:

> Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis of the complaint.

7.412 Korea submits that its second consultation request explicitly identifies the countervailing duty order at issue, and that the two consultation request together provide a fairly detailed explanation of the legal defects with the DOC and ITC determinations. Korea asserts that, since the DOC final countervailing duty order rests on the legal and factual foundations of these two agency findings, the two Korean consultation requests were in fact providing a more than sufficient "indication" of the legal basis for its claim against the DOC's final countervailing duty order. Korea also argues that the second consultation request specifically cited to Article VI:3 of *GATT 1994*, which sets forth the basic legal rule also reflected in Article 19.4 that the duties levied should not exceed the amount of the subsidy.

7.413 Korea's original request for consultations was set forth in document WT/DS296/1. That request covered the DOC's affirmative preliminary and final countervailing duty determinations, but did not refer to the DOC's final countervailing duty order. The request for consultations in respect of the DOC's final countervailing duty order was set forth in document WT/DS296/1/Add.1.

7.414 We note that the first sentence of Korea's second request for consultations provides:

> With reference to document WT/DS296/1 ... circulated on 8 July 2003, my authorities have instructed me to request further consultations with the Government of the US ...

7.415 In our view, the reference in the first sentence of Korea's second request for consultations to Korea's first request for consultations (i.e., document WT/DS296/1) is sufficient for the second request to be read in light of the first request. Thus, in addition to the provisions of the *SCM Agreement* set forth (in a non-exhaustive manner) in Korea's second request for consultations, its claims in that document should also be read in light of the provisions of the *SCM Agreement* and *GATT 1994* set out in document WT/DS296/1. In our view, the totality of these provisions provides sufficient "indication of the legal basis for the complaint" within the meaning of Article 4.4 of the *DSU*.[346]

[346] We note, in any event, that the scope of these proceedings is not necessarily restricted to the measures and claims set forth in Korea's requests for consultations (see, for example, the Panel Report in *Canada – Aircraft*, paras 9.5 – 9.14).

H. THE LEVY OF COUNTERVAILING DUTIES – ARTICLE 19.4 OF THE *SCM AGREEMENT* AND ARTICLE VI.3 OF THE *GATT 1994*

7.416 Korea claims that the US has levied countervailing duties in excess of the value of alleged subsidies, contrary to Article 19.4 of the *SCM Agreement* and Article VI.3 of the *GATT 1994*. Article 19.4 of the *SCM Agreement* provides:

> No countervailing duty shall be levied [51] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.
>
> [51]As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

7.417 Article VI:3 of *GATT 1994* provides in relevant part:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted [...].

7.418 We note that Korea's SCM Article 19.4 and *GATT 1994* Article VI.3 claims are dependent on its claims against the DOC subsidy determinations and the ITC's injury determinations. Thus, to the extent that we reject those claims, there is no basis to find that the US violated *SCM* Article 19.4 and *GATT 1994* Article VI.3. To the extent that we uphold those claims, we do not consider it necessary to make a finding under those provisions.

I. ARTICLES 10 AND 32.1 OF THE *SCM AGREEMENT*

7.419 Korea submits that, in light of many alleged inconsistencies in the DOC action, the CVD order against DRAMs from Korea is inconsistent with Articles 10 and 32.1 of the *SCM Agreement*.

7.420 Article 10 of the *SCM Agreement* provides:

> Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of *GATT 1994* and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture. (footnotes omitted)

7.421 Article 32.1 of the *SCM Agreement* provides:

> 32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of *GATT 1994*, as interpreted by this Agreement. (footnote omitted)

7.422 Korea asserts that both Articles 10 and 32.1 of the *SCM Agreement* constitute overarching provisions, establishing that no countervailing duty action specifically, and no action against a subsidy generally, shall be taken by a Member unless in accordance with provisions of the *SCM Agreement* and *GATT 1994*. Korea asserts that Article 19.2 gives Members the discretion to decide whether or not to impose duties, "where all requirements for imposition have been fulfilled." According to Korea, once the Member decides to impose the duty, the obligations of Article 10 and Article 32.1

come into play. Korea argues that the decision by the US to impose the countervailing duty order in this case thus violates Article 10 and 32.1.

7.423 The US asserts that Korea's claims under Articles 10 and 32.1 of the *SCM Agreement* are dependent claims, in that they depend upon a finding of an inconsistency with an obligation contained in some other provision of the *SCM Agreement* or *GATT 1994*. The US asserts that, because the US has not acted inconsistently with any such other provisions, the countervailing duty order is, by definition, not inconsistent with Articles 10 or 32.1.

7.424 We note that Korea's Article 10 and 32.1 claims are dependent on its claims against the DOC subsidy determinations and the ITC's injury determinations. Thus, to the extent that we reject those claims, there is no basis to find that the ITC's injury determinations are inconsistent with Articles 10 and 32.1. To the extent that we uphold those claims, we do not consider it necessary to make a finding under Articles 10 and 32.1.

J. ARTICLE 22.3 OF THE *SCM AGREEMENT*

7.425 Korea submits that the ITC's *Final Injury Determination* failed to comply with Article 22.3 of the *SCM Agreement*, which provides:

> Each [public] notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.

7.426 Korea asserts that the ITC's public determination failed to provide sufficient detail on important issues regarding the volume and price effects of the alleged subsidized imports, and the causal link between alleged subsidized imports and the injury to the domestic industry.

7.427 The US submits that the ITC's *Final Injury Determination* complied with Article 22.3.

7.428 We note that Korea's Article 22.3 claim is dependent on its claims under Articles 15.1, 15.2 and 15.5 of the *SCM Agreement*. Thus, to the extent that we reject those claims, there is no basis to find that the ITC's *Final Injury Determination* is inconsistent with Article 22.3. To the extent that we uphold those claims , we do not consider it necessary to make a finding under Article 22.3. Since the ITC's *Final Injury Determination* is inconsistent with Article 15.5 in respect of part of the ITC's non-attribution analysis, the adequacy of the ITC's public notice in respect of that part of its non-attribution analysis is immaterial.[347]

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 For the reasons set forth above, we conclude that the DOC's *Final Subsidy Determination*, the ITC's *Final Injury Determination*, and the *Final Countervailing Duty Order* based thereon, are inconsistent with Articles 1, 2 and 15.5 of the *SCM Agreement*. We therefore conclude that the US is in violation of those provisions of the *SCM Agreement*.

8.2 For the above reasons, we reject Korea's claims that the US violated:

- Article 2 in so far as Korea's claim concerns the DOC's finding the alleged subsidies provided by Group A creditors were specific;

[347] We note that such an approach is consistent with that adopted by previous panels, including *Guatemala – Cement II* (para. 8.291, note 48), Appellate Body Report, *EC – Bedlinen (Article 21.5 – India)* (para. 6.259), and *Argentina – Poultry Anti-Dumping Duties* (para. 7.293).

- Article 15.2 because *inter alia*, the ITC determinations improperly assessed the significance of the volume effects of subject imports;

- Article 15.2 because *inter alia*, the ITC determinations improperly assessed the significance of the price effects of subject imports;

- Article 15.4 because *inter alia*, the ITC failed to consider all factors relevant to the overall condition of the domestic industry;

- Article 15.5 because *inter alia*, the ITC failed to demonstrate the requisite causal link between subject imports and injury;

- Article 15.2 and 15.4 because *inter alia*, the ITC improperly and inconsistently defined the domestic industry;

- Article 12.6 because *inter alia*, the DOC conducted various private verification meetings in the territory of Korea, at which the Government of Korea had no representatives, over the explicit objection of the Government of Korea;

8.3 In light of the above conclusions, we do not consider it necessary to address Korea's claims that the US violated:

- Articles 1 and 2 because *inter alia*, the DOC imposed an improper burden of proof on respondents, that is the Government of Korea and Hynix, and thereby failed to base its decision on affirmative, objective, and verifiable evidence;

- Articles 1.1 and 14 because *inter alia*, the DOC disregarded market benchmarks for measuring benefit established by a foreign bank operating in the Korean market that extended financing to Hynix during the period of investigation;

- Articles 1.1 and 14 because *inter alia*¸ the DOC failed to utilize relevant Korean market benchmarks in determining whether Hynix was "creditworthy" or "equityworthy," and otherwise applied an improper "uncreditworthy" benchmark and discount rate in calculating the benefit to Hynix in this case;

- Article 19.4 of the *SCM Agreement* and Article VI:3 of the *GATT 1994* because *inter alia*, the DOC's failed to measure the benefit in accordance with the principles of Article 14 of the *SCM Agreement* resulted in countervailing duties levied in excess of the amount allowed under the *SCM Agreement* and the *GATT 1994*;

- Articles 10 and 32.1 because *inter alia*, the CVD order imposed by the US against DRAMs from Korea was not in accordance with the relevant provisions of the *SCM Agreement* or the relevant provisions of the *GATT 1994*;

- Article 15.1 because *inter alia*, the ITC determinations on injury and causation were not based on positive evidence and an objective assessment of the effects of allegedly subsidized imports; and

- Article 22.3 because *inter alia*, the ITC's injury determination did not set forth in sufficient detail the ITC's findings and conclusions on all material issues of fact and law.

8.4 We note that Korea requests the Panel to recommend that the US terminate the countervailing duty order immediately.[348] Any such recommendation is precluded by Article 19.1 of the *DSU*, which restricts us to recommending that the US bring the relevant measures into conformity with the relevant agreement. Accordingly, in light of the conclusions above, we recommend that the US bring the DOC's *Final Subsidy Determination*, the ITC's *Final Injury Determination*, and the DOC's final countervailing duty order, into conformity with the *SCM Agreement*.

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[348] Korea First Written Submission, para. 599.

ANNEX A

SUBMISSION OF PARTIES AND THIRD PARTIES FOR THE
FIRST SUBSTANTIVE MEETING

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ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION BY THE REPUBLIC OF KOREA

28 April 2004

I. ITC INJURY INVESTIGATION – CLAIMS OF ERROR

A. OVERVIEW OF THE US DRAM INDUSTRY

1. The US DRAM industry has a number of distinctive and unique conditions of competition. Understanding and taking into account these distinctive conditions of competition should have been a critical part of the competent authorities' objective examination required by Article 15 of the SCM Agreement. Understanding these features will also be an important part of this Panel's "objective assessment" of the ITC determinations in this dispute.

2. There are four key conditions. First, the DRAM market is highly cyclical, with regular well-known boom and bust periods. Second, the trend toward even more extreme boom-bust cycle is another feature of the DRAM market that competent authorities must take into account. Third, DRAM product pricing is extremely volatile based on worldwide, not regional, supply and demand phenomena. Fourth, most of the largest computer companies as well as DRAM suppliers have moved a substantial part of their manufacturing operations to countries outside the United States. This trend toward global production of DRAMs has reinforced the trend toward global pricing and attenuates the volume and price effects in the United States. The ITC incorrectly argued for significant price effects of subject imports in the US market and ignored the economic reality that subject imports by a single company like Hynix into the US market have at most a very limited ability to have any effect on price. Moreover, both the ITC and the DOC failed to undertake serious analysis to show whether and how these factors was being taken into account in violation of US WTO obligations.

B. ARTICLE 15.1 STANDARDS

3. 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 be based on an unbiased investigation. Further, Article 15.1 is an overarching provision rather than a stand-alone 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 SUBJECT IMPORTS

4. In this case, the ITC mechanically cited import statistics, but largely ignored any meaningful analysis of the significance of those figures. The data showed that the Hynix brand lost market share over the period of investigation, and that subject imports changed only slightly in reaction to the temporary shutdown of the Hynix US operations in Eugene, Oregon. Because the shift in market share was so small – regardless of how it is measured - the ITC instead cited a variety of other statistics without putting any of them in proper context.

5. Given the unique nature of the DRAMs product – the continual movement to higher and higher densities of chips and the ever-increasing total bits supplied and consumed, an actual increase in imports (on a billion bit basis) is meaningless. Rather, what is important in analyzing the volume of DRAMs shipments is to examine the increased shipments relative to consumption and relative to other suppliers. Thus, as the ITC itself acknowledged, the best measure of any volume effects of the subsidized imports is to examine *market share* data.

6. The data before the ITC demonstrates the following important facts about trends in market share based on US shipments from these different sources:

- The market share of Hynix's imported DRAMs was 6.7 per cent in 2000, increased to 9.0 per cent in 2001, decreased to 8.9 per cent in 2002 and decreased again to 5.8 per cent in 2003.

- The consistently small volume of Hynix's imports was dwarfed by both domestic production and non-subject imports. In 2002 non-subject imports were more than six-and-a half times larger than Hynix's imports.

- Although the market share of Hynix's imports did increase over the three year (2000-2002) period, the increase was only two percentage points.

- The increase in market share by non-subject imports from 2000 - 2002 was nearly *five times larger* than the increase in market share by Hynix's imports.

7. Taken as a whole, any objective assessment of this evidence would find that any increase in the volume of allegedly subsidized imports was not "significant."

8. The absolute level of imports might well have been increasing, but in this particular industry where the measure of imports (billions of bits) is always increasing dramatically, this particular measure alone cannot establish significance. More importantly, the market share of Hynix brand DRAMs fell consistently over the period, while other suppliers expanded over the same period. Even if one focus exclusively on Hynix imports, the Hynix share remained modest throughout the period, and fell in 2002 and the beginning of 2003. Any small increase in market share over the full period can be explained by the shutdown of the Hynix facility in Oregon, requiring a modest increase in imports simply to replace those sales previously made from the Hynix US facility. Korea submits that a careful and critical examination of the ITC explanation of the volume effects in this case reveals insufficient positive evidence to justify the ITC findings. To the contrary, the evidence shows that the volume effects of subject imports by Hynix were insignificant, at least to any objective decision-maker, and the ITC finding was inconsistent with Articles 15.1 and 15.2.

D. SIGNIFICANT PRICE EFFECTS BY SUBJECT IMPORTS

9. In this case, the ITC created the illusion of analyzing price effects, without really doing so in any meaningful way. The ITC dutifully identified certain particular and unique competitive dynamics of the DRAM market, but then largely ignored those dynamics in its mechanical invocation of its traditional methodologies. In particular:

- The ITC made factual findings about pricing at odds with the facts of this case, and with basic economic logic. Hynix was losing market share in 2002 and the beginning of 2003, was not the lowest cost supplier, and therefore had limited ability and incentive to drive down the price. It defies logic to blame Hynix pricing, when Hynix was losing market share.

- The ITC largely ignored the important fact that no customer identified Hynix as the "price leader", calling into serious doubt whether Hynix could be the source of "significant" price effects.

- The ITC undertook two types of pricing analysis, but then inexplicably chose to focus on the method that considered only subject imports, and ignored the effect of other non-subject imports on pricing trends.

- The ITC brushed aside any discussion of other factors that affect pricing by simply acknowledging they "played some role," but without any further analysis.

10. The ITC's traditional underselling analysis, which compares the weighted-average prices of domestic producers only with weighted-average prices of subject imports, was not an objective examination for the ITC's pricing analysis in this case because it ignored prices of non-subject imports. Prices of non-subject imports should have been considered particularly in this case because (i) DRAMs are a commodity product with virtual complete interchangeability; (ii) non-subject imports constituted the majority of the US market; (iii) the nature of DRAMs market has become increasingly global; and (iv) the traditional underselling analysis disguised pricing dynamics reflected in the evidence before the ITC, such as the frequency of the lowest price of respective imports.

11. The ITC's reliance on a traditional underselling analysis disguised the following important pricing dynamics reflected in the evidence before the ITC. Overall, Hynix subject imports were the lowest price in only a small number of instances. Put differently, an overwhelming per cent of the time, *other suppliers* were offering lower prices than Hynix. Over time, the record shows that the frequency of non-subject imports being the lowest price source grew. On a weighted basis, to reflect the relative importance of different products, the frequency of non-subject imports being the lowest price source almost doubled.

12. The ITC's dismissal of the role of non-subject import pricing glosses over two fundamental flaws: (i) that the average non-subject price may be higher than domestic prices does not mean very much if there is an individual non-subject supplier that is underselling and offering the lowest price; and (ii) if these patterns of underselling were considered together with trends in market share, the non-subject imports were having a significantly greater impact on the market.

13. The ITC had available considerable evidence that a variety of factors can influence the prevailing market price of DRAMs. This evidence before the ITC demonstrated that DRAM market prices are affected by: (1) changes in worldwide demand growth; (2) changes in worldwide supply; (3) how quickly competitors can climb the learning curve for new DRAM products, and (4) erratic swings in inventory levels caused by the inability to have longer term reliable forecasts. Yet the ITC did not adequately address any of these factors when explaining price declines.

14. As with the volume effects, any objective assessment of this pricing evidence taken as a whole would find that the price effects of allegedly subsidized imports were not "significant". If it had an open and objective mind, the ITC should have realized that low priced non-subject imports that were rapidly gaining market share caused the dominant price effects, and that any remaining effects of subject imports could not reasonably be considered "significant". The ITC finding was inconsistent with Articles 15.1 and 15.2.

E. CONDITION OF THE DOMESTIC INDUSTRY -- INCONSISTENT WITH ARTICLES 15.1 AND 15.4 OF THE SCM AGREEMENT.

15. Article 15.4 requires an evaluation of all relevant economic factors and indices and appreciates the fact that relevant economic factors and the weight to be given each of those factors will differ from case to case. The evidence before the ITC in this case of global scale, strong capital

spending and R&D spending, all funded by strong cash flow and access to capital markets demonstrates overall strength, not weakness. The ITC, however, largely ignored all this evidence in its analysis of the condition of the domestic industry. Even more egregiously, the ITC failed to even attempt to address the public statements that Micron and Infineon made to the financial community and their investors that they were doing quite fine, within the context of the business cycle and relative to their competitors, which contradicted the doom and gloom assessment adopted by the ITC. Such an approach does not amount to an objective examination of the key facts, and thus violates Articles 15.1 and 15.4.

F. CAUSATION

16. Pursuant to the first and the second sentences of Article 15.5, Members must demonstrate an explicit "causal relationship" between the subsidized imports and any material injury suffered by the domestic industry. In this case, the evidence before the ITC demonstrated that there was no correlation between the trends in subject imports and the condition of the domestic industry. First, Hynix was losing market share while the domestic industry gained market share, which proves the absence of any correlation between the trend of subject imports and the market shares of US producers. Second, after the "boom" year of 2000, Micron and Infineon lost more and more money even as Hynix suffered eroding market share. The ITC never even attempted to address this lack of correlation. Further, the ITC should have considered the fact that Hynix trends in imports correlate much more strongly with the shutdown of the Oregon facility than with the trends in domestic industry performance.

17. Moreover, the non-attribution requirement in the third sentence of Article 15.5 obligates an investigating 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 of the Appellate Body in the previous safeguards and anti-dumping contexts, 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, and thus to ensure it complies with the non-attribution requirement. With respect to a number of key issues, the ITC provided either no analysis or insufficient analysis:

- The ITC improperly dismissed the adverse effects of the increasing and much larger volume of non-subject imports, when the evidence before it demonstrated that non-subject imports accounted for 6 to 7 times greater share of the US market as do subject imports from Hynix. The large and growing volume of non-subject imports cannot be so easily dismissed.

- The ITC completely ignored the arguments about changes in relative capacity that confirmed the dominant role of non-subject suppliers who increased their capacity much more than Hynix.

- The ITC dismissed the role of the drop in demand for 2001, but ignored compelling evidence by every industry observer than the demand drop was a critical factor for understanding 2001 prices.

- The ITC completely ignored the arguments about Micron's own technical shortfallings, and how the absence of certain products at certain times hurt Micron.

18. The ITC at least tried to address the role of non-subject imports, but either ignored or distorted the key evidence. It is not objective to dismiss contrary evidence without discussion. It is not objective to average and thus obscure the prices of individual domestic and non-subject suppliers. Particularly in a case where the individual supplier data is available and could be easily used, there is

no persuasive reason for an objective competent authority to present the data in such a way that obscures rather than reveals.

19. In addition to this methodological flaw, the ITC finding had no sense of perspective. It is simply not credible to find this small amount of additional underselling is significant when applied to a small subject import volume averaging about 8 per cent market share over the 2000-2002 period, compared to comparable levels of underselling by non-subject import volume averaging about 56 per cent market share over the same period. For a commodity market, non-subject market share roughly seven times as large would dwarf any price effects from a much smaller volume of subject imports.

20. Moreover, although the ITC received substantial information and data that demonstrated other suppliers increased DRAM production capacity much more than did Hynix during the period examined, there is no discussion of this information in the ITC Report. The two types of data presented to the ITC – wafer starts data and data measured by both wafers and die shrinks – evinced that Hynix's Korean operations played a relatively trivial role in capacity expansions that occurred during the period examined, while other suppliers, most notably, Infineon and Samsung have been the most aggressive in expanding total DRAM output.

21. Further, the ITC improperly dismissed the unprecedented drop in underlying demand for computer and telecom equipment and the fact that 2001 was the worst year in decades for these industries. Thus, to the extent that DRAM prices rise or fall because of the changing level of demand, subject Hynix imports from Korea has not caused those price changes. There are two principal problems with this casual brushing aside of demand. First, the alleged lack of correlation is just wrong. In making its assertion, the ITC cites only a discussion in the Micron brief about trends in DRAM output, which is an issue of growing *supply*, and says nothing about the underlying intrinsic *demand*. In fact, the decline in demand growth in 2001 played a major role in the price decline in 2001. Second, the ITC ignored statements by many industry experts pointing to the decline in demand as a key explanation of the 2001 downturn in price. Most noteworthy, of course, are the statements by Micron and Infineon themselves. Micron's own annual report for 2001 gave the following explanation for disappointing 2001 earnings:

22. Lastly, the ITC completely ignored the technological and production difficulties of Micron during the claimed period of injury. Specific information about Micron, the largest US producer of DRAMs, and its successes and failure presented to the ITC had particular significance for understanding the overall situation of the US DRAM industry. However, the ITC ignored this important information in its analysis of other factors, and thus failed to provide an objective examination. The ITC findings were inconsistent with Articles 15.1 and 15.5.

G. THE ITC 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 ITC 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 ITC 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. Thus, the discussion of findings must be directly discernable from the ITC decision, yet inconsistent with Article 22.3.

II. DOC 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. Hynix's financial restructuring took place at a time of 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 both 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 two very distinct periods: the period through June 2001 and the period after June 2001.

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 United States as evidence of entrustment or direction by the Government of Korea 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 the SCM Agreement for demonstrating a financial contribution through private bodies -- a standard not met by the United States -- that protects innocent and fundamentally sound commercial conduct from the reach of improper countervailing duty actions.

B. FINANCIAL CONTRIBUTION

27. Under Article 1.1.(a)(1)(iv) of the SCM Agreement, "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. Moreover, the text of Article 1.1 requires that each alleged government delegation or command be examined with respect to <u>each</u> party, and with respect to <u>each</u> task or duty.

28. According to the *US – Export Restraints* case, the act of entrusting and that of 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* also made it clear that 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.

29. Authorities cannot meet this standard with generalized findings of entrustment or direction. 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. Yet this is exactly what the DOC did in this case. It brought together a patchwork of evidence, much of it based on press accounts, and much of it from early in the period investigated, and determined that *all* lending to Hynix by Korean banks over a ten-month period was directed by the GOK.

30. In light of the plain meaning of "entrustment or direction", this finding of guilt by vague association does not pass muster under Article 1.1(a)(1)(iv). Given the many commercial creditors involved at various stages of Hynix's financial restructuring, and the different ways in which they participated, it makes no sense to find government "direction".

31. The DOC's "directed credit" findings in the underlying case, however, do not meet this standard. In particular, nowhere in its 140-page *Decision Memorandum* does the DOC identify an explicit and affirmative action of delegation or command by the GOK to all of Hynix's commercial creditors to engage in a ten-month long process of financial restructuring. Indeed, the only evidence (i.e. the Economic Ministers meetings) offered by the DOC allegedly establishing or suggesting an explicit and affirmative action by the GOK relates to narrow circumstances that do not support the DOC's broad theory of entrustment or direction.

32. The additional evidence relied upon by the DOC to support its directed credit finding falls short of establishing explicit GOK direction. For instance, the fact that the Financial Supervisory Commission (FSC) granted waivers to certain Korean banks in connection with certain restructuring transactions involving Hynix does not explain those banks' decisions actually to participate in those transactions, or the participation of any other banks therein, over the course of 2001. Moreover, nothing in the Korea Development Bank (KDB) fast track programme involved any specific GOK direction of any specific lender to participate. Also, the presence of the Financial Supervisory Service (FSS) official at the March 2001 creditors meeting is hardly a smoking gun of GOK entrustment/direction, as clearly evidenced by the contemporaneous FSC/FSS press release. In the same vein, nothing in the Kookmin prospectus establishes an affirmative and explicit GOK action to direct commercial bank lending to Hynix. Lastly, contrary to the DOC findings, the unverified statements of anonymous experts secretly interviewed by the DOC actually suggest the lack of GOK control over Korean banks.

33. Furthermore, under Article 1.1(a) of the SCM Agreement, it is insufficient to find simply that the government commanded a particular result. The private body to which that government delegation or command was addressed must also be ascertained, as well as the object of that delegation or command. There is not a single instance in the DOC's analysis where it could point to any credible evidence linking all of Hynix's creditors to its alleged "directed credit" conspiracy. Rather, the evidence relied upon by DOC at best points to GOK *interaction* with certain banks at certain times with respect to a particular financial transaction.

34. This absence of evidence is particularly egregious for the financing transactions later in the period of investigation (i.e. the October 2001 restructuring). With respect to the October restructuring, the only evidence the DOC provides to link the motives of all the banks involved in that restructuring measure to its alleged GOK action is the *unverified* assertions of a single anonymous "expert" interviewed by the DOC in Seoul. Moreover, with respect to the October restructuring, the DOC determined that all banks participating in the programme were directed by the GOK no matter what each bank did. Yet it defies both reason and commonsense to find that banks deciding to extend new loans and banks deciding not to extend new loans were both directed to "save Hynix".

35. As regards the May 2001 restructuring, the DOC paid inadequate heed to the fact that the restructuring was expressly contingent upon a successful equity offering on global markets. Moreover, in its quest for the conclusion that the GOK was behind the May programme, the DOC effectively disregarded the active participation by private banks, including a foreign private bank (i.e., Citibank) in the restructuring process.

36. Perhaps the most troubling piece of "evidence" relied upon by the DOC to justify its finding of entrustment or direction are the anonymous statements of certain so-called "experts" interviewed in Korea. The DOC seriously distorted this evidence, and reached a conclusion without any evidentiary support. A general finding of "influence", or "some influence", over certain commercial banks could not be more ambiguous. It is even telling that out of the eight "experts" interviewed by DOC, the DOC can cite only one for the observation that the GOK could still influence banks with less than majority GOK ownership.

37. Moreover, on balance, the report of the eight "experts" actually suggests the lack of meaningful GOK control over Korean banks. Indeed, the DOC's treatment of the experts' views as discussed above is highly disingenuous. Nowhere addressed in the DOC's decision are the several statements found in the "experts" report indicating the extremely improbable nature of the DOC's grand directed credit theory, whether generally or with respect to specific banks.

38. The discrepancy between what the experts said and the conclusion drawn by the DOC is simply breathtaking. The DOC seized upon the rather unsurprising view that the GOK continued to have some influence over those banks in which it was the majority shareholder. But in seizing upon this point, the DOC conveniently ignored several far more relevant points: (1) that even for the GOK-owned banks, the GOK role is primarily influence, not control or specific direction; (2) that the GOK had no control and much less influence over the privately held banks, particularly those like Kookmin with substantial foreign investment; and (3) that several of the experts specifically indicated that the GOK had nothing to do with the Hynix financial restructuring.

39. This last point is perhaps the most significant. The DOC focused on the statements that the GOK still has influence with GOK-owned banks, but then ignored the repeated statements that the GOK "was unable to stop" banks from walking away from Hynix, that the Hynix workout "had nothing to do with the government", or that any GOK influence "could not have been a major factor in the bank's decisions". Indeed, the DOC determination to find evidence of GOK control over the Hynix restructuring obscured the reality of what the experts told the DOC. As a result, the United States simply believed what it wanted to believe regardless of the evidence. Taken as a whole, the DOC has not justified with objective evidence its decision to impute to the GOK the profit-driven actions of various individual commercial banks.

C. FINDING AND MEASUREMENT OF "BENEFIT"

40. The second requirement under the SCM Agreement 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.

41. Moreover, the SCM Agreement defines benefit in the context of the experience of private actors in the market of the Member under investigation. In this regard, the Appellate Body in *US-Lumber* recently decided that an investigating authority should not discard a primary benchmark (i.e. those in the market under investigation) in favour of some other benchmark, unless it (1) proves the market distortion necessary to take such action; and (2) demonstrates the other benchmark is connected with the prevailing market conditions in the market under investigation.

42. The DOC analysis of "benefit" provides a particularly egregious example of results-oriented analysis. Notwithstanding the need to find the most appropriate market-based benchmark to meet WTO obligations, the DOC systematically dismissed every single possible benchmark. The DOC dismissed every single commercial bank in Korea, even though DOC also found that the GOK no longer "directs" credit on an economy-wide basis. Basically the DOC found that because some evidence hinted at some influence over some banks, then all Korean commercial banks should be disregarded.

43. Even more egregious, the DOC rejected the use of Citibank as a benchmark. As a foreign commercial bank operating in Korea, Citibank should have been the perfect commercial benchmark. Yet the DOC labored mightily to reject Citibank, offering a host of reasons that made little sense under US law and WTO jurisprudence alike.

44. In this case, the DOC had a wide range of possible commercial benchmarks. Hynix creditors included a wide mix of public bodies, Korean banks with some government shareholding, other Korean banks with little or no government shareholding, and even foreign commercial banks. These

various lenders participated in different stages of the restructuring transactions, participated in different ways, and showed varying degrees of independence in their decisions. One would certainly think that an objective decision-maker could find some commercial bank out of this mix that could serve as a valid benchmark.

45. But the DOC approached the situation differently. Rather than acknowledge the range of facts, and search for the best possible benchmark, the DOC instead searched for reasons to disregard all of the banks -- every last one. Thus, the DOC took its flawed conclusions about "financial contribution" (that the GOK had "directed" all the Korean banks), and used this conclusion as an excuse not even to examine the particular circumstances of each Korean commercial bank. So every Korean bank was treated the same, whether government owned or not, whether foreign investors controlled the bank or not, or whether the bank lent to Hynix or not. Every Korean bank was rejected out of hand. This assessment ignored the facts, and was not objective.

46. With respect to foreign private bodies, in both its preliminary and final determination, the DOC specifically concluded that Citibank's participation was not directed by the GOK. Nonetheless, the DOC improperly rejected Citibank as an appropriate benchmark for the financing in which it engaged. The DOC finding that the extent of Citibank's participation in the Hynix restructuring was too small is erroneous with respect to both loans that Citibank made to Hynix in the earlier phases of the restructuring (December 2000 and May 2001), and the equity infusion that was done as part of the October 2001 restructuring. The record evidence clearly indicates that Citibank was an integral participant in each of these restructuring measures, thereby contradicting the DOC benefit findings. In addition, the evidence including sworn testimony by Citibank, unequivocally refutes the DOC determination that Citibank's decision to participate in the Hynix restructuring was somehow influenced by the GOK.

47. In terms of measuring the alleged benefit, the DOC also never explained how it justified the use of US data on companies that have defaulted as a fair proxy for a Korean company that had not defaulted. The Korean financial markets seek to avoid bankruptcy. Hynix never declared bankruptcy. In fact, Hynix stock remained actively traded throughout this period. Investors were continuing to "bet" on the future upturn in DRAM prices, hardly the sign of a company in default. The reality is that the DOC did not even attempt to identify Korean bond default rate data once it had determined that Hynix was "uncreditworthy". The DOC's rationale for rejecting the data was unreasonable, as it made no attempt to satisfy any doubts or concerns it expressed regarding the data.

D. SPECIFICITY

48. Korea submits that the DOC 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 DOC specificity findings, on the contrary, do not rise of the level of precision required under the SCM Agreement.

E. PROCEDURAL ISSUES

49. In the underlying investigation, the DOC imposed an improper burden of proof with respect to financial contribution and specificity, inconsistent with Articles 1 and 2 of the SCM Agreement. In addition, the DOC's finding of financial contribution and specificity was effectively predisposed, based on prior findings concerning different sectors and periods unrelated to the investigation at hand. Also, inconsistent with Article 12.6 of the SCM Agreement, the DOC conducted private verification meetings in Korea, at which the GOK had no representatives, over the explicit objection of the GOK. Lastly, Korea submits that the DOC imposed countervailing duties in excess of the value of the alleged subsidies, inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of GATT 1994.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

28 May 2004

I. GENERAL ISSUES

1. The Panel's task is to determine whether a reasonable, unbiased person, looking at the same evidence as the DOC and the ITC, could have – not would have – reached the same conclusions as did those agencies. Even though Korea spends a good deal of time talking about "positive evidence", at its core, Korea's argument is not really about the nature of the evidence on which the DOC and ITC determinations were based. Instead, Korea implores the Panel to reweigh the evidence in the hope of obtaining a different outcome. Korea also asserts that the investigating authority bears the burden of proof. This is a remarkable assertion for which Korea offers no citation to authority, and for which there is none. The determinations of the DOC and the ITC – including those aspects that are not subject to a requirement of positive evidence – were based upon evidence that was "affirmative", "objective", "verifiable" and "credible".

II. THE DOC SUBSIDY DETERMINATION WAS PROPER

A. The DOC's Finding of a Financial Contributions Was Proper

2. The DOC determined that the GOK entrusted and directed Hynix's creditors to provide financial contributions to Hynix The DOC made this determination based upon an objective examination of *all* of the record evidence, which was, in Korea's words, "complex and extensive". The totality of this evidence amply supports the DOC's determination that the GOK entrusted and directed Hynix's creditors to provide financial contributions to Hynix.

3. The GOK's policy with respect to Hynix was more than just some general interest in Hynix's prospects. Rather, the GOK's policy was specific: do whatever necessary to prevent the failure of a particular company – Hynix. As context for its policy, the GOK's support of Hynix as a member of a designated "strategic" industry predates the DOC's period of investigation.

4. Following the 1997 financial crisis, the GOK engineered a merger between Hynix (then Hyundai Electronics) and LG Semicon that exacerbated Hynix's financial problems. As early as November 2000, the GOK began pursuing a policy (and taking specific actions) to prevent the failure of Hynix. Economic Ministers "[s]ignaled the GOK's determination that Hynix would not be allowed to fail". A Hynix executive stated: "We won't be going bankrupt. The Korean government won't let us fail."

5. The GOK took affirmative actions to entrust and direct Hynix's creditors to provide financial contributions to Hynix. The GOK did so by exercising control over Hynix's creditors in its multiple roles as lender, owner, legislator and regulator.

6. **The GOK's Role as Lender:** Financial contributions provided to Hynix by "public bodies", such as the KDB, were direct. These "public" Hynix creditors played a significant role in the GOK's

direction of the "private" Hynix creditors. The KDB's presence as a lender was a signal to Korean "private" banks that a particular investment decision had the GOK's blessing, and that a company was backed by the GOK.

7. **The GOK's Role as Owner:** The GOK's role as owner was crucial in its exercise of control over Hynix's creditors. In each of the major Hynix restructuring and recapitalization transactions, these government-owned and -controlled banks accounted for a major portion of either new loans or debt that was swapped for equity. Through its influence over government-owned banks and its direct control over specialized banks, the GOK was able to establish its dominant position over Hynix' Creditors' Councils, influence the outcome of the council meetings, and entrust the continuation of its policies to the council. The GOK also demonstrated control over banks with relatively small government ownership shares. Kookmin Bank, which had less than 10 per cent government ownership, admitted in sworn submissions to the US SEC that it had been, and still was, subject to government influence in its lending decisions.

8. **The GOK's Role as Legislator:** The GOK took legislative action that enhanced its ability and the ability of Hynix's creditors to effectuate the GOK's policy to save Hynix. Prime Minister Decree No. 408 legalized the GOK's rights to intervene under the guise of stabilizing financial markets or exercising its shareholder rights to elect and appoint the banks' decision makers and to make credit policy decisions. The Public Fund Oversight Act required Korean private banks to sign MOUs with the GOK in exchange for the massive recapitalizations they received from the government. These MOUs provided the GOK with a contractual right to intervene in the day-to-day business and credit decisions of Korean banks. The CRPA permitted a handful of Hynix's creditors, most of whom were majority owned by the GOK, to dictate restructuring terms to other Hynix creditors. Record evidence shows that the GOK used these legislative measures during the period of investigation to effectuate its Hynix policy.

9. **The GOK's Role as Regulator:** The FSC approved three credit limit increases for Hynix's creditors "to allow them to participate in the Hynix restructuring process". The record evidence shows that, far from applying "market principles", the FSC waived the credit ceiling for three of Hynix's creditors participating in the December 2000 syndicated loan for economic, social and political reasons. The FSS requested all creditor banks "to refrain from exercising [liquidation] rights until 4 September 2001". Without this intervention, Hynix's creditors could have sought to liquidate the company, thereby ending its prospects for restructuring.

10. The DOC assessed several instances in which the GOK threatened Hynix's creditors to coerce compliance with its policy to prevent the failure of Hynix, such as the GOK's pressure on KFB (which was, at that time, 51 per cent owned by Newbridge Capital, a US company) to participate in the Fast Track Programme". Through the FSC and FSS, the GOK also threatened to terminate banks' relationships with either the government or their existing customers.

11. The totality of the evidence supports the DOC's findings that the GOK entrusted and directed Hynix's creditors to provide financial contributions to Hynix. The GOK's policy to prevent the failure of Hynix and its actions to effectuate that policy were in evidence throughout the entire period of investigation. Although the DOC was not required to do so, much of this evidence can be tied to the various specific phases of the Hynix bailout; *i.e.*, the 800 billion won syndicated loan, the KDB Fast Track Bond programme, the May 2001 restructuring package, and the October 2001 restructuring package.

12. Based on the ordinary meaning of the terms used in Article 1.1(a)(1)(iv), when a government "gives responsibility to", "orders", or "regulates the activities of" a private body such that one or more of the type of functions referred to in subparagraph (iv) is carried out, there is entrustment or direction by the government. Korea is wrong to suggest that there is a special evidentiary standard for

entrustment or direction distinct from the general evidentiary standard that applies in any dispute governed by Article 11 of the DSU, which is whether there is a "reasoned and adequate" explanation of how the facts support the investigating authority's determination. Likewise, there is no obligation that the DOC have express proof of bank-by-bank, transaction-by-transaction government direction. As an 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 evidentiary question in this dispute, therefore, is whether a reasonable, objective decision-maker, looking at *all* the evidence on the record, could have concluded that the GOK's actions *in toto* evince entrustment or direction. It was eminently reasonable for the DOC, based on the evidence before it, to conclude that the GOK's actions did evince entrustment and direction of private bodies to provide financial contributions to Hynix.

13. Korea attempts to find textual support for its bank-by-bank, transaction-by-transaction standard by citing the use of the singular "a" financial contribution in the text of Article 1.1(a)(1). Korea's "a"/singular argument 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 singular entity or more than one entity.

14. Korea's reliance on *Export Restraints* for its bank-by-bank, transaction-by-transaction evidentiary standard also is misplaced. *Export Restraints* addressed a very different issue; *i.e.*, whether a hypothetical restriction on exports could constitute entrustment or direction under Article 1.1(a)(1)(iv). Thus, the cited portion of the *Export Restraints* report is of limited (if any) relevance to the instant dispute, in which there is a voluminous body of evidence that the GOK affirmatively caused, and gave responsibility, to private entities to provide loans, equity infusions, and debt forgiveness to save Hynix from bankruptcy.

15. Subparagraph (iv) requires that the financial contribution at issue "would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments". The functions at issue in this dispute are financial restructuring and recapitalization measures (all falling within subparagraph (i), transfer of funds) to bail out a major company that is failing. As Korea acknowledges, governments "generally try to avoid the collapse of major companies in their countries". That is exactly what this case is about – a government's orchestrated and directed multibillion dollar bailout of one of its largest and most important manufacturers, *i.e.*, the GOK's actions to effectuate the bailout of Hynix.

16. In sum, there is no distinct evidentiary standard for government entrustment or direction found in Article 1.1(a)(1)(iv) or elsewhere in the SCM Agreement. Rather, the evidentiary standard in this dispute, as in any similar dispute where Article 11 of the DSU furnishes the standard, is whether there is a "reasoned and adequate" explanation of how the facts support the investigating authority's determination.

B. The DOC's Determination of "Benefit" Was Proper

17. All financial contributions (including loans, equity infusions, and debt forgiveness) received by Hynix during the period of investigation were provided either directly by the GOK through "public" Hynix creditors, such as KDB and IBK, or indirectly by "private" Hynix creditors that were entrusted and directed by the GOK to provide funding to Hynix (with the exception of Citibank, the only Hynix creditor that was wholly foreign-owned).

18. The DOC rejected loans from Hynix's private creditors for use as a benchmark because it found those loans to be government financial contributions. It is axiomatic that loans determined to

be government financial contributions cannot themselves serve as benchmarks for determining the benefit from such financial contributions.

19. The DOC also concluded that it was not appropriate to use loans from Citibank as benchmarks due to certain unusual aspects concerning the extension of these loans. In its analysis, the DOC looked at the circumstances surrounding Citibank's extension of financing to Hynix. The DOC concluded that Citibank's risk assessment, like that of other Hynix creditors, was influenced by the continuing and significant involvement of the GOK in propping up Hynix. The DOC's findings are supported by record evidence.

20. Finally, the DOC also considered Citibank's dual role as lender and financial advisor in analyzing whether Citibank loans were appropriate for use as benchmarks. The DOC concluded that Citibank was not only motivated by the fees that it stood to earn as Hynix's exclusive investment advisor, but also by its desire to serve a broader advisory role. The DOC reasonably concluded that neither the incentive provided by potential fees as investment advisor to Hynix, nor the interest in being positioned to provide advisory services more broadly in the Korean economy, was demonstrative of commercial considerations typical of a *lending institution* independent of government involvement. Furthermore, both factors significantly affect assessment of the risk attendant to participation as a lender in the restructuring measures and made the loans "problematic for purposes of comparability".

21. The DOC found that Hynix was not creditworthy during the period of investigation, and calculated the amount of the benefit based on a formula that factors in a "risk premium" to account for the higher probability that the borrower will default on repayment of the loan. Korea is not challenging, per se, the DOC's finding that Hynix was uncreditworthy at the time it received the government-directed loans. Rather, Korea argues that the DOC improperly ignored available data on Korean default rates as part of its creditworthy analysis.

22. For purposes of determining the probability of default, the DOC relied on the average cumulative default rates reported in Moody's Investors Service study of historical default rates for corporate bond issuers, including international issuers. The Moody's data relied upon by the DOC is comprehensive, reflecting the experience of 14,400 issuers of long-term debt over the cumulated period, with non-US issuers accounting for up to 38 per cent of the companies included in the statistics. Korea claims that the DOC should have used Korean default rates, but the guidelines in subparagraph (b) of Article 14 require only that a benefit calculation be based on comparable commercial loans that the Hynix could actually obtain "on the market". Nothing in this provision indicates that the definition of the term "market" should be limited to the "Korean" market, or the market "in the country of provision". Furthermore, the DOC found that Hynix failed to provide all necessary information during the investigation regarding Korean default rates. The data provided by Hynix were unreliable on their face, as the data suggested that the default rate for lowest rated debt was lower than the default rate of the highest rated debt. By contrast, in the Moody's data, lower rated bonds had higher default rates in every instance.

23. The DOC found that Hynix was not equityworthy in October 2001, and, therefore, treated the entire amount of the equity infusions received by Hynix in October 2001 as a grant. Korea does not challenge the DOC's equityworthiness methodology. Instead, Korea claims that the DOC ignored contemporaneous equity purchases and "third party enthusiasm" and improperly rejected existing (insider) creditor versus new (outside) creditor motivations. The DOC determined that no significant, reasonably concurrent purchases of newly issued Hynix shares by private investors existed, and that Hynix's June 2001 GDS offering provided no indication as to whether Hynix was equityworthy almost five months later. The DOC also examined Hynix's financial indicators and performance as part of its equityworthiness analysis. The DOC found that Hynix had been in poor condition throughout the late 1990s and through 2001.

24. The DOC also determined that the SSB and Monitor Group studies were not prepared to answer the question of whether Hynix was equityworthy. Moreover, Hynix's creditors could not have relied upon the Arthur Anderson report, because, as the DOC noted, the report was not finished until two months *after* the creditors agreed to the October 2001 restructuring package. Finally, in considering the usual investment practice of private investors, the DOC explained its reliance upon a rational investor standard, as opposed to the economic model advanced by Korea.

C. The DOC's Finding of Specificity Was Proper

25. Because the subsidy programme is directed at a particular company – Hynix – it is specific within the meaning of Article 2 of the SCM Agreement. Moreover, the DOC confirmed the specificity of the Hynix bailout through an analysis of corporate usage of the CRA/CRPA. With respect to the CRA/CRPA, the data, which was provided by the GOK, demonstrates that the Hyundai Group companies received an extraordinarily large percentage of financial restructuring and recapitalization aid and that Hynix alone received a very high percentage of such aid. Ironically, having stressed the requirement for positive evidence, Korea then asserts that its own objective, credible data on use of the CRA/CRPA is irrelevant to the specificity analysis. In the face of positive evidence that the government specifically directed and entrusted the banks to bail out Hynix, Korea argues that evidence of specificity for purposes of Article 2.1(c) *must* come from a "broader examination" of the "benefits". There is absolutely no support in the text of the SCM Agreement for that assertion. As Korea itself acknowledges, the principles that govern specificity findings are set forth in Article 2. Article 2.1(c) contains explicit references to "quantitative" factors related to use, and there is no requirement in Article 2.1(c) to "temper" those quantitative factors based on "qualitative distinctions", as suggested by Korea.

III. THE ITC'S INJURY DETERMINATION WAS PROPER

A. The ITC's Volume Analysis Was Proper

26. While the ITC made it very clear that it relied on a single consistent set of data from questionnaire responses for its examination of the volume of subsidized subject imports, Korea refers to a varying set of data sources. Also, Korea's first submission contains only selective confidential data. For several reasons, the United States urges the Panel not to rely on the selective confidential information that Korea has provided in this dispute. The data "trends" described in Korea's submission are wrong and contradict those described in the ITC's determination.

27. While there is no requirement in Article 15.2 that an authority find that the increase in subsidized subject import volume relative to consumption is significant, the ITC found not only that the increase in subsidized subject import volume relative to US consumption was significant, but also found that the volume of subsidized subject imports was significant both absolutely and relative to US production. The ITC explained why subsidized subject import volume was significant stating that its "findings about the volume of subject imports are reinforced by the substantial degree of substitutability between subject imports and domestic shipments". It also noted that "[t]he commodity-like nature of domestic and subject imported DRAM products magnifies the ability of a given volume of imports to impact the domestic market and industry". Korea does not contest the high degree of substitutability between subsidized subject and domestic DRAM products.

28. The ITC specifically acknowledged in its opinion that "the use of bits as a unit of measurement [could] present difficulties for [its] analysis, as total bits are a function of chip density and product mix, both of which changed over the period of investigation". In a portion of the opinion omitted from Korea's submission, the ITC explained that it *nevertheless* found the volume of

subsidized subject imports on an absolute basis and the increase in that volume relative to US production and consumption was "significant".

29. Korea does not dispute or even address the ITC's conclusion that the increase in the volume of subsidized subject imports was significant relative to US production.

30. Finally, the ITC's finding of a significant increase in subsidized subject imports' market share is based on positive evidence and is consistent with US obligations under the SCM Agreement. Subject imports gained market share between 2000 and 2001, while the domestic industry was losing market share. Both subsidized subject imports and the domestic industry lost market share between 2001 and 2002, but during this time of increasing, but slowing demand, subsidized subject imports *maintained* their market position *better than domestic producers*. In addition to using a table (figure 9) that is rife with errors, Korea focuses on the percentage-point increase over the period of investigation, ignoring the magnitude of this percentage increase. By putting the volume data in context, the ITC reasonably concluded that the increase in subsidized subject imports' market share was significant in light of subsidized subject imports' high substitutability with the domestic like product and the price effects of subsidized subject imports.

31. Korea argues that the increased subject imports were entering the US market to replace other Hynix-brand products while Hynix's Eugene facility was being upgraded. Even if this explanation were accurate, the fact remains that a domestic producer was losing sales to subsidized subject imports. More importantly, however, the ITC in its final determination explicitly identified a missing factual predicate that explained why, in the DRAMs investigation, any declines in Hynix's Eugene production of DRAM products or in the Hynix-brand US market share were inapposite. **Confidential Figure US-1** identifies and explains this problem.

32. Another flaw with Korea's argument is that it is premised on the notion that the ITC should have examined the impact of subsidized subject imports on a "brand-name" basis. The brand names of DRAM products did not indicate their country source, and did not correspond to the relevant inquiry under the SCM Agreement. On the facts of the DRAMs investigation, the brand-name approach suggested by Korea would not be consistent with the SCM Agreement. The approach by the ITC in this investigation is consistent with the SCM Agreement and with the approach endorsed in reports by other reviewing panels.

33. Korea asserts that the ITC used "inconsistent definitions of domestic industry, subject imports, and non-subject imports" that "prevented an objective examination of subject import volumes". Korea does not contest the ITC's definition of subject imports. Instead, Korea would have the ITC define the domestic industry for certain purposes as "producers of the domestic like product", but then abandon that definition when calculating industry shipments. The approach used by the ITC here, which throughout the determination defined the domestic industry as companies engaged in domestic production of the domestic like product, is consistent with the SCM Agreement. Its methodology was objective because it avoided double-counting data.

B. The ITC's Analysis of the Price Effects Was Proper

34. The ITC found significant underselling by subsidized subject imports based on an analysis of 8 different representative pricing products that compared the weighted-average price of domestic shipments with the weighted-average price of subsidized subject imports for each month between January 2000 and March 2003. Korea does not challenge the data underlying the ITC's pricing analysis, nor is there any basis to do so.

35. A finding of underselling, let alone significant underselling, is not a prerequisite to an affirmative injury determination. Article 15.2 provides that "[n]o one or several of these factors can

necessarily give decisive guidance". Nevertheless, it is clear that, under the analysis the ITC conducted in this investigation, there was *significant* underselling by subsidized subject imports. Korea merely asserts that the ITC's analysis was "wrong for this industry", but there is no requirement in the Agreement to analyze price effects on a brand-name basis. The disaggregated analysis by brand name urged by Korea would not reflect the source country of the DRAM products and would be utterly inconsistent with the requirement under the SCM Agreement to examine the effect "of the subsidized imports" on the "like product", the product produced by the domestic industry. Moreover, Korea ignores that the ITC *also examined* the pricing data on a disaggregated basis (broken down both by brand-name and by source). The ITC found that even a disaggregated analysis showed that subsidized subject imports were the lowest-priced product "*more often than DRAM products from any other source*". (emphasis added). There is no requirement in the SCM Agreement that subsidized subject imports be the lowest-priced product throughout the investigation based on a weighted-average pricing analysis, let alone based on a disaggregated analysis by brand name. Low-priced subsidized subject imports, nonetheless, were the lowest-priced product more often than any other source even on a disaggregated basis. Even when not priced lowest, they helped purchasers pressure other suppliers on price.

36. Other than its argument that the ITC did not adequately consider other factors in its analysis of subject imports' price effects, Korea does not challenge the ITC's finding that there was significant price depression by subject imports, evident in substantial price declines for nearly every product and channel of distribution. Regarding price leadership, Korea fails to identify any requirement under Article 15 to find price leadership, because there is none. The ITC reasonably relied on the evidence it had of lost sales and revenues to support its adverse price effects findings, and the fact that any were confirmed in an investigation of a fungible good is noteworthy, even if Korea would weigh them differently.

C. The ITC's Analysis of the Impact of Subsidized Subject Imports Was Proper

37. Although a "checklist" approach is not required, it is also clear from the text of the ITC's narrative views (not to mention the accompanying data tabulations) that the ITC evaluated the enumerated SCM Agreement Article 15.4 factors. The ITC concluded that "[i]n sum, the domestic industry's performance declined over the period of investigation with respect to many indicators, and its financial performance worsened precipitously. Declining prices are the primary reason for the industry's large operating losses, and as discussed above, subject imports contributed materially to the steep price declines that occurred over the period". The ITC's evaluation of injury factors and its consideration of the conditions of competition and business cycle distinctive to this industry permeates its entire final determination. In its narrative views, for example, the ITC explicitly incorporated its findings in other sections of its narrative views and frequently cited to the accompanying data tabulations.

38. Korea does not dispute the positive evidence supporting the ITC's conclusions. Instead, Korea argues that the ITC should have weighed the factors differently, and asserts that in this industry there are only five key indicia. While Korea focuses on selective criteria, the ITC's final determination reflects evaluation of positive evidence concerning a variety of factors showing changes in the industry's condition. Korea uses different time periods depending on the point that it seeks to make, as illustrated in Figure US-2, and although Korea cites bits of data about individual producers, the ITC examined the domestic industry, as well as the record, as a whole. Furthermore, even the criteria that Korea asserts are important showed declines during at least part, if not the entire, period of investigation.

D. The ITC's Causation Analysis Is Proper

39. Korea fails to identify any requirement in the plain text of the SCM Agreement to support its argument that the investigating authority is to "take the added step of examining other factors to ascertain their role in injury to the domestic industry" in order to "isolate" subject imports or the effects of the subject imports and other known factors on the domestic industry. Neither in *US – Hot-Rolled Steel* nor in subsequent reports has the Appellate Body found any requirement for the investigating authority to "isolate" the injurious effects of the unfair imports. Instead, the standard articulated has been whether the investigating authorities provided a satisfactory explanation of the nature and extent of the injurious effects of those other factors, as distinguished from the injurious effects of the unfair imports.

40. In the DRAMs investigation, the ITC integrated into its analysis of the volume, price effects and impact of subject imports the causation discussion and its discussion of how it ensured that it did not attribute material injury from other factors to the subject imports. The ITC clearly analyzed trends in both impact factors and the volume and price effects of the subsidized subject imports. The ITC evaluated the absolute volume of subsidized subject imports, the trends in subject import volumes, and the relative increases in these volumes. The ITC evaluated the rate and extent of underselling and price depression by subsidized subject imports. It also examined changes in the injury factors in reaching its conclusion as to injury and causation. More specifically, the ITC explored the relationship between the factors indicative of the volume and price effects of the subject imports and the movements in injury factors. This evaluation was central to its causation analysis and determination. The ITC demonstrated an "overall" temporal relationship or coincidence between the subsidized subject imports and the material injury of the domestic industry, and in demonstrating a causal link between the subsidized subject imports and the injury to the domestic industry, the ITC evaluated the relevant factors in the context of the business cycle and conditions of competition distinctive to this industry.

41. The ITC also examined other factors to ensure that it did not attribute injury from those factors to subject imports. With respect to non-subject imports, the ITC determined that a significant portion of non-subject imports were Rambus and specialty DRAM products for which domestic producers had no significant production. Moreover, even those non-subject imports consisting of "standard" products did not have the price effects that subsidized subject imports did during the period of investigation. Thus, the ITC reasonably found that non-subject imports had less impact than their absolute and relative volumes might otherwise have indicated. Furthermore, it also found that, while non-subject imports' market share grew, the "primary negative impact" on the domestic industry was due to lower prices. On this point, the ITC found that subsidized subject imports, themselves, were large enough and priced low enough to have a significant impact, regardless of the adverse effects caused by non-subject imports. Thus, the ITC evaluated the nature and the extent of the injurious effects of non-subject imports in a "comprehensive" way to ensure that it did not attribute injury to subsidized subject imports. Its findings are based on positive evidence and an objective examination. Korea wants this Panel to reweigh the evidence or ignore the ITC's analysis.

42. Korea argues that the price declines during the period of investigation were due to other factors (such as product life cycles and business cycle changes in demand and supply that lead to "boom" and "bust" periods characteristic of this industry). Although Korea asserts otherwise, the ITC explicitly evaluated these factors in its determination. It concluded that the substantial price declines were far greater than what would be expected, even according to Hynix, and that in the absence of significant quantities of subsidized subject imports competing in the same product types at relatively low prices, domestic prices would have been substantially higher.

43. The ITC also examined the domestic industry's actions to ensure that it did not attribute injury to the subsidized subject imports. Its affirmative findings in this investigation are based on a

factual record that sharply contrasts with the factual record in its previous investigation of DRAMs from Taiwan that resulted in a negative determination.

44. Not only does Korea fail to prove any substantive violation of Article 15 of the SCM Agreement, but it also fails to prove any inconsistency with Article 22.3.

IV. OTHER ISSUES

45. With respect to other issues raised by Korea's first submission: (a) the United States has not acted inconsistently with Article 19.4 of the SCM Agreement or Article VI:3 of GATT 1994 because it has not levied any countervailing duties; (b) Korea's claims regarding the DOC countervailing duty order should be rejected because Korea failed to comply with Article 4.4 of the DSU and Korea has failed to demonstrate an inconsistency with the SCM Agreement or GATT 1994; (c) the recommendation requested by Korea is inconsistent with Article 19.1 of the DSU; and (d) the DOC's meetings with financial experts were not inconsistent with Article 12.6 of the SCM Agreement.

ANNEX A-3

EXECUTIVE SUMMARY
THIRD PARTY SUBMISSION OF CHINA

4 June 2004

I. INTRODUCTION

1. China concentrates in its third party submission on the following legal issues:

(1) Indirect financial contribution entrusted or directed by a government;

(2) Selection of market benchmarks in the establishment and calculation of benefits to the recipient of a subsidy;

(3) Determination of specificity under Article 2 of *the SCM Agreement*.

II. INDIRECT FINANCIAL CONTRIBUTION UNDER ARTICLE 1.1(A)(1)(IV) OF THE SCM AGREEMENT

2. With respect to the issue of indirect financial contribution as provided for by Article 1.1(a)(1)(iv) of *the SCM Agreement*, China has the following views.

3. First, from the ordinary meaning of the words "entrust" and "direct", the Panel in *US – Export Restraint* held that the act of entrusting and that of directing "necessarily 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". China believes that these three elements establish a *stringent* standard for treating a financial contribution directly out of the pocket of a private entity as one indirectly from the government. China also believes that the first requirement of an "explicit and affirmative" action of delegation or command manifestly dictates that the action of the government must be conducted in such an explicit and affirmative way that justifies the imputation of a private action to the government.

4. Second, the negotiating history of *the SCM Agreement* supports the strict reading of the words "entrust or direct". A financial contribution is included as one of the requisite elements of a subsidy in order to limit the applicable scope of the definition of subsidy. Although Article 1.1(a)(1)(iv) was intended as an anti-circumvention provision, it should not be carried too far so as to result in a far-reaching finding of a financial contribution with respect to every instance where government involvement exists. Furthermore, the far-reaching interpretation and application of Article 1.1(a)(1)(iv) may lead to the abuse of countervailing duties that the negotiators of *the SCM Agreement* endeavoured to prevent during the Uruguay Round.

5. In the respect of the evidentiary standard for entrustment or direction, China believes that an investigation authority must set out a "reasoned and adequate" explanation of how the facts support the finding of the three elements of entrustment or direction, which is not a special evidentiary standard.

6. Consequently, China is of the view that the words "entrust" and "direct" should be read strictly in the process of finding an indirect financial contribution by the government through a private entity.

III. SELECTION OF A MARKET BENCHMARK UNDER ARTICLE 14(A) and (B) OF THE SCM AGREEMENT

7. In China's view, by analogy to the Appellate Body report of *US – Lumber CVDs Final (AB)* and on the basis of Article 14(a) and (b), the acts of Citibank may constitute a primary market benchmark in the establishment of benefit. As such, in the current dispute, the key issues would become: (1) whether an authority may abandon a primary market benchmark; (2) if yes, under what circumstances it can do so; and (3) after rejecting the primary benchmark, whether the alternative benchmark used by DOC is consistent with Article 14(a) and (b). In *US – Lumber CVDs Final (AB)*, similar legal issues also arose. China thinks the reasoning and finding of the Appellate Body in that dispute may be helpful for this Panel in its assessment of the current dispute.

8. On the basis of the understanding of the Appellate Body's ruling in *US – Lumber CVDs Final (AB)*, China believes that an investigating authority may use alternative benchmarks other than the primary ones provided in Article 14(a) and (b) to establish and calculate the benefits to the recipient of a subsidy on the condition that such a method is consistent with Article 14(a) and (b).

9. However, the Appellate Body in *US – Lumber CVDs Final (AB)* emphasized 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*". In China's view, these statements demonstrate a very high threshold for abandoning a primary benchmark. In this respect, China believes that the actual and available private prices in the country of provision should be the more appropriate market terms under normal circumstances. Although there may be some factors that may affect such comparison, adjustments may be made for the factors to the actual private prices. In contrast, if the private prices are rejected due to certain factors of incomparability and a "market price" is constructed accordingly, it is also not easy to take into account every key factors and ensure that such constructed "market terms" fully reflect the real market situation.

10. Similarly, in the cases of equity infusion and loans provision, if there are investment activities conducted by a private entity to the same company under investigation, it is preferable to use such activities as the primary market benchmark instead of to reject the readily available and actual market benchmark and to construct an additional set of "market terms".

11. In the current proceeding, both parties disputed whether on the basis of the three key factual factors, the decision of Citibank should be abandoned. After analyzing two of these factors, China thinks that they are not necessarily conclusive evidence to support the rejection of Citibank's decision as primary market benchmark.

12. Further to the above views, China also have the opinion that even if a readily available market benchmark is properly rejected, due regard should be given to maintaining consistency with Article 14(a) and (b) when constructing a market benchmark. In China's view, the specific requirements set out in Article 14(a) and (b) have the function of ensuring that only the advantage of a subsidy is calculated through the application of guidelines contained therein. This understanding is supported both by the Appellate Body report in *US – Lumber CVDs Final (AB)* and by the well accepted interpretation of the term "benefit" in Article 1.1 by the Appellate Body in *Canada – Aircraf*t. Therefore, China believes that Article 14(a) and (b) impose an obligation of excluding any factor that affects comparability of the terms that are being constructed by an authority.

IV. DETERMINATION OF SPECIFICITY UNDER ARTICLE 2 OF THE SCM AGREEMENT

13. With respect to Article 2.1(c) of *the SCM Agreement*, it provides for a three-layer requirement in the determination of *de facto* specificity: first, there shall be facts indicating the possible existence of *de facto* specificity; second, consideration may then be turned to any or all of the four factors; third, when looking at factual factors, one *shall* take into account two circumstantial factors, i.e. the extent of diversification of economic activities and the length of time of the application of the subsidy programme.

14. China notes that DOC in its *Decision Memorandum* adopted various evidence to show the intention of the GOK to rescue Hynix which, in China's view, at best only shows the "reason to believe" that there may be *de facto* specificity. The panel in *US – Lumber CVDs Final* held that "Article 2 [of] SCM Agreement is concerned with the distortion that is created by a subsidy which either in law or in fact is not broadly available". China thinks this is a proper statement of the purpose and function of the element of specificity. The four factual factors and two contextual factors contained in Article 2.1(c) serve to guarantee a justifiable finding of limited availability of a subsidy.

15. In short, China believes that the intent of a government does not necessarily prove that the actual application of a subsidy or subsidies is of *de facto* specificity.

16. With respect to "the granting of disproportionately large amounts of subsidy to certain enterprises", Article 2.1(c) of *the SCM Agreement* clearly lists it as one of the factors that may be considered in the determination of *de facto* specificity. China would like to put forward the following opinion in the context of the current dispute.

17. First, DOC seemed to ignore the qualifier of "*disproportionate"* on largeness of the amount of subsidy in Article 2.1(c) of *the SCM Agreement*. The fact that a company accounted for a big share in the debt restructuring provided by the government does not by itself conclusively establish that the amount of granted subsidy is disproportionate. In China's view, the disproportionate largeness should be determined on the basis of comparison with other participants in the restructuring programme. Such comparison should be conducted not only from the perspective of the absolute amount of debt, but also, *more importantly*, from the perspective of the scales and needs of financing of all participants in the same programme.

18. Second, China shares the same view with Korea that, as manifestly required by Article 2.1(c) of *the SCM Agreement*, the "extent of diversification of economic activities" and the "length of time" have to be taken into account in the determination of specificity.

19. Third, in China's view, though Article 2.1(c) does not require an authority to consider each and every factual factor listed therein, when taking into account of the particular settings of the debt restructuring, the consideration of the third factor, amount of subsidy, should be combined with the fourth factor, the manner of exercising discretion. The authority should have looked into whether there were other applications for debt restructuring by other companies of scale similar to Hynix and in similar needs of financing and whether such applications were refused despite situations similar to those of Hynix.

20. Therefore, China thinks that the DOC's approach to find disproportionately large amount of subsidies does not seem well founded pursuant to Article 2.1(c) of *the SCM Agreement*.

21. As a third key point, it is submitted by China that Article 2 of *the SCM Agreement* requires that specificity of subsidy programmes be determined with respect to each separate subsidy programme. Accordingly, an investigating authority should refrain from taking a particular *financial*

contribution out of the context of the subsidy programme and considering it in isolation, or combining *various separate subsidy programmes* as a whole and reviewing them as a single programme.

22. First, China believes that specificity should be examined on the basis of a subsidy programme, instead of any individual financial contribution granted under the same programme. If specificity is to be determined on the basis of any particular financial contribution under the subsidy programme, there will be no subsidy programme that is not specific. One may not be wrong to argue that a particular financial contribution under a subsidy programme is specific given the fact that it is specifically made to a company. However, this is the specificity of the financial contribution instead of that of *the subsidy*. Hence, the specificity of a financial contribution does not follow that the subsidy programme, as a whole, is specific by nature.

23. Second, in China's understanding of Article 2 of *the SCM Agreement*, China thinks that specificity should be examined in relation to *each separate and distinct subsidy programme* that is under investigation by the authority of a member. This understanding is supported by the following grounds. First, within the legal framework of *the SCM Agreement*, specificity is a pre-condition for a subsidy to be subject to countervailing duties. Consequently, the benefit of a subsidy could be counted into the total amount of subsidies only after its specificity is confirmed. Practically, a countervailing duty investigation may involve multiple subsidy programmes. A finding of the specificity of a subsidy under investigation does not necessarily extend to other subsidies programmes. Second, as an explicitly provided requirement, Article 2.4 of *the SCM Agreement* provides that, "[a]ny determination of specificity under the provisions of this Article shall be *clearly substantiated* on the basis of positive evidence. In China's view, this provision imposes an obligation on the investigating authority to clearly inquire into and demonstrate the specificity of each of the subsidy programmes under investigation.

24. In the current dispute, DOC seemed to make no effort to establish that the various programmes under the heading of "Direction of Credit and Other Financial Assistance" are financial contributions made pursuant to one single subsidy programme. If the "single programme" theory is not substantiated by relevant facts, the finding of specificity of the "programme" as a whole would be flawed, and therefore, no natural and logical conclusion could be drawn that each individual subsidy programme under this big "programme" is specific. If there is no such "single programme", an investigating authority shall establish the specificity of each separate subsidy programme under investigation.

25. In summary, China is of the opinion that Article 2 of *the SCM Agreement* requires an investigating authority to enquire into and decide on the existence of specificity with respect to each of the subsidy programmes under investigation.

V. CONCLUSION

26. In conclusion, China is of the opinion that,

(1) The words "entrust" and "direct" in Article 1.1(a)(1)(iv) of *the SCM Agreement* should be read strictly in the process of finding an indirect financial contribution by the government through a private entity.

(2) In establishment and calculation of the benefit of a subsidy pursuant to Article 14(a) and (b) of *the SCM Agreement*, an investigating authority may only use an alternative benchmark other than the primary one with good cause and under very limited situations; Article 14(a) and (b) impose an obligation of excluding any factor that affects comparability of the terms that are being constructed by an authority.

(3) With respect to establishment of specificity, the intent of a government does not necessarily prove that the actual application of a subsidy or subsidies is of *de facto* specificity; in the current dispute, the DOC finding of disproportionate granting of subsidies does not seem well founded under Article 2.1(c) of *the SCM Agreement*; Article 2 of *the SCM Agreement* requires that an investigating authority inquire into and decide on the existence of specificity with respect to each of the subsidy programmes under investigation.

ANNEX A-4

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION BY THE EUROPEAN COMMUNITIES

14 June 2004

The European Communities concentrates in its written submission on the following issues,

- the notion of "*entrustment*" and "*direction*" under Article 1.1.(a)(1)(iv) of the *SCM Agreement;*
- the description of the DRAM market and the conclusions drawn by Korea;
- the application of Article 15.2 of the *SCM Agreement* in the context of a transparent market for a homogenous product;
- and it submits that establishing a correlation between import volume and decline in domestic industry performance is, depending on the facts of the case at hand, no more than a useful tool for the determination of injury causation.

I. THE NOTION OF "ENTRUSTMENT" AND DIRECTION" UNDER ARTICLE 1.1.(A)(1)(IV) OF THE *SCM AGREEMENT*

1. The EC disagrees with the interpretation of the notion of "entrustment" or "direction" in Korea's First Written Submission. Korea firstly essentially argues that these notions must be interpreted in a very narrow sense and can only refer to an action which is "*so specific and compelling that the private body is not really making the decision at all – the private body has become the instrumentality of the government*". Korea interprets this to mean that "*any discretion left to the private body transforms the situation, and the action can no longer properly be imputed to the government*". Against the background of this standard, Korea submits that the DOC should have examined each alleged government delegation or command with respect to each party and with respect to each transaction, in order to establish whether there was an "*explicit and affirmative*" government action of delegation or command.

2. The EC submits that an interpretation requiring a delegation or command in respect of each individual measure is too narrow in respect of its scope and is not covered either by the wording of the *SCM Agreement*, nor by the findings of the *US – Export Restraints* panel quoted by Korea. Secondly, evidence of the nature and quality suggested by Korea, i.e. evidencing that each support measure is the result of an affirmative and explicit instruction by the government is not required.

3. Firstly, in respect of the notion of entrustment, the EC recalls the wording of Article 1.1(a)(1)(iv) of the *SCM Agreement*, and that the terms "entrust" and "direct" are not defined in the *SCM Agreement.* The EC also recalls that in the *US – Export Restraints* case, the ordinary meaning of "entrust" was defined and submits that on the basis of that definition, a situation of a government entrusting one or more private body (ies) with the responsibility of executing a more general task such as a public policy objective or to act in the public interest would be covered. In such case it is submitted that there is no need to show a specific entrustment or direction with respect to each specific act leading to a financial contribution.

4. Secondly, in respect of the degree of evidence required for proving a government direction, the EC submits firstly that the *US - Export Restraints* panel did not expressly address this point. Secondly the EC submits that a government can express an "*affirmative and explicit action of delegation or command*" in a more subtle way than to issue a specific instruction. This could be done, e.g. by providing for the implementation of a general policy. Hence, it is in accordance with the special circumstances and the totality of the factual elements of the case at hand that the actual delegation or command would have to be shown.

5. The EC also submits that it is very unusual in practice for an investigating authority to be able obtain evidence that proves beyond reasonable doubt government direction of a private company. The EC recalls the investigating authorities' limited powers of investigation and their dependence on information received from companies under investigation and foreign governments. The EC submits that, if the standard of proof to demonstrate government direction or entrustment of a private party, required conclusive documentary evidence, any government could easily circumvent Article 1.1(a)(1)(iv) of the *SCM Agreement* by giving instructions e.g. over the phone, by exercising other forms of pressure or by simply withholding documents during the investigation.

6. In practice, the information and evidence available to the institutions is most often circumstantial. The relevant test, in the EC's submission, is whether the totality of facts shows that there was government entrustment or direction.

7. This interpretation, the EC submits, is supported by the fact that the *SCM Agreement* allows, on the basis of its Article 12.7, for findings to be made on the basis of facts available, and this article would become meaningless if, for the finding of government direction, explicit documentary evidence were necessary.

8. The EC submits that this interpretation is in line with the *US-Exports Restraints* panel which referred to the need to analyse the elements of action in the general context. The EC also submits that the *US - Export Restraints* panel must be understood in the context of the special circumstances of that case in which the notions to "*direct*" and "*entrust*" were interpreted only to the extent needed in order to decide the particular issues of that case. Accordingly, the findings in this case cannot be transferred to cases with completely different facts raising completely different issues; the EC submits that the present factual situation differs fundamentally from the one in *US - Exports Restraints.*

9. Furthermore, the EC refers to the reports by the Panel in *Australia - Automotive Leathe*r and Appellate Body *Canada Aircraft.* These reports concern the standard of proof required for a finding whether a subsidy is export contingent in the sense of Article 3.1 of the *SCM Agreement*, a notion that is comparatively precise to the one of "entrustment" or "direction". In that context the panel and Appellate Body have held that such a finding has to be based on all the facts taken together, whilst abstaining from stipulating that particular facts must necessarily be considered. This shows by analogy, the EC submits, that an analysis of the totality of the facts is also warranted when examining government direction.

10. Finally, the EC makes the following general observations. The threshold for demonstrating entrustment or direction must take account of the government's degree of involvement in the private body. If a private body has no government shareholding and operates at arms length from government, it is defendable to expect a more explicit demonstration of government direction. However, when the government is a shareholder, it is reasonable to expect the government to have a more direct possibility to intervene in the undertaking's decisions. Therefore an investigating authority should be entitled to take account of a government's participation and influence in a private bank as an important factor in establishing government direction.

II. THE DESCRIPTION OF THE DRAM MARKET AND THE CONCLUSIONS DRAWN BY KOREA

11. Firstly, the EC submits that the particularities of the DRAM market, on which there is agreement between the parties in general terms, lead however to different interpretations of their implications for the injury finding. EC would submit that in this market, contrary to the Korean submission, injury can be caused particularly quickly even be relatively few imports. The EC also submits that the assumptions Korea draws from the functioning of the DRAM market partly leads it to stretch the interpretation of provisions of the *SCM Agreement*.

12. The EC would submit that the Korean assertion that in the cyclical DRAM market, downturns are not a sign of injury is, only part of the picture. The DRAM market, is essentially a world market on which DRAMS are traded as a fungible commodity with highly transparent prices. The EC would submit that precisely because of this fact, even comparatively small quantities of sales with temporarily lower prices can exacerbate more general industry downturns. Hence, in the DRAM market comparatively low volumes of sales undercutting the market level can have a major negative impact on the situation of competitors. From the particularities of the DRAM market structure follow a number of consequences; negative impacts from subsidized sales can possibly be felt in more than just the US market, this implying that they are also felt in the US; in a hypothetical example of ten transactions it is possible that two undercutting transactions had the most significant effect on prices, e.g. if they were made at comparatively lower prices than the eight remaining ones; it is conceivable that offering lower prices does not necessarily result in higher market shares, as this will depend on the reaction of competitors.

13. The EC recalls that the wording of Article 15.2 of the *SCM Agreement* stipulates that the investigating authority shall consider three aspects when determining injury, two of which are alternatives, but also clarifies that no one or several of these factors can necessarily give decisive guidance. The EC submits that this provision rightly provides for the flexibility to analyse each case according its particular characteristics, and that the present type of market shows that this flexibility can be required as here neither of the factors necessarily give decisive guidance. The EC rejects Korea's questioning of the "*so called traditional underselling*" analysis and submits that Article 15.2 *SCM Agreement* requires investigating authorities to "consider" a comparison on this basis.

14. The EC submits that Korea overstates the requirement for, and indicative value of, a correlation between the import volume and the decline in domestic industry performance as an indicator of injury causation.

III. CONCLUSION

15. Therefore the European Communities invites the panel to conclude that :

- the notion of government direction does not require this direction to have been affirmatively and explicitly expressed in respect of every transaction and every bank analysed;

- government direction can be established on the basis of the totality of facts available and does not necessarily have to be established on the basis of explicit documentary evidence of the direction;

- in the case of homogenous products traded on a transparent market, significant injury can be caused by relatively small quantities and relatively minor undercutting; and

- Article 15.2 of the *SCM Agreement* requires an undercutting analysis including a comparison between subsidized imports and the price of the like product in the territory of the importing Member, whilst none of the factors mentioned in it are necessarily decisive for a determination of injury. In that context, a correlation between import volume and decline in domestic industry performance is no more than a potential indicator of injury causation.

ANNEX A-5

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

4 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 by the United States International Trade Commission ("ITC") and the subsidy determination by the United States Department of Commerce ("DOC"). 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 legal and factual aspects of this case in light of this submission.

II. ARGUMENT

A. THE INJURY DETERMINATION BY THE ITC

1. The ITC Appears to Have Based Its Injury Determination on Evidence Inconsistent with Article 15.1 and Footnote 46 of the SCM Agreement

2. According to Korea, the ITC applied a wafer fabrication control approach to identify the scope of imports from Korea, and an assembly control approach to identify the domestic like products.[1] Therefore, the ITC applied different criteria to identify domestic like products and imports from Korea.

3. Footnote 46 of the SCM Agreement defines that the scope of the "like product" must be identical "in all respects" to the scope of the product under consideration. The phrase "in all respects" encompasses all features and details of the product under consideration. Thus, the application of the different criteria to define the scope of the product under consideration and the like product is inconsistent with Footnote 46.

4. Article 15.1 requires that the authorities shall base its injury determination on positive evidence of effects on price in a domestic market for the "like product" and the consequent impact of subsidized imports on the domestic producers of the "like products". Review of import data, which were prepared on a different basis from domestic like product data, would not provide meaningful analysis, rendering the injury determination inconsistent with the requirement under Article 15.1 and other provisions of Article 15.

[1] *See Korea's First Written Submission* (19 April 2004), paras. 123 - 124.

2. The ITC Appears to Have Failed to Demonstrate that Subsidized Imports Injured the Domestic Industry

5. In its final injury determination, the ITC appears to have failed to demonstrate that subsidized imports caused material injury to the domestic industry in accordance with Articles 15.1 and 15.5 of the SCM Agreement.

6. In *US–Lumber ITC Investigation*[2], the panel stated that "increases in imports proportional to the increase in demand would seem to be without any injurious effect" [3] where a situation of strong and improving demand exists. Korea presented to this dispute the data which are similar to that those presented in *US-Lumber ITC Investigation* case. This Panel should carefully review the evidence to decide whether the ITC demonstrated that the subsidized imports caused the injury to the domestic industry, taking into account the panel report in *US –Lumber ITC Investigation*.

3. The ITC Appears to Have Failed to Separate and Distinguish Injury Caused by Other Known Factors from Injury Caused by the Subsidized Imports

7. The ITC appears to have made no attempt to separate and distinguish effects of other known factors on the domestic industry from effects of dumping of the subsidized imports thereon in accordance with Article 15.5 of the SCM Agreement.

8. In *EC–Pipe Fittings*[4], the Appellate Body reconfirmed that the authorities need to separate and distinguish the injury caused by dumped imports from injury 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. In this case, the ITC knew that three other factors actually or potentially contributed to the material injury. It is not clear from the *ITC Report* how the ITC separated and distinguished these known factors from the effects of the subsidized imports. Japan thus respectfully requests that this Panel carefully review the ITC's determination on this aspect.

B. THE SUBSIDY DETERMINATION BY DOC

1. The Panel Should Carefully Review DOC's Fact Findings on Financial Contributions within the Meaning of Article1.1 (a)(1) of the SCM Agreement

(a) Certain Financial Contributions Appears to Have Been Made by Public Bodies under Article 1.1(a)(1)(i)

9. 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 Articles 1.1(b) was conferred to a recipient. Article 1.1(a)(1) of the SCM Agreement provides that loans, loan guarantees and equity infusion are financial contributions under Article 1.1(a)(1)(i) if they are provided by a public body. This Panel thus should review whether a bank of the public body made any financial support to Hynix. Such financial support, if any, is a "financial contribution" under Article 1.1(a)(1) regardless of the government's entrustment or direction.

(b) The Panel Should Apply 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)

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[2] Panel report, *United States -- Investigation of the International Trade Commission in Softwood Lumber from Canada ("US – Lumber ITC Investigation")*, WT/DS277/R, adopted 26 April 2004.

[3] *Id*., para. 7.95.

[4] 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.

10. 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 thereunder, if the bank provided the financial supports in compliance with entrustment or direction by the government.

11. The panel in *US–Export Restraints*[5] 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.[6]" Its analysis shows that Article 1.1(a)(1)(iv) provides elements, which the authorities must find to determine that the financial contribution was granted through a privately controlled bank. It also clarified that the Article does not require that the government's delegation or command must be so detailed to instruct every step that the bank must follow.

12. 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.

13. As Korea argues, the standard of review of this Panel is set forth in Article 11 of the Dispute Settlement Understanding. This Article requires that this Panel review the DOC's subsidy determination based on "an objective assessment of the matter before it, including an objective assessment of the facts of the case".[7] 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. There are no further requirements of the evidentiary standards.

2. The Panel Should Apply the Correct Legal Standards under Article 2 of the SCM Agreement to Review Issues of Specificity in This Case

14. It appears that the DOC's finding of the "entrust or direct" by the Government of Korea sufficiently covers the issue of the specificity under Article 2.1(a). DOC stated that "[t]he objective of this programme was the complete financial restructuring of Hynix in order to maintain the company as an ongoing concern".[8] This statement indicates that DOC found that the programme was limited to Hynix and that the programme was specific under the terms of Article 2.1(a) of the SCM Agreement.

III. CONCLUSION

15. For the reasons set forth above, Japan respectfully requests this Panel carefully review the consistency of the injury determination by the ITC with Articles 15.1, 15.5 and Footnote 46 and the consistency of the subsidy determination by DOC with Articles 1.1(a)(1) and 2.1.

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

[6] *Id*., para. 8.29.

[7] Article 11 of the DSU.

[8] *Korea's First Submission*, para. 387, citing *Decision Memorandum,* at 48 (GOK Exhibit 5).

ANNEX B

ORAL STATEMENTS OF PARTIES AND THIRD PARTIES AT THE FIRST SESSION OF THE FIRST SUBSTANTIVE MEETING

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ANNEX B-1

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE GOVERNMENT OF KOREA AT THE FIRST SUBSTANTIVE MEETING

2 July 2004

I. ITC INJURY INVESTIGATION – CLAIMS OF ERROR

A. ARTICLE 15.1 STANDARDS

1. As an overarching provision, Article 15.1 sets the basic framework for the injury portion of the current dispute. Article 15.1 requires that all aspects of the injury investigation must be based on positive evidence and an objective examination of the facts.

2. In the case below, the ITC violated the requirements of Article 15.1 by not providing sufficient explanations in support of the various conclusions it drew.

B. SIGNIFICANT INCREASE IN SUBJECT IMPORTS

3. The data in the underlying case showed that the Hynix brand lost market share over the period of investigation, and that subject imports changed only slightly in reaction to the temporary shutdown of the Hynix US operations.

4. The ITC now tries to obscure these facts with detailed arguments about the data. For example, the United States accuses Korea of erroneously mixing the shipment data of subject imports based on their value with other data based on volume. However, the data provided by Korea to the ITC was based on volume.

5. The ITC tries to look at import volume in a vacuum, mechanically checking off boxes. But Article 15.2 requires more than such mechanical checking. For the term "significant" to have meaning, the authorities must ensure whether there have been increases in various measures.

6. Moreover, the ITC tries to address the shutdown at the Hynix Oregon facility, but never credibly explains why substitution between factories by a single Korean company can represent a significant increase in volume or market share of subject imports.

C. SIGNIFICANT PRICE EFFECTS BY SUBJECT IMPORTS

7. The ITC's traditional underselling analysis was not an objective examination for the pricing analysis in this particular case because it ignored the prices of non-subject imports.

8. As with the volume effects, any objective assessment of the pricing evidence taken as a whole would find that the price effects of allegedly subsidized imports were not "significant". Accordingly, the ITC's finding was inconsistent with Articles 15.1 and 15.2.

D. CONDITION OF THE DOMESTIC INDUSTRY

9. Unlike the ITC assertion, the evidence before the ITC demonstrated overall strength, not weakness, of the domestic industry. Most egregiously, the ITC failed to even address the public

statements that Micron and Infineon made to the financial community and their investors that they were doing quite fine. Moreover, the ITC never put the condition of the domestic DRAM industry into the context of the overall business cycle.

E. CAUSATION

10. Pursuant to Article 15.5, Members must demonstrate an explicit "causal relationship" between the subsidized imports and any material injury suffered by the domestic industry. In this case, the evidence before the ITC demonstrated that there was no correlation between the trends in subject imports and the condition of the domestic industry. Most importantly, record evidence shows that there was an unprecedented drop in underlying demand for computer and telecom equipment and that 2001 was the single worst year in decades for these industries.

11. The ITC defence is that it did address these various arguments. The United States seems to believe that any mention of a fact or argument is somehow sufficient and meets WTO obligations. But such an approach does not satisfy obligations under Article 15.

II. DOC SUBSIDY INVESTIGATION – CLAIMS OF ERROR

12. Much of the US financial contribution and benefit analysis is based on the predicate that the US style bankruptcy approach is *the single norm* against which to measure all restructurings everywhere in the world. Yet it is a fundamental aspect of any market economy that there be some method of addressing financially distressed companies short of termination or bankruptcy.

A. FINANCIAL CONTRIBUTION

13. In the underlying case, DOC brought together a patchwork of evidence and determined that all lending to Hynix by all Korean banks over a ten-month period was somehow being directed by the GOK. This absence of evidence is particularly egregious for the financing transactions later in the period of investigation. With respect to the October restructuring, the only evidence the DOC provides regarding alleged GOK action is the unverified assertions of a single anonymous "expert" interviewed by the DOC in Seoul.

14. The United States argues that the evidence indicates that the post-1997 reform measures did not guarantee complete bank independence or eliminate government interference in lending decisions in Korea. In so arguing, however, the United States largely ignores the extensive GOK discussion of various legal mechanisms effectively precluding and prohibiting any form of inappropriate government intervention in the banking and financial sectors of Korea.

15. For instance, contrary to the erroneous US allegation, the actual language of Article 1 of the Prime Minister Decree No. 408 makes amply clear that this law had a very different purpose than that attributed by the United States.

16. The United States also makes much of the "Corporate Restructuring Promotion Act". Yet as Korea made clear, the CRPA is a law of general application. Also, creditors still have choices under the CRPA as they could put the company in question into a court receivership, or exercise appraisal rights and can walk away.

17. In the present case, the United States tries to read Article l.1(a) so broadly as to provide authorities with almost limitless discretion. Yet as the panel in *US -Export Restraints* articulated, the plain meaning of "entrusts or directs" poses the core questions of "who" is being directed to do "what".

B. FINDING AND MEASUREMENT OF "BENEFIT"

18. In this case, the DOC had a wide range of possible commercial benchmarks. Yet rather than acknowledge the range of facts, and search for the best possible benchmark, the DOC instead searched for reasons to disregard all of the banks.

19. The DOC approach in this case was to create a set of rules that would make it impossible for any company to engage in a debt workout rather than a bankruptcy. The US approach seems to be that because Korea favours the "London Approach" of debt workouts that avoid bankruptcy, rather than US style bankruptcy proceedings, any debt workout of Hynix must be condemned as a subsidy.

C. SPECIFICITY

20. In its first submission, the United States argues for unlimited discretion under Article 2. But the fact that Article 2 does not enumerate specific tests or methodologies does not mean that authorities can draw conclusions in a vacuum. The very idea of disproportionate use has imbedded in the term "disproportionate" the idea of some benchmark level of use that makes sense.

D. SECRET MEETINGS

21. Finally, Korea believes that the United States breached Article 12.6 when it conducted secret verification meetings in Korea over explicit objections by the Government of Korea.

22. The US argument now interprets Article 12.6 as presenting an impossible choice. The United States argues that a Member must consent either to any and all procedures or to none at all. However, a "right" to guarantee itself adverse facts available is not a right at all.

ANNEX B-2

FIRST SUBSTANTIVE MEETING - CLOSING STATEMENT OF THE GOVERNMENT OF KOREA

Mr. Chairman and Members of the Panel, thank you for your time over the past two days. I believe we have made progress in focusing the issues in this case. We also believe that your written questions will further focus the issues. We welcome those questions. I would like to close this meeting with several general observations.

First, the United States is correct that there is no real disagreement over the standard of review. In paragraph 6 of its opening statement, the United States agreed the Panel should consider whether the agency decision is "well reasoned" and "adequately supported". We agree. But with all due respect, we submit that the ITC and DOC decisions in this case are neither well reasoned nor adequately supported. That is what the Panel must decide.

Second, this case is not about bold and colourful language used by politicians and political groups. The United States has certainly collected many examples of the most colourful language of Korean politicians. But in many different contexts, WTO jurisprudence has recognized the wisdom on focusing on what countries actually do, and not on what politicians in those countries might say. Consider the comment yesterday in the US opening statement about the "bottomless pit". We checked last night, and it turns out this report was drafted and submitted by the opposition party in Korea on the eve of the Presidential election, and was never accepted by the Korean Congress. Criticism of the government by its opposition party in such circumstances must be viewed with a healthy scepticism. This example illustrates the danger of relying on such statements as "evidence".

It was legal error for the United States to rely on such statements as the keystone of its determination, and to spend so little time focusing objectively on what actually happened with respect to specific transactions. We are confident this Panel will focus on the specific actions of the Government of Korea, and the Korean banks, and not on the rhetoric.

What were those actions? Consider paragraph 15 of the US opening statement that identifies three concrete actions. But even if these actions led to some loans, the United States then goes much further and condemns all loans including those that have nothing to do with these actions. Loans by other banks that did not require any waiver of lending limits. Loans at distant points of time, far removed from the initial loans. Loans that had nothing at all to do with rolling over maturing Hynix bonds.

This represents the overarching legal flaw in the US approach. The United States does not seem to mind when it has weak or no evidence of "entrustment or direction" with respect to various loans or investment decisions. Under the US approach, evidence for some transactions somehow becomes evidence for all transactions. We believe this is a flawed interpretation of Article 1.1(a) of the SCM Agreement. Third, this case is not about mere Korean disagreement with DOC findings. This case is about whether the DOC and ITC rationales can survive factual and legal scrutiny. Consider for example, the DOC decision to reject Citibank as a possible benchmark. DOC offered various reasons for rejecting Citibank, most of which had nothing to do with the specific transactions at all. Article 14(b) of the SCM Agreement requires only that a loan be "comparable" and "actually

obtained on the market" for that loan to serve as a benchmark. The Citibank loans were both. Even if the Citibank loan was not a perfect comparison, there is no credible factual basis to conclude that these loans were not at least "comparable".

Or consider the numerous conclusions drawn by ITC. The ITC should provide the factual underpinnings that justify its various conclusions. Obtaining such data – in its actual form -- is the only way for the Panel to do its job. We urge the Panel to view sceptically any summaries that obscure the real figures. A range may be appropriate. But an average can be seriously misleading, depending on how the average is done.

But even before receiving any additional data, the flaws in the ITC analysis of causation stand out. The ITC brushed aside the role of non-subject imports with a vague statement that a "significant" portion of those imports did not compete. But how large were these specialized products, and why does attenuated competition for some portion of non-subject imports negate the effect of the still large remaining portion. The ITC never explains. Or consider the role of capacity increases by other suppliers. Just because the ITC may not have collected certain evidence does not mean that evidence can be ignored. Even if it prefers its own data, that is no reason for the ITC to ignore without any explanation other credible data. Yet that is precisely what the ITC did in this case.

That concludes my closing remarks. Thank you.

ANNEX B-3

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

24 June 2004

General Issue - Standard of Review

1. While Korea says that it does not advocate *de novo* review, in fact, it does. Korea does not allege errors in the evidence on which the DOC and the ITC relied. Rather, Korea argues that the US authorities should have discounted certain facts and relied on others, or analyzed the evidence in different ways. In other words, Korea wants this Panel to reweigh the evidence to reach a different outcome. That is *de novo* review, and the Panel should reject Korea's suggestions to the contrary.

2. This case is, in fact, a perfect example of why *de novo* review is *not* the standard of review. The administrative records of the DOC and the ITC are enormous, totalling tens of thousands of pages. The authorities took many months to review and evaluate all of the record evidence, and explained in considerable detail the conclusions they drew from that record evidence. The depth and complexity of this investigation demonstrates the wisdom of a standard under which the Panel's task is not to step into the role of investigator and gather or reweigh evidence, but rather, in examining whether a Member met its agreement obligations relating to fact-finding, to consider whether the investigating authority's decision-making is well reasoned and adequately supported by the evidence before it.

Issues Concerning the Commerce Department's Subsidy Determination

3. *Financial Contribution* – "Injecting money into a bottomless pit" – that is how a November 2002 report by the Korean Congress – entitled "Public Fund Mismanagement Investigation" – characterized the GOK's policy in 2000-2001 to bail out the Hyundai Group companies, including Hynix. By the end of 2000, Hynix had incurred staggering losses, totaling 1.9 billion dollars, and the company's debt was 186% of its total equity. Hynix, which employed over 24,000 workers, was very important to the Korean economy, and singled it out for special treatment. The GOK established a policy to ensure that the debt-ridden Hynix did not fail. The Hynix bailout totalled over 11 billion dollars, in less than 12 months, a figure nearly three times total sales of *all* Hynix products in 2001. 11 billion dollars equaled total sales of DRAMS, by all DRAM producers worldwide, in 2001, as indicated by the record evidence.

4. Korea asks the Panel to substitute its judgment for that of the DOC and find, despite all the record evidence to the contrary, that this enormous financial assistance for a company that was "technically insolvent" was simply the result of commercial banks doing as they saw fit. The facts, however, paint a very different picture – a picture in which the GOK is directing and entrusting Hynix's creditors to carry out the GOK's decision that the company not go under.

5. Korea insists that Hynix's creditors were motivated purely by commercial considerations. However, while commercial considerations are relevant to the issue of whether a company received a benefit, they are not germane to the issue of a financial contribution. "Financial contribution" focuses on the action of the government in making the financial contribution. In particular, subparagraph (iv)

focuses on whether the government has given responsibility to, ordered, or regulated the activities of private bodies to make the financial contributions.

6. There is no support in the SCM Agreement for Korea's suggestion that a formal mandate is required to find a financial contribution. While governments may act in such a formal manner, they frequently operate behind closed doors. There is no textual basis for the assertion that the SCM Agreement somehow ceases to apply when the doors close.

7. In this case, the GOK knew it would be heavily criticized, both domestically and internationally, for bailing out Hynix. Thus, it is not surprising that the GOK operated behind closed doors. Nevertheless, due in part to intensive public interest in such an enormous bailout, there is ample compelling evidence that the GOK directed and entrusted Hynix's creditors to rescue the failing company.

8. For example, despite its much publicized reforms, the GOK announced that it had to alleviate Hynix's liquidity crisis. The government then waived the ceiling on the amount of debt banks could carry for a single debtor on three separate occasions specifically for the purpose of additional loans to Hynix. The government also ordered the KEIC to resume insuring Hynix's exports for the purpose of increasing Hynix's accounts receivable financing. The GOK also instituted a programme to ensure that Hynix did not default on its maturing bonds.

9. The evidence also demonstrates that the GOK did not merely extend a helping hand to Hynix – it used its strong arm to protect the company as well. For example, when KFB balked at participating in the bailout, government officials threatened the bank with the loss of deposits and the loss of customers. After the government arm-twisting, KFB got the message. Likewise, KorAm Bank balked initially, but subsequently succumbed to government threats and intimidation and went along with the programme.

10. The evidence also demonstrates that government threats were not limited to creditors, but extended to anyone who might jeopardize the success of the Hynix bailout. In particular, the government reprimanded and threatened credit rating agencies that lowered (or attempted to lower) Hynix's rating to reflect the reality of the company's dismal financial situation.

11. Even if we assume, for the purposes of argument, that the motivations of Hynix creditors are relevant to the question of a financial contribution, the record evidence also demonstrates that Hynix creditors were acting to fulfil the government's objective. For example, the rationale given by KEB for participating in the May and October 2001 restructurings was to be aligned with the "social and economic policy concerns of the GOK".

12. Could an investigating authority reasonably conclude, based on this evidence, that the GOK directed and entrusted Hynix's creditors to ensure that the company did not fail? Absolutely. The government's message was crystal clear. As the Deputy Prime Minister and Minister of Finance and Economics stated: "If Hynix says it needs an additional one trillion won, and if the creditor group cannot make a decision whether or not to provide additional support, the financial authorities should decide. We cannot simply leave it blindly to the creditor group."

13. *Benefit* – Hynix's financial picture was abysmal. Given this, could an investigating authority reasonably conclude that in measuring the benefit to Hynix from loans, the benchmark should include a risk premium? Absolutely. Could an investigating authority also reasonably conclude that a reasonable investor would not have invested in Hynix? Absolutely.

14. Korea does not dispute the facts concerning Hynix's poor financial condition. Nevertheless, Korea challenges the DOC's finding that Hynix was not creditworthy or equityworthy during the

period of investigation. Korea's argument echoes its argument that the GOK did not direct or entrust private banks to rescue Hynix. The evidence supports the DOC's determination that private banks in Korea were directed or entrusted by the GOK, and, therefore, could not provide an appropriate market benchmark for loans and equity infusions. The sole exception was Citibank, and the United States explained in its first written submission why Citibank did not provide an appropriate benchmark.

15. The facts on the record of the investigation support each of the DOC's findings with respect to financial contribution, benefit, and specificity. There is also a "reasoned and adequate" explanation of how the facts support those findings. The DOC's determination that a countervailable subsidy exists is therefore consistent with the requirements of the SCM Agreement, and the Panel should reject Korea's claims to the contrary.

Issues Concerning the International Trade Commission's Injury Determination

16. *The Many and Misleading Data Sources Cited by Korea* – The ITC used a single, consistent data source: questionnaire responses covering the period 2000 to 2002 and the first three months of 2002 and 2003. Korea relies on an ever-varying set of data sources and time periods depending on the point that it seeks to make. Through its selective use of other data sources, Korea repeatedly makes statements in its submission that are completely inconsistent with the data used by the ITC in its injury determination.

17. *No Basis for Korea's Insistence that Only Market Share Increases Matter* – There is no legal support for Korea's assertion that increases in market share are the only indicator that matters for an affirmative material injury analysis. The investigating authority has discretion to select the methodology to analyze the volume of subsidized subject imports. The ITC found that the absolute volume of subsidized subject imports was significant. It also found that the increase in that volume was significant both absolutely and relative to both production and consumption. Article 15.2 specifies that no one or several of these factors is determinative.

18. *Korea Disregards Important Conditions of Competition in this Industry* – Korea does not dispute that subsidized subject imports were highly substitutable for domestic DRAM products. They were used interchangeably, and there were no important differences in product characteristics or sales conditions between them. Throughout the period of investigation, Hynix's subject Korean operations produced many of the same product densities as domestic producers. Moreover, subject imports and domestic DRAM products were sold largely to the same customers and through the same channels of distribution.

19. The commodity-like nature of domestic and subject imported DRAM products magnified the ability of a given volume of imports to impact the domestic market and industry. These conditions of competition, as well as the importance of price in this particular industry, were also important to the ITC's price effects findings. In a commodity-type market which adjusts quickly (even biweekly) to price changes, significant price disparities between suppliers would not usually be expected. Thus, the ITC found the patterns of frequent, sustained high-margin undercutting by subsidized subject imports (at margins often exceeding 20 per cent and at increasing frequencies) was especially significant in this industry, and could be expected to have particularly deleterious effects on domestic prices.

20. *Korea Seeks Alternate Methodologies without Demonstrating Any Shortcoming in the Methodologies Used by the ITC* – Korea merely asserts that the ITC's weighted-average pricing analysis was "wrong for this industry" and that the ITC should have examined pricing and volume on a brand-name basis. These arguments ignore the fact that it is for the investigating authorities in the first instance to select methodologies for their analysis under Article 15.2 of the SCM Agreement. There is no requirement to conduct a brand-name analysis, and on the facts of this case, a brand-name

analysis was not consistent with the relevant inquiry under the SCM Agreement. Use of the brand-name analysis urged by Hynix would not reflect the source country of the DRAM products and would be utterly inconsistent with the requirement under the SCM Agreement to examine the effect "of the subsidized imports" on the "like product", the product produced by the domestic industry. By comparing the weighted-average price of subsidized subject imports with the weighted-average price of domestic shipments for each time period, the ITC's methodology in this investigation addressed the inquiry posed by Article 15.2 – the assessment of the price effects of the subsidized imports on the domestic industry.

21. In any event, the ITC *also examined* the pricing data on a disaggregated basis (broken down by both brand-name and by source). Even a disaggregated analysis showed that subsidized subject imports were the lowest-priced product "*more often than DRAM products from any other source*".

22. *Korea Asks This Panel to Reweigh the Evidence and Factors Concerning the Impact of Subsidized Subject Imports, but the Result is the Same* – Based on an examination of trade, financial and other industry performance indicators, the ITC concluded that the domestic industry's performance declined over the period of investigation with respect to many indicators, and its financial performance worsened precipitously. The ITC determined that declining prices were the primary reason for the industry's large operating losses, and that subject imports "contributed materially to the steep price declines that occurred over the period." Korea argues that the ITC should have weighed the evidence differently, and it asserts that in this industry there are only five key indicia.

23. Korea ignores that it is the investigating authorities that are to evaluate the impact factors and weigh the evidence and that no one or several of the non-exhaustive list of enumerated SCM Agreement Article 15.4 factors is determinative. The ITC's final determination reflects evaluation of positive evidence concerning each of the various Article 15.4 factors showing changes in the industry's condition, but even the select criteria that Korea asserts are important in this industry showed declines during at least part, if not the entire, period of investigation.

24. *The ITC's Causation Analysis was Proper* – In ascertaining whether there is a "causal relationship", authorities must demonstrate a causal relationship between the subsidized imports and the injury to the domestic industry based on an examination of all relevant evidence before the authorities. The authorities also must examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry to ensure that the injury caused by these other factors is not attributed to the subsidized imports. The ITC clearly demonstrated such a causal relationship, and also provided a satisfactory explanation of the nature and extent of the injurious effects of other factors. Even in the context of reviewing safeguards determinations, the Appellate Body has found that Article 4.2(b) of the Safeguards Agreement does not require that increased imports alone, in and of themselves, are causing serious injury. Nor is there any such requirement in Article 15 of the SCM Agreement.

25. <u>*Non-subject imports*</u>: The ITC found that subsidized imports, by themselves, were large enough and priced low enough to have a significant impact, regardless of the adverse effects caused by non-subject imports. The ITC determined that there were two principal factors that reduced the significance of the volume of non-subject imports. First, there was less competition between the domestic DRAM products and the non-subject imports than there was between the domestic DRAM products and the subject imports. The ITC determined after examining the composition of non-subject imports that a significant portion of non-subject imports were Rambus and specialty DRAM products for which domestic producers had no significant production during the period of investigation. Second, even those non-subject imports consisting of "standard" products did not have the price effects that subsidized subject imports did during the period of investigation. Price effects were what the ITC concluded caused the "primary negative impact" on the domestic industry.

26. *Other possible reasons for price declines*: The ITC also evaluated other possible reasons why prices declined in the US market (including product life cycles and business cycle changes in demand and supply that lead to "boom" and "bust" periods characteristic of this industry). While slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the ITC found that the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor. It concluded that the increasing frequency of underselling by subsidized subject imports from 2000 to 2002 corresponded with the substantial decline in US prices over those same years and that in the absence of significant quantities of subsidized subject imports competing in the same product types at relatively low prices, domestic prices would have been substantially higher.

ANNEX B-4

CLOSING STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

24 June 2004

Subsidy Issues

1. In closing, we would like to comment briefly on Korea' s suggestion that the Commerce Department is an over-zealous agency run amok. Korea characterizes the US position in alarming terms, portending unlimited discretion for investigating authorities and a world in which the financial community has no choice but to stand by and watch ailing companies go bankrupt. The alarm Korea sounds is necessary to justify the fact that Korea is asking the Panel to read into the "entrusts or directs" language of Article 1.1(a)(1)(iv) a special evidentiary requirement that would immunize all informal government action from the disciplines of that provision, by prohibiting reliance on circumstantial evidence, no matter how compelling, and by requiring explicit, concrete evidence of government entrustment or direction not only for a particular task, but also for each action necessary to accomplish that task. Korea's solution, in short, is to make Article 1.1(a)(1)(iv) so easy for governments to circumvent that it would render the provision meaningless – an absurd result that Korea apparently does not find alarming.

2. As we discussed in our submission and over the past two days, the DOC provided a well-reasoned analysis of why the facts – and admittedly the facts are very complex – when viewed as a whole, present a clear picture of a government bailout of Hynix.

Injury Issues

3. In its written submission, Korea repeatedly asserted that the volume of subsidized imports declined. In its opening statement, Korea retreated from this assertion, arguing in paragraphs 7 and 9 only that the Hynix brand declined. Indeed, Korea even conceded in paragraph 11 that subject imports did increase.

4. Even without an increase, subject imports can have price effects if, for example, they force other market players to lower their prices. For the sales that the financially troubled Hynix did make, there was significant price undercutting, however measured. It does not take much to set the margin in a commodity market where prices are rapidly disseminated.

5. Korea admitted that there was injury here. The fact that other factors may have been causing injury at the same time as subsidized subject imports does not, under the SCM Agreement, invalidate or prevent an investigating authority from finding that subsidized subject imports caused material injury to the domestic industry.

Standard and Scope of Review

6. Over the course of the past two days, we and Korea have repeatedly referred to the fact that "we have a disagreement" or "we have a dispute". It is important that we be clear about what the disagreement before the Panel is all about.

7. One possible disagreement is historical, involving the question of whether Hynix received subsidies and whether imports of subsidized merchandise caused injury to a US industry. That issue was resolved by the Department of Commerce and the International Trade Commission in their determinations, and is not before the Panel.

8. The present disagreement – the disagreement before the Panel – is different; it is whether a reasonable, unbiased person *could* have reached the same conclusions as those agencies, based on the evidence before them.

9. Korea says that there is no disagreement concerning the standard of review, but there is. Korea said earlier that your job is to determine what a reasonable authority *should* have found. However, your task is *not* to determine what a reasonable authority *should* have found. Rather, your task is to determine what a reasonable investigating authority *could* have found based upon the evidence before it.

10. A related issue is the scope of the Panel's review. We can certainly understand the Panel's desire to have as much information before it as possible. However, once you stray into the area of non-record evidence, you risk running afoul of the provisions of Article 11 of the DSU. We urge you to consider that if you are thinking of accepting non-record evidence. The Panel cannot perform its assigned function if it is considering information that was not before the agency.

11. Finally, it is Korea that bears the burden of proving that a reasonable, unbiased person could not have reached the same conclusions as the DOC and the ITC. So far, all Korea has done is to say that there are conflicting pieces of evidence in the record, but it has failed to prove – although it repeatedly suggests – that the agencies' consideration of such evidence was improper. In other words, Korea has failed to satisfy its burden of proof with respect to the disagreement that is before this Panel.

12. Thank you again for agreeing to participate in the work of this Panel. We look forward to continuing that work with you in the coming weeks.

ANNEX B-5

ORAL STATEMENT OF CHINA AT THE THIRD PARTY SESSION

24 June 2004

Thank you, Mr. Chairman, and members of the Panel. China appreciates the opportunity to present this oral statement as a third party. China wishes to highlight certain aspects of the issues contained in its written submission.

I. INDIRECT FINANCIAL CONTRIBUTION

1. The first legal issue China would like to address is indirect financial contribution by a government. In this respect, China holds the view that Article 1.1 (a)(1)(iv) of *the SCM Agreement* should be interpreted strictly.

2. First, this view is supported by the reading of the plain text of the provision. The Panel in *US – Export Restraint* concluded that the words of "entrust" and "direct" consist of 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". China thinks that these three elements must be proved by positive evidence in order to find "entrustment" or "direction" by a government.

3. Second, in the negotiating history of *the SCM Agreement*, the element of financial contribution was included in the definition of a subsidy to limit the kinds of government actions to be regarded as subsidies. On the other hand, subparagraph (iv) of Article 1.1(a)(1) was intended as an anti-circumvention provision, disciplining subsidies provided by a government through a funding mechanism or a private body. Taking together, a strict reading of the subparagraph (iv) not only serves the purpose of limiting the applicable scope of *the SCM Agreement*, but also ensures the effective operating of the anti-circumvention provision.

4. In the context of reviewing a countervailing duty determination by a panel, it is crucial to assess whether the facts before the investigating authority at that time supported its finding of financial contributions, and whether the investigation reports set forth "the basis on which the existence of a subsidy has been determined" as provided by Articles 22.4 and 22.5 of *the SCM Agreement*. In China's view, although *the SCM Agreement* does not provide for any special evidentiary standard for the finding of indirect financial contribution, the facts accepted by the investigating authority must support the finding of the above-mentioned three elements of entrustment or direction.

II. BENEFIT

5. Now China would like to turn to the second legal issue, the selection of a market benchmark for the determination and calculation of benefits. On this issue, China submits that the current dispute involves a set of questions similar to those in *US – Lumber CVDs Final*.

6. First, China thinks that the investment decision of Citibank may constitute a primary market benchmark in the course of determining and calculating benefits conferred by the alleged subsidy programmes.

7. Second, by analogy to the Appellate Body report in *US – Lumber CVDs Final*, China is of the view that the threshold for abandoning a primary benchmark is very high. It is preferable to adjust the benchmark for some elements of incomparability. Therefore, in the cases of equity infusion and loans provision, if there are investment activities conducted by a private entity to the same company under investigation, it is desirable to use such activities as the primary market benchmark instead of to reject this readily available and actual benchmark and to construct an additional set of "market terms".

8. Third, even if a readily available market benchmark is properly rejected with good cause, Article 14 of *the SCM Agreement* requires that any alternative method used shall be consistent with the guidelines. In China's view, the specific requirements set out in Article 14(a) and (b) have the function of ensuring that only the advantage of a subsidy is calculated through the application of guidelines contained therein. This understanding is supported both by the Appellate Body report in *US – Lumber CVDs Final (AB)* and by the well accepted interpretation of the term "benefit" in Article 1.1 by the Appellate Body in *Canada – Aircraft*. Therefore, China believes that Article 14(a) and (b) impose an obligation of excluding any factor that affects comparability of the terms that are being constructed by an authority.

III. SPECIFICITY

9. The third key legal issue on which China would like to comment is the determination of specificity.

10. First, in China's understanding, Article 2.1(c) of *the SCM Agreement* provides for a three-layer requirement in the determination of *de facto* specificity: (i) there shall be facts indicating the possible existence of *de facto* specificity; (ii) consideration may then be turned to any or all of the four factors; (iii) when looking at factual factors, one *shall* take into account two circumstantial factors, i.e. the extent of diversification of economic activities and the length of time of the application of the subsidy programme.

11. China notes that DOC in its *Decision Memorandum* adopted various evidence to show the intention of the GOK to rescue Hynix. In China's view, such intention, even if established, at best only shows the "reason to believe" that there may be *de facto* specificity. It should be pointed out that Article 2.1(c) of *the SCM Agreement* does not include the intention of a granting authority as one of the four factors.

12. Second, in China's opinion, while deciding on the issue of granting disproportionately large amounts of subsidy to certain enterprises, the mere fact that a company accounted for a large share in the debt restructuring provided by the government does not conclusively prove that the amount of granted subsidy is "disproportionately large". In China's opinion, the disproportionate largeness should be determined on the basis of comparison with other participants in the restructuring programme, not only from the perspective of the absolute amount of debt, but also, *more importantly*, from the perspective of the scales and needs of financing of all participants in the same programme.

13. China also is of the view that Article 2.1(c) of *the SCM Agreement* clearly provides that two circumstantial factors have to be considered in the determination of specificity, namely, the "extent of diversification of economic activities" and the "length of time".

14. Furthermore, in China's view, though Article 2.1(c) does not require an authority to consider each and every factual factor listed therein, when taking into account of the particular settings of the debt restructuring, the consideration of the third factor, amount of subsidy, should be combined with the fourth factor, the manner of exercising discretion. The authority should have looked into whether there were other applications for debt restructuring by other companies of scale similar to Hynix and

in similar needs of financing, and whether such applications were refused despite situations similar to those of Hynix. Such an inquiry would clarify whether the subsidy is of limited availability.

15. Therefore, China thinks that the DOC's approach to finding disproportionately large amount of subsidies does not seem well founded pursuant to Article 2.1(c) of *the SCM Agreement*.

16. Third, China would like to express its view that Article 2 of *the SCM Agreement* requires that specificity of subsidy programmes be determined with respect to each separate subsidy programme. It is not consistent with Article 2 for an investigating authority to take a particular *financial contribution* out of the subsidy programme and consider it in isolation. Neither is permissible to combine *various separate subsidy programmes* as a whole and review them as a single programme.

17. In this dispute, the responding party seems to introduce a so-called "inherent specificity" theory. It is argued by this party that in the situation where the government provides a grant to a single, financially distressed manufacturer, the nature of the subsidy is inherently specific. Contrary to such point of view, China believes that specificity should be examined on the basis of a subsidy programme, rather than an individual financial contribution granted under the same programme. If specificity is to be determined on the basis of any particular financial contribution under the subsidy programme, there would be no subsidy programme that is not specific.

18. On the other hand, DOC also appears to have put together some seemingly separated programmes under a big "programme" named "Direction of Credit and Other Financial Assistance" and examine their specificity as a single programme. Such a practice seems inconsistent with *the SCM Agreement*. China believes that specificity should be examined in relation to each separate and distinct subsidy programme. Under *the SCM Agreement*, a subsidy becomes countervailable only after its specificity is confirmed. A finding of the specificity of a subsidy programme does not necessarily extend to other subsidy programmes. Article 2.4 of *the SCM Agreement* also specifically requires that any determination of specificity shall be clearly substantiated on the basis of positive evidence. China thinks this provision obliges an investigating authority to clearly inquire into and demonstrate the specificity of each separate subsidy programme.

IV. CONCLUSION

19. This concludes the oral statement of China. Thank you again for this opportunity to express our views.

ANNEX B-6

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE EUROPEAN COMMUNITIES

8 July 2004

1. The EC generally refers to its written submission in this case, and only wishes to make very few further observations mainly, triggered by submissions made by other third parties, which the EC submits have to be nuanced.

I. THE APPELLATE BODY REPORT IN US – SOFTWOOD LUMBER IS NO SUPPORT FOR KOREA'S PRIMARY BENCHMARK TEST

2. According to Korea, supported by China, the US-Softwood Lumber case established principles that, in respect of the calculation of the amount of the benefit of the subsidy in accordance with Article 14 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") apply across each of the paragraphs of Article 14. In particular and again based on the *US-Softwood Lumbe*r case, Korea argues that if a benchmark exists in the market of the Member under investigation, this primary benchmark must be used unless the investigating authority demonstrates that this benchmark is distorted. The EC does not agree that there is any primary benchmark included in Article 14 (b) of the *SCM Agreement* and submits, for the reasons that will follow, that alternative benchmarks may be used.

3. China also argues that, based on the finding of the Appellate Body in *US- Softwood Lumber*, the threshold for abandoning a primary benchmark is very high.

4. The EC does not agree with this view. The EC would first of all recall that Article 14 of the *SCM Agreement* leaves the methodology for determining the amount of a benefit to Members, referring in its chapeau to "any" method used. The word "any" indicates that more than one method may be acceptable and, the principles in Article 14 subparagraphs (a) to (d) of the *SCM Agreement* contain "guidelines". Secondly, Article 14 sub-paragraphs (b) and (c) of the *SCM Agreement* bear no limitation in respect of the market which could provide a comparative benchmark for establishing the benefit. Sub-paragraphs (b) and (c) refer in general terms to a "*comparable commercial loan*" and to "*the market*". This wording does not support an interpretation according to which, in the application of Articles 14 sub-paragraphs (b) and (c) of the *SCM Agreement*, regard must be had first to any benchmark on the market of the Member under investigation.

5. In that context, the EC supports the US view according to which the *US- Softwood Lumber* case is not a relevant authority for this case. From the report it is very clear that the Appellate Body ruled on the specific facts of the case and that it was concerned only about the interpretation of Article 14 sub-paragraph (d) of the *SCM Agreement* which concerns the provision of goods and not as in the present case the provision of loans and equity. Accordingly the EC submits that China's argument concerning the threshold for abandoning a primary benchmark would be, if at all, applicable only to the case of Article 14 sub-paragraph (d) of the *SCM Agreement*, which is, however, not at issue in this case. Furthermore, it is submitted that all parties do not dispute that the Appellate Body's holdings in the US- Softwood Lumber Case were limited to the interpretation of Article 14(d). For these reasons, the EC submits that the *US- Softwood Lumber* case should be disregarded as authority in this case.

II. DISTORTION OF MARKET BENCHMARKS

6. The EC also wishes to comment on China's argument that it is not reasonable require that the investment decision of a private entity should be free of any government involvement in order for it to be used as benchmark.

7. The EC submits that this argument needs to be nuanced, especially in the case of financial investments. It is submitted that, if there was also an investment by the government, this can be an important factor in assessing whether the decisions by private entities to invest as well were tainted by the government's action. Indeed any perception that a government invests in a company will give the signal that the government it committed to the company receiving the investment. That in turn suggests that the company invested in, because the government is behind it, is unlikely to fail. In the case of an otherwise highly risky investment opportunity, such government backing may well tilt the private operators' risk assessment in favour of the decision to actually invest. It is therefore, the EC submits, reasonable to assume a distorting effect by such government commitment, at least in the absence of convincing factors pointing to another finding.

8. Therefore, the EC disagrees with the argument put forward by China that the mere perception that the GOKs policy commitment to Hynix's survival continued to be significant should not have influenced Citibank's decision in such a substantial way as to invest in a company that, according to DOC, should have failed. Purely from a logical point of view, it is perfectly conceivable for the reasons just explained that because of the perception of a GOK policy commitment to Hynix, Citibank may have assessed the risk of failure as small. This could have tilted the decision by Citibank in favour of investing.

9. However, the US dismissed Citibank as a reliable benchmark also because of its role as financial adviser. China argues that all commercial entities operate in a complex commercial reality. A decision in a particular transaction may be influenced by that in another transaction and suggests that even if such an influence exists, it may not necessarily constitute a justification for denying the commercial nature of the first decision. The EC actually agrees that transactions can be influenced by decisions in other transactions. However, the issue is: can it be assumed that the investments made be the other participating banks were based on commercial grounds just because Citibank, as private sector bank, invested too?

10. It is submitted that for a benchmark to make any sense in this context, the comparison to it must be made on an equal footing. In other words: it is not appropriate to compare the lending decision of a bank which is engaged vis-à-vis the recipient of the loan only by its lending business to the motivation of a bank whose main role is that of financial advisor. Indeed precisely because decisions in one transaction influence those in others, the interest a bank has as financial advisor is bound to taint the decision such bank takes in respect of lending to its advisory client, especially if this lending is comparatively small.

11. Hence, the EC submits that the Panel should bear in mind the very specific position of Citibank in assessing Korea's and China's arguments in respect of Citibank as a possible benchmark.

III. EVIDENTIARY STANDARDS TO REVIEW THE EXISTENCE OF ENTRUSTMENT OR DIRECTION BY THE GOVERNMENT OF KOREA IN THIS CASE

12. The EC would like to take this opportunity to underline that Japan seems to be of the same opinion as the EC in respect of the degree of evidentiary standard required for showing government direction for proving a financial contribution under Article 1.1.(a)(1)(iv) of the *SCM Agreement*. The EC, as further set out in its written submission, comes to that conclusion as well.

13. The EC also fully agrees with the interpretation by Japan that the *Export Restraints* panel did not set forth the type of evidence required for finding entrustment or direction, and that these elements may also be shown by circumstantial or secondary evidence. The EC agrees that 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 a privately-controlled bank to provide financial support to a specific company.

14. Hence, the EC would suggest the Panel should find that the US finding of direction was consistent with WTO rules in so far as an objective assessment of the evidence would reasonably allow the Panel to reach the conclusion the authorities did.

IV. CONCLUSION

15. In conclusion, the EC respectfully submits

- That the *US- Softwood Lumber* case should be disregarded as authority in this case;
- That Citibank's specific situation in this case should be borne in mind when assessing whether it was a proper benchmark for the purposes of Article 14 SCM Agreement; and
- That government entrustment or direction can properly be established on the basis of circumstantial evidence.

ANNEX B-7

ORAL STATEMENT OF JAPAN AT THE FIRST SUBSTANTIVE MEETING, THIRD PARTY SESSION

24 June 2004

I. INTRODUCTION

1. Mr. Chairman and distinguished Members of the panel, on behalf of the Government of Japan, I thank you for giving us this opportunity to express our views on this important matter. This morning, we will focus on certain arguments presented by the parties, which involve systemic issues, and should be addressed further.

II. ARGUMENT

A. ENTRUSTMENT OR DIRECTION BY THE GOVERNMENT UNDER ARTICLE 1.1(A)(1)(IV)

2. The United States argues that the words "entrusts or directs" in Article 1.1(a)(1)(iv) of the SCM Agreement dictate that "[t]he focus in determining entrustment or direction is on the government's action".[1] We agree. As the panel in *US – Export Restraints* explained, the word "entrust" means to "give (a person, etc.) the responsibility for a task . . . Commit the . . . execution of (a task) to a person . . ".[2] The word "direct" means to "[g]ive authoritative instructions to; order (a person) to do . . . order the performance of".[3] The ordinary meaning of these words, as analyzed by the *US – Export Restraints* panel, clarifies that Article 1.1(a)(1)(iv) is concerned with the action taken by the government. The reactions of private banks are not the primary concern of this Article. Some private banks may accept the responsibility wholly or partly for a task entrusted or directed to them by the government. Other private banks may decline to take the responsibility. The reaction of such private banks, however, does not affect the evaluation for the existence of entrustment or direction under Article 1.1(a)(1)(iv).

3. We also agree with the United States that instructions by a government do not have to be in a particular form or on a transaction-specific basis.[4] The panel in *US – Export Restraints* interpreted the government's entrustment or direction to be an explicit and affirmative action prompting a particular party to perform a particular task or duty.[5] Article 1.1(a)(1)(iv), however, does not specify any particular methodology for evaluating the government's action relating to the entrustment or direction to private banks. The government's entrustment or direction, thus, does not have to be a publicly announced command, or a command instructing a private bank, in every detail, to provide financial support to a specific company. It is sufficient under Article 1.1(a)(1)(iv) if the government's action were such that a private bank were able to understand what the government delegated or commanded.

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[1] The First Written Submission of the United States (the "*US First Written Submission*"), dated 21 May 2004, para. 175.

[2] Panel Report, *United States - Measures Treating Export Restraints as Subsidies* ("*US – Export Restraints")*, WT/DS194/R, adopted 23 August 2001, para. 8.28.

[3] *Id*.

[4] *See US First Written Submission*, paras. 162-170.

[5] Panel Report, *US – Export Restraints*, para. 8.29.

4. Consequently, the major question under Article 1.1(a)(1)(iv) is the evidence on which the investigating authority may base its finding on whether the government's instruction constituted an entrustment or direction under this Article. As we discussed in our third party submission, the instruction may be shown through circumstantial evidence. The evidentiary standard applicable to this Article is found in Article 11 of the DSU. Article 11 requires that the Panel review whether an investigating authority's determination was based on "an objective assessment of the matter before it, including an objective assessment of the facts of the case". Article 11 directs panels to make an objective assessment of the facts. However, we would consider that this obligation of an objective assessment applies equally to the investigating authorities' assessment, because panels are required to review the investigating authorities' evaluation of facts in accordance with that standard. Article 11 thus requires, in this case, that an investigating authority must base its determination on the evidence sufficient to allow the authority to reasonably conclude that the government delegated or commanded a private bank to provide certain financial support to a specific company. There are no further requirements of the evidentiary standards applicable to Article 1.1 of the SCM Agreement.

B. NON-ATTRIBUTION RULE UNDER ARTICLE 15.5 OF THE SCM AGREEMENT

5. The United States argues that "there is no requirement to collect detailed information concerning 'other factors,' including non-subject imports"[6] to comply with the non-attribution rule under Article 15.5 of the SCM Agreement. This argument should be carefully examined. Article 15.5 requires that the authorities "examine any known factors other than the subsidized imports" and that "injuries caused by these other factors must not be attributed to the subsidized imports".[7] This language clarifies that if any other factors are known by the investigating authority, the investigating authority must undertake positive actions to collect and evaluate the evidence so that the investigating authority can separate and distinguish the possible injurious effects of the other known factors.

6. The Appellate Body has repeatedly explained that the investigating authority must take positive actions to collect and assess information regarding the known factors. In *US – Hot-Rolled Steel*, the Appellate Body clarified the meaning of the word "examination". According to the Appellate Body, an examination "relates . . . to the way in which the evidence is gathered, enquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally".[8] Regarding the authorities' conduct of the "investigation", the Appellate Body explained:

> The ordinary meaning of the word "investigation" suggests that the competent authorities should carry out a "systematic enquiry" or a "careful study" into the matter before them.[45] The word, therefore, suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an enquiry or a study – to use the treaty language, an "investigation" – must actively seek out pertinent information.[9]
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> [45] *The New Shorter Oxford English Dictionary, supra*, footnote 43, Vol. I, p. 1410.

[6] The "US First Written Submission" , para. 422.

[7] Article 15.5 of the SCM Agreement (emphasis added).

[8] 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. 193.

[9] The Appellate Body Report, *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities ("US – Wheat Gluten")* WT/DS166/AB/R, adopted 19 January 2001, para. 53.

The examination to separate and distinguish other known factors under Article 15.5 is a part of the authorities' conduct of the investigation under Part V of the SCM Agreement.[10] As the Appellate Body explained in the above reports in *US-Hot-Rolled Steel* and in *US-Wheat Gluten*, therefore, the investigating authorities are required to take positive actions to "gather" and "evaluate" the evidence related to other known factors.

7. The phrase "must not be attributed", in Article 15.5, further clarifies that the investigating authorities are required to take positive actions to separate and distinguish injury caused by other known factors from injury caused by the subsidized imports. The Appellate Body has clarified Article 3.5 of the AD Agreement, which is equivalent to Article 15.5 of the SCM Agreement:

> We recognize, therefore, that it may not be easy, as a practical matter, to separate and distinguish the injurious effects of different causal factors. However, although this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors.[11]

8. In sum, WTO jurisprudence has clarified that the investigating authorities are required to take positive actions to collect and evaluate other known factors to separate and distinguish injury caused by factors other than the subsidized imports.

III. CONCLUSION

9. For the reasons discussed above and in our third party submission, Japan respectfully requests that this Panel carefully review the consistency of the injury determination and the subsidy determination by the United States.

[10] *See* Article 10, which provides "Countervailing duties may only be imposed pursuant to *investigations* initiated and *conducted* in accordance with the provisions of this Agreement and the Agreement on Agriculture." (footnote omitted, emphasis added.)

[11] Appellate Body Report, *US – Hot-Rolled Steel*, para. 228 (emphasis added).

ANNEX B-8

THIRD PARTY ORAL STATEMENT SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

24 June 2004

Introduction

1. Based on trade and systemic concerns, the Government of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu wishes to take this opportunity to express its positions with regard to the interpretation of the Agreement on Subsidies and Countervailing Measures (ASCM) concerning the dispute between the United States and Korea. We will address, in particular, two issues: the interpretation of ASCM Article 1.1(a)(1)(iv) "entrust or direct", and the selection of a suitable benchmark in the calculation of benefit pursuant to ASCM Articles 14(b).

ASCM Article 1.1(a)(1)(iv) "Entrust or Direct"

2. With regard to the interpretation of the terms "entrust or direct" in Article 1.1(a)(1)(iv) of the ASCM, we believe that the interpretation of the Panel in *US - Export Restraints* is applicable to the present case. The Panel directly examined the meaning of the words "entrust" and "direct" in the context of ASCM Article 1.1(a)(1)(iv) in a general manner.[1] The Panel held that

> the act of entrusting and that of directing…necessarily carry with them the following three elements: (i) there must be an *explicit and affirmative* action, be it delegation or command; (ii) addressed to a particular party; and (iii) the object of which is a particular task or duty…We therefore do not believe that either entrustment or direction could be said to have occurred until all of these three elements are present."[2] [emphasis added]

3. It follows from the Panel's stringent standards that mere influence or control by the government is, in itself, insufficient to prove entrustment or direction. The investigating authorities must determine whether the government influence was the result of an explicit and affirmative act addressed to a particular party for a specific task. Drawing inference from circumstantial evidence does not discharge a competent authority's evidentiary burden in this regard. It is our view that the competent authority should make an examination of all evidence in order to decide whether the above three elements of entrustment or direction have been met.

Benchmark Pursuant to Articles 14(b) of the ASCM

4. Article 14 of the ASCM deals with the calculation of benefit based on four guidelines, in which Article 14 (b) addresses the issue of loans and loan guarantees. The paragraph emphasizes the difference in capital costs by comparing the interest payments the firm would make on government loan with the amount it would otherwise pay on "*comparable commercial loan* which the firm could

[1] *United States – Measures Treating Exports Restraints as Subsidies (US – Export Restraint)*, Panel Report, WT/DS194/R, paras. 8.25-8.32.

[2] *US – Export Restraint*, para. 8.29.

actually obtain on the market", or the benchmark.

5. In selecting a benchmark, we believe that Article 14(b) should be interpreted along with other paragraphs of Article 14 in a consistent manner. In our view, the appropriate benchmark for comparable commercial loans should be the marketplace in the Member's territory in question. If the firm under investigation received its funding from local sources, the use of a non-domestic benchmark would be incongruous. It is only when all possible domestic benchmarks have been determined by the investigating authorities to be indeed distorted should other benchmarks be considered. In doing so, the investigating authorities should also establish that the other benchmark of their choice relates to the prevailing market conditions of the market at issue.

Conclusion

6. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu respectfully submits the above positions for consideration by the Panel. We thank you again for the opportunity to offer our comments.

ANNEX C

REBUTTAL SUBMISSIONS OF PARTIES

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ANNEX C-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION BY THE REPUBLIC OF KOREA

19 July 2004

I. SUBSIDY ISSUES

A. The Scope Of "Entrusts Or Directs"

1. The meaning of "entrusts or directs" imposes legal limits

1. The United States acknowledges but then ignores the legal limitations imposed by Article 1.1(a)(i)(iv). In particular, the United States has ignored the core meaning of both of these key terms.

(a) Text

2. Both the word "entrusts" and the word "directs" convey the basic meaning of carrying out some specific action. The United States claims that guidance or suggestions alone would be sufficient to establish "entrusts or directs". Yet "directs" has a much stronger meaning, and conveys the idea of ordering the private party to do something. Also, in light of the French and Spanish texts, the most appropriate interpretation of the English word "directs" must be the meaning of ordering a private body to take some action.

3. The term "entrusts" also conveys the idea of the person who is entrusting already having something to be entrusted. Thus the government must already have something that is going to be "entrusted" to the private body. Accordingly, in the context of the Hynix restructuring, the only relevant term is the concept of "directs" since the restructuring was both privately organized and carried out.

(b) Context

4. Both the words "entrusts" and "directs" are verbs, and Article 1.1(a)(1)(iv) has important textual guidance about the object of these two verbs, and what that object must be. *First*, the entrustment or direction must apply to "a private body". *Second*, that private body must be entrusted or directed "to carry out" something. Since the private body is not being entrusted or directed to "carry out" some action, any discretion being left to the private body is thus fundamentally at odds with this notion of "carry out". *Third*, the action being entrusted or directed is not some generalized policy or wish, but rather one of the concrete actions specified in Article 1.1(a)(1).

(c) Object and purpose

5. Unlike the US assertion, Korea never argued that entrustment or direction had to be expressed in writing. By "explicit", our argument means some concrete action directed to some specific person to do some specific action. This narrow approach is quite proper in that the entire WTO framework regulates governmental action, not private action.

2. US-Export Restraints

6. The United States tries to downplay the relevance of *US-Export Restraints*, by arguing that panel decision considered a different factual context. But this effort to distinguish *Export Restraints* fails on two levels. First, the panel in that case was clearly offering its own reading of the specific text at issue here. Second, that panel also wisely explained the problems with an overbroad reading of "entrusts or directs". In particular, the panel distinguished carefully between government interventions and actions that by their nature rise to the level of "entrusts or directs".

3. The US approach of considering general evidence is flawed

7. The United States repeatedly invokes the argument that it was considering the evidence in its totality. Korea notes that this approach is deeply flawed on a number of levels. Among others, under the US approach, an authority could countervail as an impermissible subsidy a loan from a bank without a single shred of evidence about that particular bank or that particular loan. Also, the US theory has no temporal limits.

4. The actions of private bodies

8. The United States also mischaracterizes the Korean argument about private bodies. Indeed, the actions of private parties are very much part of the evidence that must be assessed to see whether the authorities have in fact met the necessary legal standard.

B. The DOC "Evidence" With Respect To Specific Transactions

1. October 2001 Restructuring

9. The US evidence with regard to the October restructuring utterly fails for the following reasons. First, the United States makes serious factual misstatements about the CRPA. Moreover, the United States paints the CRPA as a trap with no escape, notwithstanding the numerous procedural safeguards built into the text of the law itself. Finally, the United States makes broad allegations about FSS monitoring that lack relevance. Moreover, under the US theory of "entrusts or directs", all the Korean banks were being told what to do. Yet as well borne out by the October 2001 restructuring, different banks made different choices based on their own commercial considerations.

2. May 2001 Restructuring & December 2000 Syndicated Loan

10. The US evidence with respect to the May restructuring has the following flaws. *First*, the United States repeats its flawed assertions about "blocking majority" and about alleged GOK influence over all of Hynix's creditors through shareholding in certain of them. *Second*, the United States mischaracterizes the Prime Minister's Decree No. 408 while citing to the MOUs as somehow providing a mechanism of control. *Fourth*, the mistaken press reports and the KorAm denials were provided to the DOC, but the United States continue to brush them aside. Most egregious of all, the United States says not one word about the GDR equity offering that was the necessary precondition for the May 2001 restructuring. With respect to the December 2000 syndicated loan, the United States stresses the results of the Economic Ministers meetings, but draws conclusions far beyond what an objective authority would conclude based on these facts.

C. The DOC's Other General "Evidence"

1. General problems with the US approach

11. In general, the United States cites evidence regardless of the time period and regardless of the connection to the Hynix restructuring. The United States also makes numerous factual misstatements.

12. In addition, there are several problems with the evidence of an alleged policy to save Hynix. The core US argument in this regard focuses on the Economic Ministers meetings in late 2000. But this discussion illustrates the shortcomings in the US approach. The United States also argues that Hynix was somehow exempt from its review of financially insolvent companies, citing a single newspaper article as evidence. Yet the FSS/FSC never exercised any pressure to exempt any companies from the list of companies to be liquidated.

2. Alleged control over creditors

(a) Signalling & Ownership

13. The United States repeatedly invokes the idea of "signalling". The problem for the US theory is that such evidence is legally irrelevant to the issue of entrusts or directs. The United States also invokes GOK ownership in the banks, but in so ding, ignores the various procedural safeguards imposed by the GOK.

(b) Kookmin Prospectus

14. The United States makes much of the Kookmin prospectus, but this approach to the Kookmin prospectus overlooks several important pieces of evidence. Among others, the possibility of GOK influence is belied by the actual actions of Kookmin in the October restructuring.
Prime Minister's Decree & Public Funds Oversight Act/MOUs

(c) Prime Minister's Decree & Public Funds Oversight Act/MOUs

15. The United States mischaracterizes the Prime Minister's Decree No. 408. As Korea already explained, the United States completely ignores Article 1 of the Decree. Instead the United States mischaracterizes other parts of the Decree. The United States ALSO cites to the MOUs as somehow providing a mechanism of control. Unlike the US assertion, however, the purpose of the MOUs is to ensure that the bank can recover quickly following its Normalization Plan so that the GOK can recover the public funds injected into the bank as fast as possible.

(d) CRPA

16. The United States describes the basic CRPA process, but then makes several serious mischaracterizations. The United States argues the Creditors Council gave only limited options, but this claim ignores the context of the restructuring. The United States also erroneously argues that the CRPA does not provide any real choices.

(e) Role of FSS

17. One of the more disingenuous US arguments is the effort to take normal bank regulation and turn it into another mechanism of control. Unlike the US claim, when a government regulatory agency decides whether to grant an exception to a regulatory limit, that government agency may consider a wider range of factors.

(f) Alleged Coercion

18. The United States cites numerous press articles about alleged pressure on KFB. But in the end, the actual behaviour of KFB is hardly consistent with the US theory of coercion. The United States goes on to raise two other irrelevant points that have nothing to do with Hynix.

D. The DOC's Determination of "Benefit"

1. Requirements of Articles 1.1 and 14

19. With respect to the existence of a benefit, Article 14 applies very concrete terms focused on the "usual" or "prevailing" conduct in the market under investigation, or "comparable" conduct. In *US – Lumber*, the Appellate Body found that the "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*". The US claims that the Appellate Body's holding in *US – Lumber* must be restricted to Article 14(d) on that basis. But such a reading completely ignores the clear preference found in Article 14 for primary benchmarks.

(a) Scope of Article 14(b) & (a)

20. Under Article 14(b), comparable must first be defined by what a firm can "actually obtain on the market". In this case the market in question is first and foremost Korea. Thus, to the extent Hynix obtained loans in Korea from lenders the DOC did not prove were "directed" by the GOK to extend credit to Hynix, those loans are "comparable". Under Article 14(a), the issue turns on what is the "usual investment practice of private investors in the territory" of the member. Even if the DOC can prove that some creditors were entrusted or directed by the government to purchase equity, it is not the basis to discard all investors as benchmarks.

2. DOC improperly rejected all Korean private banks

21. The DOC's benefit findings in this case are simply overbroad. The syndicated loan is a perfect example. With respect to Korean private banks, there is simply no evidence indicating that Shinhan, Hana, or KorAm bank were entrusted or directed by the GOK. These banks cannot be discarded as benchmarks simply because the DOC had suspicions or evidence concerning GOK entrustment or direction of other creditors.

3. DOC improperly rejected all equity benchmarks

22. Under Article 14(a), the applicable standard is whether the equity investment is consistent with the "usual investment practice" in Korea. Moreover, the text of Article 14(a) makes quite explicit that the benchmark standard for behavior is that of investors in Korea. Given the liquidation value as estimated by Arthur Andersen, banks with large amounts of outstanding debt could quite reasonably decide to further invest in Hynix. The United States tries to brush aside the Arthur Andersen determination of liquidation value based on some dispute about the date of the report. Yet this argument fails on several levels. The United States also tries to brush aside "Prospect Theory". This US argument is both sloppy and wrong because, among others, this is hardly a "marginal economic theory".

4. DOC improperly rejected Citibank as a suitable benchmark

(a) Rejecting Citibank is inconsistent with Article 14(b)

23. The DOC's rationale for rejecting Citibank as a suitable benchmark was based on a "circumspect finding" of "unusual aspects" in connection with Citibank's loans to Hynix. Yet in light of what the Appellate Body has found in *US - Lumber*, this rationale does not meet the standard set forth in Article 14(b).

(b) The DOC's rationale for rejecting Citibank is not supported by positive evidence

24. The United States continues to insist on viewing Citibank's loans in the context of total financing. Such approach, however, underscores the danger of allowing an investigating authority to utilize whatever methodology of its choice. Also, when one considers Citibank's participation in the transactions as they occurred, it is very much comparable to the commitments of other Hynix creditors in those transactions.

5. Korean default rates

25. Even assuming DOC was somehow correct in its approach to creditor benchmarks, there was no basis to ignore Korean default rates in calculating its "uncreditworthy" interest rate benchmark. At the very least, the DOC was obliged to explain why the US data related or referred to prevailing market conditions in Korea. Yet if failed to do so.

E. The DOC Determined "Specificity" Inconsistently with Article 2

26. The United States argues that specificity is the "natural consequence of the nature of the subsidy at issue". Yet by failing to analyze the constituent elements of the Hynix restructuring, the United States failed to comply with the requirements of Article 2.

27. The United States also tries to ignore the "extent of diversification" requirement by arguing that Korea is not a small developing country. But as the United States itself admits, this language "requires a consideration of the broader economic context" within which the alleged subsidy operates. The Korean economy is well known for having a small number of large industry groups. Thus in a Korean context, debt restructuring of a chaebol will automatically mean that a large value of debt will be involved. Yet the United States has adopted an approach whereby any time a Korean chaebol has to restructure, that restructuring is deemed specific.

II. INJURY ISSUES

A. The Requirements Of Article 15.1

28. As pointed out in Korea's First Submission, the standard of review in this case sharpens the meaning of the terms positive evidence and objective examination found in Article 15.1. The Appellate Body has clearly stated that Article 11 of the DSU does not allow for a rubber stamp of a competent authority's determination, including its selection of facts and how it applies those facts in given case.

29. Also, as Appellate Body in *US – Lamb Meat* made clear, verifiable facts are not necessarily positive evidence of injury, and an examination of incomplete or inadequate facts does not make an examination objective.

B. US Interpretation of the Causation Standard

30. The US reading of Article 15.5 of the SCM Agreement would render the causation requirement of that provision largely meaningless. In its First Submission, the United States resists what is now well-established principle that Article 15.5 requires authorities to disentangle causes, including subject imports, so as not to attribute injury to subject imports caused by other factors.

1. Interpretation of "causal relationship"

31. Article 15.5 requires a demonstration that there normally be a coincidence of, or correlation between, subject imports and declining domestic industry performance trends. In its First Submission, Korea provided the Panel with just such a temporal analysis. The United States offered no comparable analysis, either within the ITC report or in its First Submission.

32. In its First Submission, the United States argues that the concepts of *causation* are unique to the Agreement on Safeguards given the higher *injury* standard contained in that Agreement. The GOK disagrees. First, concepts of causation and injury comprise distinct legal elements under both agreements. Also, although the terms "link" and "relationship" appear different, in fact, a careful review of the plain meaning of both terms shows that they are interchangeable. Moreover, the French and Spanish texts confirm that the terms "relationship" and "link" have essentially the same meaning.

2. The non-attribution requirement in Article 15.5

33. Unlike the US assertion, Korea never used the term "isolate" in the context of causation, and specifically with respect to non-attribution. Rather, Korea has argued that an authority must separate and distinguish the injury caused by subject imports, consistent with the Appellate Body's determination in *US - Hot-Rolled Steel*.

34. Under Article 15.5, as the Appellate Body in *US - Lamb Meat* made perfectly clear, an authority cannot leave non-attribution to a simple recitation of other causal factors or some superficial discussion of the relative importance of different causes.

35. Korea takes further exception to US claims that Korea advocates a "sole cause" standard. Korea makes no such argument. In fact, it appears that the US favours what is in essence a "tangential cause" standard. Such a position cannot be supported by the Agreement text. Indeed, the purpose of the non-attribution analysis required by Article 15.5 is not merely to discern whether subsidized imports are a cause of injury in any form, but whether they are a cause of material injury.

36. Also as the Appellate Body in *US - Hot-Rolled Steel* made clear, imports must be causing *the injury* which justifies the imposition of duties. If it is something less, duties are unwarranted.

C. The US Failure To Identify Positive Evidence

1. The ITC Finding of Significant Volume

(a) Korean market share data

37. The US criticisms of the market share data relied upon by Korea are both wrong and disingenuous. The United States is wrong to allege that Korea compared a quantity based market share figure for domestic shipments with a value-based market share figure for Hynix. Quite to the contrary, Korea notes that a quantity measure was used to derive the market share figures provided in Figure 9 of Korea's First Submission.

38. The United States is disingenuous when it states that Korea's estimate of non-Hynix subject imports is "troubling". Contrary to the US assertion, the estimates that Korea provided were the best possible estimates given the constraints imposed by the United States.

39. Also, the ITC's decision to make the entire record confidential is not only not necessary to protect confidentiality but also is at tension with the ITC's own past practice (i.e. "three or more" rule). The United States argues that under its "one company with 75 per cent or two companies with 90 per cent rule", it could not provide this data publicly. Yet nothing prevents the United States from providing this information to the Panel with a request for confidentiality. Second, under the US rule itself, the Panel can have a high degree of confidence that the portion omitted is not material.

40. In sum, Korea vigorously disputes the ITC's factual conclusion that the data demonstrate that any increase in the volume of subsidized imports was "significant". The only way to resolve this critical issue is to examine the *actual* quantity and value figures relied upon by the ITC in making its determination.

(b) Finding of "significant" increase

41. Under Article 15.1, there must be positive evidence supporting the specific conclusion that the volume of subject imports can be deemed "significant". In this case, the volume of subject imports was not significant.

42. First, this case did not involve a typical measure of units, such as tons of steel. Having chosen a measure of volume of imports that by definition would show huge increases, the United States cannot now claim the SCM Agreement has been satisfied based on such a measure of volume. Also, the ITC never explained how it took this unique factor into account.

43. Second, the importance of substitutability must apply on a consistent basis throughout the period. The focus here should be on what has changed over time, not what has always been true about the DRAM market. Third, the United States insists that the increase in market share was significant. But once again the United States substitutes assertion for analysis. Moreover, in light of the fact that the Hynix Oregon facility shut down during this period, the significance is even smaller.

(c) Hynix's US manufacturing facility

44. The United States tries to justify ignoring the shutdown of the Oregon facility, but this effort fails. Korea submits that Article 15.1 does not require the investigating authority to ignore *context* when assessing whether the volume of subject imports is significant. Subject Hynix imports and DRAMs from Hynix's Oregon facility were the same DRAM commodity product.

45. Given the complete substitutability between Hynix Korea and Hynix Eugene DRAMs, the ITC should have treated subject Hynix imports as merely replacing production at Hynix's Oregon facility. Korea submits that the evidence establishes that ALL of the increase in DRAMs imported in 2001 and 2002 was to replace the Hynix-Oregon produced DRAMs.

2. The ITC Finding of Price Effects

(a) Failure to justify specific decisions with positive evidence

46. The United States argues that the ITC's usual practice is not to disaggregate pricing by company, and that it would have been "arbitrary" to do so here. But this statement ignores Hynix's detailed arguments about the *particular circumstances of this case*, and the fact that the ITC Staff, in fact, did undertake the very analysis suggested by Hynix.

47 The ITC defence of its averaging methodology actually admits the defects in the rationale. Specifically, the United States noted that transaction-specific data "would be more suitable", admitting the reality that more detail is better than less detail in trying to understand pricing dynamics. But because transaction specific data sometimes is onerous to collect, the United States then swings to the opposite extreme, and largely ignores the disaggregated data *that it actually did collect in this case*.

(b) Price effects of subject imports

48. The United States asserts that Hynix undersold more often than any other source, a conclusion that it reaches only by distorting the presentation. It disaggregates the other suppliers into domestic and import sources, thus making them appear smaller. The United States also ignores the fact that during the investigation period, Hynix's US manufacturing facility shut down. Finally, the United States does not put the combined volume of the other suppliers into proper context. Even if Hynix was sometimes the lowest price source, the effects of that pricing must have been small because of the low and falling market share of Hynix DRAM shipments.

49. The US arguments about price depression are also without merit. Most importantly, the United States points to no positive evidence supporting its conclusion to blame imports for the price decline.

(c) The pricing analysis compiled by the ITC

50. Once again, Korea respectfully requests that the Panel instruct the United States to provide the actual confidential "lowest price" pricing data provided in *Appendix E* of the *ITC Staff Report*. We submit that such data is critically important for a proper analysis by the Panel of the claims being made in this dispute.

D. The Legal Requirement to Consider Other Factors

1. The importance of non-subject imports

51. There can be no dispute that non-subject imports dwarfed Hynix subject imports. In an attempt to obscure the importance and sheer magnitude of non-subject imports, the United States seeks to bolster the theory that competition between non-subject imports and domestic product was somehow attenuated because some non-subject imports consisted of RAMBUS and other specialty DRAM products.

52. In its First Submission, the United States notes that it "collected information on the percentage of imported products and US shipments" that were Rambus DRAM products and other "specialty" products. In fact, what the ITC collected were value estimates of those companies' share of 2002 shipments attributed to RAMBUS and other specialty DRAMs.

53. The record ignored by the ITC and the United States shows that the most significant player in the "speciality" market was Samsung. The record also shows that Samsung's Rambus DRAM production comprised only a small portion of its overall production.

2. The injurious effects of the unprecedented drop in the demand growth rate

54. Notwithstanding the record evidence showing that 2001 marked an unprecedented drop in demand in the two largest DRAM consuming sectors (PC and telecom), the United States would have this Panel believe that the information on the record was completely speculative or represented a minor event. Yet the *ITC's own data* demonstrate that by the end of the investigation period the

demand growth rate had dropped by nearly two-thirds. Also, Micron and Infineon explicitly acknowledged a direct correlation between the decline in the demand growth rate and harm to the domestic industry.

3. Increased capacity of other suppliers

55. What the evidence before the ITC demonstrated was that DRAM manufacturers other than Hynix were dramatically increasing their capacity. The ITC completely ignored this evidence. To date, neither the ITC nor the United States have adequately explained, or really even considered, the role of capacity expansion by producers other than Hynix on the performance of the domestic industry. Moreover, the data on relative capacity changes in this case strongly corroborated Hynix's argument that other suppliers were offering the lowest prices and had a much more substantial effect on price levels.

4. Injurious effects of Micron's technological difficulties

56. In its First Submission, Korea includes 16 paragraphs that provide evidence and argumentation concerning the significance of Micron's admitted technological difficulties on its financial performance. In response, the ITC merely provides a single footnote of just three sentences. As importantly, the US never recognizes that if Micron experiences difficulties, it has a substantial impact on the performance data for the industry as a whole.

E. The Condition of the Domestic Industry

57. In its discussion of the condition of the US DRAM industry, the United States largely repeats the recitation of facts that appeared in the ITC determination in the first instance. The United States takes apparent pride in its "wealth of data". But collecting data does not mean the data has been analyzed, or analyzed properly.

58. Yet with so much information about industry performance over time, with so much testimony by industry executives about how well they were doing relative to the business cycle, it simply defies belief that the ITC would continue with its "business as usual" measurement of trends in a vacuum. Such an approach is simply not an objective examination of positive evidence.

III. OTHER ISSUES

A. The Secret Meetings Were Inconsistent with Article 12.6

59. Contrary to the US argument, Korea was not objecting to the substance of the verification. Korea has a procedural objection that had no effect on the substance of what the DOC would do or would find out. The Korean request in this situation was quite modest as Korea requested only that counsel be allowed to observe the meetings. The decision by the DOC to proceed anyway, over the objections of Korea, was inconsistent with Article 12.6.

B. The United States Has Levied Duties Inconsistently with Article 19.4 of the SCM Agreement and Article VI.3 of GATT 1994

60. Under the US system, the final duty announced in the countervailing duty order has important consequences. First, this duty rate serves as the basis for a cash deposit that importers must pay, with serious trade consequences. Second, and more importantly, this cash deposit becomes the final duty to be collected, if no party requests an administrative review. Because of the pending court challenges under US law, the legal assessment may not yet be "final," but is still "definitive".

C. The Countervailing Duty Order is Properly Before This Panel

61. The United States argues that Korea did not provide any "indication" of the legal basis for its challenge to the countervailing duty order. Yet the two consultation requests of the GOK provide a fairly detailed explanation of the legal defects with the DOC and ITC determinations. Since the US countervailing duty order rests on the legal and factual foundations of these two agency findings, Korea was in fact providing a more than sufficient "indication" of the legal basis for its claim.

D. The Panel May Consider Any Evidence It Deems Appropriate

62. At the first meeting with the Panel the United States raised the argument that the Panel may only consider information submitted to the administering authorities. Korea believes this argument is wrong as a matter of law. The only relevant textual obligation on panels under the SCM Agreement is found in Article 11 of the DSU. Moreover, this more flexible approach makes sense. If the authorities have not asked the right questions, or did not clarify certain information, then those failures might well be part of the "objective assessment" that the panel must provide.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

19 July 2004

I. DOC'S SUBSIDY DETERMINATION WAS CONSISTENT WITH US WTO OBLIGATIONS

1. This dispute is not about the validity of a particular "approach" or a specific restructuring "mechanism".[1] Rather, this dispute is about the DOC's determination that the GOK-directed bailout of Hynix gave rise to countervailable subsidies, and whether that determination was inconsistent with the terms of the SCM Agreement.

2. **Entrustment or Direction:** Record evidence showed that the GOK adopted an explicit policy to keep Hynix from failing, and that the GOK took affirmative actions to entrust and direct Hynix's creditors to provide financial contributions to Hynix. The GOK did so by exercising control over Hynix's creditors in its multiple roles as lender, owner, legislator and regulator, and, where necessary, using coercion.

3. Early in the countervailing duty investigation, both the GOK and Hynix conceded – in fact argued – that the various bailout phases were part of a single overall restructuring programme for Hynix. The manner in which the various phases of the bailout programme overlapped and were interrelated is illustrated graphically in Figure US-3, entitled "The Constituent Parts of the Hynix Debt Restructuring".

4. The DOC gave a reasoned explanation of how the various aspects of the bailout were part of an overall programme. They were all driven by the same GOK policy to support Hynix; they occurred over a relatively short period of time; they were overlapping and interrelated; and the GOK's role was evident at each stage. Moreover, no Hynix creditors was allowed to say "no" to participating in the GOK's Hynix bailout programme.

5. Korea asserts that, legally, the government was precluded from intervening in the banking and financial sectors of Korea. A plain reading of the legal instruments cited by Korea belies Korea' s assertion. Regardless of the "primary purpose" of the Decree No. 408, on its face, the Decree gave the GOK the legal authority to intervene in the lending decisions of a bank in the exercise of the GOK's shareholder rights. Similarly, with respect to the Public Fund Oversight Act, the law on its face provides for government intervention in the financial sector. For example, the Act required Korean private banks to sign contractual commitments with the GOK ("Memoranda of Understanding" or "MOUs") in exchange for the massive recapitalizations they received from the government. These MOUs provided the GOK with a contractual right to intervene in the day-to-day business and credit decisions of Korean banks.

6. Bank-specific evidence also belies Korea's assertions that the GOK was precluded from intervening in the banking and financial sectors of Korea. Statements in Kookmin Bank's June 2002 prospectus were a clear and unequivocal acknowledgment by a private bank that the GOK could and

[1] Indeed, the fact that the International Monetary Fund (IMF) may have recommended changes to Korea's corporate workout mechanisms, and that Korea adopted some form of the "London Approach" to restructurings, is irrelevant.

did influence its lending decisions. Moreover, Kookmin's financial statements suggested that the statements in its prospectus related to Hynix. Kookmin's 2001 Annual Report listed Hynix as its single largest financially troubled borrower.

7. With respect to the CRPA, the GOK enacted the CRPA precisely at the time when Hynix and other Hyundai Group companies were on the brink of bankruptcy and required significant financial assistance to avoid financial failure. Citibank officials characterized the CRPA as a way for the larger creditors to force their decisions on smaller creditors. Independent analysts, such as Standard and Poor's, noted that the CRPA provided the GOK with "a powerful voice in lending decisions", and concluded that the GOK could utilize its powers to "force some financial institutions to make new loans against their will" and "strip[] the financial services companies of their independence in lending decisions". Thus, while the CRPA may have been modelled in some respects on the so-called "London Approach", the GOK's version was government-driven, with the GOK playing a direct role in working out debts with financial institutions owned and controlled by the GOK.

8. The structure of the CRPA enabled a handful of banks – the "Creditors' Council" – to dominate the restructuring process, to establish the terms and details of the agreement, and to dictate the results to every other creditor, and this is what happened in the Hynix October restructuring. Citibank confirmed the effectiveness of this voting structure, stating that "creditor banks holding 75 per cent of Hynix' debt can impose their decisions on everyone else ... [and that, while] foreign creditors wanted more freedom to manoeuvre ... they didn't see that they had much choice ... ". Public entities, such as the KDB, and private entities owned and controlled by the GOK, were by far Hynix's largest creditors. Under the CRA/CRPA voting structure, even when these banks did not account for 75 per cent of the votes, they had sufficient voting power to block any actions that the minority creditors might propose. The DOC found that in both the May and October restructurings, GOK-owned and controlled banks held a majority of the voting rights; *i.e.*, a blocking majority.

9. It was impossible for any creditor to "walk away" from the Hynix bailout, and none did. The investigation record established that Hynix creditor banks did not have any choices beyond the three options offered under the proposed restructuring plan developed by Hynix's 18 largest creditors – which were public and private entities owned and controlled by the GOK – and presented to all creditors for a vote on 31 October 2001. There was no fourth option outside the plan approved by the Creditors' Council.

10. Option 3 is what Korea characterizes as "walking away" from Hynix and receiving "basically what they would have obtained in liquidation". Under the terms of Option 3, the banks were required to accept a five-year interest-free debenture from Hynix, thus condemning them to maintain a financial relationship with Hynix at least until 2006. In addition, what the Option 3 banks "obtained" was not comparable to what they might have received in liquidation.

11. In addition to taking actions that directly evinced entrustment and direction, the GOK also took actions to ensure that Hynix's creditors were in a position to effectuate the GOK's policy to rescue Hynix. In a November 2000 meeting, the Economic Ministers concurred on a "resolution of special approval" by the FSC to increase certain banks' ceiling limits for single borrowers, as requested by the KEB on behalf of Hynix's creditors. The FSC approved three credit limit increases for Hynix' creditors "in order to allow them to participate in the Hynix restructuring process". Korea claims that the waivers were simply a "modest" step. To the contrary, at the time of the DOC's investigation, the FSC had approved only five cases since January 2000 where an applicant bank applied to exceed its credit ceiling, four of which related to Hynix and other Hyundai Group companies. The record evidence showed that, far from applying "market principles", the FSC waived the credit ceiling for three of Hynix's creditors participating in the December 2000 syndicated loan for economic, social and political reasons. The salient fact is that the GOK waived the ceiling for every Hynix creditor that needed a waiver in order to participate in various restructuring events.

12. Another of the GOK's actions aimed at effectuating its policy to ensure the survival of Hynix was the GOK's pressure on credit rating agencies. Agencies cancelled plans to downgrade or were forced to upgrade credit ratings. Lower credit ratings would have made it more difficult for the GOK to continue its Hynix bailout programme, which was already the subject of intense criticism.

13. Governments may have political reasons for wanting to obscure their role in providing assistance to a particular company or industry. Thus, cases involving indirect subsidies can present particular challenges for an investigating authority attempting to gather facts and figure out what really happened. If Article 1.1(a)(1)(iv) is to have any meaning, it is essential to recognize the importance of examining, on a case-by-case basis, all of the evidence, including primary, secondary, and circumstantial evidence, surrounding possible government entrustment or direction.

14. In the case of the Hynix bailout, the reasonableness of the DOC's conclusion that the GOK entrusted or directed Hynix's creditors is not even a close call. The DOC considered a wide range of evidence. With respect to secondary sources, prior panel reports provide support for the DOC's reliance on secondary sources and the drawing of reasonable inferences based on the record evidence. In the DRAMs investigation at issue in this dispute, the secondary sources in the record have been shown to be credible and are often corroborated by other reports or documents. Moreover, the Appellate Body has recognized the permissibility of relying on reasonable inferences. Thus, it is not the *type* of evidence that matters. Rather, the issue is whether the domestic authority examined all the pertinent facts and provided an adequate explanation as to how the facts support its determination. The DOC did so in the DRAMs investigation.

15. **Benefit:** In determining the existence of a benefit, the issue is the position of the recipient "but for" or "absent" the government's financial contribution. Only by comparison to a market undistorted by the government's financial contribution is it possible to determine whether the recipient is better off than it otherwise would have been absent the financial contribution.

16. Article 14 does not redefine the concept of benefit in Article 1.1(b). Article 14 merely provides guidelines that must be followed in establishing "methods" for applying that concept to particular types of financial contributions. Therefore, each guideline in Article 14, including the guideline contained in Article 14(b), must be interpreted in a manner that is consistent with the meaning of the term "benefit" as used in Article 1.1(b) of the SCM Agreement.

17. With respect to Citibank, consistent with Article 14 of the SCM Agreement, the DOC examined the pertinent facts surrounding the loans and equity investments from Citibank and provided an explanation as to why they did not qualify as appropriate benchmarks. The reasons why the DOC rejected Citibank as a suitable benchmark are discussed extensively in the paragraphs 197-204 of the US first written submission.

18. With respect to the DOC's use of historical cumulative default rates published by Moody's Investor Service to calculate the uncreditworthy benchmark rate used to measure the benefit to Hynix, nothing in Article 14 of the SCM requires that the DOC use Korean default rates to measure loans benefits. In fact, the DOC examined but rejected the Korean default rates provided by Hynix. First, there was no information provided with the rates offered by Hynix that would have allowed the DOC to ascertain how they were calculated. Second, there was nothing indicating that the historical rates were cumulative average rates, as required under the DOC's regulations. Only cumulative rates provide the probability of default over the full term of the loan, as opposed to a single year. Third, the default information submitted by Hynix was unreliable on its face, because the data suggested that the default rate for the lowest rated debt was lower than the default rate for the highest rated debt. This inverse relationship made no sense. Accordingly, the DOC reasonable declined to rely on the rates offered by Hynix, because they lacked sufficient information and appeared unreliable on their face.

19. **Specificity:** As detailed in the US first written submission, the DOC demonstrated, based on positive evidence, that the GOK-directed bailout was specific in fact to Hynix, and thus actionable under the SCM Agreement. Although Korea disputes whether the bailout was government-directed, it has not disputed that Hynix was the beneficiary of a planned financial restructuring programme. The DOC also examined corporate usage of the CRA/CRPA to substantiate its specificity determination. The DOC found that, based on data provided by the GOK, the Hyundai Group companies received an extraordinarily large percentage of financial restructuring and recapitalization aid and that Hynix alone received a very high percentage of such aid. It is axiomatic that an analysis of disproportionate use is comparative. Korea has simply argued for use of a different comparative benchmark; argument should not be confused with WTO obligation.

20. **Meetings with Experts:** There is no requirement in Article 12.6 that investigating authorities must permit counsel for the government of the Member in question to be present for its meetings with financial experts. The Panel should reject Korea's new version of the facts and its Article 12.6 claim.

II. THE ITC'S INJURY DETERMINATION WAS CONSISTENT WITH US WTO OBLIGATIONS

21. **Volume Analysis:** The ITC examined the volume of subsidized subject imports in three ways: (1) in terms of billions of bits; (2) as a ratio to domestic production; and (3) as a share of apparent US consumption. All three measurements increased over the period of investigation. In light of the undisputed high degree of substitutability between subsidized subject imports and the domestic like product, the ITC found that the volume of subject imports on an absolute basis, as well as the increase in the volume of subject imports both absolutely and relative to both production and consumption in the United States, was "significant".

22. The United States has previously explained why Korea's brand-name argument has no legal basis under the SCM Agreement given the facts of this investigation. Korea has not rebutted this argument. Nor has it shown that the ITC's rejection of Hynix's factual explanation for the increased volume of subsidized subject imports was unreasonable.

23. Korea continues to place a great deal of emphasis on relative market share increases. However, there is no legal support for Korea's assertion that increases in market share are the only indicia that matter for an affirmative material injury analysis.

24. Korea's volume arguments continue to ignore the importance of the conditions of competition in this industry to the ITC's volume analysis. As the ITC emphasized, its findings about the volume of subject imports were reinforced by the substantial degree of substitutability between subject imports and domestically-produced DRAM products. The commodity-like nature of domestic and subject imported DRAM products magnified the ability of a given volume of imports to impact the domestic market and industry.

25. Korea disregards the fact that the degree of product fungibility, price sensitivity, and market differentiation can be relevant in assessing the significance of a given import volume or of a given increase of import volume absolutely or relative to domestic production or consumption. In an investigation involving a highly fungible product, a specific volume or a specific increase of import volume absolutely or relative to domestic production or consumption can be more harmful than a similar increase for a highly differentiated product, because it is more likely to have a direct impact on the market. Given how quickly information is disseminated in the DRAMs industry, it is not surprising that purchasers were reluctant to commit large portions of their purchases to the financially troubled Hynix, although they were free to use Hynix's low-priced offers to ratchet down prices from other potential suppliers.

26. **Price Effects:** The ITC engaged in one of the most data-intensive, complex pricing analyses it has ever undertaken. The pricing data the ITC collected were clearly representative, accounting, by value, for approximately 45.9 per cent of domestic producers' and 36.9 per cent of subject imports' US shipments in 2002. Based on a weighted-average comparison of the price of domestic shipments with the weighted average price of subsidized subject imports for each month of that time period, the ITC found significant price undercutting by subsidized subject imports.

27. The level of detail of pricing data obtained by the ITC provided unassailably accurate head-to-head price comparisons. The level of accuracy and objectivity of examination permitted by the monthly series of weighted-average price comparisons by product and by channel of distribution was remarkable. These data permitted the ITC to determine in those monthly periods for which price comparisons were available whether the subsidized subject imports were underselling or overselling the domestic like product and by what margins. Based on this extensive data, the ITC ascertained that for the majority of possible comparisons, subsidized subject imports undercut the domestic like product at high margins (often over 20 per cent), and at increasing frequencies (from 51 per cent of possible comparisons in 2000 to 56 per cent in 2001 and 70 per cent in 2002). The ITC identified significant price undercutting to each of the three main channels of distribution (PC OEMs (*i.e.*, original computer equipment manufacturers), other OEMs, and non-OEMs). The ITC also found that undercutting was consistent and substantial for particular high-revenue products to particular channels of distribution at specific points during the period of investigation. The ITC went well beyond the approach found to be WTO-consistent by the panel in *EC – Tube*.

28. The ITC also went well beyond the requirements of the SCM Agreement by collecting and evaluating pricing data on non-subject imports. Korea's argument in its opening statement that the ITC "ignored the prices of non-subject imports" in its pricing analysis is simply wrong.

29. The pricing data show that the underselling frequency by non-subject imports was lower than, and increased less than, the underselling frequency of subsidized subject imports between 2000 and 2002. In particular, while subject imports were increasing their underselling frequency between 2000 and 2001 from 51 per cent of all observations to 56 per cent of all observations, the frequency of underselling by non-subject imports was fairly steady at 46.6 per cent of instances in 2000, and 47.7 per cent in 2001. Underselling by subsidized subject imports increased to 69.8 per cent of all observations in 2002, or about 10 percentage points higher than the percentage for non-subject imports in that year (60.7 per cent). Consistent with the data, the ITC concluded that for these "standard" pricing products, subsidized subject imports undersold non-subject imports in a majority of instances.

30. Equally without merit is Korea's argument that the ITC should have examined the pricing data on a brand-name basis. There is no requirement in the SCM Agreement to analyze price effects on a brand-name basis, nor does Korea identify one. In the DRAMs investigation, use of the brand-name analysis urged by Hynix would not reflect the source country of the DRAM products and would be utterly inconsistent with the requirement under the SCM Agreement to examine the effect "of the subsidized imports" on the "like product," the product produced by the domestic industry. On the other hand, by comparing the weighted-average price of subsidized subject imports with the weighted-average price of domestic shipments for each time period, the ITC's methodology in this investigation addressed the inquiry posed by Article 15.2 – the assessment of the price effects of the subsidized imports on the domestic industry.

31. In any event, the ITC *also examined* the pricing data on a disaggregated basis (broken down both by brand name and by source). Even a disaggregated analysis showed that subsidized subject imports were the lowest-priced product "*more often than DRAM products from any other source*".

32. Contrary to Korea's repeated arguments, the ITC did not "largely ignore" the "particular and unique competitive dynamics of the DRAM market". The ITC identified several reasons why the

factual data on undercutting was probative. These included the high degree of substitutability between subject imports and the domestic DRAM products, the overlapping customers and channels of distribution to which subject imports and the domestic DRAM products were sold, the inelasticity of demand, and the importance of price in this particular industry.

33. A finding of undercutting, let alone significant undercutting, is not a prerequisite to an affirmative injury determination. Article 15.2 of the SCM Agreement specifically provides that "[n]o one or several of these factors can necessarily give decisive guidance". Nevertheless, it is clear that, under the analysis the ITC conducted in this investigation, there was *significant* undercutting by subsidized subject imports.

34. The ITC also found that subsidized subject imports depressed prices to a significant degree. Korea does not challenge the ITC's finding that there was significant price depression by subsidized subject imports. Instead, to the extent Korea mentions price depression at all, it is in connection with its argument that the ITC did not adequately consider factors other than subsidized subject imports in its price effects analysis. In its discussion of the ITC's causation analysis, the United States has addressed and rebutted Korea's argument.

35. **Impact of Subsidized Imports :** The ITC found that many indicators of domestic industry performance declined over the period of investigation. These included capacity, production, market share, employment, and hourly wages. The domestic industry's operating performance also declined. The ITC also found that domestic producers reduced capital expenses during the period of investigation. The ITC explicitly acknowledged that for some of the impact factors, there were positive trends in the data at specific points during the period of investigation. But, it further analyzed the data and explained why, even for factors showing increases, the value of such "improvements" was limited.

36. Korea does not contest the positive evidence supporting these findings. Instead, Korea continued to reference snippets of information that it believes would support a different conclusion than the ITC reached. This approach ignores the fact that the ITC examined the domestic industry, as well as the evidentiary record, *as a whole*, as required by Article 15.4 and Article 16.1 of the SCM Agreement. Other panels have recognized the importance of this language, including the panels in *Mexico – HFCS* and *EC – Tube.*

37. Moreover, Korea's arguments about individual domestic producers are also flawed and/or based on a selective reading of the evidence. The public statements that Korea continues to assert show that the US DRAM industry was doing well often pertain to the individual company's global operations on all products, not just DRAMs. Indeed, the two randomly selected quotations from Micron that Korea asserts show how the domestic industry purportedly assessed its own condition reinforce rather than detract from the ITC's impact findings. Neither statement establishes nor was intended to suggest that the identified factors show that Micron or the domestic industry did not suffer injury. Rather, they show that, because of good management practices, Micron expected to survive, despite the significant injury that it had suffered.

38. **Article 15.5 Analysis:** The ITC's analysis was also consistent with the requirements of Article 15.5 of the SCM Agreement. The ITC found that the domestic industry producing DRAM products was materially injured by reason of the subsidized subject imports of DRAM products from Korea. The ITC demonstrated a causal nexus between the subsidized subject imports of DRAM products from Korea and the material injury suffered by the domestic industry through its examination of the volume, price effects, and impact of the subsidized subject imports on the domestic industry. No one or several of these factors was decisive. Rather, the material injury determination – and, thus, the ITC's causation analysis – was based on an analysis of these factors collectively. Thus, in the DRAMs investigation, the ITC integrated the causation discussion and its discussion of how it ensured that it did not attribute material injury from other factors to the subject

imports into its analysis of the volume, price effects and impact of subject imports. While this approach is not required by the SCM Agreement, it is certainly consistent with the Agreement. Korea fails to show otherwise.

39. Korea's arguments reveal that it believes that in investigations like the DRAMs investigation, where there are several factors that may be injuring the domestic industry, an investigating authority is precluded from making an affirmative material injury determination. Korea's argument has no basis in the provisions of the SCM Agreement. Appellate Body reports also lend the argument no support.

40. The ITC also examined other known factors to ensure that it did not attribute injury from those factors to the subsidized subject imports. In so doing, the ITC properly separated and distinguished other known factors from the subsidized subject imports by providing a satisfactory explanation of the nature and extent of the injurious effects of the other known factors, as distinguished from the injurious effects of the subsidized subject imports. This is all that is required, even in the context of the Safeguards Agreement.

41. For example, with respect to the business cycle, the ITC found that because growth in demand for DRAM products has been continuous, but supply increases are sporadic, supply and demand in this industry tend to be chronically out of equilibrium, giving the market its characteristic "boom" and "bust" business cycle. The ITC also determined that largely because of the perpetual improvements in production efficiencies experienced by this industry, prices are usually declining. At the same time, the ITC determined that the business cycle (and other factors affecting prices) simply did not explain the unprecedented severity of the price declines that occurred from 2000 to 2001 and that persisted through 2002. Nor could it explain the increasing frequency of underselling by subsidized subject imports during the period of investigation.

42. The ITC's examination of other known factors is identical to the methodology upheld by the panels in *EC – Tube* and *Egypt – Rebar*. The panel in *Egypt – Rebar* did not require the "non-attribution" findings of the investigating authority to be based on an econometric model or some sophisticated quantification exercise. All that the panel in *Egypt – Rebar* required was that the "non-attribution" findings be based on a meaningful explanation as to why the effects of the subsidized imports did not "overlap" with (that is, were notionally distinct from) those of another factor causing injury at the same time. In the DRAMs investigation, the ITC found that the *subsidized imports had price effects that significantly exceeded those of non-subject imports*, and that other factors – such as the operation of the business cycle (including by virtue of capacity/supply increases); slowing in the growth of demand; and the product life cycle – could not explain the unprecedented price declines experienced during the period of investigation. Therefore, it is clear that subsidized imports had their own, independent, injurious effects.

43. As in *EC – Tube*, the ITC found that effects of one factor (capacity expansions) were subsumed within the effects of another factor (the operation of the business cycle), and determined that the effects of the latter factor could not explain the totality of the injury observed (cumulative price declines that ranged as high as 90 per cent, well in excess of the "usual" ranges). These findings supported the ITC's conclusion about the causal nexus between the subsidized subject imports and the injury to the domestic industry.

E. Korea does not Dispute the ITC's Treatment of Certain Data as Confidential and Offers no Basis for the Panel to Request Confidential Data

44. Finally, in its opening statement and its oral responses to the Panel's questions during the first Panel meeting, Korea requested that the Panel ask the United States to provide the entire confidential final determination of the ITC, as well as the entire confidential data tabulations that formed the ITC's report in this investigation. Korea also suggested that if the ITC did not provide such information that the Panel look to **Confidential US Figure 1**. As we have previously explained, Korea has failed to demonstrate why any or all such confidential information would be necessary or appropriate in this dispute.

45. Reports reviewing other investigating authorities' antidumping determinations – such as *Thailand – H-Beams* – have recognized that it is objective for investigating authorities to base their determinations on the entire agency record (including confidential data). Thus, it was objective for the ITC to base its injury determination on a review of the entire record, and not just data that could be released in the public version of an opinion.

46. With respect to Korea's suggestion that the Panel look to **Confidential US Figure 1**, for the reasons set forth in paragraph 300 of the US first submission, we continue to urge the Panel not to rely on the selective confidential information that Korea has provided in this dispute. Nevertheless, should the Panel be inclined to examine the data summarized in **Confidential US Figure 1**, the United States makes the following observations based solely on a comparison of the limited confidential data before the Panel concerning Hynix Semiconductor America's imports and Hynix Semiconductor America's US shipments of imported subsidized subject DRAM products with non-confidential information contained in the ITC's final report.

* The ratio of subject imports to domestic production increased enormously from 2000 to 2002.

* Even based only on Hynix Semiconductor America's reported data, it is clear that subsidized subject imports gained market share between 2000 and 2001 while domestic producers were losing market share. Likewise, although both the domestic industry and subsidized subject imports lost market share between 2001 and 2002, reliance solely on Hynix Semiconductor America's reported data shows that subsidized subject imports maintained their market share better than the domestic industry between 2001 and 2002 at a time of slowing demand.

* Confidential Figure US-1 also reveals information about the magnitude of the absolute increases in subject import volume.

ANNEX D

ORAL STATEMENTS OF PARTIES AT THE
SECOND SUBSTANTIVE MEETING

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ANNEX D-1

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

30 July 2004

I. INJURY ISSUES

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

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

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

D. Non-Attribution

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

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

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

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

II. SUBSIDY ISSUES

A. Financial Contribution

The Legal Standard To have any meaning, the text of Article 1.1(a)(1)(iv) must impose some threshold that must be met. To focus on who is being entrusted to do what is a textually sound way to ensure this legal threshold is being met. This interpretation may make it more difficult for authorities to make sweeping, broad-brush conclusions about debt restructuring programmes. But that is the unavoidable consequence of giving this provision some substantive legal content. Also, a careful review of the treaty text in context confirms this interpretative approach as encapsulated in *US - Export Restraints*.

The Evidence Once the evidence of entrustment or direction cited by the United States is held up against the proper legal standard, the deficiencies become quite apparent. The deficiencies are most egregious for the October 2001 and May 2001 restructurings. As for the May restructuring, the United States describes the restructuring without even acknowledging the $1.25 billion in new equity capital that was raised. As for the October restructuring, the United States largely ignores the critical feature of the October restructuring: many banks, including some 100 per cent owned by the GOK, declined to provide any new money. The United States also misstates both the function of the CRPA and the actual facts of the October restructuring. Contrary to the US allegations, each creditor under the CRPA had a chance to see whether the restructuring options were more attractive than appraisal rights. With respect to the Kookmin prospectus, the US now argues that the GOK could and did influence {Kookmin's} lending decisions. Yet the actual behavior of Kookmin clearly demonstrates that Kookmin was exercising its own judgment with respect to the different phases of the Hynix restructuring. In the end, this evidence simply does not support the sweeping DOC conclusion that every single Korean bank was entrusted or directed to engage in every single transaction with respect to the Hynix restructuring.

B. Benefit

The DOC approach to "benefit" is utterly at odds with the textual requirement of Article 14(b) in that the DOC crafted onto Article 14 the requirement of finding the perfect benchmark, and rejecting anything less. The DOC simply did not have the legal or factual basis to reject all possible benchmarks. This rush to reject all benchmarks is particularly egregious for Citibank. The DOC simply has not explained satisfactorily why Citibank was not "comparable" within the meaning of Article 14(b) for loans, and why Citibank was not indicative of the "usual investment practice under Article 14(a) for debt equity swaps. In addition, the US argument that because Citibank's initial loan to Hynix was small relative to total Hynix debt is just absurd in that nothing in Article 14(b) requires a loan to be both "comparable" and large relative to total debt.

C. Specificity

The United States has defined the subsidy in an overbroad way so as to render the specificity requirement irrelevant. Of course there is only one Hynix "bailout". But hundreds of Korean companies obtained loans, and hundreds of indebted Korean companies went through restructuring. By failing to analyze the constituent elements of the Hynix restructuring, the United States failed to comply with the requirements of Article 2.

ANNEX D-2

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

21 July 2004

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

Injury Issues

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

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

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

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

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

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

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

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

On non-subject imports, the ITC is trapped by its own logic. If the substitutability of a commodity product enhances the volume effects, then the much, much larger volume of non-subject imports must have been having an overwhelming effect on the market. Non-subject imports were five times larger, gaining market share three times as fast, and underselling domestic prices with almost the same frequency. None of the ITC explanations satisfactorily separate and distinguish the role of this other factor in the market. The ITC acknowledges the magnitude and trends of non-subject imports, but never explains its conclusion that subject imports themselves were still the cause of material injury.

Note that we are not saying that the existence of other factors means that subject imports cannot also be the cause of material injury. That is a false characterization of Korea's position. Our argument is that in this case, the ITC explanation is so deficient that we really do not know whether or how the ITC separated and distinguished this other factor. We know the ITC conclusion, but we do not have a satisfactory explanation of how it reached that conclusion. Put differently, we have no idea how the ITC controlled for the effect of non-subject imports, and did not mistakenly attribute these effects to subject imports. Both explanations offered – the limited volume of specialized products, and the different frequency of underselling – fail under more careful scrutiny.

The same problems infect the ITC discussion of other alternative causes. We need not repeat those arguments now.

The United States yesterday made a plea that domestic industries are entitled to protection from subsidized imports. This may be true, but under WTO standards the domestic industry is entitled to such protection only when very specific standards have been met. In this case, they have not been met. This Panel is charged with applying these standards, and ensuring that protection is given only when these international standards have been met.

Subsidy Issues

With respect to subsidy issues, we offer just a few thoughts on the issue of entrustment or direction.

First, we continue to believe it is critical to decide on the legal standard. The United States has tried to side-step this issue. We disagree. We think this treaty language has a very specific meaning, and the Panel's probing has helped us focus our own interpretation.

The United States has argued in its opening statement that Korea is reading "entrusts" out of the agreement, but that argument is wrong. That word remains in the agreement; but our argument is that the "entrusts" portion of the standard is not properly part of this case. "Entrusts" must have some meaning different than "directs," otherwise the word would be unnecessary. When read in light of the phrase "normally vested in", we believe this word conveys the idea of something concrete that can be entrusted. Since the word "vested" conveys the core meaning of giving someone a legally fixed right, it seems quite natural to read "entrusts" as focusing on those situations when the government has transferred responsibility for some programme to a private body. A party can have some legally fixed right pursuant to a formal programme. A party cannot have any legally fixed rights with regard to a general "bailout". After all, the word "directs" remains to cover other situations not involving such formal programmes. The US interpretation simply does not give any separate meaning to "entrusts" and blurs the distinction between these two important terms.

Second, with respect to this legal standard, the key requirement remains: has the United States provided sufficient evidence to meet the legal standard. During this dispute, we have often used the phrasing "who" was directed to do "what", or called for a bank-by- bank or transaction-by-transaction analysis. But underlying both of these analytic frameworks is the simple idea that there must be evidence to support all aspects of any finding of entrustment or direction. Having entrusted or directed part of an alleged bailout does not automatically establish entrustment or direction of the entire alleged bailout. Certain evidence might support some, but not all, of such a finding.

Third, although we believe the US evidence fails with respect to all aspects of the Hynix restructuring, these failures are most apparent with respect to the October 2001 restructuring and with respect to the private Korean banks. The United States had only limited evidence with respect to October. We agree with the United States that general pronouncements are not enough. So the US argument for the October restructuring is based entirely on the role of the Creditors' Council.

We have discussed at length the US flawed interpretation of the statutory framework of the CRPA. But more fundamentally, the US theory cannot explain what else the United States expected the creditors to do in the October restructuring. Unless the United States is arguing for a per se rule that companies must declare bankruptcy and not restructure, what else were the creditors to do? The option 3 banks simply took the liquidation value, and walked away from any further involvement. The statute sets forth a series of procedural rights, including the right to mediation. The Hynix financial statement clearly shows these banks invoked their right to mediation, and Hynix recorded their claims as a current liability. The option 2 banks took a chance on a debt for equity swap to recover a larger portion of the outstanding debt, but refused new loans. The option 1 banks – those with the largest amounts of debt at stake – made some new loans so as to be allowed to swap more debt for equity, and thus limit the size of the write-offs they had to take at the time. None of this is sinister or suspicious. These are the typical choices in a debt restructuring, and individual banks made those choices that made the most sense for them. This is hardly entrustment or direction.

Similarly, the evidence with respect to private banks is simply insufficient. We urge this Panel to consider not just the evidence cited by the United States, but the other evidence left out of the DOC determination. The outside experts were quite consistent in stating that the private banks were different, and acted independently. The information before the DOC about substantial foreign ownership of these private banks is also fundamentally at odds with the DOC finding of entrustment or direction. The evidence of private bank independence, such as the refusal of KFB to participate in many parts of the Hynix restructuring provides further evidence. In the final analysis, the US evidence with regard to private banks is simply insufficient to meet the legal standard.

We believe the Panel can usefully focus its analysis on the private banks. If the Panel finds that the private banks were not entrusted or directed, either for all or for parts of the Hynix

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

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

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

ANNEX D-3

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

21 July 2004

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

Second, as a practical matter, we agree that the Panel should not be undertaking *de novo* review. But that argument goes to the way in which the evidence is being used, not the mere existence of evidence. If there is some information that helps clarify what the authority did during the investigation, there is no reason that the Panel cannot use that information to understand better what the authorities did and what information the authorities considered.

Third, in this case the United States has serious exaggerated the extent and use of new information. Let me review the main items.

With respect to the default rates, this information serves a very narrow purpose. We argue at paragraph 148 of our second submission that the information about cumulative default rates could easily have been provided if DOC had asked. We have not and are not asking the Panel to use this information for any recalculation or any other purpose. We are simply illustrating how easily Korea could have responded if we had been asked.

With respect to the MOU, the US argument is quite disingenuous. As paragraph 183 of the US First Submission shows, the DOC reviewed such documents during the verification, and offered its own characterization of the MOU. All Korea has done is provide the Panel with the MOU itself, so that the Panel can itself test whether the DOC has fairly characterized the document reviewed at verification. The US argument is basically that it can review the MOU, but the Panel cannot. This argument is absurd.

With respect to the sequence of meetings leading to the Hynix enrollment in the KDB programme, we cited specifically to the DOC verification report. We refer the Panel to Exhibit GOK 61, which provides the DOC document. Even if Hynix made a minor misstatement in its questionnaire response, when the DOC investigation collected additional and more detailed information, the DOC cannot ignore that information.

With respect to the FSS document in Exhibit GOK 50 and para 83 of the GOK Second Submission, this information is simply responding to a US argument at para 52 of the US First Submission. If the United States can draw an inference from a newspaper article, and refer to Hynix as being "conspicuously absent", all without any citation to the DOC determination below, then Korea should be allowed to respond to that innuendo. Exhibit GOK 50 does nothing more.

With respect to the alleged pressure on credit rating agencies, we are simply responding to a new argument raised in the US First Submission. At the outset, we note that this whole line of argument is secondary, and does not really address alleged entrustment or direction of the Hynix

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

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

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

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

ANNEX D-4

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

2 August 2004

The Commerce Department's Subsidy Determination

1. ***Korea's Submission of New Information*:** Korea's second written submission and answers to the Panel's questions are replete with information which was never provided to the DOC at any time during its investigation, notwithstanding the DOC's extensive requests for information. All of this new information – some of which is contradicted by evidence that was submitted during the investigation – should be disregarded by the Panel. Prior panels have recognized that in disputes involving the review of a determination by an investigating authority, the consideration of new evidence by a panel is incompatible with the principle that "a panel is not to perform a *de novo* review of the issues considered and decided by the investigating authorities".

2. Korea's submission of new evidence illustrates its continuing efforts to have the Panel reweigh the facts. It is remarkable that Korea so blithely has ignored its own admonition that the focus must be on the "evidence before the agency" at the time of its determination. We are quite certain that if, for example, the United States had provided the Panel with information showing that prior to its privatization in December 2003, the GOK formally acknowledged to the WTO its legal and practical control over Kookmin Bank, Korea would object strenuously on the grounds that the information was not on the record.

3. It is equally distressing that Korea's second submission and responses to the Panel's questions are laced with many assertions of fact without citation to any support in the underlying record. An objective assessment of Commerce's explanation of how the record evidence supported its determination will lead the Panel to find that Commerce's determination was entirely consistent with the SCM Agreement.

4. ***Financial Contribution, Benefit, and Specificity*:** Korea, based on a novel and fundamentally flawed interpretive analysis, and some verbal sleight of hand, concludes that the facts of this case dictate the appropriate interpretation of the Agreement. Specifically, Korea argues that "in the context of the Hynix restructuring" only the term "directs" is relevant. Thus, Korea argues for purpose of this case the Panel should read the term "entrusts" out of the SCM Agreement. There is absolutely nothing in the text of subparagraph (iv) that even remotely suggests that the task delegated to a private body must involve the administration of a formal "government programme".

5. Korea argues that the term "directs" can only mean "orders" because the French and Spanish verbs – "ordonner" and "ordenar" – *translate* into English as "to order". The drafters could easily have used the term "orders" in the English text for Article 1.1(a)(1)(iv), but they did not. The drafters used the term "directs". While "order" is certainly one meaning of "directs", it is not the only meaning.

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

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

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

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

10. With respect to specificity, as discussed earlier, Korea's argument concerning the timing of Hynix's nomination for the KDB Fast Track programme is contradicted by the record evidence submitted by Hynix. Moreover, Korea entirely ignores the fact that in the one-year existence of the Fast Track programme, only six companies *in total* participated in the programme, four of which were Hynix and its Hyundai affiliates.

The ITC's Injury Determination

11. ***Subject Import Volume was <u>Increasing</u>*:** Korea's arguments that volume did not increase are based entirely on the assumption that "volume" does not mean the volume of subsidized subject *imports*, but instead means the volume of all Hynix-brand products being sold in the US market. A brand-name analysis was not appropriate under the circumstances and would contradict the SCM

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

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

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

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

15. ***Korea Has Not Shown any Shortcomings in the ITC's Price Effects Analysis*:** Underselling by subject imports increased between 2000 and 2001 at a time when the volume of subsidized subject imports was increasing, domestic market share was declining, and underselling of standard products by non-subject imports was relatively stable. The underselling by subsidized subject imports ballooned to 69.8 per cent of all observations in 2002, and underselling by subsidized subject imports was at a much higher frequency than underselling by non-subject imports at that time. While not required to do so, the ITC *did* conduct a disaggregated analysis, which showed that Hynix's subsidized subject imports were the lowest priced product more often than products from any other source.

16. Contrary to Korea's assertion, subject imports can have significant adverse price effects if they force domestic producers to lower their prices in order to retain market share. With respect to the ITC 's conclusion that subsidized subject imports significantly depressed prices in the US market, to the extent that Korea is implying that evidence of price leadership is required under the SCM Agreement, it is wrong. Second, the ITC found that factors other than subsidized subject imports could not explain the unprecedented price depression experienced during the period of investigation. Third, Korea's assertion that non-subject imports are completely fungible with the domestic like product is simply not supported by the evidence in this investigation.

17. ***The ITC's Impact Analysis Was Consistent with the SCM Agreement*:** Korea tries to rebut the ITC's impact analysis with snippets of information about individual producers. These snippets of information pertain only to individual producers, and are taken out of context and/or based on the company' s global operations and/or operations on a broader array of products.

18. ***The ITC's Determination Was Also Consistent with Article 15.5 of the SCM Agreement*:** The ITC's determination more than satisfies the standard articulated by Korea of "some causal connection" between subject imports and the material injury to the domestic industry, whether or not

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

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

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

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

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

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

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

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

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

ANNEX D-5

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

2 August 2004

Standard of Review

1. We just heard our Korean colleague say that the Panel must decide whether import volume was significant. Of course, that is not the issue before the Panel. Instead, the issue is whether the ITC's conclusions regarding import volume were reasonable. Based on the discussion over the past few days, we believe the Panel fully understands this.

The Commerce Department's Subsidy Determination

2. At the last meeting the Panel asked, what must the government *do* for there to be an indirect subsidy? We have thought a great deal about this question and we have explored it with the Panel. In the end, we have concluded that the only answer is the one found in the SCM Agreement itself – the government must "entrust" a private entity or "direct" a private entity to make a financial contribution. That is, the government must set the task, the task must involve making a financial contribution, and the government must give responsibility for carrying out that task to a private entity. Thus, we know what the government must do. We also know based on the ordinary meanings of "entrust" and "direct" what the government need not do. That is, the government does not have to have a formal programme or dictate precisely how that task is carried out. Moreover, nothing in the ordinary meaning of entrustment nor direction suggests that the party tasked must believe that what it is being tasked to do is totally irrational – that it is something no one would do absent government intervention. The issue is simply whether that party acts at the behest of the government to provide a financial contribution.

3. So, once again, let us step back from that impressionist painting and look at the whole picture rather than focusing on the dots. In this case, there is ample evidence that the government set the task; *i.e.*, to give Hynix the financial assistance needed to resolve the company's financial crisis. There is also ample evidence that the banks had not been relieved of that task prior to the October restructuring. Explicit statements by Ministers and by Hynix itself demonstrate that; just prior to the October restructuring the government had publicly stated that Hynix was going to get whatever it needed.

4. We also know that, for the most part, the government did not directly give Hynix the funds it needed. So, how did the government implement its decision? Of course, the government did not make the decision and then simply do nothing to implement it. The government turned to Hynix's creditors and gave them responsibility for completing the task. Korea argues that the banks acted solely for commercial reasons. But, the record supports a different conclusion. Record evidence for all elements of the Hynix bailout, such as the loan approval documents and the Kookmin prospectus, indicate that even the banks that were not controlled by the government were acting at the government's behest; *i.e.*, that the government had asked them to assist Hynix and they were doing so

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

5. In addition, there is the fact that delegating the task of saving Hynix to the banks was a readily available option for the GOK because most of Hynix's debt was held by government banks, which the government knew it could trust to carry out its decision. There was also a system – the Creditors' Council – through which those government banks could dictate terms to other Hynix creditors as well, particularly if it was demonstrated to the banks that the government was willing to step in as the enforcer, doing a little arm-twisting where necessary. While the GOK denies these allegations by the banks, it cannot explain them under its theory of purely commercial behaviour.

6. In sum, the government did not micro-manage the Hynix bailout; but there is ample evidence that the banks were acting at the government's behest in bailing out Hynix. Thus, as the EC noted, this is not a close case. The government's hand – as policy maker, facilitator and enforcer – is all over the Hynix bailout. Without question, based on the evidence as a whole, one can objectively and reasonably conclude that the Hynix bailout was a financial contribution. Frankly, if the evidentiary bar is set so high that the evidence in this case is not sufficient to establish a financial contribution, then the indirect subsidy provision in Article 1 is utterly useless.

The ITC's Injury Determination

7. Throughout these proceedings, Korea has insisted that the United States, through the ITC, "violated" US obligations under the SCM Agreement, "ignored" record evidence, and considered other evidence in a "vacuum". Notwithstanding its repeated arguments, Korea has fallen far short of satisfying its burden of proving that the United States acted in a WTO-inconsistent manner. Indeed, several of Korea's factual and legal arguments contain no reference to the factual record, the ITC's determination, the SCM Agreement, or reports reviewing other investigating authorities' determinations.

8. Korea has repeatedly asserted that the volume of subject imports declined. The facts, however, showed that subject import volume and market share increased, as even Hynix's counsel admitted at the ITC's hearing. In fact, what Korea is really alluding to in its argument is the Hynix brand (composed of subsidized Hynix products made in Korea and products produced at Hynix' s US facility in Eugene, Oregon), not Hynix's subject imports. But, Korea cannot point to any provision in the SCM Agreement for the investigating authority to consider volume on a brand-name basis in circumstances such as in the DRAMs investigation, where brand names do not reflect country source and thus do not correspond to the relevant legal inquiry: namely the effect of subsidized subject imports on the domestic industry.

9. Korea never explained why the ITC's rejection of Hynix's proffered reason for the increase in subject import volume was inconsistent with the SCM Agreement. Hynix's Eugene facility was part of the domestic industry, so even if Hynix substituted subsidized imports for DRAM products made by its US affiliate in Eugene, Oregon, those imports injured the domestic industry. The ITC provided a satisfactory explanation for its rejection of Hynix's factual argument, but Korea simply disagrees with the reason. As for Korea's argument that Hynix has no obligation to supply the US market first from its Oregon facility, and then supplement it with imports, Hynix can supply the US market with imports, as Samsung did, but only if those imports are fairly traded. Hynix's imports benefited from unfair subsidies, as my colleagues have explained at length.

10. The ITC found significant price undercutting by subsidized subject imports at high margins and increasing frequencies, no matter how the data were examined. Korea calls the ITC's pricing analysis "crude". In fact, the weighted average pricing comparisons that the ITC conducted were tailored to the conditions in the DRAMs industry and were painstaking and representative. The ITC calculated a weighted average for subject imports and offset instances of overselling with instances of underselling. It compared the weighted average price for subject imports with the weighted average price for domestic producers' US shipments. Thus, the ITC's analysis was consistent with the relevant legal inquiry under the SCM Agreement, which is the price effects of subsidized subject imports on the domestic industry.

11. Although Korea has yet to demonstrate that a brand-name analysis was required, let alone permitted, under the SCM Agreement given the facts of the DRAMs investigation, the ITC also examined the pricing data on a disaggregated basis by brand name by source, and this analysis confirmed the results of its weighted-average pricing analysis. The disaggregated analysis revealed that Hynix was the lowest-price source more often than any other source.

12. Korea repeatedly accuses the ITC of conducting its examination of the volume and price effects of subsidized subject imports in a vacuum. But, it is Korea that wants the Panel to look at certain facts and findings in a vacuum. Korea wants the Panel to look at the absolute volume of subject imports and the increases in subject import volume both absolutely and relative to domestic consumption and production in the abstract. But, the SCM Agreement does not require such an approach, because it does not define any volume or increase as "by definition" significant or insignificant.

13. As evidenced by its lengthy discussion of the relevant conditions of competition and business cycle in a separate section of its determination, and by the integration of this discussion into its analysis of the volume, price effects, and impact of subsidized subject imports on the domestic industry, the ITC clearly examined the evidence and the relevant factors in context. Subsidized subject imports were highly substitutable for domestic DRAM products. In this commodity market, price was important, and purchasers reacted quickly to price undercutting through the rapid dissemination of pricing information to certain purchasers, including through such mechanisms as most-favoured customer, best price clauses, and other informal arrangements. Demand was inelastic, so lower prices were unlikely to generate additional demand for the product, and demand continued to rise each year. Because DRAM producers must invest constantly in new capital equipment and research and development, they had to maximize capacity utilization.

14. Under these circumstances, a given volume can be more harmful than in other cases involving a highly differentiated product because it is more likely to have a direct impact on the market, particularly in terms of purchasers' willingness to switch to, or increase their purchasing of, subsidized subject imports, and/or use the low prices of subsidized subject imports as leverage to extract lower prices. Indeed, under these circumstances, it was not even necessary for subsidized subject imports to gain market share, if they forced the domestic industry to lower its prices in order to retain its share of the market.

15. The SCM Agreement, which employs disjunctive language, does not even require a finding of a significant increase in subsidized subject import volume, let alone a significant increase in market share. Here, however, not only were there significant adverse price effects in the form of significant underselling and significant price depression, but there was also a significant volume of subsidized subject imports and significant increases in subject import volume, no matter how measured. As the ITC explained, the commodity-like nature of the highly substitutable domestic and subsidized subject DRAM products magnified the ability of a given volume of imports to impact the domestic market and industry. In such a commodity market, which adjusts quickly to price changes, the ITC found that significant monthly price disparities between suppliers would not usually be expected.

16. Thus, it found a pattern of frequent, sustained underselling by subject imports, often at high margins, was especially significant in the context of the DRAM market, and could be expected to have particularly deleterious effects on domestic prices. Although certain other factors played a role in the price declines, the ITC found that the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor. The increasing frequency of underselling by subsidized subject imports from 2000 to 2002 corresponded with the substantial decline in US prices over those same years. In the absence of significant quantities of subject Korean product competing at relatively low prices, domestic prices would have been substantially higher. Korea never seriously challenged the ITC's analysis of the impact of subsidized subject imports on the domestic industry.

17. In the DRAMs investigation, there was a very high causal nexus between the material injury suffered by the domestic industry and the subsidized subject imports, no matter what standard the Panel applies, and no matter what lens the Panel uses to examine the evidence. Korea's contrary arguments are predicated on the assumption that the volume of subsidized subject imports was declining, an assumption that has no support in the record evidence.

18. Finally, Korea has failed to demonstrate why the ITC's evaluation of factors other than subsidized subject imports is inconsistent with US obligations under the SCM Agreement. As Korea stated, there is no requirement in the SCM Agreement for an investigating authority to quantify injury, nor has the Appellate Body ever said there was any requirement to do sophisticated modelling or an econometric analysis of the data. The Appellate Body has explained that to "separate and distinguish" means that an investigating authority is to provide a satisfactory explanation of the nature and extent of the injurious effects of other factors, as distinguished from the injurious effects of the unfair imports. The ITC' s determination shows that the ITC not only examined all such factors, but provided a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the unfair imports. Korea has been unable to show why the ITC's explanation is inadequate.

19. Korea would have the Panel believe that the Government of Korea's intervention in the market to artificially sustain the existence of the number three producer of DRAMs in the world had no adverse consequences on Hynix's competitors. We respectfully disagree. While the consequences of Korea's subsidization of Hynix may have varied from market to market, the evidence before the ITC – and the ITC's analysis of that evidence – leave no doubt that subsidized subject imports from Hynix caused material injury to the US DRAMs industry.

ANNEX E

PANEL'S QUESTIONS, ANSWERS AND COMMENTS OF PARTIES

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ANNEX E-1

QUESTIONS TO THE PARTIES FOLLOWING THE FIRST SUBSTANTIVE MEETING OF THE PANEL

Each party may address/comment on questions addressed to the other party.

A. QUESTIONS TO THE UNITED STATES

1. Alleged subsidization

1. At paras 235 and 236 of its first written submission, the US refers to "the Hynix bailout" as the "the subsidy program". What are the relevant constituent parts of that alleged subsidy programme?

2. For each alleged financial contribution forming part of the "Hynix bailout" "program", please specify which private entities participated in that financial contribution, and what evidence of entrustment and/or direction the ITC relied on in respect of each of those private entities.

3. With regard to paras 139 and 146 of the US first written submission, please list which Hynix creditors the DOC considered to be "government-owned and controlled", which were treated as "government-owned", which were designated as "majority-owned by the government", and which were treated as public bodies. Please explain how the US defines each of these terms for the purpose of these proceedings, and the consequential rationale for the designation made by the DOC with respect to each of the relevant entities.

4. Did the DOC find that "government-owned and controlled" banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?

5. Did the DOC find that "majority-owned by the government" banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?

6. Did the DOC find that "government-owned" banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?

7. Assume a government announces publicly that it is going to restructure a bankrupt industry and that, although it would prefer to do so with the assistance of private investors, it would do so on its own if necessary. Assume that private investors decide to participate in that restructuring, purely on the basis of the government's statement that it is going to keep that industry afloat. Leaving aside issues of benefit concerning the terms of the restructuring, should an investigating authority find that those private investors had been entrusted or directed by the government to participate? Why, or why not?

8. Please comment on Korea's assertion (para. 51 of its oral statement) that many creditors "walked away" from the October 2001 restructuring. Doesn't this suggest that those creditors were able to act independently of any GOK desire to restructure Hynix? Please explain.

9. The US argued at the first substantive meeting that KFB was "brought into line" after initially resisting GOK efforts to require it to participate in the Hynix restructuring. Korea denies this, arguing that KFB ultimately did not participate in the October 2001 restructuring. Please comment.

10. The US asserted at the first substantive meeting that creditors were required to participate in the October 2001 restructuring by virtue of the CRPA. Was such alleged mandatory participation relied on by the DOC as evidence of entrustment and/or direction? If yes, please indicate where this issue is addressed in the DOC's determination. If not, why not?

11. With regard to the May and October 2001 restructurings, the parties have referred to option 3 as the exercise of "appraisal rights". Please comment. Was the exercise of appraisal rights any different from liquidation? Please explain.

12. The US asserted at the first substantive meeting that this case is not about a comparison of different WTO Members' restructuring frameworks. At para. 21 of its oral statement, however, the US seems to have argued that an investigating authority could reasonably have found that a reasonable investor would not have invested in Hynix because it was "technically insolvent". Doesn't this suggest a *per se* rule that all "technically insolvent" companies should be liquidated? Please explain.

13. At para. 17 of its oral statement, the US refers to alleged pressure on credit rating agencies. Is this evidence of entrustment / direction of private creditors? If not, what is the relevance of this evidence to the DOC's determination of subsidization? Please explain.

14. At para. 18 of its oral statement, the US refers to KEB's rationale for participating in the May and October 2001 restructurings. Is it surprising that a public body would act on the basis of social and economic policy considerations? Why does the fact that a public body creditor acted on non-commercial principles necessarily mean that other private body creditors also did so?

2. Alleged injury

15. At para. 316 of its first written submission, the US states that the ITC explained that although it opined that "the use of bits as a unit of measurement [could] present difficulties for [its] analysis", it nevertheless found that the absolute volume of subsidized subject imports and the increase in that volume relative to US production and consumption was "significant".

(i) What were the reasons <u>why</u> the ITC nevertheless found that the absolute volume of subsidized subject imports and the increase in that volume relative to US production and consumption was "significant"?

(ii) Where were those reasons set forth in its Determination and Views (Exhibit GOK-10) (or any other relevant document)?

(iii) The last paragraph of page 21 of the ITC's Determination and Views states that the ITC's "findings about the volume of subject imports are reinforced by the substantial degree of substitutability between subject imports and domestic shipments". If the finding that the absolute volume of subsidized subject imports is significant is "reinforced" by considerations of substitutability, what is the initial basis for that

finding? In other words, what is the initial basis that is then "reinforced" by considerations of substitutability?

(iv) Was the ITC's determination of material injury and/or causation based on its finding that the absolute volume of subsidized subject imports was "significant"? Was this finding relevant to its determination? Would the ITC not have made its determination of material injury and/or causation but for its finding that the absolute volume of subsidized subject imports was "significant"?

16. Please comment on Korea's statement that there was no displacement of US workers resulting from Hynix's Eugene facility "swapping customers" with Hynix's Korean facility.

17. At para. 40 of its oral statement, the US asserts that the ITC determined that "a significant portion of non-subject imports were Rambus and speciality DRAM products". On the basis of a non-confidential presentation/summary of the underlying proprietary information, please indicate what percentage of non-subject imports were Rambus and speciality products?

18. On the basis of a non-confidential presentation/summary of the underlying proprietary information, please set out the basis for the ITC's finding that the volume of subsidized subject imports was "significant".

19. The US argued at para. 424 of its first written submission that the causal analysis for countervail was different than the causal analysis for safeguards. The US based its argument on the different injury thresholds set forth in the SCM and Safeguards Agreements respectively. How does the injury threshold determine the requisite degree of causal nexus? In other words, what is it about the need to find serious injury in the case of safeguards that makes the causation standard different than in countervail, where material injury need to be established?

20. The US noted at the first substantive meeting that Article 15.5 of the SCM Agreement refers to a "causal relationship" between the subsidized imports and the material injury to the domestic industry, whereas Article 4.2(b) refers to a "causal link" between increased imports and the serious injury to the domestic industry. Does this explain the alleged difference in the applicable causation standards? Please explain.

21. The US asserts at para. 424 of its first written submission that "the 'causal relationship' of the SCM Agreement is ... different from the 'causal link' requirement of the safeguards Agreement". At para. 443 of its first written submission, the US refers to the ITC "demonstrating a causal link". At para. 419, the US refers to the need to establish a "causal relationship". How credible is the US assertion that the term "causal link" differs from the term "causal relationship" if the US fails to distinguish between those two concepts in its written submission?

22. At para. 424 of its first written submission, the US appears to argue that the ITC applied the "causal relationship" standard. Is this a correct understanding of the US argument? Please explain.

23. Please explain how the ITC complied with the causation standard described at para. 427 of the US first written submission. In particular, how did the US "separate and distinguish" the injurious effects of non-subject imports?

24. How do the causation standards of "causal link" (Article 4.2(b) of the Safeguards Agreement) and "causal relationship" (Article 15.5 of the SCM Agreement) differ in practice?

25. Korea noted at the first substantive meeting that the Argentina-Footwear panel, in respect of a safeguards dispute, stated (para. 8.238) that an absence of coincidence, or correlation, "would create

serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present" (italics in original). Does the US consider that such panel ruling is not relevant to the present proceedings because it concerns causation in the context of safeguards, and not countervail? Please explain.

B. QUESTIONS TO KOREA

1. Alleged subsidization

26. Korea stated at the first substantive meeting that the more concrete the designated task, the more specific the target entity, the more confident one could be of the existence of entrustment/direction. Does the fact that concrete tasks and specific addresses increases confidence in a finding mean that the finding is precluded in circumstances where the designated task is less concrete and the addressee is not clearly specified? Isn't it simply more difficult – but not necessarily impossible - to establish entrustment / direction in such circumstances? Isn't the discussion about formal/explicit as opposed to informal/implicit entrustment / direction really an issue of evidence, rather than law? Please explain / comment.

27. Korea asserts at para. 59 of its oral statement that "the plain meaning of 'entrusts or directs' poses the core questions of 'who' is being directed to do 'what'". How does the plain meaning of that text (leaving aside the ruling of the US - Export Restraints panel) mean that such core questions can only be answered by reference to explicit and formal acts of government?

28. Is Korea challenging the DOC's determination that the KDB Fast Track Program constitutes a subsidy? If so, please refer to the relevant part(s) of Korea's first written submission.

29. How were the Creditors' Councils composed during the period of the DOC's investigation? How did the composition of those Creditors' Councils change over that period?

30. Korea indicated at the first substantive meeting that participation in the October 2001 Creditors' Council was mandatory, by virtue of the CRPA.

(i) Why did the CRPA make participation in Creditors' Councils mandatory?

(ii) What, if any, sanctions applied to creditors that (a) refuse to participate in the Creditors' Council, and / or (b) refuse to abide by the terms of the restructuring agreed on within the Creditors' Council?

(iii) If participation in the Hynix Creditor's Council was mandatory, didn't that mean that participation in the Hynix restructuring was mandatory? Please explain.

(iv) Was there a statutory option available to creditors, other than the three options designated by the Creditors' Council?

(v) How were the terms of the three options determined?

(vi) Was there any difference between the value of appraisal rights under option 3 and liquidation value? Please explain.

31. At para. 45 of its oral statement, Korea asserts that DOC "reversed its prior finding" that all commercial banks in Korea were controlled by GOK. When was any such "prior finding" made by the DOC, and what is the relevance of that case to the Hynix restructuring?

32. Korea stated during the First Substantive meeting with the Panel that Korean investors were entitled to rely on the prospect theory. Is this case really about which economic theory the Korean investors were entitled to rely on? Isn't it rather about which economic theory the DOC was required to apply under the terms of the SCM Agreement?

2. Alleged injury

33. What is the relevance of note 47 to Article 15.5 of the SCM Agreement for the purpose of establishing the requisite "causal relationship"?

34. Does Korea claim that the ITC's finding of significant price depression is inconsistent with the SCM Agreement? If so, please specify where this claim is addressed in Korea's first written submission.

35. Regarding para. 14 of Korea's oral statement, did subject Hynix imports and DRAMs from Hynix's Oregon facility compete with other US produced DRAMs on the same terms / under the same conditions of competition? Would this be relevant to the issue of whether or not the ITC should have treated subject Hynix imports as merely replacing production at Hynix's Oregon facility?

36. Korea argues that Hynix's subject imports were merely replacing sales by Hynix's Eugene facility. Korea refers in this regard to "customer swapping". Leaving the present case to one side, imagine a case in which the volume of imports increases during the period of investigation because a domestic company ceased manufacturing operations in order to "re-tool" up at the very beginning of that period, and sourced its product (for resale) from unrelated subject exporters instead. If the resultant absolute increase in imports during the period of investigation was significant, would an investigating authority be entitled to rely on that in its injury determination?

37. Is Korea arguing – as alleged by the US at para. 39 of its oral statement – that subject imports must be the sole cause of injury in order for the requisite causal link to be established between the subsidized imports and injury? If so, please comment on the finding of the Hot-Rolled Steel panel (DS184) that the USITC was not required to demonstrate that dumped imports alone caused material injury (para. 7.260 of that report).

38. Please comment on para. 431 of the US first written submission. Does Korea argue that the ITC should have "'isolate[d]' subject imports or the effects of the subject imports and other known factors on the domestic industry"? Please explain.

39. Please comment on the US remarks regarding Korea's use of volume / market share data sources set forth at paras 292-294 of the US first written submission.

40. Please comment on the US argument (para. 32 of its oral statement) that there is no obligation under the SCM Agreement for a brand-name analysis of price undercutting. If Korea disagrees, please indicate which provisions of the SCM Agreement provide for this obligation.

ANNEX E-2

QUESTIONS TO THE PARTIES FOLLOWING THE SECOND SUBSTANTIVE MEETING OF THE PANEL

Each party may address/comment on questions addressed to the other party.

A. QUESTIONS TO US

1. Please comment on the following paragraphs of Korea's Opening Statement at the Second Substantive Meeting of the Panel:

§ 20 : the hypothetical of Hynix being the lowest price twice, but 98 other suppliers being each the lowest price once;

§ 22 : the ITC's focus on relatively small changes in the frequency of underselling, while ignoring dramatically different volumes of non-subject imports;

§ 26 : the issue of correlation, in the context of causal nexus: what changed from 2000, when the domestic DRAMS industry had record performance, and 2001, when price fell and industry profits plunged;

§ 33 : the selection of data on record about product substitutability;

§ 34 : the portion of subject imports underselling in 2001 was 5% of the market, whereas the portion of non-subject imports underselling was 27% of the market;

§ 37 : the ITC does not explain why the effect of supplier competition was attributed to the small change in subject import market share, rather than the much larger market share of non-subject imports and the rate at which non-subject imports were gaining market share;

§ 39 : the key missing point – non-attribution required the ITC to separate and distinguish the role of subject import supply sources from domestic and non-subject import supply sources;

§ 49 : appearance of control where none exists, nothing suggests that the GOK would intervene in day-to-day credit decisions of various banks;

§ 76 : the argument regarding the size of Citibank's loan.

2. With regard to para. 32 of the Second Written Submission of the US, are the "actions that directly evinced entrustment and direction" those set forth in section 1(a) – (c) of that submission? Is the US arguing that there is both direct and indirect evidence of entrustment / direction? Why is mandatory participation under the CRPA included as an "action [...] that directly evinced entrustment and direction", when at para. 33 of its replies to the Panel's questions, the US asserts that "[t]he DOC did not find that mandatory participation under the CRPA constituted, in and of itself, entrustment or direction"?

3. Please comment on Korea's argument (para. 128 of Korea's Second Written Submission) that "there is simply no evidence indicating that Shinhan, Hana, or KorAm bank were entrusted or directed by the GOK to extend their portion of the syndicated loan". What evidence of entrustment / direction did the US rely on in respect of the participation of these banks in the syndicated loan? Even if one does not accept Korea's argument on the need for specific banks to be directed to perform specific tasks, is it not necessary for an investigating authority to point to evidence showing that creditors included in the finding of entrustment/direction were actually entrusted / directed ?

4. At para. 18 of its Answers to the Panel's questions, the US asserts that "The DOC did *not* find specifically that government-owned and controlled private entities 'were instruments through which the GOK entrusted/directed other entities'. Rather, the DOC found, for example, that the GOK exercised control over Hynix's creditors generally through government-owned and controlled banks, because those banks played a dominant role in the Creditors Councils." Does the US response mean that control over creditors through government-owned and controlled private entities is not relevant to the issue of entrustment / direction of those creditors? How does the concept of the exercise of control over creditors differ from the notion of entrustment / direction of those creditors?

5. At para. 20 of the US Answers to Panel questions, the US asserts that "the motives of private investors are not germane" to the issue of entrustment / direction. At para. 24, however, the US argument of entrustment/direction relies on private creditors knowing what was good for them. If entrustment/direction is based on creditors knowing what is good for them, doesn't that imply an analysis of their motives?

6. At para. 33 of its Answers to the Panel's questions, the US asserts that "[t]he DOC did not find that mandatory participation under the CRPA constituted, in and of itself, entrustment or direction. Rather, the DOC found that the GOK used the CRPA as a vehicle to effectuate the GOK's Hynix policy". Does this mean that the alleged mandatory nature of the CRPA is not relevant to the issue of entrustment/direction? How does the notion of entrusting / directing someone to carry out an objective differ from using something as a vehicle to have someone effectuate that objective? If the October 2001 restructuring had occurred in isolation, would the CRPA in and of itself have been sufficient evidence of entrustment/direction?

7. What was the evidence of entrustment / direction in respect of Pusan?

8. Regarding Figure US-4, the different proportions of council vote held by group A, B and C creditors in respect of the October 2001 restructuring do not add up to 100%. Please explain.

9. What was the basis for the DOC's finding that Citibank was not entrusted/directed?

10. In its Second Written Submission to the Panel, the US refers to the Kookmin Prospectus in a section entitled "GOK Ownership and Control of Hynix's creditors". Does the US argue that GOK's 15.1% shareholding resulted in GOK control over Kookmin?

11. In reply to question 1 from the Panel, the US stated that "the constituent parts of the subsidy programme ... ***included*** the 800 billion won syndicated loan, the KDB Fast Track bond program, the May 2001 restructuring package, the October 2001 restructuring package, and the benefits conferred by these and other financial contributions, such as D/A loans, made as part of the Hynix bailout." Please specify an exhaustive list of the constituent parts of the alleged subsidy programme.

12. Please comment on para. 182 of Korea's Second Written Submission. In particular, does the US accept that the Hynix-only import figures are a reasonable proxy for the total import figures ?

13. Please comment on Korea's argument regarding the difference between the US submission and the ITC report regarding the extent of the "portion" speciality products (para. 211 of Korea's Second Written Submission). Please comment on Korea's argument regarding the ITC's use of "value estimates" in respect of those speciality products (para. 212 of Korea's Second Written Submission).

14. In response to Question 23 from the Panel, the US asserts that although the ITC determined that non-subject imports were responsible for "the bulk of the market share lost by domestic producers during the period of investigation", it identified two reasons why it did not find the volume of non-subject imports as significant as otherwise would be suggested. First, the ITC referred to the composition of non-subject imports. Second, the ITC referred to the price effects of non-subject imports. How do these two factors qualify the loss of market share ? Wouldn't any impact resulting from the composition and price effects of non-subject imports already be reflected in the market share data? For example, wouldn't the fact that non-subject imports include speciality products mean that they would have taken less market share from domestic producers, and that this consideration is therefore already reflected in the market share data?

15. Did the DOC conclude that the KEB was entrusted or directed to (a) participate in the Syndicated Loan and/or (b) seek a loan limit waiver ?

16. To what extent was the USD 1.35 billion GDS offering taken into account by the DOC with respect to its finding of entrustment / direction of Hynix's creditors ?

17. Was the participation by "small" creditors accounting for approximately 20% of the debt in the October Restructuring countervailed ?

B. QUESTIONS TO KOREA

18. Please comment on the following paragraphs of the Opening Statement of the US at the Second Substantive Meeting of the Panel:

> § 24 : Korea's concession that the transactions made under the KFB Fast Track Programme constitute financial contribution, but could still serve as benchmarks for determining benefit;
>
> § 45 : no requirement in the SCM Agreement that the period examined for the subsidies enquiry cover the entire period examined for the injury determination.

19. With reference to Figure US-1, does Korea contest the DOC's conclusion that each of the Group B creditors were controlled by GOK? Please explain.

20. With reference to Figure US-1, does Korea contest the DOC's conclusion that each of the Group B creditors were entrusted or directed by GOK ? Please explain.

ANNEX E-3

REPUBLIC OF KOREA'S ANSWERS TO THE PANEL QUESTIONS

9 July 2004

A. QUESTIONS TO THE UNITED STATES

We only set forth below only those questions (for the United States) to which the GOK also provides an answer.

1. Alleged subsidization

1. At paras. 235 and 236 of its first written submission, the US refers to "the Hynix bailout" as the "the subsidy program". What are the relevant constituent parts of that alleged subsidy programme?

GOK ANSWER: Korea simply notes that the four elements set forth at paragraphs 129 through 151 identify the same four elements that the United States discussed in the first meeting with the Panel: the December 2000 syndicated loan; the KDB Fast Track Programme, the May 2001 restructuring, and the October 2001 restructuring.

* * * *

2. For each alleged financial contribution forming part of the "Hynix bailout" "programme", please specify which private entities participated in that financial contribution, and what evidence of entrustment and/or direction the ITC relied on in respect of each of those private entities.

GOK ANSWER: This question is primarily for the United States to answer. Korea simply notes that any evidence identified by the United States must be carefully reviewed to determine whether and to what extent that evidence in fact relates to that specific constituent element of the alleged subsidy programme.

* * * *

3. With regard to paras. 139 and 146 of the US first written submission, please list which Hynix creditors the DOC considered to be "government-owned and controlled", which were treated as "government-owned", which were designated as "majority-owned by the government", and which were treated as public bodies. Please explain how the US defines each of these terms for the purpose of these proceedings, and the consequential rationale for the designation made by the DOC with respect to each of the relevant entities.

GOK ANSWER: This question is for the United States. Korea will review the answer provided by the United States, and confirm for the Panel the factual accuracy of the statements being made about the various Korean banks.

* * * *

4. Did the DOC find that "government-owned and controlled" banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?

GOK ANSWER: Korea looks forward to this clarification of the US position on this issue. We note the text of Article 1.1(a)(1)(iv) requires that the government be the party taking the action to entrust or direct. Korea believes that this provision does not allow actions by private parties to serve as the factual or legal basis for a finding of entrustment or direction.

* * * *

5. Did the DOC find that "majority-owned by the government" banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?

GOK ANSWER: See answer to Q4 above.

* * * *

6. Did the DOC find that "government-owned" banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?

GOK ANSWER: See answer to Q5 above.

* * * *

7. Assume a government announces publicly that it is going to restructure a bankrupt industry and that, although it would prefer to do so with the assistance of private investors, it would do so on its own if necessary. Assume that private investors decide to participate in that restructuring, purely on the basis of the government's statement that it is going to keep that industry afloat. Leaving aside issues of benefit concerning the terms of the restructuring, should an investigating authority find that those private investors had been entrusted or directed by the government to participate? Why, or why not?

GOK ANSWER: No, this hypothetical would not justify a finding of entrustment or direction. Article 1.1(a)(1)(iv) involves government actions that require private actors to take some action. Both "entrusts" and "directs" convey the core meaning of a private party being told what to do.

Article 1.1(a)(1)(iv) is not about government actions that may or may not have some effect on the incentives of private parties to take actions. As the panel in *US–Export Restraints* recognized, governments intervene in markets in many different ways.[1] For example, central banks set interests rates that have enormous influence on whether and how financial transactions take place, and the risk associated with those transactions. The key issue under Article 1.1(a)(1)(iv) is not about whether the government is affecting the incentives, but whether the government is requiring certain actions to be taken through private intermediaries.

* * * *

[1] *United States -- Measures Treating Export Restraints as Subsidies*, Report of the Panel, WT/DS194/R, 29 June 2001 ("*US - Export Restraints*"), para. 8.31.

8. Please comment on Korea's assertion (para. 51 of its oral statement) that many creditors "walked away" from the October 2001 restructuring. Doesn't this suggest that those creditors were able to act independently of any GOK desire to restructure Hynix? Please explain.

GOK ANSWER: At the first meeting with the Panel, the United States stressed that these creditors still had to take substantial write-offs of their Hynix debt, and suggested that such a situation is not "walking away."

Korea would like to note two points. First, such write-offs were inevitable -- after all, the situation involved a heavily indebted company in a restructuring. Write-offs are a very common part of such restructuring. The United States has not indicated -- and indeed, cannot indicate -- any scenario in which the creditors could have avoided such write-offs.

Second, the key issue at play in the October 2001 restructuring was which creditors would provide any new funds to facilitate the overall restructuring. Creditors were given an incentive to do so -- they could convert a higher portion of their debt to equity, lower the amount of the write-offs, and see whether and to what extent the equity would allow the banks to recover a higher percentage of their investment in Hynix. But ultimately, it was for each creditor to decide what to do. In Korea's view, any creditor that did not extend new loans was essentially "walking away," particularly those creditors who chose Option 3 and declined both new loans and any debt for equity swap.

* * * *

9. The US argued at the first substantive meeting that KFB was "brought into line" after initially resisting GOK efforts to require it to participate in the Hynix restructuring. Korea denies this, arguing that KFB ultimately did not participate in the October 2001 restructuring. Please comment.

GOK ANSWER: To clarify for the Panel, KFB participated in the December 2000 syndicated loan, and the May 2001 restructuring. KFB did not participate in the KDB Fast Track Programme, and did not participate in the October 2001 restructuring by refusing any new funds, by declining any debt-equity swap, and by exercising its appraisal rights. KFB may have been part of the restructuring at the outset -- under the CRPA, all creditors are part of the overall process -- but KFB eventually exercised its statutory rights under the CRPA to walk away with basically the same amount it could have received in liquidation.

* * * *

10. The US asserted at the first substantive meeting that creditors were required to participate in the October 2001 restructuring by virtue of the CRPA. Was such alleged mandatory participation relied on by the DOC as evidence of entrustment and/or direction? If yes, please indicate where this issue is addressed in the DOC's determination. If not, why not?

GOK ANSWER: Korea addresses a similar issue in its response to Question #30 below.

* * * *

11. With regard to the May and October 2001 restructurings, the parties have referred to option 3 as the exercise of "appraisal rights". Please comment. Was the exercise of appraisal rights any different from liquidation? Please explain.

GOK ANSWER: Korea addresses a similar issue in its response to Question #30 below.

* * * *

12. The US asserted at the first substantive meeting that this case is not about a comparison of different WTO Members' restructuring frameworks. At para. 21 of its oral statement, however, the US seems to have argued that an investigating authority could reasonably have found that a reasonable investor would not have invested in Hynix because it was "technically insolvent". Doesn't this suggest a *per se* rule that all "technically insolvent" companies should be liquidated? Please explain.

GOK ANSWER: Although the United States denied that its position was a *per se* rule, the logic of the US position is in fact a *per se* rule. The US view is that a reasonable investor only looks at narrow financial indicators. The US view precludes a reasonable investor from considering broader economic factors. The US view also precludes a reasonable investor from having a different perspective as an "inside investor". For example, under the US view, a bank that has a large amount of outstanding debt is not allowed to consider the effect of a new loan on the probability of recovering the existing loan. Given the narrow focus of the US-style "reasonable investor," that investor is applying a *per se* rule.

* * * *

13. At para. 17 of its oral statement, the US refers to alleged pressure on credit rating agencies. Is this evidence of entrustment / direction of private creditors? If not, what is the relevance of this evidence to the DOC's determination of subsidization? Please explain.

GOK ANSWER: In Korea's view, this argument about credit agencies is an example of US arguments that have nothing to do with the entrustment or direction of specific Hynix creditors to make specific transactions.

We also note that the evidence of this alleged pressure is based on press reports that were subsequently denied by the relevant Korean Government agencies.[2]

* * * *

14. At para. 18 of its oral statement, the US refers to KEB's rationale for participating in the May and October 2001 restructurings. Is it surprising that a public body would act on the basis of social and economic policy considerations? Why does the fact that a public body creditor acted on non-commercial principles necessarily mean that other private body creditors also did so?

GOK ANSWER: At the outset, we would like to clarify that KEB is a private commercial bank in Korea, and is not a "public body". This appears to be a typographical error, and refers instead to KDB.

Korea would like to clarify one aspect of this question. In Korea's view, it is more accurate to think of "commercial principles" as being a full consideration of all aspects of a proposed transaction. Of course, a major focus will be on then profitability of the transaction. But it is also appropriate for an institution to consider the broader economic and social context of proposed transaction. For example, a loan that avoids bankruptcy for a major company might well prevent bankruptcies of that company's suppliers. Or a bank with a substantial presence in one national market might well view loans that help develop the overall economy and a positive longer-term

[2] *See* GOK Exhibit 58.

development for the bank. These factors are indeed "commercial" even if they do not all relate to the short-term profitability of a particular loan.

* * * *

2. Alleged injury

15. At para. 316 of its first written submission, the US states that the ITC explained that although it opined that "the use of bits as a unit of measurement [could] present difficulties for [its] analysis", it nevertheless found that the absolute volume of subsidized subject imports and the increase in that volume relative to US production and consumption was "significant".

(i) What were the reasons <u>why</u> the ITC nevertheless found that the absolute volume of subsidized subject imports and the increase in that volume relative to US production and consumption was "significant"?

<u>GOK ANSWER</u>: Since the ITC determination does not state any reasons, and the US First Submission is also quite unclear on this point, Korea also wonders what rationale and what framework the ITC used for assessing the "significance".

* * * *

(ii) Where were those reasons set forth in its Determination and Views (Exhibit GOK-10) (or any other relevant document)?

<u>GOK ANSWER</u>: Korea believes that the ITC determination does not answer this key question. The ITC determination stated these conclusions without any explanation.

* * * *

(iv) Was the ITC's determination of material injury and/or causation based on its finding that the absolute volume of subsidized subject imports was "significant"? Was this finding relevant to its determination? Would the ITC not have made its determination of material injury and/or causation but for its finding that the absolute volume of subsidized subject imports was "significant"?

GOK ANSWER: We note that the ITC determination strongly suggests the outcome would have been different. We note that at page 27 of the ITC Final Determination[3], the ITC states that "subject imports, themselves, were large enough and priced low enough to have a significant impact". The ITC then goes on: "Given our findings about the significant volume of subject imports…." Thus, the determination as written makes clear that the ITC determination rested very much on the fact in this case that the ITC considered import volume to be significant.

* * * *

16. At para. 40 of its oral statement, the US asserts that the ITC determined that "a significant portion of non-subject imports were Rambus and speciality DRAM products". On the basis of a non-confidential presentation/summary of the underlying proprietary information, please indicate what percentage of non-subject imports were Rambus and speciality products?

GOK ANSWER: We address this issue in our Second Submission, and provide concrete public evidence about the lack of importance of Rambus DRAMs. Rambus DRAMs accounted for less than 10 per cent of total DRAM sales by Samsung, the major supplier of Rambus DRAMs. *See* also GOK Exhibit 63. Given that Samsung was the predominate Rambus supplier, this fact means that *at least* 90 per cent of non-subject imports were standard DRAMs that competed directly with US production.

* * * *

17. The US argued at para. 424 of its first written submission that the causal analysis for countervail was different than the causal analysis for safeguards. The US based its argument on the different injury thresholds set forth in the SCM and Safeguards Agreements respectively. How does the injury threshold determine the requisite degree of causal nexus? In other words, what is it about the need to find serious injury in the case of safeguards that makes the causation standard different than in countervail, where material injury need to be established?

GOK ANSWER: Korea believes that the injury standards and the causation standards are distinct, and the higher injury standard in the safeguards context does not require a higher causation standard. The causation standards in the SCM and Safeguards Agreements each speak for themselves, as discussed below.

* * * *

18. The US noted at the first substantive meeting that Article 15.5 of the SCM Agreement refers to a "causal relationship" between the subsidized imports and the material injury to the domestic industry, whereas Article 4.2(b) refers to a "causal link" between increased imports and the serious injury to the domestic industry. Does this explain the alleged difference in the applicable causation standards? Please explain.

GOK ANSWER: Although the terms are different, in fact a careful review of the plain meaning of both terms shows that there are for this purpose interchangeable terms. If we start with the dictionary definitions of both terms, we find that "link" is defined as a verb to mean "connect or join", connect causally", to be joined or connected, and is defined as a noun as "a connecting part", or "to establish or maintain a connection". Relationship is defined as "a connection, an association", and "related" is defined as "having relation", or "connected".[4] The common thread in all of these

[3] GOK Exhibit 10.
[4] *See* GOK Exhibit 46.

definitions is the core idea of some connection -- in other words, finding some causal connection between the imports and the alleged injury (either serious or material) to the domestic industry.

Moreover, the French and Spanish texts confirm this reading. In the French versions, Article 15.5 of the SCM Agreement uses the term "lien" where the English version uses the word "relationship" and Article 4.2(b) of the Safeguards Agreement uses the identical word "lien" where the English version used the word "link". This French word translates as "connection" or "link" or "tie".[5] The same pattern occurs in Spanish, which uses the word "relacion" in both places. This Spanish word translates as "connection".[6]

Thus, as a matter of the plain meaning of the English terms and the use of identical terms in the French and Spanish versions, Korea submits that the terms "relationship" and "link" have essentially the same meaning -- having some causal "connection".

* * * *

19. Please explain how the ITC complied with the causation standard described at para. 427 of the US first written submission. In particular, how did the US "separate and distinguish" the injurious effects of non-subject imports?

GOK ANSWER: For the reasons we set forth at some length in our Second Submission, Korea believes ITC did not separate and distinguish these other causes.

* * * *

20. How do the causation standards of "causal link" (Article 4.2(b) of the Safeguards Agreement) and "causal relationship" (Article 15.5 of the SCM Agreement) differ in practice?

GOK ANSWER: They do not. As we discuss in answer to Question #20 above, the two terms actually mean the same thing. Moreover, even if there were some very subtle difference in the nuance of meaning, that nuance would not have any practical relevance. Korea believes that in both phrases the key word is "causal," the idea of the imports under investigation bringing about the injury to the domestic industry. The word "causal" conveys all of the substantive content in these phrases, and that word is identical. The difference between "link" and "relationship" is not significant.

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[5] *See* GOK Exhibit 47.
[6] *See* GOK Exhibit 48.

B. QUESTIONS TO KOREA

1. Alleged subsidization

21. Korea stated at the first substantive meeting that the more concrete the designated task, the more specific the target entity, the more confident one could be of the existence of entrustment/direction. Does the fact that concrete tasks and specific addresses increases confidence in a finding mean that the finding is precluded in circumstances where the designated task is less concrete and the addressee is not clearly specified? Isn't it simply more difficult – but not necessarily impossible - to establish entrustment / direction in such circumstances? Isn't the discussion about formal/explicit as opposed to informal/implicit entrustment/direction really an issue of evidence, rather than law? Please explain / comment.

GOK ANSWER: Korea believes there are both legal and evidentiary aspects to this issue. From a factual perspective, there must be sufficient evidence of "entrusts or directs". By referring to concrete tasks and specific entities, Korea's comments at the first substantive meeting sought to address this factual aspect of the issue.

Korea also believes, however, there is an important legal dimension to this issue. "Entrusts or directs", when read in light of the plain meaning of these words, the context of these words, and their object and purpose, imposes a legal minimum necessary to establish "entrusts or directs". In other words, there are some government objectives that are so vague and so loosely directed to no one in particular that the legal standard for "entrustment or direction" simply cannot be said to have been met.

Put differently, there are some government actions that have so little connection to the specific actions set forth in Article 1.1(a) or to specific entities that an authority simply cannot label those actions as "entrustment or direction" of a private entity to do anything.

*** * * ***

22. Korea asserts at para. 59 of its oral statement that "the plain meaning of 'entrusts or directs' poses the core questions of 'who' is being directed to do 'what'". How does the plain meaning of that text (leaving aside the ruling of the US - Export Restraints panel) mean that such core questions can only be answered by reference to explicit and formal acts of government?

GOK ANSWER: The meaning of treaty text must be discerned by reference to the plain meaning, when read in context and in light of the object and purpose of the language. Korea believes that all of these interpretative elements are important to understanding the proper meaning of "entrusts or directs". Moreover, Korea does not argue that the government actions must be formal acts of government. Any such formal acts would probably fall more properly under one of the specific government actions enumerated elsewhere under Article 1.1(a)(1). With these clarifications in mind, we would like to address the specific question. We discuss these interpretative issues at more length in our second submission, but we would like to emphasize the main points in response to this question.

Both the word "entrusts" and the word "directs" convey the basic meaning of carrying out some specific action. That is why Korea has stressed the importance of "what" is being entrusted or directed. The definitions cited by the United States themselves underscore this point. In paragraph 157 of its First Submission, the United States highlights that "entrust" means give a person

responsibility for a task, or to commit the execution of a task to a person. Similarly, in paragraph 158 of its first submission, the United States highlights that "directs" means to do a thing.

But both of these words are verbs, and to understand better the object of these verbs one must turn to the context in which these words are being used. Article 1.1(a)(1)(iv) has important textual guidance about the object of these two verbs, and what that object must be. There are several elements worth noting.

First, the entrustment or direction must apply to "a private body". That is why Korea has stressed the "who" that is being entrusted or directed. The text of Article 1.1(a)(1)(iv) requires such a focus.

This language makes clear that some kinds of entrustment or direction will not fall within the meaning of Article 1.1(a)(1)(iv) because the government has not been targeting a "private body". In other words, if the government orders a public body to take some action, that entrustment or direction of a public body is legally irrelevant to the issue of whether a private body has been directed. The text is quite explicit in focusing on the government action toward a private body, and simply does not allow authorities to string together a series of indirect and increasingly remote entrustment or direction through one or more public bodies. Unless the government itself is entrusting or direction, the requirement of the text has not been met.

Similarly, the public body cannot be the source of entrustment or direction. The text of Article 1.1(a)(1(iv) is quite explicit that the government must be the one entrusting or directing. Thus, although a public body can make a loan that constitutes a "financial contribution", a public body cannot be the source of any entrustment or direction. Second, that private body must be entrusted or directed "to carry out" something. This additional phrase reinforces the importance of "what" is being entrusted or directed. There must be something concrete that can be carried out. A Korean bank can make a loan, but it cannot "save" a company.

But at the same time, this language also sheds light on the proper interpretation of "entrusts or directs". The private body is not being entrusted or directed to consider some action, or to assist some action, but to "carry out" some action. Any discretion being left to the private body is fundamentally at odds with this notion of "carry out". Thus, any time banks have a choice, it is hard to imagine how they can have been entrusted or directed to "carry out" a certain action.

In this particular case, the Korean banks considered various loans to Hynix, but were never entrusted or directed to "carry out" these specific loans. In fact, at no point of the various parts of the Hynix restructuring did every bank participate. This poses a logical dilemma for the US argument in this case. If the US theory is that all Korean banks were being entrusted or directed to save Hynix, why were many banks able to ignore this entrustment or direction? The only logical answer is that the individual banks were making their own decisions, and thus were not being entrusted or directed to "carry out" anything.

Third, the action to be carried out is "one or more of the type of functions illustrated in (i) to (iii)". In other words, the action being entrusted or directed is not some generalized policy or wish, but rather one of the concrete actions specified earlier in Article 1.1(a)(1). The action must be a grant, a loan, an equity transfer, or some other specific action, not some generalized act of "saving" a company or of preventing bankruptcy. This specific language reinforces the importance of the "what" that is being entrusted or directed.

Finally, the text imposes an additional requirement. The private body must be entrusted or directed to carry out some specific action, and that action must meet the additional requirement that it, "in no real sense, differs from practices normally followed by government". This idea of not differing

from normal government practices takes on particular importance in this dispute. A number of aspects of the Hynix restructuring belie the notion that banks were acting as mere extensions of the government. Consider the May 2001 restructuring. This restructuring transaction was contingent on the success of the new GDR equity offering, a feature hardly common on typical government loans. If the Korean Government had truly wanted banks to "carry out" loans that they would otherwise not make, there would have been no explicit contingency.

* * * *

23. Is Korea challenging the DOC's determination that the KDB Fast Track Programme constitutes a subsidy? If so, please refer to the relevant part(s) of Korea's first written submission.

GOK ANSWER: Yes. Korea does not challenge the conclusion that the KDB Fast Track Programme constituted a "financial contribution". Our argument at paragraphs 481 and 482 of Korea's First Submission meant to clarify and respond to US efforts to infer from the KDB Fast Track Programme entrustment or direction of other Hynix creditors.[7]

A "subsidy" finding, however, has two other elements. Korea challenges the existence of any benefit from the KDB Fast Track Programme. Our arguments in paragraphs 517 through 520 apply generally to all aspects of the Hynix restructuring: private Korean banks and the average interests being paid by Korean banks in general serve as a benchmark to establish that any refinancing obtained under the KDB Fast Track Programme did not constitute a benefit.

Our first submission addressed at some length the arguments about foreign private bodies (paragraphs 521 through 546), because this aspect of the DOC decision was particularly egregious. Citibank participated in the December 2000 syndicated loan, the May 2001 restructuring, and the October 2001 restructuring. Citibank did not participate in the KDB Fast Track Programme, because Citibank did not hold any maturing Hynix bonds at that time. Citibank was a new lender to Hynix. The failure specifically to mention the KDB Fast Track Programme in Section D.2(a)(2), however, does not mean we did not intend the argument under Section D.2(a)(1) to apply to the KDB Fast Track Programme. We apologize for any confusion on this point.

In particular, Korea notes the following key points: First, the real issue about the KDB Fast Track Programme related only to the portion of the bonds held by the KDB and by the other Korean banks. The DOC did not countervail the 70 per cent of the refinanced bonds that were subsequently repackaged as CBOs.[8] Thus, only 30 per cent of the total being refinanced is at issue.

Second, the various private Korean banks that refinanced Hynix bonds did so on the same terms as those accepted by the KDB – in particular, at the same interest rates. Thus although the DOC found KDB to be a public body, any financial contribution associated with that public body did not constitute a benefit.

Third, the information before the DOC showed that the effect interest rates being paid on refinanced Hynix bonds ranged from 10.99 per cent to 12.56 per cent, which was much higher than the average interest rates prevailing in Korea at that time for third year loans -- 9.3 per cent in 2000 and 7.1 per cent in 2001.[9] For all of these reasons, the bonds refinanced through the KDB Fast Track Programme did not constitute a benefit.

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[7] *See also* paragraphs 425-428 of the GOK First Submission.
[8] *See Decision Memorandum*, at 82 provided in GOK Exhibit 5.
[9] *See* GOK Exhibit 60.

In addition, Korea challenges the specificity of the KDB Fast Track Programme. The arguments in Section E of our first submission, paragraphs 557 through 577 apply generally to the various parts of the Hynix restructuring.

As the United States acknowledges in paragraph 57 of its first submission, the KDB Fast Track Programme was designed to address systemic problems in the Korean capital markets.[10] The United States then tries to argue that the Programme was designed for Hynix, and cites the fact the announcement occurred before the recommendation even occurred.[11] The problem with this theory, however, is that the United States has its facts wrong. As the DOC itself acknowledged at page 15 of the Government of Korea verification report, there were two meetings of the creditors: one on 28 December and another on 4 January.[12] In fact, the creditors recommended Hynix for the KDB Fast Track Programme at the 28 December meeting. Thus a key part of the US logic for finding the Programme to be specific to Hynix rests on a factual misunderstanding.

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24. How were the Creditors' Councils composed during the period of the DOC's investigation? How did the composition of those Creditors' Councils change over that period?

GOK ANSWER: On 10 March 2001, the first Creditors' Council was formed for Hynix restructuring based on a private agreement between Hynix's creditors. The council consisted of the following 17 banks: KEB, KDB, Woori, Chohung, Kookmin, H&CB, Shinhan, Hana, Koram, Seoul, KFB, NACF, Peace, Busan, Kyungnam, Kwangju, and IBK. In August 2001, Citibank joined the Council increasing the number of member banks to 18. The first Hynix Creditors' Council consisted of 17 banks with debt exposure to Hynix as of 30 November 2000. Since Citibank had no claims against Hynix as of this date, which was before the December 2000 syndicated loan had been finalized, it was excluded from the initial Creditors' Council.

On 4 October 2001, a new Creditors' Council was formed under the CRPA consisting of 104 financial institutions with debt exposure to Hynix. The breakdown of these 104 institutions was as follows: Banks (21), investment trust companies (14), and others (69).

On 10 October 2001, 3 banks (Kwangju, Kyungnam and HSBC) exercised appraisal rights thereby severing their ties with the council.

On 30 October 2001, the number of participating institutions increased to 115. The breakdown was as follows: Banks (18), investment trust companies (15), and others (82).

On 7 November 2001, the KFB walked away from the Council through its exercise of appraisal rights.

* * * *

25. Korea indicated at the first substantive meeting that participation in the October 2001 Creditors' Council was mandatory, by virtue of the CRPA.

(i) Why did the CRPA make participation in Creditors' Councils mandatory?

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[10] *See* also *Decision Memorandum*, at 22-23, provided at GOK Exhibit 5 (DOC discussion of Fast Track Programme).

[11] US First Submission, at para. 59.

[12] *See* GOK Exhibit 61.

GOK ANSWER: The CRPA was designed to facilitate restructuring indebted companies. The broader the participation in such restructuring efforts, the more effective the restructuring. Under prior restructuring regimes, some creditors had tried to "free ride", by leaving the burden of restructuring on the larger creditors, but then insisting on complete payment of their smaller debts.

Since this "free riding" made it more difficult to achieve fair restructuring arrangements, the Korean legislature decided that all creditor must participate in restructuring under the framework of the CRPA. Under Article 24.1 of the CRPA, a Creditors' Council consists of all financial institutions with debt exposure to a potentially insolvent company.[13]

Under this provision, however, participation in the Creditors' Council lasts only for a minimal period of time (usually until the first Creditors' Council meeting) during which each creditor can decide on its own whether to take part in the restructuring measure being contemplated by the council or not.

When a certain financial institution decides not to participate in the underlying restructuring process, it can either choose not to attend the first council meeting, or participate at the first meeting, and then subsequently exercise appraisal rights as provided under Article 29.1 of the CRPA. Thus although the CRPA is mandatory in the sense that every creditor is essentially deemed part of the Creditors' Council, and has the rights to participate, the CRPA does not require creditors to remain or to participate against their wishes.

* * * *

(ii) What, if any, sanctions applied to creditors that (a) refuse to participate in the Creditors' Council, and / or (b) refuse to abide by the terms of the restructuring agreed on within the Creditors' Council?

GOK ANSWER: Where a creditor institution refuses to participate in the Creditors' Council, that institution will be entitled to exercise appraisal rights. Once these rights are exercised, that creditor will no longer belong to the Creditors' Council. According to Article 24.1 of the CRPA, a Creditors' Council consists of creditor financial institutions. Under Article 2.1, the term 'creditor financial institution' means a legal or natural person who extends credits to the business enterprise concerned. When a financial institution exercises its appraisal rights, its claims against the distressed company all extinguish, and ***as such,*** it no longer qualifies as a 'creditor financial institution' under the CRPA. Accordingly, it can no longer belong to the council. There are no statutory limits or restrictions imposed on exercise of appraisal rights.

On the other hand, where a creditor does not exercise its appraisal rights, it is deemed to have agreed to the restructuring and is thus required to carry out applicable measures put forward by the Creditors' Council, subject to the constraint that any measure must win the support of those creditors representing at least 75 per cent of the outstanding debt.

Where a creditor incurs damages to other creditors by failing to keep the council resolution, the aggrieved party(ies) can seek damages pursuant to Article 30 of the CRPA. We note that the financial supervisory authorities or the government more generally do not have any legal rights to take any measures against the breaching creditor.

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[13] *See* GOK Exhibit 22-(c).

(iii) If participation in the Hynix Creditor's Council was mandatory, didn't that mean that participation in the Hynix restructuring was mandatory? Please explain.

GOK ANSWER: No. All creditors had to come to the table. Whether and how they participated in the deliberations in the Creditors' Council was up to the individual creditor. In addition, once the deliberations had hammered out a set of options, the individual creditors could make their choice among those options, or exercise their other rights under the statute as described below. Almost immediately after the Creditors' Council formed, two banks (Kwangju and Kyungnam) with 100 per cent GOK ownership, and a foreign bank (HSBC) exercised their appraisal rights and walked away. Any other bank could have exercised the same rights, and one other -- KFB -- eventually did. So, no bank was forced to participate in the Hynix restructuring against its will.

* * * *

(iv) Was there a statutory option available to creditors, other than the three options designated by the Creditors' Council?

GOK ANSWER: At the outset, it is useful to distinguish Option 3 in the Hynix October 2001 restructuring and appraisal rights more generally. In the context of the October restructuring, Option 3 specifically referred to the buyout price ("BOP") and terms of payment for dissenting creditors as crafted by the Hynix Creditors' Council. As discussed above, the terms and conditions of this particular option were negotiable as the dissenting creditors group was entitled to exercise appraisal rights.

Both in the context of the Hynix October 2001 restructuring and the CRPA framework more in general, appraisal rights refer to the statutory right bestowed on dissenting creditors under the CRPA to decline such terms of payment and buyout price as may be proposed by the Creditor Council, if these conditions are deemed unreasonable or otherwise unacceptable. Appraisal rights thus reflect procedural rights for the dissenting creditors, including multiple layers of dispute settlement mechanism as follows:

> 1) first, bilateral consultation phase under Article 29.4 during which the council proposes a BOP and terms of payment for dissenting creditors; 2) if 1) fails, then mediation phase under Article 29.5 begins where the mediation committee requests the council and opposing creditors to jointly select an accounting firm to compute a mutually agreeable BOP; and 3) lastly, court action pursuant to Article 33.2

The primary purpose of mandating appraisal rights is to ensure maximum procedural fairness and transparency for opposing creditors as a group.

It is to be noted that at the time of the October 2001 restructuring, the proposal for Option 3 by the Creditors' Council prompted a negotiation between the Council and dissenting creditors about the terms of payment for the latter as initially set out in Option 3. Unhappy with the outcome of this bilateral consultation, the dissenting creditors group went on to invoke the dispute settlement apparatus under the CRPA as a means of reifying and protecting their appraisal rights.

The CRPA does not limit or restrict the range of options that can be made available to creditor institutions. The range and particulars of these options are determined by the Creditors' Council on its own accord. In addition, the Creditors' Council can amend the details of the existing options, as well as add new options to the menu of choices that are already on the table by passing a resolution.

* * * *

(v) How were the terms of the three options determined?

GOK ANSWER: KEB, which is the principal creditor bank of the Hynix Creditors' Council, proposed Option 1 (including debt-to-equity swaps and extension of new lines of credit) on the basis of several market studies prepared by outside consultants for review by the creditor group.

For those banks that opposed to the extension of new loans under Option 1, Option 2 was proposed (debt to equity conversion & forgiveness of the remaining debt), which was finalized after a Council resolution.

In the meanwhile, the banks that balked at both of the options above were automatically entitled to exercise appraisal rights under the CRPA. Under the CRPA, the buyout price ("BOP") and terms of payment for dissenting creditors are decided by a mutual agreement between the Creditors' Council and the dissenting creditors. The Creditors' Council proposes the BOP and terms of payment for the dissenting creditors group in accord with the CRPA, and the parties then negotiate to resolve this issue

In the case of Hynix, the Option 3 banks objected to the Creditors' Council proposal and subsequently asked for mediation with the mediation committee as provided under Article 31 of the CRPA.

* * * *

(vi) Was there any difference between the value of appraisal rights under option 3 and liquidation value? Please explain.

GOK ANSWER: Under the CRPA, the buyout price ("BOP") for opposing creditors is determined by a consultation between the council and each opposing creditor. Upon mutual agreement, the BOP can be something other than the liquidation value of the company at stake.

On the other hand, where the Creditors' Council and the dissenting creditors fail to reach agreement, a mutually appointed outside accounting firm will compute the BOP based on the appraisal value of the company.

In general, the BOP of secured debts is determined by the value of the underlying collateral, while that of unsecured debts largely by the liquidation value of the distressed company.

In Hynix's case, the Option 3 creditors rejected the initial BOP and terms of payment put forward by the Creditors' Council, asking for mediation under the CRP. After mediation processes, 100 per cent of these creditors' secured debts and 25.46 per cent of their unsecured debts were paid out in cash. We note that the mediation process ended up using the same liquidation value that had been determined by Arthur Andersen in its study of the liquidation value of Hynix.

To put this 25.46 per cent in broader context for the Panel, Korea reviewed the other instances in which creditors exercised appraisal rights in CRPA restructuring proceedings. Other than the Hynix restructuring, creditors in various cases received the following amounts as exercise of their appraisal rights: 6.17%, 15.4%, 19.5%, 20.8%, 29.4%, 29.43%, 27.26%, 32.3%, and 35.56%. The appraisal rights in the Hynix case were based on a neutral third party study by Arthur Andersen, and were well within the range of the value for appraisal rights found in other cases. We can provide whatever other details the Panel might consider useful. But the basic point is that the amount of the appraisal rights in the Hynix case was quite typical.

* * * *

26. At para. 45 of its oral statement, Korea asserts that DOC "reversed its prior finding" that all commercial banks in Korea were controlled by GOK. When was any such "prior finding" made by the DOC, and what is the relevance of that case to the Hynix restructuring?

GOK ANSWER: This finding was made through a number of DOC determinations. They are all cited in the DOC determination in this particular case.[14]

These prior findings are not relevant in this case for two reasons. First, the DOC itself reversed those prior finding based on the particular facts presented in this case about the post 1997 financial reforms and restructuring in Korea.[15] Second, those prior cases covered different periods of time and different factual circumstances.

*** * * ***

27. Korea stated during the First Substantive meeting with the Panel that Korean investors were entitled to rely on the prospect theory. Is this case really about which economic theory the Korean investors were entitled to rely on? Isn't it rather about which economic theory the DOC was required to apply under the terms of the SCM Agreement?

GOK ANSWER: This case is not about any economic theory. Rather, this case is about whether the DOC properly applied the standard set forth in Article 14(a) of the SCM Agreement. That standard required the DOC to focus on the "usual investment practice" of private investors in the "territory of that member". In other words, the standard required DOC to focus on the usual practice of Korean investors.

The evidence in this case demonstrated two key factual points. First, many of the Korean investors in Hynix equity were inside investors. Second, these inside investors were very much concerned about their existing investments, as well as the possible future return on any additional investment.

The legal error by DOC was to find that these concerns about existing investments were irrelevant. This concern about existing investments was very much part of the usual practice of Korea investors. Yet DOC simply deemed this factor to be irrelevant. The concerns of inside investors may or may not be relevant under US law. But such concerns are very much relevant under the applicable standard in Article 14(a).

Moreover, the focus on investors in the "territory of that member" is critical. If Korean investors feel a nationalist need to help save important companies, that consideration can affect the

[14] *See Decision Memorandum*, at 12-15, provided as GOK Exhibit 5.

[15] *See id.* at 47-48 (not appropriate to follow past approach), at 70 (no direction of credit to semiconductor industry generally).

usual investment "practice" in Korea. The focus on investors in a particular country ensures that any such country specific preferences can and should be captured.

In this case, the DOC imposed the standard of a hyper rationale outside investor. The DOC investment standard was not the "usual investment practice" of a Korean investor. The DOC required its "investor" to care only about the profitability of the new investment.

We presented the discussion of prospect theory for two reasons. First, this theory helps explain the actual practice of the Korean banks that were investing in Hynix, as well as the practice of all inside investors around the world. Indeed, the genesis of prospect theory was the effort by scholars to understand the fundamental disconnect between the actual practice of inside investors compared to what economic theory relied upon by an investigating authority such as the DOC would have predicted.

Second, this more modern theory of investment decision making helps provide context for why the language of Article l4(a) focuses on "practice" rather than posing a particular rational investor standard. Put differently, if the usual investment practice is something other than narrowly defined profit maximization, then the government may make equity investments using the same standard. The government is not held to any higher standard than the "usual investment practice."

* * * *

2. Alleged injury

28. What is the relevance of note 47 to Article 15.5 of the SCM Agreement for the purpose of establishing the requisite "causal relationship"?

GOK ANSWER: Note 47 identifies at Paragraphs 15.2 and 15.4 of the SCM Agreement a non-exhaustive list of indicia of domestic industry performance (*e.g.*, prices, output, sales, market share, profits, productivity, return on investments, capacity utilization, *etc*.), trends in which must bear a relationship to the presence of subsidized imports. Specifically, a causal relationship between subsidized imports and "decline[s]"[16] in these indicia must be established before a CVD order may be imposed. At the most fundamental level, it is a temporal analysis; there should normally be a coincidence of, or correlation between, import and performance trends. As noted in our brief, this inter-linkage has been explored more closely in the context of Articles 3.2, 3.4 and 3.5 of the AD Agreement and under Article 4.2 of the Agreement on Safeguards[17], but it is no less relevant in the context of the SCM Agreement.

We would further add that there are two levels to this aspect of the causation analysis when considering the effect of subsidized imports (or dumped imports for that matter), as distinguished from the analysis required under the Agreement on Safeguards. Whereas an analysis under the Agreement on Safeguards is focused solely on the effects of "increased imports," the United States correctly notes in its first submission that the SCM Agreement requires an assessment of the *volume* of the *subsidized* imports.[18] Thus, both import trends and subsidy trends are important. If imports are declining, it is difficult to show any correlation or relationship between those imports and declines in domestic industry performance. If the domestic industry's performance begins declining well in advance of alleged conferral of subsidies on the imports in question, the relationship between the two is also suspect. In this case, both factual circumstances were present.

* * * *

[16] Art. 15.4 of the SCM Agreement.
[17] GOK First Submission, at paras. 220-225.
[18] US First Submission, at paras. 424.

29. Does Korea claim that the ITC's finding of significant price depression is inconsistent with the SCM Agreement? If so, please specify where this claim is addressed in Korea's first written submission.

GOK ANSWER: Yes. In it first submission, Korea addressed the US arguments about price effects generally, and also addressed specific aspects of the underselling analysis in more detail. In particular, our argument that price effects were not "significant" applies to both the price undercutting and price depression arguments.[19]

Article 15.2 does not talk about price depression in the abstract. Low prices alone are not enough. Rather the textual requirement is to find whether the "effect of such [subsidized] imports is otherwise to depress prices to a significant degree". No one in this case disputed that DRAM prices fell in 2001 and 2002. The relevant issue under both Article 15.2 and Article 15.5, however, is why did the prices fall.

In particular, three of the arguments from Korea's First Submission about pricing related specifically to price depression. First, the argument at paragraphs 142 through 144 about price leadership relates to price depression. The ITC definition of price leadership has nothing to do with whether subject import prices are higher or lower than other prices -- the question asks only for an indication of which firm[s] is having a "significant impact" on price. Thus, when the customers responded to this question, and failed to identify Hynix as the price leader, the customers were basically indicating that the effects of Hynix imports were not to depress prices to a significant degree.

Second, the argument about substitutability at paragraphs 164 through 170 also applies to the analysis of price depression. The core ITC argument was that prices would have been higher -- an argument about price depression or suppression, not about price undercutting. The ITC tried to rebut certain Hynix arguments about the role of non-subject imports by comparing the relative rates of price undercutting, but the argument itself was about why DRAM prices were so low.

Third, the argument about other causes summarized at paragraphs 171 through 174 also applies to price depression. As noted above, Article 15.2 requires that price depression consider the role of subject imports in bringing about the price depression. Thus, arguments about alternative causes are legally relevant under both Article 15.2 and Article 15.5.

* * * *

30. Regarding para. 14 of Korea's oral statement, did subject Hynix imports and DRAMs from Hynix's Oregon facility compete with other US produced DRAMs on the same terms / under the same conditions of competition? Would this be relevant to the issue of whether or not the ITC should have treated subject Hynix imports as merely replacing production at Hynix's Oregon facility?

GOK ANSWER: The answer to the first question is yes. Subject Hynix imports and DRAMs from Hynix's Oregon facility were the same DRAM commodity product. And as a *commodity product*, there is no question that both subject Hynix imports and DRAMs from Hynix's Oregon facility competed with all other DRAM suppliers on the same terms and under the same conditions of competition.

[19] *See* GOK First Submission, at para. 131.

The answer to the second question is also yes. Given the complete substitutability between Hynix Korea and Hynix Eugene DRAMs, the ITC should have treated subject Hynix imports as merely replacing production at Hynix's Oregon facility. One of the most significant errors in the ITC's determination is the refusal of the ITC to examine the volume of imports *in context*. Korea submits that the evidence establishes that ALL of the increase in DRAMs imported in 2001 and 2002 was to replace, not an addition to, the Hynix-Oregon produced DRAMs. The chart below demonstrates this fact:

Hynix's Market Share by Country of Production[20]

	2000	2001	2002
DRAMs produced by Hynix Oregon	6.3%	1.1%	0.2%
DRAMs produced by Hynix Korea	6.7%	9.0%	8.9%
Total Hynix US Shipments	13.0%	10.1%	9.1%

The above chart demonstrates that, effectively, the ITC "had blinders on" when it examined whether import volume had increased over the period examined. The ITC focused myopically on the fact that Hynix's *subject imports* had increased from 6.7% per cent of the market to 9.0% of the market, but effectively ignored *why* there was increase in imports. Korea submits that an "objective examination" required that the ITC consider whether the reason for the increase should change the usual assumptions that exist about the adverse effect of increased market share held by subject imports; that is, that an increase in imports steals volume that otherwise would have gone to domestic producers.

An increase in the market share held by subject imports is possible direct evidence of subject imports having an adverse *volume* effect on the domestic industry *only when* it can be shown that the subject imports took away sales that otherwise would have been captured by the domestic industry. Such evidence does not exist in this case. As the above evidence demonstrates, in the real world, Hynix did not win business from the domestic industry during the period 2000-2001 or during the period 2001-2002. Hynix's total share of the US market *actually decreased* during these periods. Accordingly, the evidence demonstrates that the subject imports were simply a replacement of volume that Hynix had already been supplying from its US production facility.

* * * *

31. Korea argues that Hynix's subject imports were merely replacing sales by Hynix's Eugene facility. Korea refers in this regard to "customer swapping". Leaving the present case to one side, imagine a case in which the volume of imports increases during the period of investigation because a domestic company ceased manufacturing operations in order to "re-tool" up at the very beginning of that period, and sourced its product (for resale) from unrelated subject exporters instead. If the resultant absolute increase in imports during the period of investigation was significant, would an investigating authority be entitled to rely on that in its injury determination?

[20] *See* GOK Exhibit 41 (Hynix's US Importer's Questionnaire Response to the ITC).

GOK ANSWER: If the domestic company that ceased its manufacturing operations for re-tooling was the only or predominate domestic producer, then we submit the answer is no; the investigating authority would not be permitted to rely on the increase in subject imports to justify an affirmative injury determination. In such a situation, the imports helped, not harmed, the domestic industry.

A somewhat harder question arises if there were other domestic producers from which the domestic (re-tooling) company could have sourced product during its temporary shut-down of manufacturing. On the one hand, if such other domestic producers existed, it would be correct to conclude that subject imports prevented other domestic producers from having a temporary increase in their sales during the re-tooling by the domestic company.

On the other hand, it far from certain that this fact alone could properly justify an affirmative finding of "significant" volume effects. In Korea's view, if the increase is simply to allow the same company to maintain its existing customer relationships, such an increase cannot be deemed significant.

The key is *context*. In most trade cases a significant increase in subject imports is evidence that the foreign exporters have taken away business from domestic producers. In the normal case, imports occur precisely because the particular company does not have a domestic manufacturing base, and must import. When the exporting company has a domestic manufacturing base, the analysis must be different. That is why Article 15.2 does not impose a numerical threshold. Some increases that might appear large at first impression, may well prove not to be "significant" when objectively considered in context.

* * * *

32. Is Korea arguing – as alleged by the US at para. 39 of its oral statement – that subject imports must be the sole cause of injury in order for the requisite causal link to be established between the subsidized imports and injury? If so, please comment on the finding of the Hot-Rolled Steel panel (DS184) that the USITC was not required to demonstrate that dumped imports alone caused material injury (para. 7.260 of that report).

GOK ANSWER: Nowhere has Korea argued that subject imports must be the sole cause of injury for the requisite causal relationship to be established between the subsidized imports and injury. Korea has argued, however, that causation must be established between subsidized imports and injury to the domestic industry. Causation is not clearly established where a competent authority has failed to undertake the appropriate analyses prescribed by the SCM Agreement. We believe the US allegation largely reflects its inability to accept the non-attribution requirement under Article 15.5 of the SCM Agreement; the same requirement under Article 3.5 of the Antidumping Agreement, and Article 4.2(b) of the Agreement on Safeguards that have been the subject of several Appellate Body determinations.[21] It misconstrues the obligation to separate and distinguish the effects of subsidized imports as a an argument by Korea that imports be the sole cause of injury. In sum, there can be cases where multiple causes are present and an affirmative injury finding is warranted. In other cases,

[21] *See United States -- Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan*, Report of the Appellate Body, WT/DS184/AB/R, 24 July 2001 ("*US - Hot-Rolled Steel*"), at para. 223; *United States -- Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Report of the Appellate Body, WT/DS202/AB/R, 15 February 2002, at para. 217; *United States -- Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Report of the Appellate Body, WT/DS166/AB/R, 19 January 2001, at para. 70*; United States -- Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Report of the Appellate Body, WT/DS177/AB/R, WT/DS178/AB/R,1 May 2001, at para. 179.

however, where a proper causation analysis is completed, including *inter alia*, a proper non-attribution analysis, it is possible to discern that imports are not a cause of material injury.

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33. Please comment on para. 431 of the US first written submission. Does Korea argue that the ITC should have "'isolate[d]' subject imports or the effects of the subject imports and other known factors on the domestic industry"? Please explain.

GOK ANSWER: At the outset we note the Korea never used the term "isolate" in the context of causation in its first submission. In addition to incorrectly stating Korea's position, the US is simply confusing the issue. Article 15.5 of the SCM Agreement states "authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry . . . ". More importantly, Article 15.5 states that "injuries caused by these other factors must not be attributed to the subsidized imports". This is the crux of the non-attribution requirement; the same requirement found in the Agreement on Safeguards at Article 4.2(b) and the AD Agreement at Article 3.5. In interpreting the identical language in Article 3.5 of the AD Agreement, the Appellate Body stated:

> In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. *If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors.* Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.[22]

In short, it is unclear what the US even implies by the word "isolate", nor is the issue relevant. Ultimately, an authority must ensure that injury caused by other factors is not attributed to imports. This may only be accomplished by separating causes, including imports, and distinguishing them. Offering assumptions about the effects of imports and other causes is insufficient. There must be an objective assessment and adequate explanation. Again, Korea is not advancing an argument that imports be a sole cause of material injury; but the effects of imports must be understood. As the Appellate Body clearly stated, "in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury . . . ".[23]

* * * *

34. Please comment on the US remarks regarding Korea's use of volume / market share data sources set forth at paras. 292-294 of the US first written submission.

GOK ANSWER: The US criticisms of the market share data relied upon by Korea are both wrong and disingenuous.

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[22] *US – Hot-Rolled Steel*, at para. 223 (emphasis added).
[23] *Id*.

The United States is wrong to allege that Korea compared a quantity-based market share figure for domestic shipments with a value-based market share figure for Hynix. A quantity measure -- billions of bits -- was used to derive the market share figures for subject imports, non-subject imports and domestic industry provided in Figure 9 of Korea's First Written Submission. In GOK Exhibit 62 we provide a "map" detailing how the market share figures were derived.

The USG is disingenuous when it states that Korea's estimate of non-Hynix subject imports is "troubling" because Korea did not take into account the fact that the record evidence demonstrated that there were 12 companies that had imported subject merchandise from Korea.[24] In fact, it is this argument by the USG that is troubling. Korea very much wanted to utilize the actual subject import volume in its arguments, but could not do so because the ITC made virtually the entire factual record confidential. The estimates that Korea provided were the best possible estimates given the constraints imposed by the United States.

The ITC's decision to make the entire record confidential, however, was not only not necessary to protect confidentiality but also was at tension with the ITC's own past practice. In virtually all other cases the ITC has followed a "three or more" rule. If three or more companies in a particular category (*i.e.*, importers) provided data, in all other cases the ITC has made the total of that category (*i.e.*, subject imports) public. The United States itself admits that there were 12 importers of the subject merchandise[25], yet the United States refuses to make available to the Panel and to Korea the actual quantity/market share of subject imports, arguing the need to preserve confidentiality.

In its first submission and at the first meeting with the Panel, the United States argued that under its "one company with 75% or two companies with 90% rule," it could not provide this data publicly.[26] We have two comments. First, nothing prevents the United States from providing this information to the Panel with a request for confidentiality. With the passage of time, the market sensitivity of volume, market share, and other information fades.

Second, under the US rule itself, the Panel can have a high degree of confidence that the portion omitted -- subject imports by the 12 importers other than Hynix itself -- is not material. Hynix is quite confident that during this period of time it was the largest importer of Hynix brand DRAMs. Hynix is not aware of -- nor was there any argument about -- large volumes of gray market imports by importers other than Hynix itself. If the Panel is willing to make this assumption -- or ask the United States for confirmation -- then the Panel can know with confidence that the Hynix-only figures are a reasonable proxy for the total figures that the United States has not yet disclosed.

Korea submits that there is no reason for there to be any data issues or disagreements in this case. There is no reason why the United States cannot provide the actual volume data so that both sides can argue about -- and the Panel can itself decide -- what the actual figures mean, rather than pointless criticisms of each other's estimates.

* * * *

35. Please comment on the US argument (para. 32 of its oral statement) that there is no obligation under the SCM Agreement for a brand-name analysis of price undercutting. If Korea disagrees, please indicate which provisions of the SCM Agreement provide for this obligation.

[24] US First Submission, at para. 293.
[25] *Id.*
[26] *Id.* at para. 297.

GOK ANSWER: Korea respectfully disagrees. Article 15.1 of the SCM Agreement requires a determination of injury to be based on positive evidence and involve an objective examination.

Article 15.2 requires a determination that price undercutting be "significant", and that the allegedly subsidized imports must have an "effect" on domestic prices. Korea submits that when the facts of a particular industry render a particular approach to price undercutting meaningless, that approach is no longer permissible under Article 15.2. Unless the particular approach allows an meaningful examination of "effect" and "significant", that approach can and should be found inconsistent with Article 15.2, read in light of Article 15.1 and Articles 15.4 and 15.5.

Article 15.4 requires that the examination of the impact of subsidized imports "shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry (emphasis added)", and specifically refers to "factors affecting domestic prices." Likewise, Article 15.5 requires "the demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities (emphasis added)," and footnote 47 links the price effects from Article 15.2 to the causation analysis under Article 15.5.

In this case, the ITC specifically recognized a number of key features of the global DRAM industry that were highly relevant to the issue of pricing, such that it was obliged to consider a brand-name analysis of pricing. Specifically, the ITC recognized:

- "The parties agreed that the increasingly global nature of the DRAMs market, both in terms of producers as well as purchasers, is an important consideration."[27]

- US producers own fabrication facilities in multiple other countries; major purchasers are "multinational computer equipment manufactures that source DRAMs and DRAM modules globally."[28]

- "The commodity nature of standard DRAMs and low transportation costs mean that DRAMs and DRAM modules can, and are, easily shifted from one customer location to another, or purchases shifted from one source to another . . . . The major DRAM producers can and do shift DRAMs and DRAM production to and from alternative markets."[29]

- Major PC OEMs (i.e., the largest consumer of DRAMs), "purchase products under contracts from multiple sources, including most if not all the major producers of DRAM products."[30]

- "Many responding purchasers reported differences between DRAMs and DRAM modules from different firms, but were unable to determine the country of fabrication."[31]

The ITC's public record further reveals that two of the four major producers were also US importers -- Infineon and Samsung.[32] The public record further reveals that Micron (also one of the

[27] ITC Final Determination, at 18, provided at GOK Exhibit 10.
[28] *Id*.
[29] *Id*.
[30] *Id*. at 22.
[31] *Id*. at II-8.
[32] *Id*. at 24.

big four producers) operated facilities in Italy, Japan, and Singapore.[33] Moreover, the ITC recognized that "non-subject imports increased market share by a substantially larger amount than subject imports"[34], and that the domestic industry exported a large and growing share of DRAM products production.

What these findings and information reveal is that: (1) a global industry exists dominated by four major producers, including Samsung, Micron, Infineon and Hynix; (2) DRAM products and production shift freely from location to location and source to source; and (3) brand is more important and certainly more recognizable than origin. These are relevant economic factors having a bearing on the US domestic industry and are relevant to the issue of causation and injury. Articles 15.2, 15.4, and 15.5 of the SCM Agreement require that they be examined, and that the examination be objective, consistent with Article 15.1 of the SCM Agreement.

Korea submits that the only objective examination of these factors as they relate to pricing, causation and injury in this particular case is to undertake a brand-name analysis of price undercutting. Not only is this the only objective means to explore price undercutting, but the fact remains that such an analysis was before the ITC. By the ITC's own admission, these factors and information were known; they could not be summarily dismissed.

[33] *Id*. at 18.
[34] *Id*. at 21.

ANNEX E-4

ANSWERS OF THE UNITED STATES TO THE PANEL'S QUESTIONS TO THE PARTIES FOLLOWING THE FIRST SUBSTANTIVE MEETING OF THE PANEL

9 July 2004

TREATMENT OF BUSINESS PROPRIETARY INFORMATION

The United States notes that, with one exception, the entire text of these answers and the accompanying exhibits is public information. The one exception is the US answer to Question 16 from the Panel, which contains business proprietary information ("BPI") derived from the BPI exhibits attached to Korea's first written submission. The BPI information in the answer to Question 16 is noted with double brackets and a bold font.

Consistent with the request made by Korea in its first written submission, the Secretariat and the Panel should treat the bracketed information in the answer to Question 16 as confidential.

Table of Reports Cited in These Answers

EC – Tube and Pipe Fittings	*European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, Report of the Panel, as modified by the Appellate Body, adopted 18 August 2003
EC – Tube and Pipe Fittings (AB)	*European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, Report of the Appellate Body adopted 18 August 2003
Thailand – H-Beams	*Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, Report of the Panel, as modified by the Appellate Body, adopted 5 April 2001
US – Hot-Rolled Steel	*United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, Report of the Panel, as modified by the Appellate Body, adopted 23 August 2001
US – Hot-Rolled Steel (AB)	*United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, Report of the Appellate Body adopted 23 August 2001
US – Lamb	*United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, Report of the Appellate Body adopted 16 May 2001
US – Steel Safeguards	*United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, Report of the Panel, as modified by the Appellate Body, 10 December 2003
US – Steel Safeguards (AB)	*United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS/258/AB/R, WT/DS259/AB/R, Report of the Appellate Body, adopted 10 December 2003
US – Wheat Gluten	*United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, Report of the Appellate Body adopted 19 January 2001

QUESTIONS TO THE UNITED STATES

Alleged Subsidization

1. At paras 235 and 236 of its first written submission, the US refers to "the Hynix bailout" as the "the subsidy program". What are the relevant constituent parts of that alleged subsidy programme?

1. The US Department of Commerce (DOC) found that the series of measures taken by the Government of Korea (GOK) – and the financial institutions that the GOK entrusted or directed – constituted a "single {subsidy} programme," the objective of which was "the complete financial restructuring of Hynix in order to maintain the company as an ongoing concern".[1] As such, the DOC's reference to the "single {subsidy} program" encompassed the GOK's policy and the resulting series of actions taken to support Hynix and prevent its failure from 1999 through the end of the DOC's period of investigation.[2] Specifically, the constituent parts of the subsidy program identified by the DOC included the 800 billion won syndicated loan, the KDB Fast Track bond program, the May 2001 restructuring package, the October 2001 restructuring package, and the benefits conferred by these and other financial contributions, such as D/A loans, made as part of the Hynix bailout.[3]

2. For each alleged financial contribution forming part of the "Hynix bailout" "program", please specify which private entities participated in that financial contribution, and what evidence of entrustment and/or direction the [DOC] relied on in respect of each of those private entities.

2. Figure US-4 contains a chart that lists the banks that participated in the four government-directed financial restructuring and recapitalization measures that made up the Hynix bailout. For the sake of completeness, it includes both public and private bodies that were government-owned and controlled, as well as other private bodies.

3. With respect to the evidence relied on in respect of each of the "private entities", the DOC did not engage in the type of bank- and transaction-specific analysis advocated by Korea. As previously explained, there is no basis in subparagraph (iv) of Article 1.1(a)(1) of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) for such an analysis.[4] Approximately 10-18 banks participated in each of the four bailout measures[5], and there were hundreds of individual financial contributions (*e.g.*, loans) made by each of these banks under the auspices of the four measures. An interpretation of subparagraph (iv) that would require explicit and/or formal evidence of government entrustment or direction to each bank with respect to each contribution would render the circumvention of subparagraph (iv) a simple matter.

4. The US first submission sets out in great detail the evidentiary basis for the DOC's finding of government entrustment and direction. The evidence showed that the GOK adopted an explicit policy to keep Hynix from failing. The evidence also showed that the GOK took affirmative actions to entrust and direct Hynix's creditors to provide financial contributions to Hynix during the period of

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[1] *Issues and Decision Memorandum* at 48 (Exhibit GOK-5); *see also First Written Submission of the United States of America* (May 21, 2004), para. 35, note 31 [hereinafter "US First Submission"].

[2] *Issues and Decision Memorandum* at 19-24 (Exhibit GOK-5).

[3] *See* US First Submission, paras. 127-151.

[4] *See* US First Submission, paras. 164-170.

[5] Because of the mandatory nature of the Corporate Restructuring Promotion Act and the options devised by the Creditors' Council, all of Hynix's creditors were required to participate in the October restructuring and refinancing of Hynix. This included the 18 banks listed in Figure US-4, as well as other small creditors, many of which were owned by one of the 18 major creditors.

investigation. The GOK did so by exercising control over Hynix's creditors in its multiple roles as lender, owner, legislator and regulator. When necessary, the GOK used coercion as a means of effectuating its Hynix policy. In some instances, the evidence is bank-specific; in other instances, the evidence is event-specific. In other instances, the evidence of government entrustment and direction is relevant on a program-wide basis or with respect to all Hynix creditors.

5. For example, some important evidence – such as a number of the quoted statements by GOK officials – was not linked either to specific events or banks. Nevertheless, such evidence established the GOK's role in entrustment or direction generally during the bailout period. Consider one such quoted statement by Deputy Prime Minister Jin Nyum, who stated, "[i]f Hynix says it needs an additional 1 trillion won, and if the creditor group cannot make a decision whether or not to provide additional support, the financial authorities [*i.e.*, the FSS, FSC and MOFE] should decide. We cannot simply leave it blindly to the creditor group".[6] This sort of key evidence was not particular to any one bank, but was directed more generally to all Hynix creditors.

6. On another occasion, an official from the Office of the President of Korea stated, "Hyundai is different from Daewoo. Its semiconductor and constructions are Korea's backbone industries. These firms hold large market shares of their industries, and these businesses are deeply-linked with other domestic companies. Thus, these firms should not be sold off just to follow market principles."[7]

7. The evidence before the DOC included official GOK documentation of high-level meetings and directives; GOK laws; the investigative report of Korea's Grand National Party investigation of the GOK's preferential policies for Hynix and other Hyundai Group *chaebol*; reports of direct meetings between GOK officials and Hynix/Hyundai creditors, confirmed by supporting documentation; sworn submissions to US and Korean regulatory agencies, and reports and website materials of Korean banks; numerous direct quotes from GOK officials in interviews and press conferences; public statements of Hynix's creditors; US Government reports; IMF and OECD reports; public statements of Hynix; book excerpts; newspaper reports; and the reports of scholars, analysts and experts on the GOK's control of the banks, direction of credit practices and Hynix's financial condition.

8. From this body of evidence, a reasonable, unbiased person could have reached the same conclusion as did the DOC; namely, that the GOK entrusted and directed Hynix's creditors to bail out the company.

3. With regard to paras 139 and 146 of the US first written submission, please list which Hynix creditors the DOC considered to be "government-owned and controlled", which were treated as "government-owned", which were designated as "majority-owned by the government", and which were treated as public bodies. Please explain how the US defines each of these terms for the purpose of these proceedings, and the consequential rationale for the designation made by the DOC with respect to each of the relevant entities.

9. Paragraphs 139 and 146 discuss the dominant role played by the government-owned and controlled banks in both the May and October restructurings. The "government-owned and controlled" designation refers to: (A) creditors that the DOC found to be "public" bodies, *and* (B) to "private" creditors in which the GOK had 100 per cent ownership or was the single largest

[6] *Deputy Prime Minister Chin, "Government will Take Actions to Turn Around Hynix,"* KOREA ECONOMIC DAILY (4 August 2001) (translated version) (Exhibit US-118). Apparently realizing his excessive candor, Jin quickly added: "This should not be viewed as if the government is running the financial sector. It is not." *Id*.

[7] *The State Activism toward the Big Business in Korea, 1998-2000: Path Dependence and Institutional Embeddedness*, Jiho Jang, University of Missouri-Columbia (April 2001) (Exhibit US-17).

shareholder, and KFB (the GOK was not the largest single shareholder in KFB, but did own 49 per cent). Figure US-4, provided in response to Question 2, above, describes the basis for such classification (*i.e.*, the percentage of GOK ownership).

10. Through its administrative practice, the DOC has developed criteria to assess whether an entity should be considered a public body for purposes of a countervailing duty investigation. The relevant factors considered by the DOC are: (1) government ownership; (2) government presence on the entity's board of directors; (3) government control over the entity's activities; (4) the entity's pursuit of governmental policies or interests; and (5) whether the entity is created by statute.[8] In the DRAMs investigation, the DOC evaluated these factors in light of the evidence, and determined that the Korea Development Bank (KDB), the Industrial Bank of Korea (IBK) and other "specialized" banks in Korea were "government authorities"; *i.e.*, public bodies.[9] Consistent with Article 1.1(a)(1) of the SCM Agreement, the DOC treated financial contributions made by these government authorities as direct financial contributions by the GOK.

11. The designation "majority owned by the government" refers to those financial institutions in which the GOK was the majority shareholder at the time of the Hynix bailout, that is those banks in which the GOK had greater than 50 per cent ownership. In other words, it is a subset of "private" entities "owned and controlled" by the GOK (*i.e.*, in Figure US-4, every bank in Group B except the KEB and the KFB). Under its general practice, the DOC does not automatically treat an entity as a "government authority" merely because the government has an ownership stake in the entity (even a significant ownership stake).[10] In this case, the DOC found that the GOK majority-owned financial institutions did not meet the criteria for a "government authority." Therefore, the DOC had to determine whether the GOK entrusted or directed these entities to make financial contributions to Hynix.

12. Government ownership in an entity does, of course, have significance beyond the mere technical issue of how to treat financial contributions by the entity in a countervailing duty investigation. The mere fact that an entity is not treated as a public body does not mean that a government cannot or does not exercise control or substantial influence over it through its voting rights as a shareholder. In the DRAMs investigation, the DOC found that the GOK's ownership rights and privileges were in no way limited, and that as the single largest shareholder (or significant shareholder in the case of KFB) it was able to entrust and direct these banks.

4. Did the DOC find that "government-owned and controlled" banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?

5. Did the DOC find that "majority-owned by the government" banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?

6. Did the DOC find that "government-owned" banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?

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[8] *See* US First Submission, para. 55, note 75; *Issues and Decision Memorandum* at 16 (Exhibit GOK-5).

[9] For purposes of domestic law, the DOC uses the term "government authority" instead of "public body."

[10] Korea has not challenged the DOC's designations of financial institutions as either public or private bodies. We note, however, that the approach taken by the DOC was conservative. Under Article 1.1(a)(1) of the SCM Agreement, the DOC reasonably could have considered as "public bodies" those Hynix creditors that were wholly-owned or majority-owned by the GOK.

13. The United States is answering Questions 4-6 together.

14. As discussed in response to Question 3 above, The "government-owned and controlled" designation refers to: (A) creditors that the DOC found to be "public" bodies, *and* (B) to "private" creditors in which the GOK had 100 per cent ownership or was the single largest shareholder, and KFB.

15. For purposes of Article 1.1(a)(1), a "public body" is treated in the same manner as a "government". Nevertheless, depending upon the facts of a particular case, one may accurately refer to such public bodies as being owned and controlled by the government. In its *Final Determination*, the DOC found that financial contributions provided by public bodies – such as the KDB – were direct.[11] In other words, the DOC did not find, nor did it need to find, government entrustment or direction of the entities it found to be "public". However, the DOC did find that "public" Hynix creditors – the KDB in particular – played a significant role in the GOK's direction of the "private" Hynix creditors.[12]

16. The DOC found that all Hynix's "private" creditors were entrusted and directed by the GOK. These "private" entities included both the "government-owned and controlled" private entities (Group B in Figure US-4) and other private entities (Group C in Figure US-4).

17. The designation "government owned and controlled private entities" encompasses entities that are 100 per cent GOK-owned, majority GOK-owned (*i.e.*, GOK ownership greater than 50 per cent), those in which the GOK was the single largest shareholder, and KFB in which the GOK ownership was significant (*i.e.*, 49 per cent) .

18. The DOC did *not* find specifically that government-owned and controlled private entities "were instruments through which the GOK entrusted/directed other entities". Rather, the DOC found, for example, that the GOK exercised control over Hynix's creditors generally through government-owned and controlled banks, because those banks played a dominant role in the Creditors Councils. The voting rights in the Councils were based on the total credit exposure to Hynix. In both the May and October restructurings, the credit exposure of the government-owned and controlled banks far exceeded that of all other banks.[13]

19. The GOK has not disputed that government-owned and controlled banks had a significant presence in Hynix's Creditors Councils. These banks could and did set the terms of the financial restructurings in May and October. The May Creditor's Council consisted of only 17 banks. The government-owned and controlled banks accounted for over 70 per cent of the voting rights in that council. While their voting rights were somewhat lower at the October restructuring, the terms of the restructuring were set by the same 17 banks, with the addition of Citibank, before the full Creditors' Council met to vote on the final package.[14] Even if other private banks (*i.e.*, those private entities not owned and controlled by the GOK (Group C in Figure US-4)) had desired an alternative outcome or financing based on different terms, they would have been incapable of bringing it about.

7. Assume a government announces publicly that it is going to restructure a bankrupt industry and that, although it would prefer to do so with the assistance of private investors, it would do so on its own if necessary. Assume that private investors decide to participate in that restructuring, purely on the basis of the government's statement that it is going to keep that

[11] US First Submission, para. 55; *Issues and Decision Memorandum* at 15-16 (Exhibit GOK-5).
[12] *See* US First Submission, paras. 55-78.
[13] *Issues and Decision Memorandum* at 53 and notes 18-20 (Exhibit GOK-5).
[14] *Hynix Verification Report* at 16 (Exhibit US-43).

industry afloat. Leaving aside issues of benefit concerning the terms of the restructuring, should an investigating authority find that those private investors had been entrusted or directed by the government to participate? Why, or why not?

20. As both Korea and the United States have previously stated, the focus of the financial contribution element in the definition of "subsidy" under Article 1.1 of the SCM Agreement is on the action of the government in making the financial contribution. The Panel's question posits that private investors decide to participate in a restructuring on the basis of the government's statement that it is going to keep a particular industry afloat. In determining whether there is a financial contribution – and more specifically under subparagraph (iv) of Article 1.1(a), whether the government entrusted or directed private actors to carry out a financial contribution function – the motives of private investors are not germane.

21. Whether a particular government action amounts to entrustment or direction is an evidentiary question. The Panel's hypothetical posits merely that a government announces that it is going to restructure a bankrupt industry and it would prefer to do so with the assistance of private investors. The general government pronouncement posited by the Panel would not appear to evince government entrustment or direction under subparagraph (iv), which requires consideration of whether a government "gave responsibility to", "ordered", or "regulated the activities of" private bodies to "carry out" financial contribution functions, such as the transfer of funds.

22. Needless to say, the facts in this case do not involve general government pronouncements. As set forth in detail in our first submission, the record evidence shows that the GOK adopted an explicit policy to keep Hynix from failing. The evidence also shows that the GOK took affirmative actions to entrust and direct Hynix's creditors to provide financial contributions to Hynix during the period of review. The GOK did so by exercising control over Hynix's creditors in its multiple roles as lender, owner, legislator and regulator. The evidence also showed that, where necessary, the GOK engaged in coercion as a means of effectuating its Hynix policy.

23. The DOC's record consists of thousands of pages of evidence, including official GOK documents of the GOK's formal decision to assist Hynix in Economic Ministerial level meetings; the meeting minutes of the FSC; known GOK planning and meetings on the Hynix case; known reported meetings between the GOK, Hynix and its creditors; public statements by GOK officials; sworn statements by Hynix creditor banks admitting GOK entrustment or direction to the US Securities and Exchange Commission; memoranda of understanding (MOUs) between the government and the government-invested banks that permitted the GOK to fire bank officials; other statements or documents by Hynix creditors corroborating GOK entrustment or direction; multiple examples of GOK threats and coercive tactics; many observations by third party observers; the GOK's pervasive ownership and control of the banks; direct lending by the GOK through the KDB; and the coordination of the bailout by the KEB, the GOK's officially designated lead bank.

24. The record in this case thus paints a very different picture from the hypothetical posed by the Panel. This was not a situation where the GOK said to the banks: "We, the GOK, are going to bail out Hynix and we do hope you join us." Instead, this was a situation where the GOK effectively told the banks: "If you know what's good for you, you are going to help us bail out Hynix".

25. Moreover, to resolve this dispute, it is not necessary for the Panel to articulate, in the abstract, the precise quantum or type of evidence necessary to support a finding of government entrustment or direction. Instead, the Panel's task is much more straightforward. The Panel need only consider whether the DOC's conclusion – that the GOK entrusted and directed Hynix's creditors to bail out the financially distraught Hynix – was reasoned and adequate in light of the totality of the evidence before it. The United States submits that the DOC's conclusion meets this standard.

8. Please comment on Korea's assertion (para. 51 of its oral statement) that many creditors "walked away" from the October 2001 restructuring. Doesn't this suggest that those creditors were able to act independently of any GOK desire to restructure Hynix? Please explain.

26. The statement that certain creditors "walked away" from the October restructuring implies that Hynix's creditors had real choices in determining to what extent, if any, they would participate in the financial restructuring. The United States disagrees with the GOK's characterization of the three options available to Hynix's creditors.[15]

27. The three options available to Hynix creditors were:

(1) extend new loans to Hynix, convert a portion of their unsecured Hynix debt to equity, and extend maturities on the remainder;

(2) withhold new loans, convert 100 per cent of secured loans and 28.46 per cent of unsecured loans to equity, and forgive the remainder; or

(3) choose not to provide new loans or to convert loans into equity shares, and instead agree to convert a portion of their loan balances into five-year debentures at zero per cent interest. The portion converted into debentures was calculated based on 100 per cent of the secured loans and 25.46 per cent of the unsecured loans, based on the liquidation value of the company.

28. First, due to the requirements of the Corporate Restructuring Promotion Act (CRPA) under which the October bailout was conducted, no creditors were permitted to "walk away" from the October 2001 restructuring.[16] The CRPA applied to all conceivable forms of creditors and made participation in the Creditor Council mandatory.[17] Thus, as a result of the CRPA, all of Hynix creditors were forced to participate in the October restructuring. Hynix creditor banks had to select one of the three options listed above, and had to abide by the terms of the decision dictated by the banks that accounted for 75 per cent of Hynix's debt. As the United States noted in its first submission, "the CRPA gave Hynix's largest creditors – *i.e.*, the specialized banks and those owned and controlled by the GOK – the power to dictate restructuring terms to all other Hynix creditors."[18] In other words, no bank was free to make an independent deal with Hynix, nor was any bank able to force Hynix into liquidation. There was no "fourth way."

29. Second, it is misleading for the GOK to characterize "Option 3" as a "walk-away" provision. The GOK states that Option 3 was to "exercise appraisal rights against their outstanding debt based on the liquidation value of the company, as determined by an independent auditor, and walk away".[19] Contrary to the GOK's assertions, however, the banks that elected Option 3 did not, and could not, just "walk away".

30. The ongoing relationship between the Option 3 banks and Hynix was not a matter of liquidating and walking away. Nor did creditors obtain "what they could have obtained in

[15] *See* US First Submission, paras. 88-93.

[16] It is important to note that the CRPA was enacted just prior to the October restructuring measures, with Hynix and other Hyundai Group companies as the most visible pending bankruptcies. US First Submission, para. 84. The CRPA was meant to improve on the voluntary Credit Restructuring Agreement (CRA) system, which had been roundly criticized by GOK officials because it permitted creditors to refuse to participate in corporate restructurings. *GOK Verification Report* at 7-8 (Exhibit US-12).

[17] Corporate Restructuring Promotion Act, Article 2.1 (Exhibit US-51).

[18] US First Submission, para. 88.

[19] Korea First Submission, para. 353.

liquidation".[20] Instead, the relationship between the Option 3 banks and Hynix consisted of five elements that distinguished this situation from a typical liquidation process:

- First, as part of the CRPA processes described above, these banks had no independent rights to seek or establish the value of their outstanding credit to Hynix. Rather, their rights were dictated to them by the government-owned banks and the rest of the blocking majority on the Creditor Council.[21]

- Second, the banks were foreclosed from even seeking liquidation. Under the terms of the CRPA, at the request of the lead creditor bank, the Financial Supervisory Service (FSS), a government agency, could stop creditors that wanted to seek liquidation from exercising their rights to call loans and to move companies into receivership. In the case of Hynix, the FSS did request that banks refrain from exercising their creditor rights.[22]

- Third, two of the Option 3 banks, Kyongnam and Kwangju, were 100 per cent government-owned banks and were merged with another 100 per cent government- owned bank, Hanvit, in April 2001, to form Woori Financial Holdings.[23] As a result, there was no need for the GOK to funnel new money through these two banks (which had ceased to have separate legal identities, in any event), because Woori had already committed to assist Hynix by selecting Option 1.

- Fourth, as part of the recapitalization process, banks were subject to intense pressure from the GOK. Among other things, MOUs associated with the recapitalization of banks permitted GOK control over the hiring and firing of bank officials.

- Fifth, and most important, Korea implies that the banks were paid the liquidation value of their loans and that was the end of their relationship with Hynix. *Not true.* These banks were forced to accept an IOU in the form of an interest-free Hynix debenture that would not mature for another five years; *i.e.*, in 2006. In other words, the four banks selecting Option 3 (which, in any event, represented only a small fraction of total Hynix loans) *are still waiting to be paid*.

In sum, the choices available to the creditors at the October 2001 restructuring were clearly designed to ensure the continued survival of Hynix, at the expense of Hynix's creditors.[24]

9. The US argued at the first substantive meeting that KFB was "brought into line" after initially resisting GOK efforts to require it to participate in the Hynix restructuring. Korea denies this, arguing that KFB ultimately did not participate in the October 2001 restructuring. Please comment.

31. First, it should be clarified that KFB *did* participate in the October 2001 restructuring. Indeed, under the terms of the CRPA, KFB did not have the legal right to refuse to participate in the October restructuring. (See Answer to Panel Question 8, above.) KFB chose Option 3 which meant that it received a zero coupon bond amounting to 100 per cent of its secured loans and 25.46 per cent of its unsecured loans based on the estimated liquidation value of Hynix. KFB was forced to write off

[20] Korea Oral Statement, para. 51.
[21] US First Submission, para. 88.
[22] *GOK Verification Report* at 19 (Exhibit US-12).
[23] *GOK Verification Report* at 6 (Exhibit US-12).
[24] US First Submission, para. 90 ("This means that the option 3 banks will not actually receive what they were able to salvage from their loans to Hynix until 2006 and will not earn any interest on the money that is owed to them by Hynix, hardly a real choice.")

the remainder of its loans under the terms of the CRPA. Three other banks also selected Option 3. In total, these banks forgave 234,000 million won, and took 81,000 million won in the form of the zero coupon bonds. This provided a considerable benefit to Hynix. Moreover, the KFB participated in other key parts of the subsidy program, including the Syndicated Loan, and the May restructuring.

32. Second, there was ample evidence in the DOC record demonstrating that the GOK applied considerable pressure both publicly and privately on KFB to ensure that KFB continued to participate in assisting Hynix.[25] Among other things, the GOK pulled $77 million in deposits out of KFB after KFB balked at participating in the KDB Bond Program for Hynix; threatened to have government agencies cease all business with KFB; and threatened to have KFB's clients terminate their relationship with KFB.

10. The US asserted at the first substantive meeting that creditors were required to participate in the October 2001 restructuring by virtue of the CRPA. Was such alleged mandatory participation relied on by the DOC as evidence of entrustment and/or direction? If yes, please indicate where this issue is addressed in the DOC's determination. If not, why not?

33. The DOC did not find that mandatory participation under the CRPA constituted, in and of itself, entrustment or direction. Rather, the DOC found that the GOK used the CRPA as a vehicle to effectuate the GOK's Hynix policy.

34. As explained in our first submission, the CRPA gave Hynix's largest creditors – *i.e.*, the specialized banks and those banks owned and controlled by the GOK – the power to dictate restructuring terms to all other Hynix creditors. Hynix's Creditors' Council, dominated by specialized banks and government-owned and controlled banks, determined that: (1) no creditor would have the option to call in its debt, (2) no creditor would have the option to walk away without penalty, and (3) no creditor would have the option to remain an interest-earning creditor without extending new loans or forgiving significant debt on terms favorable to Hynix. The DOC found that these "choices" were extremely limited and highly favorable to Hynix, essentially keeping Hynix from complete bankruptcy. Furthermore, the terms of those "choices" were dictated by Hynix's government-owned and controlled creditors.[26]

35. During the investigation, the GOK conceded that the CRPA was introduced by the National Assembly "to make sure that the banks could not avoid participating in workouts".[27] Under the CRPA, all creditor banks were obligated to participate in the workout system.[28] The DOC found that this "provided the dominant GOK-owned and controlled [banks] with the ability to establish the financial restructuring terms over many more creditors".[29]

36. Thus, the evidence before the DOC showed that enactment of the CRPA considerably leveraged the GOK's already considerable power over Hynix's creditor banks. First, by naming Hynix's principal transactions bank as head of the council, the GOK positioned itself to take full advantage of the KEB's longtime role as agent and facilitator of government credit and management

[25] For a description of the GOK's coercive tactics with respect to KFB, see US First Submission, paras. 105-113.

[26] *Preliminary Determination*, 68 Fed. Reg. at 16776 (Exhibit GOK-4); *Issues and Decision Memorandum* at 55 (Exhibit GOK-5).

[27] *Issues and Decision Memorandum*, at 53, n.19 (Exhibit GOK-5); *Government of Korea Verification Report* at 8 (Exhibit US-12).

[28] *Issues and Decision Memorandum* at 53, n.19 (Exhibit GOK-5).

[29] *Issues and Decision Memorandum* at 53, n.19 (Exhibit GOK-5).

decisions.[30] Second, the law made all creditors of an ailing firm subject to the Council's authority.[31] This requirement left KFB and other banks with non-GOK ownership little option but to participate in any restructuring and recapitalization measures.

11. With regard to the May and October 2001 restructurings, the parties have referred to option 3 as the exercise of "appraisal rights". Please comment. Was the exercise of appraisal rights any different from liquidation? Please explain.

37. First, we note that an exercise of "appraisal rights" only applied to the October bailout, because the May bailout involved only new lending and the restructuring of the payment terms on existing debt.

38. With respect to the October bailout, the four banks that selected Option 3 converted a portion of their loan balances into five-year debentures at zero per cent interest. The portion converted into debentures was calculated based on 100 per cent of the secured loans and 25.46 per cent of the unsecured loans, based on the liquidation value of the company. This conversion amounted to 81 million won. These banks wrote off all of the remaining loans to Hynix amounting to 234,000 million won.

39. The GOK has characterized this option as an exercise of appraisal rights, presumably because the amounts that were converted to five year zero coupon debentures (and consequently the amounts written off) were determined by reference to some estimated liquidation value of the company. However, Option 3 was not the same thing as a true exercise of appraisal rights as would be contemplated in a liquidation. Under a true exercise of appraisal rights, creditors would receive payment for some negotiated portion of their outstanding credit to the liquidated company. In this case, the Option 3 banks had no control over the amount of the liquidation value, nor what portion of that value they would recover. All of this was under the control of the GOK-owned and controlled banks, which dominated the Creditors Council. Moreover, the GOK, through the FSS, could prevent a creditor from exercising its creditor rights to call loans and to seek liquidation value. Most importantly, the Option 3 banks were *never paid* the liquidation value. Instead, they were given an IOU in the form of zero interest debentures that will not even come due until 2006. As explained in the answer to Question 8, above, in no way can Option 3 be considered the same as a liquidation.

12. The US asserted at the first substantive meeting that this case is not about a comparison of different WTO Members' restructuring frameworks. At para. 21 of its oral statement, however, the US seems to have argued that an investigating authority could reasonably have found that a reasonable investor would not have invested in Hynix because it was "technically insolvent". Doesn't this suggest a per se rule that all "technically insolvent" companies should be liquidated? Please explain.

40. In paragraph 21, the United States was discussing the issue of "benefit" and how Hynix's abysmal financial picture affected the calculation of the benefit. In its investigation, the DOC examined whether Hynix was equityworthy as a means to determine whether GOK-directed financial contributions, in the form of equity infusions, provided a benefit. This test is specifically foreseen in

[30] *Issues and Decision Memorandum* at 56-57 (Exhibit GOK-5); *Hynix Verification Report* at 13-14 (Exhibit US-43).

[31] *See* CRPA, Article 2 (Exhibit US-51); *Hynix Verification Report* at 16 (Exhibit US-43); and *Foreign Banks Required to Attend Creditor Meetings for Ailing Firms*, Korea Times (July 22, 2001) (Exhibit US-52). A Ministry of Finance official stated that: "[w]e've decided to force all creditor financial institutions to take part in the meetings in order to prevent some of them from refusing to attend and pursuing their own interests by taking advantage of bailout programmes." *Id.* Thus, this law was not intended to modify the behaviour of domestic banks, which already felt compelled to attend all such meetings.

paragraph (a) of Article 14 of the SCM Agreement. The DOC concluded that such financial contributions provided a benefit to Hynix given that no "reasonable private investor" would have purchased equity from Hynix as Hynix was unequityworthy. As mentioned in paragraph 21, Hynix's technical insolvency was one factor, along with its staggering losses and the worsening conditions in the DRAMs industry, supported this conclusion. However, the DOC did not inquire into whether "technical insolvency" warranted liquidation, as this was not a relevant issue in the DRAMs investigation.

13. At para. 17 of its oral statement, the US refers to alleged pressure on credit rating agencies. Is this evidence of entrustment / direction of private creditors? If not, what is the relevance of this evidence to the DOC's determination of subsidization? Please explain.

41. Credit rating agencies obviously are not Hynix creditors. Nevertheless, the pressure put on the credit rating agencies to refrain from lowering Hynix's credit ratings was illustrative of the extent to which the GOK was willing to intervene in the normal workings of the market to effectuate its policy of keeping Hynix afloat. This evidence also enhanced the credibility of the evidence indicating that the GOK engaged in coercion with respect to Hynix's creditor banks.

14. At para. 18 of its oral statement, the US refers to KEB's rationale for participating in the May and October 2001 restructurings. Is it surprising that a public body would act on the basis of social and economic policy considerations? Why does the fact that a public body creditor acted on non-commercial principles necessarily mean that other private body creditors also did so?

42. No, it is not surprising that a public body would act on the basis of social and economic policy considerations, although that, of course, does not alter the disciplines that WTO Members have accepted in the SCM Agreement. However, the DOC did *not* find that the KEB – the Korea Exchange Bank – was a public body. Instead, the DOC found that KDB, the IBK, and other specialized banks were public bodies.[32]

43. The United States understands how confusion might arise as to whether the KEB was a public body. The KEB was the GOK's designated lead bank and the head of Hynix's creditor council, the GOK was its single largest shareholder, the GOK regularly intervened in its management, and the GOK heavily capitalized the bank. The fact remains, however, that the KEB was a private entity, and, as such, would normally not be expected to articulate the government's national economic and social policy concerns in deciding to assist Hynix. That it did, and that the GOK expressly ordered it to carry out its Hynix policy "perfectly" and required it to coordinate the actions of Hynix's creditors, was simply further evidence that the GOK entrusted or directed the KEB and the other private Hynix creditors to assist Hynix.

Alleged Injury

15. At para. 316 of its first written submission, the US states that the ITC explained that although it opined that "the use of bits as a unit of measurement [could] present difficulties for [its] analysis", it nevertheless found that the absolute volume of subsidized subject imports and the increase in that volume relative to US production and consumption was "significant".

(i) What were the reasons why the ITC nevertheless found that the absolute volume of subsidized subject imports and the increase in that volume relative to US production and consumption was "significant"?

[32] *See* US First Submission, paras. 55-56 and note 77.

(ii) Where were those reasons set forth in its Determination and Views (Exhibit GOK-10) (or any other relevant document)?

(iii) The last paragraph of page 21 of the ITC's Determination and Views states that the ITC's "findings about the volume of subject imports are reinforced by the substantial degree of substitutability between subject imports and domestic shipments". If the finding that the absolute volume of subsidized subject imports is significant is "reinforced" by considerations of substitutability, what is the initial basis for that finding? In other words, what is the initial basis that is then "reinforced" by considerations of substitutability?

44. The ITC based its volume analysis on data from confidential questionnaire responses that were reported in terms of billions of bits.[33] As the question indicates, the ITC recognized that use of bits as a unit of measurement could present difficulties, given that total bits are a function of chip density and product mix.[34] It is true that one would expect volume increases in the DRAMs industry if volume is measured in terms of bits, to the extent that total bits are a function of chip density and product mix, both of which changed over the period of investigation as demand for DRAM products continued to increase and as producers continued to move to higher density products.[35] The ITC explicitly recognized this reality.[36]

45. Nevertheless, bits were clearly the best possible unit of quantity in the DRAMs market. The ITC has consistently relied on bits as a unit of measurement in prior investigations involving DRAMs and synchronous random access memory semiconductors ("SRAMs"). As the ITC stated, "total bits are a uniform measure of the quantity of DRAM products."[37] Given the constant development of new product types in the DRAM market, measuring volume in terms of units rather than bits would yield a meaningless comparison. For example, were the ITC to compare the number of units of 64 Mb chips produced in 2000 with the number of 128 Mb chips produced in 2002, it would be comparing apples with oranges. Reliance on bits, as the ITC stated, was the only means of ensuring consistency across time periods.[38] Indeed, when asked at the Commission's hearing about the use of bits as the unit of measurement for volume in this industry, Hynix's witness (Mr. Tabrizi) agreed that bits was an appropriate measure.[39]

(1) The ITC found that the volume of subject imports absolutely and the increase in that volume over the period of investigation absolutely and relative to production and consumption in the United States was "significant".[40] Thus, the ITC used both absolute and relative measures of import volume. By their very nature, the relative comparisons addressed the concerns inherent in the use of absolute data associated with ever-increasing product densities over time. Under both types of measures, subject import volume increased between 2000 and 2002, as set forth in the ITC's final determination. The absolute volume of subsidized subject imports increased between 2000 and 2001 and between 2001 and 2002.[41] The ratio of subsidized subject imports to US production increased between 2000 and 2001.[42] While this ratio declined between 2001 and 2002, it was still higher than

[33] *See, e.g.*, USITC Pub. 3616 at 20 (Exhibit GOK-10).
[34] *See, e.g.*, USITC Pub. 3616 at 20 (Exhibit GOK-10).
[35] *See, e.g.*, USITC Pub. 3616 at 15 & n.92, 20 (Exhibit GOK-10).
[36] *See, e.g.*, USITC Pub. 3616 at 20 (Exhibit GOK-10).
[37] *See, e.g.*, USITC Pub. 3616 at 20 (Exhibit GOK-10).
[38] *See, e.g.*, USITC Pub. 3616 at 20 (Exhibit GOK-10).
[39] *See, e.g.*, Hearing Transcript at 250 (Exhibit US-122). Korea also agrees that this is an appropriate unit of measurement. *See* Korea First Submission, para. 91.
[40] *See, e.g.*, USITC Pub. 3616 at 20 (Exhibit GOK-10).
[41] *See, e.g.*, USITC Pub. 3616 at 20, Tables IV-4, C-1 (Exhibit GOK-10).
[42] *See, e.g.*, USITC Pub. 3616 at 21, IV-3 (Exhibit GOK-10).

the ratio in 2000.[43] The ratio of subsidized subject imports to US shipments of DRAM products increased between 2000 and 2001, and also increased between 2001 and 2002.[44]

46. In terms of their share of apparent domestic consumption, subsidized subject imports increased their market share between 2000 and 2001 while the domestic industry was losing market share.[45] Both subsidized subject imports and the domestic industry lost market share between 2001 and 2002.[46] Although subsidized subject imports' market share declined between 2001 and 2002, the ITC ascertained that subsidized subject imports' market share in 2002 was still significantly higher than in 2000.[47] Moreover, subsidized subject imports' maintained their market share better than the domestic like product between 2001 and 2002 at a time when growth in demand was slowing.[48]

47. The ITC also considered the weight to accord interim 2003 data. Based on an examination of monthly shipment data reported by Hynix for the period January 2002 to March 2003, the ITC determined that the change in the volume of subsidized subject imports since the filing of the petition in November 2002 was related to the pendency of the investigation. Therefore, the ITC reduced the weight accorded to the data for the period after the filing of the countervailing duty petition (*i.e.*, the interim 2003 data). It noted that this finding was not inconsistent with record information showing an increase in the volume of subsidized subject imports from Korea between 2000 and 2001, after the October 5, 2000, revocation of the previous antidumping duty order on DRAMs from Korea and the restraining effects that it may have had on subject imports from the Hynix companies.[49]

(2) In its final determination, the ITC did not simply list these volume figures and trends. As the panel recognized in *Thailand – H-Beams*, it is important for investigating authorities to go an additional step. The panel in that report observed that "the authorities went beyond a mere recitation of trends in the abstract and put the import figures into context".[50]

(3) There is no abstract way to determine whether a given volume or a given increase in that volume absolutely or relative to domestic production or consumption is "significant". The answer to this inquiry will vary depending on the characteristics of a particular industry and the conditions of competition. Thus, it is logical that the SCM Agreement does not specify any absolute volume or any increase in volume absolutely or relative to domestic production or consumption that by definition is "significant".[51]

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[43] *See, e.g.*, USITC Pub. 3616 at 21, IV-3 (Exhibit GOK-10).
[44] *See, e.g.*, USITC Pub. 3616 at 21 n.138, Table IV-5 (Exhibit GOK-10).
[45] *See, e.g.*, USITC Pub. 3616 at 20, 26, Table C-1 (Exhibit GOK-10).
[46] *See, e.g.*, USITC Pub. 3616 at 20, 26, Table C-1 (Exhibit GOK-10).
[47] *See, e.g.*, USITC Pub. 3616 at 20, Table C-1 (Exhibit GOK-10).
[48] *See, e.g.*, USITC Pub. 3616 at 20, 21, 24, 26 & n.174, Tables IV-4, IV-5, C-1 (Exhibit GOK-10).
[49] *See, e.g.*, USITC Pub. 3616 at 21 & nn.140-41, Table IV-3 (Exhibit GOK-10).
[50] *Thailand – H-Beams*, para. 7.170.
[51] Indeed, the only purely quantitative measure in the SCM Agreement that has anything to do with volume is the reference in SCM Agreement Article 11.9 and SCM Agreement Article 15.3 to the volume of imports that is "not negligible". Unlike in the counterpart provision of Article 5.8 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), "negligible" is not more specifically defined in either of these SCM Agreement provisions. Even in the context of the AD Agreement, "negligible" is not defined by reference to domestic market share or production. *See* AD Agreement Article 5.8.

Negligibility was never an issue raised by any of the parties in the underlying agency proceeding. As the ITC determined, "[n]egligibility is not an issue in this investigation because subject imports from Korea constituted *** per cent of total imports of DRAMs in the most recent twelve months prior to the filing of the petition for which data are available, and are thus not negligible." *See, e.g.*, USITC Pub. 3616 at 14 n.79 (Exhibit GOK-10). Korea does not make any argument that the volume at issue in this case is "negligible" under either Article 11.9 or 15.3 of the SCM Agreement.

(4) Consistent with the approach endorsed by the panel in *Thailand – H-Beams*, the ITC took the additional step and put the import figures and trends into the factual context of the DRAMs industry and the facts of this particular investigation. Specifically, the ITC explained why the absolute volume of subsidized subject imports and the increases in that volume both absolutely and relative to production and consumption in the United States were "significant" in this investigation. The ITC stated that "[o]ur findings about the volume of subject imports are reinforced by the substantial degree of substitutability between subject imports and domestic shipments ...".[52]

48. Korea does not contest the high degree of substitutability between subsidized subject imports and domestic shipments.[53] DRAMs of similar density, access speed, and variety (standard DRAM, VRAM, SGRAM, etc.) were generally interchangeable regardless of country of fabrication, and substitutability also existed between similarly configured DRAMs of different density, but to a more limited degree. Interchangeability existed among different varieties of DRAMs and among those with different addressing modes/access speeds, but often only if substitution occurred during the design of the electronic system.[54]

(5) It was appropriate for the ITC to consider substitutability in its volume analysis. Whether a product is fungible and price sensitive, or whether the market is highly differentiated can be relevant in assessing the significance of a given import volume or of a given increase of import volume absolutely or relative to domestic production or consumption. In the instant investigation, involving a completely fungible commodity, a given volume or a given increase of import volume absolutely or relative to domestic production or consumption is more harmful than in other cases involving highly differentiated products, because it is more likely to have a direct impact on the market particularly in terms of purchasers' willingness to switch to or increase their purchasing of subsidized subject imports, and/or use the low price of subsidized subject imports as leverage to extract lower prices.[55] This is a factual determination properly made by the investigating authorities. As the ITC determined, "[t]he commodity-like nature of domestic and subject imported DRAM products magnifies the ability of a given volume of imports to impact the domestic market and industry".[56]

49. Therefore, the ITC concluded that it was the high degree of substitutability between the subsidized subject imports and the domestic DRAM products that made the subsidized subject import volume and the increases in that volume both absolutely and relative to domestic production and consumption "significant" in this investigation, even in an industry where increases in volume measured in billions of bits might be expected.

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[52] *See, e.g.*, USITC Pub. 3616 at 21 (Exhibit GOK-10).

[53] With respect to the degree of interchangeability between subsidized subject imports and domestic DRAMs products, 19 of 21 responding producers and importers reported that subject and domestic DRAMs products were generally used interchangeably, and 22 of 23 reported no important differences in product characteristics or sales conditions between them. The ITC found that throughout the period of investigation, Hynix produced many of the same product densities as domestic producers. Moreover, subject imports and domestic DRAM products were sold largely to the same customers and through the same channels of distribution. *See, e.g.*, USITC Pub. 3616 at 22-23 & nn.145-147, II-1 to II-3 & n.3, II-4 to II-7, Tables II-1 to II-3, V-3 (Exhibit GOK-10).

[54] *See, e.g.*, USITC Pub. 3616 at 22, I-8 to I-10 (Exhibit GOK-10); Hearing Transcript at 36-37, 53, 70-75, 168-175, 181-182 (Exhibit US-94).

[55] *See, e.g.*, Hearing Transcript at 23 (So how do you compete? How are we supposed to compete against subsidies at that level? At least one answer is the following: You have to lower your prices through the floor to keep up with the subsidized prices of Hynix."); 50 ("Competition against subsidized imports from Hynix has forced Micron to cut prices in order to win orders and defend our business with US customers."); 72-75 ("Artificially low prices that can be offered by someone who doesn't have to pay his own bills are capable of having a harmful impact well beyond actual sales volume or market share.") (Exhibit US-94).

[56] *See, e.g.*, USITC Pub. 3616 at 21 (Exhibit GOK-10).

(iv) Was the ITC's determination of material injury and/or causation based on its finding that the absolute volume of subsidized subject imports was "significant"? Was this finding relevant to its determination? Would the ITC not have made its determination of material injury and/or causation but for its finding that the absolute volume of subsidized subject imports was "significant"?

50. In its volume analysis, the ITC found a "significant" absolute volume of subsidized subject imports as well as "significant" increases in that volume both absolutely and relative to both domestic production and consumption, as noted above.[57] In other words, it found that the volume of subsidized subject imports was "significant" based on each of the possible bases identified in Article 15.2 of the SCM Agreement. In its analysis of the price effects of subsidized subject imports, the ITC found significant undercutting and significant price depression by the subsidized subject imports.[58] Under Articles 15.1 and 15.2 of the SCM Agreement, no one or several of these factors can necessarily give decisive guidance. Given its findings concerning the volume and price effects of subsidized subject imports and declines in nearly all of the domestic industry's performance indicators, the ITC concluded that subject imports were having a significant adverse impact on the domestic industry producing DRAM products.[59] The ITC also examined other known factors to ensure that it did not attribute injury from those factors to the subsidized subject imports, and concluded that the domestic industry producing DRAM products was materially injured by reason of subject imports from Korea that Commerce found to be subsidized.[60]

(6) In other words, the ITC's finding that the absolute volume of subsidized subject imports was "significant" was only one aspect of its volume analysis, and, in turn, only one aspect of its material injury determination. To the extent that there are a number of ways of examining the volume and price effects of subsidized subject imports under SCM Agreement Articles 15.1 and 15.2, and no one or several of these factors can necessarily give decisive guidance, then the viability of the ITC's material injury determination does not turn on any individual volume findings.[61] Moreover, the ITC's affirmative injury determination relied not only on the multiple findings on volume but also its analysis of other factors concerning the price effects and impact of the subsidized subject imports on the domestic industry. Consequently, the ITC's finding of a significant absolute volume of imports cannot by itself be characterized as "dispositive" of the ITC's ultimate determination of material injury by reason of subject imports.

(7) Furthermore, in its final determination in this investigation, the ITC did not separately analyze "material injury" and "causation", as the question appears to suggest. The ITC conducted what has been referred to by the agency's US reviewing courts as a "unitary" analysis. In its "unitary" analysis in this investigation, the ITC did not ask, in the abstract, whether a domestic industry was experiencing material injury and then, if the answer was affirmative, proceed to a second determination of causation. Instead, the ITC asked whether a domestic industry was being materially

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[57] *See, e.g.*, USITC Pub. 3616 at 20-21 (Exhibit GOK-10); *see also, e.g.*, Hearing Transcript at pages 229 to 235 (Exhibit US-94) (containing dialogues between Commissioners Hillman and Koplan and Hynix's counsel confirming that the confidential data showed increases in the volume of subsidized subject imports).

[58] *See, e.g.*, USITC Pub. 3616 at 22-25 (Exhibit GOK-10).

[59] *See, e.g.*, USITC Pub. 3616 at 25-27 (Exhibit GOK-10).

[60] *See, e.g.*, USITC Pub. 3616 at 20-27 (Exhibit GOK-10).

[61] Thus, Korea is mistaken in its insistence that only increases in market share by subsidized subject imports matter. The text of Article 15.2 does not contain any requirement that the volume of subsidized subject imports increase, let alone that there be a "significant" increase in terms of market share. It is certainly possible to have significant adverse price effects without *any* increase in subsidized subject imports, if, for example, the domestic industry is forced by lower priced subsidized subject imports to lower its price in order to retain its market share.

injured "by reason of" subject imports as a unified question and then issued a single determination that subsumed the causation question, as evidenced by the ITC's explicit findings: "Based on the record in this investigation, we determine that an industry in the United States is materially injured by reason of imports of {subsidized DRAMs from Korea}."[62]

(8) The SCM Agreement does not require any particular methodology or methodologies to analyze material injury or causation. The unitary analysis applied by the ITC in this investigation is consistent with SCM Agreement Articles 15.1, 15.2, 15.4, and 15.5 because the material injury determination was based on a comprehensive analysis of all of the factors set forth in these provisions concerning the volume, price effects, and impact of subject imports on the domestic industry. No one or several of these factors was decisive. Rather, the material injury determination and thus the ITC's causation analysis was based on an analysis of these factors collectively.

16. Please comment on Korea's statement that there was no displacement of US workers resulting from Hynix's Eugene facility "swapping customers" with Hynix's Korean facility.

51. First, Korea is incorrect that there was a mere "swapping" of customers between Hynix's Korean and Eugene facilities while Hynix upgraded the Eugene facility between July 2001 and January 2002. As we explained in Confidential US-Figure 1,[63] there is a missing factual predicate to Korea's argument – that **[BCI: Omitted from public version]**.

(9) Second, even if Korea's factual premise were correct, to the extent that Hynix used Korean workers and production facilities to produce DRAM products for the US market, its actions displaced US production, US productive capacity, and US workers. During the proceedings before the ITC, the agency included Hynix Semiconductor Manufacturing America in the domestic industry consistent with the position advocated by Hynix.[64] Thus, even if subsidized subject imports were replacing sales of the Eugene facility, that meant that they were replacing sales of a domestic producer and, *inter alia*, displacing US production facilities and employees.[65]

17. At para. 40 of its oral statement, the US asserts that the ITC determined that "a significant portion of non-subject imports were Rambus and speciality DRAM products". On the basis of a non-confidential presentation/summary of the underlying proprietary information, please indicate what percentage of non-subject imports were Rambus and speciality products?

52. In a postconference brief that Hynix and Samsung submitted jointly during the preliminary phase of the ITC's investigation, they emphasized that Samsung, whose US shipments of DRAM

[62] USITC Pub. 3616 at 3 (Exhibit GOK-10); *see also id.* at 28 ("For the reasons stated above, we determine that the domestic industry producing DRAM products is materially injured by reason of subject imports of DRAM products from Korea that Commerce found to be subsidized.")

[63] *See also, e.g.*, USITC Pub. 3616 at 21 n.139 (Exhibit GOK-10) (confidential discussion of the missing factual predicate is omitted from the public version of the last paragraph of the footnote, as indicated by the asterisks).

[64] *See, e.g.*, USITC Pub. 3616 at 12-14 (Exhibit GOK-10).

[65] The factual data on the public record of this investigation indicate declines in employment and employment-related indicia. Over the period 2000 to 2002, the number of hours worked in DRAM fab operations, hourly wages, and aggregate wages all fell. After two years of extraordinary losses (a 79.2 per cent operating loss in 2001, followed by a 50.8 per cent operating loss in 2002), the domestic industry was forced to lay off workers. US fab operations lost 2,378 production and related workers by the first quarter 2003. In sum, employment in fab operations by the end of the period of investigation was down 21 per cent from 2002, 18 per cent from 2001, 17 per cent from 2000, and 6 per cent from interim 2002. *See, e.g.*, USITC Pub. 3616 at 26-27, Table III-8 (Exhibit GOK-10). Employment-related information concerning assembly and module packaging operations is confidential.

products were an important portion of US shipments of non-subject imports during the period of investigation, offered products that "differ[ed] *substantially* from and were not interchangeable with products made by US producers".[66] Thus, by Hynix's own admission, Samsung's imports were less likely to compete with US-produced products than Hynix's imports.

53. Hynix and Samsung further asserted that "[n]o domestic producer makes Rambus chips, to the best of our knowledge, and Micron's witness Mr. Sadler acknowledged ... that, 'there's only one significant supplier of RAM Bus {sic} DRAM; that would be Samsung from Korea.'"[67] They noted "the incontrovertible fact is that Rambus now accounts for a *significant* percentage of Samsung's US sales, ***, as shown in SSI's questionnaire response."[68] Hynix and Samsung also emphasized that "irrefutable evidence exists that a *very significant* proportion of Samsung's US sales had no competition from" Micron, Infineon, and Hynix.[69]

54. As another example, they noted that another "significant market segment" where Samsung had not materially injured the domestic industry was in double data rate ("DDR") DRAM products, which are technically not specialized products, but leading edge SDRAM products. They pointed to evidence that Samsung was clearly out in front of other suppliers in terms of DDR penetration.[70] For all of these reasons, they argued, imports of Samsung's Rambus, specialty, and leading edge DRAM products could not have materially injured the domestic industry.[71]

55. There was also extensive testimony by witnesses at the Commission's hearing about the extent to which non-subject imports consisted of Rambus and specialty DRAM products.[72]

(10) The ITC confirmed the validity of these arguments through its data collection efforts.[73] The responses indicated that a significant percentage of non-subject DRAM products were non-standard DRAM products, such as Rambus or specialty DRAM products. The exact percentage is confidential. Korea does not challenge the ITC's treatment of this information as confidential under either Article 12.4 or 22.5 of the SCM Agreement. Because the Panel requested a non-confidential summary of the underlying confidential percentage, we can confirm that of all US shipments of non-subject imports in 2001, approximately one-fifth were Rambus or specialty DRAM products. The corresponding percentage in 2002 was somewhat higher than in 2001.

(11) Based on this positive evidence, it was appropriate for both the ITC and Hynix to characterize the portion of non-subject imports that consisted of Rambus and specialty DRAM products as "significant".

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[66] *See, e.g.*, 27 November 2002 Postconference Brief of Hynix and Samsung at 52 (Exhibit US-100) (emphasis added).

[67] *See, e.g.*, 27 November 2002 Postconference Brief of Hynix and Samsung at 50-56 (Exhibit US-100).

[68] *See, e.g.*, 27 November 2002 Postconference Brief of Hynix and Samsung at 50 n.69 (Exhibit US-100) (emphasis added).

[69] *See, e.g.*, 27 November 2002 Postconference Brief of Hynix and Samsung at 53 (Exhibit US-100) (emphasis added).

[70] *See, e.g.*, 27 November 2002 Postconference Brief of Hynix and Samsung at 55-56 (Exhibit US-100).

[71] *See, e.g.*, 27 November 2002 Postconference Brief of Hynix and Samsung at 50-56 (Exhibit US-100).

[72] *See, e.g.*, Hearing Transcript at 168-175, 258-260 (Exhibit US-94).

[73] In the questionnaires issued in this investigation, the ITC collected information from importers on the percentage of imported products and US shipments of DRAM products in 2001 and 2002 that were "standard" DRAM products, Rambus DRAM products, and other "specialty" DRAM products. Importers were asked to differentiate the reported information for Rambus DRAM products containing dice fabricated in Korea by "Samsung" and the portion containing dice fabricated in Korea by "Others" and to differentiate the reported information for specialty DRAM products containing dice fabricated in Korea by "Samsung" and the portion containing dice fabricated in Korea by "Others." *See, e.g.*, Importer's Questionnaire at question II-10(a) (Exhibit GOK-44(b)).

18. On the basis of a non-confidential presentation/summary of the underlying proprietary information, please set out the basis for the ITC's finding that the volume of subsidized subject imports was "significant".

56. In the global DRAMs market, there are only a handful of producers of DRAM products. As the ITC explained in its final determination, publicly available information about the DRAM industry did not provide usable, probative data with respect to the factors specified in US law (which correspond to factors under the SCM Agreement).[74] For that reason, the ITC relied on data from questionnaire responses consistent with its regular practice.[75] Because there are so few players in the market, there were several instances where even aggregated information from three or more companies was treated as confidential, consistent with the ITC's practice, because one or two of the companies represented such a large share of the aggregated information that revealing the aggregated data would reveal confidential information about individual concerns.[76]

(12) In the ITC's final determination in this investigation, the domestic industry's shipments, production, and market share data as well as the data concerning total apparent US consumption of DRAM products is not confidential.[77]

57. The volume of subject imports and the exact increase in subject imports both absolutely and relative to domestic production and consumption is not revealed, however, because this information *is* confidential.[78] Because the DOC found that Korean producer Samsung received only *de minimis* subsidies, for purposes of the ITC's final determination, there was only one foreign producer of subject merchandise, Hynix Semiconductor Inc. of Korea. Moreover, during the entire period of investigation, one importer accounted for at least 75 per cent of all subsidized subject imports and/or two importers combined accounted for at least 90 per cent of all subsidized subject imports. Thus, consistent with ITC practice, the aggregated data were considered to be confidential. The trends in the data concerning subject imports, however, are not confidential and they were discussed in the public version of the ITC's final determination.[79]

(13) The volume of non-subject imports and their market share also is not revealed in the public version of the ITC's final determination, because revealing this information would permit the derivation of the confidential data concerning subject imports. The trends in the data concerning non-subject imports and the fact that non-subject imports increased by "a substantially larger amount than subject imports", however, are not confidential and are discussed in the public version of the ITC's final determination.[80]

58. Thus, notwithstanding the constraints of the limited number of players in this market, the ITC endeavored to provide as much information as possible in the public version of its final determination. As evidenced by the extensive argumentation provided by Korea in this proceeding and Korea's failure to challenge the ITC's treatment of the information as confidential under either Article 12.4 or 22.5, we submit that the ITC provided a summary in sufficient detail to permit a reasonable understanding of the data.

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[74] *See, e.g.*, USITC Pub. 3616 at 20 n.134 (Exhibit GOK-10).
[75] *See, e.g.*, USITC Pub. 3616 at 20 n.134 (Exhibit GOK-10).
[76] *See, e.g.*, US First Submission, paras. 297-298.
[77] *See, e.g.*, USITC Pub. 3616 at Table C-1 (Exhibit GOK-10).
[78] *See, e.g.*, USITC Pub. 3616 at ii, 20-21, Table C-1 (Exhibit GOK-10).
[79] *See, e.g.*, USITC Pub. 3616 at 20-21 (Exhibit GOK-10).
[80] *See, e.g.*, USITC Pub. 3616 at 20-21 (Exhibit GOK-10).

(14) The United States appreciates that the Panel has not asked it to provide any confidential information in these proceedings. With respect to the Panel's request that the ITC set out the basis for the ITC's finding that the volume of subsidized subject imports was "significant" on the basis of a non-confidential presentation/summary of the underlying proprietary information, unfortunately, there is not much beyond the response to question 15 above that can be provided without compromising the obligations of the United States under Article 12 to treat the underlying information as confidential. We refer the Panel to our response to question 15 above and also observe that throughout the period of investigation, the level of non-subject imports was at least five times the level of subject imports. Given the amount and type of information that was already discussed in the public version of the ITC's final determination and the US first written submission and the fact that Hynix has provided certain of its own confidential information to the Panel, we are unable to provide any further summary without compromising the confidential information reported by individual importers other than Hynix during the ITC's investigation. These importers voluntarily provided their confidential information at the ITC's request, notwithstanding the fact that the overwhelming majority of them were not even participants in the ITC's investigation.

19. The US argued at para. 424 of its first written submission that the causal analysis for countervail was different than the causal analysis for safeguards. The US based its argument on the different injury thresholds set forth in the SCM and Safeguards Agreements respectively. How does the injury threshold determine the requisite degree of causal nexus? In other words, what is it about the need to find serious injury in the case of safeguards that makes the causation standard different than in countervail, where material injury need to be established?

59. Before addressing the differences between safeguards and countervail, it is first necessary to describe the analysis conducted by the ITC. As explained above in response to Question 15(iv), in its final determination in the DRAMs investigation, the ITC did not separately analyze "material injury" and "causation", but instead conducted a "unitary" analysis. The ITC did not ask, in the abstract, whether a domestic industry was experiencing material injury and then, if the answer was affirmative, proceed to a second determination of causation. Instead, the ITC asked whether a domestic industry was being materially injured "by reason of" subject imports as a unified question, and then issued a single determination that subsumed the causation question. This is evidenced by the ITC's explicit findings: "Based on the record in this investigation, we determine that an industry in the United States is materially injured by reason of imports of {subsidized DRAMs from Korea}."[81] We further explained above why this unitary analysis is consistent with US obligations under the SCM Agreement.

(15) In ascertaining whether there is a causal nexus between subsidized imports and material injury to the domestic industry in countervailing duty investigations, investigating authorities must examine several factors. Article 15.1 of the SCM Agreement specifies that a final determination shall be based on "positive evidence" and an "objective examination" of the volume of the subsidized subject imports, their price effects, and their impact on the domestic industry. The investigating authority's obligation to examine these factors is further specified in Articles 15.2 and 15.4 (which provide further details concerning the investigating authority's examination of the volume, price effects, and impact of subsidized subject imports on the domestic industry). In addition, Article 15.5 provides that:

[81] USITC Pub. 3616 at 3 (Exhibit GOK-10); *see also id*. at 28 ("For the reasons stated above, we determine that the domestic industry producing DRAM products is materially injured by reason of subject imports of DRAM products from Korea that Commerce found to be subsidized.") In conducting this analysis, the ITC also examined other known factors to ensure that it did not attribute injury from such factors to the subsidized subject imports.

> It must be demonstrated that the subsidized imports are, through the effects[47] of the subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports ... .

Footnote 47 to the SCM Agreement indicates that the "effects" to which the first sentence of Article 15.5 refers are those set forth in Articles 15.2 and 15.4 (*i.e.*, the volume, price effects, and impact of the subsidized subject imports on the domestic industry).

(16) The unitary analysis applied by the ITC in this investigation integrates the questions of injury and causation in order to ascertain whether an industry has suffered material injury by reason of subsidized (or dumped) subject imports (in this case the imports from Korea found to be subsidized). This ensures that the ITC finds that those impact factors that demonstrate injury are in fact attributable to the imports under investigation.

(17) Turning to the differences between safeguards and countervail, there are several differences between the causation analysis specified in the SCM Agreement and that specified under the *Agreement on Safeguards* (Safeguards Agreement).

(18) The first, as previously discussed, is that under Article 15.5 of the SCM Agreement, the causation analysis in a countervailing duty investigation calls for consideration of the "effects" of the subsidies, and this in turn is related to the analysis of the volume, price effects, and impact of subsidized subject imports. There is no counterpart to this requirement in the Safeguards Agreement. This is because the Safeguards Agreement, in contrast to the SCM Agreement and the AD Agreement, does not involve unfairly traded imports and their effects.

60. Instead, a different inquiry is specified in the Safeguards Agreement. Article 4.2(a) of the Safeguards Agreement provides that

> to determine whether increased imports have caused ... serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

Article 4.2(b) further provides that an affirmative safeguards determination "shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof".

61. Thus, under the Safeguards Agreement, there is an explicit reference to volume as there is under the SCM Agreement, but the nexus between the imports and the injury to the domestic industry under the Safeguards Agreement is explicitly dependent on the existence of the causal link between *increased* imports and the serious injury to the domestic industry. Under Articles 15.1 and 15.2 of the SCM Agreement, volume is a consideration, but no one or several of the factors mentioned can necessarily give decisive guidance. Moreover, unlike the "serious" injury standard set forth in Articles 2 and 4 of the Safeguards Agreement, the "material injury" standard of Article 15.5 of the SCM Agreement contains no requirement that the volume of subsidized subject imports be increasing

in order for relief to be provided. Under Article 15.5, the volume considerations also include examination of the absolute and relative volume levels, as well as increases either absolutely or relative to either production or consumption in the importing Member. These differences in the manner of analyzing volume between the Safeguards Agreement and the SCM Agreement are important, because the analysis of volume is a factor relevant to causation, *i.e.*, whether an industry has suffered injury by reason of imports, and not simply to the question of injury in the abstract.

62. Another difference is that there is no express requirement under the Safeguards Agreement to consider the price effects of imports (although competent authorities are free to do so). In contrast, Articles 15.1 and 15.2 of the SCM Agreement provide that in a countervailing duty investigation, an investigating authority "shall consider" the effect of the subsidized imports on prices, although, again, no one or several of the identified factors can necessarily give decisive guidance.[82]

63. Furthermore, although there is an express reference in the Safeguards Agreement to some of the same impact factors that are listed in the SCM Agreement, there are several additional factors listed in the SCM Agreement that have no explicit parallel in the Safeguards Agreement (although competent authorities are free to consider them). In addition, there is no language in the SCM Agreement parallel to the Safeguards Agreement concerning the evaluation of factors of an "objective and quantifiable nature".

64. Also significant is the fact that the Safeguards Agreement involves a more rigorous injury standard. Under the Safeguards Agreement, the competent authority examines whether a "product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause *serious* injury to the domestic industry that produces like or directly competitive products."[83]

65. As defined by Article 4.1(a) of the Safeguards Agreement, "serious injury" means a significant overall impairment in the position of a domestic industry. As the Appellate Body emphasized in *US – Lamb Meat*, "serious injury" is a much higher standard than "material injury".[84] It stated:

> We are fortified in our view that the standard of 'serious injury' in the Agreement on Safeguards is a very high one when we contrast this standard with the standard of 'material injury' envisaged under the Anti-dumping Agreement, the Agreement on Subsidies and Countervailing Measures (the 'SCM Agreement') and the GATT 1994. We believe that the word 'serious' connotes a much higher standard of injury than the word 'material.' Moreover, we submit that it accords with the object and purpose of the Agreement on Safeguards that the injury standard for the application of a safeguard measure should be higher than the injury standard for anti-dumping or countervailing measures ... .[85]

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[82] Korea's insistence that this proceeding is about the relative increase in the market share of subsidized subject imports (while largely ignoring the ITC's findings concerning other factors, especially the adverse price effects of the subsidized subject imports) may explain the prominence of reports reviewing safeguards determinations in its arguments to the extent that volume considerations are more prominent in the text of the Safeguards Agreement.

[83] Safeguards Agreement, Article 2.1 (emphasis added).

[84] *US – Lamb Meat*, para. 124. Even in the context of reviewing safeguards determinations, however, the Appellate Body has stated that Article 4.2(b) of the Safeguards Agreement does not require that increased imports alone, in and of themselves, are causing serious injury. *See, e.g., US – Wheat Gluten*, paras. 70, 79. The same is true in the context of countervailing and antidumping duty investigations. *See, e.g., US – Hot-Rolled Steel (Panel)*, para. 7.260 (reviewing an antidumping duty determination).

[85] *US – Lamb Meat*, para. 124.

(19) Given the Safeguards Agreement's more rigorous injury standard and the fact that it does not provide the same level of detail as does the SCM Agreement as to how to ascertain the causal connection between the imports that are the subject of the investigation and the level of injury sustained by the domestic industry, one would expect that examination of causation would be different in an investigation under the Safeguards Agreement than in a countervailing duty investigation under the SCM Agreement.

66. Moreover, because the injury thresholds and relevant inquiries in safeguards and countervailing duty investigations are so different, there is no basis to assume the required nexus between the imports and the injury to the domestic industry in a safeguards investigation is the same as the required nexus between the imports and the injury to the domestic industry in a countervailing duty investigation.

20. The US noted at the first substantive meeting that Article 15.5 of the SCM Agreement refers to a "causal relationship" between the subsidized imports and the material injury to the domestic industry, whereas Article 4.2(b) refers to a "causal link" between increased imports and the serious injury to the domestic industry. Does this explain the alleged difference in the applicable causation standards? Please explain.

67. As explained in response to Question 19[86], the United States believes that the differences in the applicable causation standards are due to differences in the relevant inquiries in terms of the factors expressly identified in the two Agreements. At the Panel's request, we have considered the use of the term "a causal relationship" in Article 15.5 of the SCM Agreement as opposed to the term "the causal link" in Article 4.2(b) of the Safeguards Agreement. Although there may be some semantic differences between the two terms[87], upon further examination of the Agreements, we do not believe that the use of the different terms captures the difference in the applicable causation standards.

21. The US asserts at para. 424 of its first written submission that "the 'causal relationship' of the SCM Agreement is ... different from the 'causal link' requirement of the safeguards Agreement". At para. 443 of its first written submission, the US refers to the ITC "demonstrating a causal link". At para. 419, the US refers to the need to establish a "causal relationship". How credible is the US assertion that the term "causal link" differs from the term "causal relationship" if the US fails to distinguish between those two concepts in its written submission?

68. As explained in response to Questions 19 and 20, above, the causation standard of the SCM Agreement is different from the causation standard of the Safeguards Agreement.

(20) Although the questions of what nexus between the imports and the material injury to the domestic industry is required in a countervailing duty investigation, and whether this nexus is lower than that required in the context of a safeguards investigation, are important conceptually, their resolution is not pivotal to this proceeding. As is evident from the responses to these questions and the US first written submission (which refers in para. 419 to the need to establish a "causal relationship" and in para. 443 to the ITC as "demonstrating a causal link"), this was not a case where

[86] *See also*, US First Submission, para. 424.

[87] "Link" is defined as being "[a] connecting part; esp. a thing or person serving to establish or maintain a connection; a means of connection or communication." *New Shorter Oxford English Dictionary* (5th ed. 2002) at 1604. In contrast, "relationship" is defined as "the state or fact of being related". *Id.* at 2520. "Related" is defined as "[h]aving relation." *Id.* "Relation", in turn, is defined as "the existence or effect of a connection, correspondence, or *contrast* between things; that particular way in which one thing stands in connection with one another; *any connection or association conceivable as naturally existing between things*". *Id.* (emphasis added).

only a low-level nexus existed between the subsidized subject imports and the material injury suffered by the domestic industry. The strength of the nexus between the subsidized subject imports and the material injury suffered by the domestic industry is further demonstrated by the ITC's reference to the "link" between the subsidized subject imports and the material injury suffered by the domestic industry in its final determination in this investigation. For example, in its discussion of the domestic industry's exporting activities, the ITC concluded that "while the industry's export performance played a role in the injury it experienced, it [did] not sever *the causal link* between subsidized subject imports and material injury to the domestic industry".[88]

(21) The United States wishes to make clear that the final sentence in paragraph 424 of its first written submission was not intended to suggest that the respective use of the terms "causal relationship" and "causal link" in the SCM and Safeguards Agreements indicated that a different standard applied. (Other textual differences between the two Agreements, however, do support such a construction, as noted above). Those terms were instead merely used as shorthand for the identified differences in the language of the two Agreements.

22. At para. 424 of its first written submission, the US appears to argue that the ITC applied the "causal relationship" standard. Is this a correct understanding of the US argument? Please explain.

69. The US argument is simply that the ITC's causation analysis in the DRAMs investigation was consistent with the requirements of the SCM Agreement.

(22) The ITC found that the domestic industry producing DRAM products was materially injured by reason of the subsidized subject imports of DRAM products from Korea. The ITC demonstrated a causal nexus between the subsidized subject imports of DRAM products from Korea and the material injury suffered by the domestic industry through its examination of the volume, price effects, and impact of the subsidized subject imports on the domestic industry.

23. Please explain how the ITC complied with the causation standard described at para. 427 of the US first written submission. In particular, how did the US "separate and distinguish" the injurious effects of non-subject imports?

70. Article 15.5 of the SCM Agreement provides that an investigating authority must demonstrate that subsidized imports are causing material injury based on an examination of all relevant evidence before the authority. It also provides in relevant part that:

> The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which *may be relevant* in this respect *include*, <u>*inter alia*</u>, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry. (emphasis added).

71. The Appellate Body, based upon language in the Safeguards Agreement and in its own reports reviewing safeguards determinations, has stated that "in order to comply with the non-attribution language[,] investigating authorities must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the

[88] *See, e.g.*, USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10) (emphasis added).

injurious effects of the [unfair] imports from the injurious effects of those other factors".[89] Although the Appellate Body concluded in *US – Hot-Rolled Steel* that an investigating authority must "identify" the injury caused by other known factors, neither in that report nor in subsequent ones has the Appellate Body ever required the investigating authorities to "isolate" and "precisely quantify" the injurious effects of the unfair imports, for example, by means of econometrics or modelling.

72. Instead, with respect to the question of what it means to "separate and distinguish" the injurious effects of the unfair imports from the injurious effects of other known factors, the Appellate Body has stated that "[t]his requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the [unfair] imports".[90]

(23) The Appellate Body has consistently stated that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of unfair imports from the injurious effects of the other known causal factors are not prescribed by the WTO agreements. Thus, "provided that the investigating authority does not attribute the injuries of other causal factors to [unfair] imports, it is free to choose the methodology it will use in examining the 'causal relationship' between [unfair] imports and injury".[91]

(24) In this regard, there is no requirement to evaluate each or any of the factors referenced in the last sentence of SCM Agreement Article 15.5 in every countervailing duty investigation. As the panel found in *Thailand – H-Beams* regarding the parallel provision of the AD Agreement, "[t]he text of Article 3.5 indicates that the list of other possible causal factors enumerated in that provision is illustrative". In order for the "known factors" obligation to be triggered, the Appellate Body has explained that the factor at issue must: "(a) be 'known' to the investigating authority; (b) be a factor 'other than [subsidized] imports'; and (c) be injuring the domestic industry at the same time as the dumped imports".[92] Regarding whether a factor is "known" to the investigating authority, the panel in *Thailand – H-Beams* found that other "known factors" would include factors "clearly raised before the investigating authorities by interested parties in the course of an AD investigation". [93] It explained that investigating authorities are not required to seek out such factors on their own initiative.[94]

73. Whether or not the Panel agrees with Korea that they qualify as "other known factors", it is clear from the ITC's final determination that the ITC properly examined non-subject imports; other reasons for the price declines during the period of investigation; and the domestic industry's actions.

(25) *Non-subject imports*: The ITC determined that non-subject imports were in the US market throughout the period of investigation and at absolute volumes that were higher than subsidized subject imports.[95] The ITC also recognized that some domestic producers were responsible for some of the non-subject imports.[96] Non-subject imports increased market share between 2000 and 2001 and between 2001 and 2002, an increase the ITC evaluated as a "substantially larger amount than subject imports".[97] Although the ITC determined that non-subject imports were responsible for "the bulk of the market share lost by domestic producers during the period of investigation", it identified two

[89] *EC – Tube (AB)*, para. 188 quoting *US – Hot-Rolled Steel (AB)*, para. 226.
[90] *US – Hot-Rolled Steel (AB)*, para. 226.
[91] *EC – Tube (AB)*, para. 189, relying on *US – Hot-Rolled Steel (AB)*.
[92] *EC – Tube (AB)*, para. 175.
[93] *Thailand – H-Beams (Panel)*, para. 7.273.
[94] *Id*.
[95] *See, e.g.*, USITC Pub. 3616 at 21, 25, 27, Tables IV-4, IV-5, C-1 (Exhibit GOK-10).
[96] *See, e.g.*, USITC Pub. 3616 at 6, 10-11, 17, 18 (Exhibit GOK-10).
[97] *See, e.g.*, USITC Pub. 3616 at 21, Tables IV-4, IV-5, C-1 (Exhibit GOK-10).

reasons why it did not find the volume of non-subject imports as significant as otherwise would be suggested.[98]

74. First, after examining the composition of non-subject imports, the ITC determined that a significant portion of non-subject imports were Rambus and specialty DRAM products for which domestic producers had no significant production during the period of investigation,[99] as discussed in more detail above in response to question 17. Contrary to Korea's repeated (and erroneous) characterization of "near complete interchangeability among domestic, non-subject, and subject imports" or "high substitutability" between subject and non-subject DRAM products,[100] non-subject imports were not as substitutable with subject or domestic DRAM products because their product mix was different.

75. Second, even those non-subject imports consisting of "standard" products did not have the price effects that subsidized subject imports did during the period of investigation. Although there is no requirement in the SCM Agreement for the investigating authority to collect such data – and, to our knowledge, most Members do not collect *any* pricing data on non-subject imports – the ITC collected pricing data on non-subject imports in this investigation. According to that pricing data, while the frequency with which non-subject imports undersold domestically produced DRAM products increased between 2000 and 2002, the underselling frequency by non-subject imports was lower than, and increased less than, the underselling frequency of subsidized subject imports between 2000 and 2002.[101] Thus, the ITC reasonably found that because non-subject imports were less substitutable for domestic DRAM products than were subsidized subject imports, and because non-subject imports undersold domestic DRAM products less frequently than subsidized subject imports did, non-subject imports had less of an impact than their absolute and relative volumes might otherwise have indicated.

76. Moreover, the ITC also found that, while non-subject imports' market share grew, the "primary negative impact" on the domestic industry was due to lower prices.[102] On this point, the ITC found that subsidized subject imports, themselves, were large enough and priced low enough to have a significant impact, regardless of the adverse effects caused by non-subject imports.[103]

77. Thus, it is clear that in its final determination, the ITC provided a satisfactory explanation of the nature and extent of the injurious effects of non-subject imports (including the volume and prices of non-subject imports) as distinguished from the injurious effects of the subsidized subject imports.

78. *Other possible reasons for the price declines*: Based on its analysis of the pricing data, the Commission ascertained that prices for nearly every pricing product and channel of distribution declined substantially over the period of investigation. It observed that prices for domestic products and subsidized subject imports followed the same general trends and were generally similar for sales

[98] *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10).
[99] *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10).
[100] *See, e.g.*, Korea First Submission, para. 166.
[101] In particular, non-subject imports undersold the domestic industry in 46.6 per cent of instances in 2000, 47.7 per cent in 2001, and 60.7 per cent in 2002 whereas subsidized subject imports undersold the domestic industry in 51.0 per cent of instances in 2000, 56.0 per cent in 2001, and 69.8 per cent in 2002. Consistent with these figures, the ITC concluded that for these "standard" pricing products, subsidized subject imports undersold non-subject imports in a majority of instances. *See, e.g.*, USITC Pub. 3616 at 25 & n.164 (Exhibit GOK-10). Moreover, even based on a disaggregated analysis of the pricing data on these "standard" products by brand name and source, subsidized subject imports were the lowest-priced source more often than DRAM products from any other source, contrary to Korea's assertions. *See, e.g.*, USITC Pub. 3616 at 24 (Exhibit GOK-10).
[102] *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10).
[103] *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10).

to PC OEMs across all products. More particularly, the product-specific data showed price declines of 70 to 90 per cent from late 2000 through 2001, a modest rebound in early 2002, then a further decline over the course of 2002. The ITC identified record evidence indicating that the price decline in 2001 was the "most severe in history".[104]

79. The ITC examined other possible reasons for these price declines. Regardless of the label attached to these factors or if a particular factor encompassed "sub-factors", it is clear from the face of the ITC's determination that the ITC examined the *product life cycle* and the DRAMs *business cycle* that is characterized by repeated "boom" and "bust" periods (when *supply/capacity*, which increased during the period of investigation, outpaces *demand*, whose growth slowed at the end of the period of investigation) as other possible reasons for the price declines.[105]

80. Based on its evaluation of the record evidence in this investigation, the ITC determined that "[w]hile slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor".[106] The ITC determined that these pricing declines were far greater than the 20 to 30 per cent that Micron or even the 40 per cent declines that Hynix *itself* reported would be expected on an annual basis.[107]

81. The ITC concluded that the increasing frequency of underselling by subsidized subject imports from 2000 to 2002 corresponded with the substantial decline in US prices over those same years and that in the absence of significant quantities of subsidized subject imports competing in the same product types at relatively low prices, domestic prices would have been substantially higher.[108]

82. At the first Panel meeting, Korea suggested that Hynix may have misunderstood the ITC's question and that Hynix may not have meant that the average annual price decline was 40 per cent. Positive evidence from the ITC's record, however, supports the ITC's finding that the price declines experienced between 2000 and 2001 were far greater than even Hynix asserted would be the norm. In addition to the testimony of Hynix's witness (Mr. Tabrizi) at the ITC's hearing that has been previously cited[109], in its brief filed after the ITC's hearing, Hynix took another opportunity to respond to the same question that was posed by the ITC during the hearing. Hynix argued that the average annual price decline had increased in recent years, and once again estimated that the average annual decline was approximately 43 per cent. Hynix included historical data on average sales prices, but even these data did not include any year in which the price declines ranged as high as 90 per cent, as was the case between 2000 and 2001 according to the ITC's pricing data.[110] In other words, it was reasonable for the ITC to have drawn the conclusions it did based on the evidence before it, such evidence including testimony and responses made by Hynix itself.

83. As this discussion shows, the ITC analyzed the nature and the extent of the injurious effects of other known factors that were affecting prices, and examined those factors in the factual context of the record in this investigation to ensure that it did not attribute injury from those factors to subsidized subject imports. The ITC provided a satisfactory explanation of the nature and extent of the injurious

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[104] *See, e.g.*, USITC Pub. 3616 at 24 (Exhibit GOK-10).

[105] *See* US First Submission, paras. 454-457, which identify in more detail where in the ITC's final determination the examination of these factors took place.

[106] *See, e.g.*, USITC Pub. 3616 at 24-25 (Exhibit GOK-10).

[107] *See, e.g.*, USITC Pub. 3616 at 24-25, I-11 (Exhibit GOK-10); Hearing Transcript at 157-161, 267-68 (Exhibit US-94).

[108] *See, e.g.*, USITC Pub. 3616 at 24-25 (Exhibit GOK-10).

[109] *See, e.g.*, Hearing Transcript at 267-68 (Exhibit US-94).

[110] *See, e.g.*, Hynix's July 2, 2003, Posthearing Brief at Exhibit 1 at 39-41 & Exhibit 19 (Exhibit US-121).

effects of other factors affecting prices (which could not explain the unprecedented price declines that took place in the US market) as distinguished from the injurious effects of the subsidized subject imports (which undersold the domestic industry at high margins and in increasing frequencies). Thus, the ITC satisfied any requirement to "separate and distinguish" those factors.

84. *The domestic industry's actions*: The ITC also examined the domestic industry's actions. Korea argues that because Micron focused more on moving from 0.15 micron to 0.11 micron technology than on moving from 0.15 micron to 0.13 technology, Micron was unable to supply the market with certain DDR products (256 Mb DDR products) based on the 0.13 technology and instead had to supply the market with those products made from 0.15 micron technology (which was more costly). In fact, the ITC collected pricing data on 256 Mb DDR266 SDRAMs.[111] The record indicated that volume demand for 256 Mb DDR DRAMs did not develop until the latter half of 2002, which was *after* Micron and the domestic industry had sustained their most significant losses.[112] Moreover, as the ITC analyzed the data, it determined that whatever negative effect any particular decisions may have had on Micron, they "could not explain the harm" experienced by the domestic industry as a whole.[113] This "harm was not isolated to Micron and was due mainly to lower prices".[114]

85. Second, even though Hynix never even argued that exports might be another causal factor, the ITC nonetheless evaluated the domestic industry's exporting activities.[115] The ITC identified the "increasingly global nature of the DRAMs market, both in terms of producers as well as purchasers."[116] Analyzing the data, the ITC determined that the domestic industry exported "a large and growing share of its DRAM products production, although it [sold] a substantial portion (the majority in each of the full years 2000 through 2002) in the US market".[117] The ITC determined that "[i]ncreasing export shipments offset to some degree the slower growth of the industry's domestic sales and thereby allowed the industry to utilize more capacity than it would otherwise have done. However, falling unit sales values on export sales had a negative impact on the domestic industry's profitability. The unit value of the industry's export shipments fell substantially, although somewhat less than the unit value of the industry's domestic sales."[118] Based on this evaluation of the data, the ITC concluded that "while the industry's export performance played a role in the injury it experienced, it [did] not sever the causal link between subsidized subject imports and material injury to the domestic industry".[119]

86. Thus, the ITC analyzed the nature and the extent of the injurious effects of domestic producers' actions, and evaluated this factor in the factual context of this investigation to ensure that it did not attribute injury to subsidized subject imports. Because its evaluation was also based on positive evidence and an objective examination, its analysis of this factor is consistent with US obligations under Articles 15.1 and 15.5.

(26) It is clear that in its examination of other known factors, the ITC went well beyond what has been found to be sufficient by other WTO panels. For example, in *EC – Tube and Pipe Fittings*, the panel examined Brazil's claim that the EC did not adequately examine non-subject imports from Poland. The EC found that Brazil's claim was not substantiated, apparently based on data from

[111] *See, e.g.*, USITC Pub. 3616 at V-3, Table V-10 (pricing product 5) (Exhibit GOK-10).
[112] *See, e.g.*, Micron's Posthearing Brief at Exhibit 3 at 19-21 (Exhibit US-96).
[113] *See, e.g.*, USITC Pub. 3616 at 26 n.177 (Exhibit GOK-10).
[114] *See, e.g.*, USITC Pub. 3616 at 26 n.177 (Exhibit GOK-10).
[115] *See, e.g.*, USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10). The ITC noted in its determination that Hynix had not argued that exports were another causal factor.
[116] *See, e.g.*, USITC Pub. 3616 at 18 (Exhibit GOK-10).
[117] *See, e.g.*, USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10).
[118] *See, e.g.*, USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10).
[119] *See, e.g.*, USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10).

Eurostat that was not susceptible to verification because it was not available at such a level of detail. The panel reiterated that Poland "was not under investigation for selling the product at dumped prices in the EC market". The panel found that although the investigating authority was required during the course of the investigation to satisfy itself as to the accuracy of the information supplied by interested parties upon which its findings were based, the EC's consideration of Brazil's argument was enough, and there was no inconsistency with Articles 3.1, 3.5 or 6.6 of the AD Agreement.[120] The fact that the ITC's collection and evaluation of data concerning other known factors in this investigation exceeded the level considered adequate by the panel reviewing the EC's determination in *EC – Tube and Pipe Fittings* provides yet another reason for this Panel to find that the ITC's analysis of "other known factors" was consistent with the SCM Agreement.

24. How do the causation standards of "causal link" (Article 4.2(b) of the Safeguards Agreement) and "causal relationship" (Article 15.5 of the SCM Agreement) differ in practice?

87. As explained in the answers to Questions 19 and 20, above, the injury threshold and the relevant inquiry in a safeguards investigation differ from those involved in a countervailing duty investigation.

(27) These differences in the injury thresholds and relevant inquiries may have practical effects on the findings in those investigations. Or, depending on the factual circumstances of the investigations, the causation findings may not be so divergent. For example, there is no explicit requirement to consider price effects in a safeguards investigation, but there may be safeguards investigations where adverse price effects are relevant to the causal inquiry.

25. Korea noted at the first substantive meeting that the Argentina-Footwear panel, in respect of a safeguards dispute, stated (para. 8.238) that an absence of coincidence, or correlation, "would create serious doubts as to the existence of a causal link, and would require a very compelling analysis of why causation still is present" (italics in original). Does the US consider that such panel ruling is not relevant to the present proceedings because it concerns causation in the context of safeguards, and not countervail? Please explain.

88. Korea relies heavily in its first written submission on the *Argentina – Footwear* panel report, in which the panel stated in the context of reviewing a safeguards determination that an absence of coincidence or correlation "would create serious doubts as to the existence of a causal link, and would require a very compelling analysis of why causation still is present". In a coincidence analysis, an authority examines trends in imports and overall trends in factors specified in the agreement, as well as their absolute levels; it ascertains whether, for example, movements or trends in factors concerning the imports correspond temporally with overall movements or trends in factors showing injury to the domestic industry.

89. In the answers to Questions 19 and 20, above, we set forth our concerns with the use of the Safeguards Agreement and reports reviewing safeguards determinations as tools for interpreting the provisions of the SCM Agreement concerning countervailing duty measures. Nevertheless, whether this Panel reviews the ITC's material injury determination through the lens of a correlation analysis, the lens of a conditions-of-competition analysis, or some other lens, it is clear that the ITC's causation analysis in the DRAMs investigation was consistent with US obligations under the SCM Agreement.

(28) For example, as discussed in more detail in our first written submission, there was a correlation between the volume (and the increases both absolutely and relative to both domestic production and consumption) of the subsidized subject imports and the adverse impact on the domestic industry. There was a correlation between the significant underselling by the subsidized

[120] *EC – Tube (Panel)*, para. 7.389.

subject imports and the significant price declines experienced during the period of investigation. There was also a correlation between these price declines and the adverse impact on the domestic industry.

(29) In its causation analysis, the ITC also took into account several conditions of competition, including, for example: the importance of price in this industry; the high degree of substitutability between subsidized subject imports and domestically produced DRAM products; and the existence of a commodity-type market that reacts quickly to underselling through the rapid dissemination of pricing information to a limited number of purchasers including through such mechanisms as most-favoured-customer, best-price clauses, and other informal arrangements.

(30) Thus, unlike the situation described in the *Argentina – Footwear* case, in the DRAMs investigation there was a very clear nexus between the injury suffered by the domestic industry and the volume, price effects, and impact of the subsidized subject imports. The DRAMs investigation was not a case in which the subsidized subject imports were priced higher than the domestic industry's prices such that any depression in US prices could not be correlated to the subsidized subject imports. Nor is this a case in which the volume, market share, or ratio to domestic production of the subsidized subject imports was in decline. The contrasting volume and price trends of subject imports and the condition of the domestic DRAM industry over the period of investigation provided compelling evidence of the material injury caused by the subsidized subject imports from Korea.

(31) We also note that Korea's reliance on *Argentina – Footwear* ignores the more recent report in *US – Steel Safeguards*, in which the panel upheld certain aspects of the US safeguard measures concerning steel products, notwithstanding that for some of these measures, as the panel in that case noted, the United States "did not perform a coincidence analysis".[121]

(32) The panel in *US – Steel Safeguards* recognized that previous reports reviewing safeguards determinations had found that a coincidence finding was "central" to a causation analysis under the Safeguards Agreement.[122] At the same time, that panel recognized that Safeguards Agreement Article 4.2(b) does not prescribe the use of any particular methods or analytical tools for demonstrating causation, leaving it up to the competent authority to decide the method it considers most appropriate to determine causation.[123] In that report, the panel recognized that "there may be cases, for instance, where a competent authority does not undertake a coincidence analysis or does so, but the facts do not support a finding of causal link on the basis of such an analysis".[124] The panel found that in such situations, "reference could be made to the conditions of competition as between imports and domestic products with a view to providing a compelling explanation, in the absence of coincidence, as to why a causal link nevertheless exists".[125] Notably the panel continued that in its view, "consideration of the conditions of competition of the market in which the relevant imported and domestic products are being sold may generally prove insightful in respect of the issue of the causal relationship between increased imports and serious injury".[126] As the panel further explained, "the more complicated the factual situation, the more important it is for a number of factors to be taken into consideration".[127] The panel then upheld, subject to its review of the ITC's non-attribution

[121] *US – Steel Safeguards (Panel)*, para. 10.295.
[122] *US – Steel Safeguards (Panel)*, para. 10.296.
[123] *US – Steel Safeguards (Panel)*, para. 10.294.
[124] *US – Steel Safeguards (Panel)*, para. 10.314.
[125] *US – Steel Safeguards (Panel)*, para. 10.314.
[126] *US – Steel Safeguards (Panel)*, para. 10.314.
[127] *US – Steel Safeguards (Panel)*, para. 10.323.

analysis, the ITC's causation analysis concerning hot-rolled bar and rebar that the panel ascertained was not based on a coincidence analysis but on a conditions of competition analysis.[128]

(33) Thus, while a correlation analysis may be one tool that an authority may employ to demonstrate causation, it is not the only such tool. A conditions of competition analysis is another tool that has been found to be adequate to demonstrate causation by a panel reviewing a safeguards determination.

[128] *US – Steel Safeguards (Panel)*, paras. 10.424 to 10.430, 10.470 to 10.477. The Appellate Body explicitly declined to make findings on the issue of causation, and thus neither reversed nor upheld these findings. *US – Steel Safeguards (AB)*, para. 483.

ANNEX E-5

THE REPUBLIC OF KOREA'S ANSWERS TO THE PANEL QUESTIONS FOLLOWING THE SECOND SUBSTANTIVE MEETING

6 August 2004

Each party may address/comment on questions addressed to the other party

A. QUESTIONS TO US

1. Please comment on the following paragraphs of Korea's Opening Statement at the Second Substantive Meeting of the Panel:

§ 20: the hypothetical of Hynix being the lowest price twice, but 98 other suppliers being each the lowest price once;

Comment:

1. During the second meeting with the Panel, the United States expressed frustration with not being able to respond directly to this hypothetical. Korea would like to note three points. First, any frustration is entirely within the control of the United States: it has the information that it is unwilling to disclose.

2. Second, the main point of this hypothetical is in fact a public fact: the United States methodology focused on the individual effect of each supplier, and never assessed the collective effective of all of these other suppliers. In our view, such an explanation is inherently defective and insufficient. It is simply not possible to assess the reasonableness of the US explanation without knowing the magnitude of the collective effect of these other suppliers charging lower prices than subject imports.

3. Third, there is strong support for the proposition that panels may draw adverse inferences against those parties that possess but withhold key information. The WTO Appellate Body has previously found that panels have "the legal authority and the discretion to draw inferences from the facts before it," including facts a party chooses not to release.[1]

4. The ITC in the first instance, and the United States now before this Panel, has decided to ignore or withhold the necessary information on the collective magnitude and effect of these others sources. This Panel may presume the information has been withheld because it is not favourable.

* * *

§ 22 : the ITC's focus on relatively small changes in the frequency of underselling, while ignoring dramatically different volumes of non-subject imports;

[1] *Canada – Aircraft (AB)*, para. 203; *see also US – Wheat Gluten (AB)*, paras. 171-172.

Comment:

5. See discussion below in response to Question 14.

* * *

§ 26 : the issue of correlation, in the context of causal nexus: what changed from 2000, when the domestic DRAMS industry had record performance, and 2001, when price fell and industry profits plunged;

Comment:

6. No comment.

* * *

§ 33 : the selection of data on record about product substitutability;

Comment:

7. No comment.

* * *

§ 34 : the portion of subject imports underselling in 2001 was 5% of the market, whereas the portion of non-subject imports underselling was 27% of the market;

Comment:

8. See discussion in answer to Question 14 below.

* * *

§ 37 : the ITC does not explain why the effect of supplier competition was attributed to the small change in subject import market share, rather than the much larger market share of non-subject imports and the rate at which non-subject imports were gaining market share;

Comment:

9. No comment.

* * *

§ 39 : the key missing point – non-attribution required the ITC to separate and distinguish the role of subject import supply sources from domestic and non-subject import supply sources;

Comment:

10. No comment.

* * *

§ 49 : appearance of control where none exists, nothing suggests that the GOK would intervene in day-to-day credit decisions of various banks;

Comment:

11. No comment.

* * *

§ 76 : the argument regarding the size of Citibank's loan.

Comment:

12. No comment.

* * *

2. With regard to para. 32 of the Second Written Submission of the US, are the "actions that directly evinced entrustment and direction" those set forth in section 1(a) – (c) of that submission? Is the US arguing that there is both direct and indirect evidence of entrustment / direction? Why is mandatory participation under the CRPA included as an "action [...] that directly evinced entrustment and direction", when at para. 33 of its replies to the Panel's questions, the US asserts that "[t]he DOC did not find that mandatory participation under the CRPA constituted, in and of itself, entrustment or direction"?

Comment:

13. No comment.

* * *

3. Please comment on Korea's argument (para. 128 of Korea's Second Written Submission) that "there is simply no evidence indicating that Shinhan, Hana, or KorAm bank were entrusted or directed by the GOK to extend their portion of the syndicated loan". What evidence of entrustment / direction did the US rely on in respect of the participation of these banks in the syndicated loan? Even if one does not accept Korea's argument on the need for specific banks to be directed to perform specific tasks, is it not necessary for an investigating authority to point to evidence showing that creditors included in the finding of entrustment/direction were actually entrusted / directed ?

Comment:

14. No comment.

* * *

4. At para. 18 of its Answers to the Panel's questions, the US asserts that "The DOC did not find specifically that government-owned and controlled private entities 'were instruments through which the GOK entrusted/directed other entities'. Rather, the DOC found, for example, that the GOK exercised control over Hynix's creditors generally through government-owned and controlled banks, because those banks played a dominant role in the Creditors Councils." Does the US response mean that control over creditors through government-owned and controlled private entities is not relevant to the issue of entrustment / direction of those creditors? How does the concept of the exercise of control over creditors differ from the notion of entrustment / direction of those creditors?

Comment:

15. No comment.

5. At para. 20 of the US Answers to Panel questions, the US asserts that "the motives of private investors are not germane" to the issue of entrustment/direction. At para. 24, however, the US argument of entrustment/direction relies on private creditors knowing what was good for them. If entrustment/direction is based on creditors knowing what is good for them, doesn't that imply an analysis of their motives?

Comment:

16. No comment.

* * *

6. At para. 33 of its Answers to the Panel's questions, the US asserts that "[t]he DOC did not find that mandatory participation under the CRPA constituted, in and of itself, entrustment or direction. Rather, the DOC found that the GOK used the CRPA as a vehicle to effectuate the GOK's Hynix policy." Does this mean that the alleged mandatory nature of the CRPA is not relevant to the issue of entrustment / direction? How does the notion of entrusting / directing someone to carry out an objective differ from using something as a vehicle to have someone effectuate that objective? If the October 2001 restructuring had occurred in isolation, would the CRPA in and of itself have been sufficient evidence of entrustment /direction?

Comment:

17. No comment.

* * *

7. What was the evidence of entrustment / direction in respect of Pusan?

Comment:

18. In over 140 pages of the DOC's unpublished Decision Memorandum, Pusan Bank is mentioned once, and only in reference to Hynix's argument that:

> it is clear that the privately-controlled banks (including Citibank, Koram Bank, Shinhan Bank, Hana Bank, *Pusan Bank*, Kookmin Bank, Housing and Commercial Bank ("H&CB"), Korea First Bank ("KFB"), and KEB) acted independently of GOK influence when participating in the Hynix loans and restructurings. Hynix contends that the record evidence relating to these banks (if any was provided at all) either 1)

> does not provide substantial evidence of GOK influence or control over the banks; 2) had nothing to do with Hynix; 3) did not refer specifically to the May or October restructuring, or the syndicated bank loan; 4) was based only on speculation; or 5) actually confirms the independence of certain banks. Thus, Hynix argues that loans or other funds from these banks cannot be deemed a financial contribution, and that these banks' should be used as benchmarks.[2]

* * *

8. Regarding Figure US-4, the different proportions of council vote held by group A, B and C creditors in respect of the October 2001 restructuring do not add up to 100%. Please explain.

Comment:

19. No comment.

* * *

9. What was the basis for the DOC's finding that Citibank was not entrusted / directed?

Comment:

20. At the second meeting with the Panel, the United States responded that since Citibank was a foreign bank, it did not find it to be entrusted or directed. This approach to Citibank, however, is at odds with the treatment of other Korean banks.

21. First, several of the other Korean banks were essentially controlled by foreign investors. The evidence before the DOC showed, for example, that KFB had 51 per cent foreign ownership as of 1999, Kookmin had 64.5 per cent foreign ownership as of June 2001, H&CB had 65.4 per cent foreign ownership by June 2001, KorAm had 59.5 per cent foreign ownership by 2000 (JP Morgan holding over 40 per cent by itself), KEB had 58.8 per cent foreign ownership as of June 2001, Shinhan had 52.1 per cent foreign ownership by 2000, and Hana had 52 per cent foreign ownership by the end of 2001.[3] If the control by foreign interests distinguished Citibank, this foreign control should have distinguished other Korean banks as well.

22. Second, the DOC disregarded Citibank as a benchmark by citing alleged influence by the GOK, and Citibank's desire to build its business in Korea. This rationale is in fact quite similar to the DOC argument for why other Korean banks were deemed entrusted or directed. The DOC rationale is internally inconsistent.

* * *

10. In its Second Written Submission to the Panel, the US refers to the Kookmin Prospectus in a section entitled "GOK Ownership and Control of Hynix's creditors". Does the US argue that GOK's 15.1% shareholding resulted in GOK control over Kookmin?

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[2] DOC Decision Memorandum at 40 (emphasis added).

[3] *See Hynix's Initial Arguments on: The Independence of Korean Banks Hynix Paper on the Independence of Korean Banks*, pp. 10-28, GOK Exhibit 25.

Comment:

23. We note that foreign investors owned 64.5 per cent of Kookmin Bank as of June 2001[4], and this substantial foreign ownership is part of the Kookmin's independence. No reasonable and objective authority would put such stress on the 15% GOK ownership, and so little attention on the 64.5 per cent foreign investor ownership.

We also note that the Kookmin prospectus refers to the possibility of influence, and never refers to any GOK control over lending decisions. Indeed, the Kookmin prospectus must be contrasted to the actual behavior of Kookmin in the October 2001 restructuring, where Kookmin refused to make any new loans to Hynix. A reasonable authority would not have concluded that Kookmin was "controlled" or even entrusted or directed based on these facts.

* * *

11. In reply to question 1 from the Panel, the US stated that "the constituent parts of the subsidy programme ... included the 800 billion won syndicated loan, the KDB Fast Track bond program, the May 2001 restructuring package, the October 2001 restructuring package, and the benefits conferred by these and other financial contributions, such as D/A loans, made as part of the Hynix bailout." Please specify an exhaustive list of the constituent parts of the alleged subsidy programme.

Comment:

24. No comment.

* * *

12. Please comment on para. 182 of Korea's Second Written Submission. In particular, does the US accept that the Hynix-only import figures are a reasonable proxy for the total import figures ?

Comment:

25. We note that that the Hynix figures are a reasonable proxy. The Panel can use either the Korean presentation of these figures, or the US presentation of these figures, since they are both basically the same. The problem with the US figures is that the United States did not bother to extend the analysis to quantify the amount of non-subject imports, which is a critical part of the analysis.

26. We also note given the US choice not to provide either the actual information or some other non-confidential version, the Panel has both the legal authority and discretion to draw adverse inferences.[5] In this case, the Panel can simply draw the inference that the Hynix figures are in fact a reasonable proxy.

* * *

13. Please comment on Korea's argument regarding the difference between the US submission and the ITC report regarding the extent of the "portion" speciality products (para. 211 of Korea's Second Written Submission). Please comment on Korea's argument regarding

[4] *Id*. at 19.
[5] See response to panel question 1 above.

the ITC's use of "value estimates" in respect of those speciality products (para. 212 of Korea's Second Written Submission).

Comment:

27. No comment.

* * *

14. In response to Question 23 from the Panel, the US asserts that although the ITC determined that non-subject imports were responsible for "the bulk of the market share lost by domestic producers during the period of investigation," it identified two reasons why it did not find the volume of non-subject imports as significant as otherwise would be suggested. First, the ITC referred to the composition of non-subject imports. Second, the ITC referred to the price effects of non-subject imports. How do these two factors qualify the loss of market share ? Wouldn't any impact resulting from the composition and price effects of non-subject imports already be reflected in the market share data? For example, wouldn't the fact that non-subject imports include speciality products mean that they would have taken less market share from domestic producers, and that this consideration is therefore already reflected in the market share data?

Comment:

28. We do not believe the ITC reasons adequately address the significance of the volume of non-subject imports. At the second meeting with the Panel, the United States argued that it did address the volume and increase in non-subject imports. But acknowledging a fact is not the same thing as analyzing that fact in an objective way. Even if we completely exclude the 20 per cent of the non-subject imports that the US contends do not compete (a characterization and argument with which we disagree), the remaining 80 per cent still dwarf the size and trends of the subject imports. It is not reasonable or logical to stress modest differences in the frequency of underselling while not taking into account the relative volumes of the subject versus non-subject imports.

29. Moreover, this logical defect is even more egregious given the ITC reason for stressing the small volume of subject imports. All of the ITC statements about commodity products and substitutability apply with equal force to that portion of the non-subject imports than are not RAMBUS or speciality products. If the small volume of subject import could have a more significant effect, that logic applies with even greater force to the much larger volume of non-subject imports that were growing faster than the subject imports.

30. Consider the following summary of the data before the ITC:

	2000	2001	2002
Market Share[6] – Subject	6.7	9.0	8.9
Market Share – Non-Subject	49.9	56.7	60.4
Frequency in Underselling[7] – Subject	51.0	56.0	69.8
Frequency in Underselling – Non-Subject	46.6	47.7	60.7

[6] *See* GOK First Submission, at para 250. The same analysis would apply if instead of the Hynix figures, we were to use the figures from US Figure 1, as summarized in the US Second Submission.

[7] *See* GOK Exhibit 5, ITC Determination at page 25, fn. 164.

31. The ITC stressed two points: the frequency of underselling was "lower", and "increased less", and therefore the trends in non-subject imports could be ignored. For each of these two points, the price data alone and then the price data viewed in light of the disparate volumes present interesting contrasts. We submit that the conclusions drawn from this data, although technically correct, are in fact fundamentally misleading, biased, and unsatisfactory.

32. At the outset, we note the basic point about market share. The growing market share of non-subject imports confirms the extent to which price competition by non-subject imports was having a dramatic effect in the market place. But objectively viewed, the data shows even more.

33. The ITC stressed the somewhat "lower" frequency of underselling: 4.4 per cent points in 2000, 8.3 percentage points in 2001, and 9.1 per cent points in 2002. But this focus on the difference obscures the fact that both subject and non-subject imports had a high frequency of underselling. Moreover, since this still high frequency of non-subject underselling applied to much greater volume of non-subject imports, the overall impact of non-subject imports would be much greater. Consider the relative volumes of imports that were underselling the domestic prices (in other words, the market share multiplied by the frequency of underselling[8]):

	2000	2001	2002
Market Share[9] – Subject	3.4	5.0	6.2
Market Share – Non-Subject	23.3	27.0	36.7

34. Thus, although the subject imports might have been underselling with a slightly greater frequency, that small difference in frequency is dwarfed by the much higher volume of non-subject imports. The volume of non-subject imports that were underselling was consistently five times larger than subject imports. The subject imports underselling the domestic price gained only 2.8 percentage points of market share, while the non-subject imports underselling the domestic price gained 13.4 percentage points. Thus the absolute magnitude and the change in magnitude were much greater for non-subject imports.

35. The ITC also stressed the somewhat lower rate of increase in underselling: subject imports underselling increased 18.8 per cent points, but non-subject imports increased only 14.1 percentage points over the 2000 to 2002 period. This difference is actually quite modest, since both subject and non-subjects increased their frequency of underselling. Relative to the fact that both subject and non-subject imports were underselling more than 60 per cent of the time, this change in the rate of increase of only 4.7 percentage points is small.

36. But once again, the ITC focus on this small change is oblivious to the much larger absolute volume (60% for non-subject in 2002, versus only 9% for subject) and increase in market share (a gain of 10.5 percentage points versus 2.2%) by non-subject imports.

37. The ITC's superficial conclusions simply do not do justice to the underlying data. Rather than analyse the data carefully, the ITC drew conclusions designed to confirm an outcome. This approach is not sufficient to satisfy the obligations of Article 15.

* * *

[8] Note that these percentages come from the ITC data on pricing, they focus on the commodity products, not the speciality products.

[9] Market share multiplied by the frequency of underselling.

15. Did the DOC conclude that the KEB was entrusted or directed to (a) participate in the Syndicated Loan and/or (b) seek a loan limit waiver?

Comment:

38. The DOC did not make any distinction between these two different steps in its determination.[10] Indeed, it is not really clear that the DOC ever attempted to accomplish the first step. The DOC evidence related only to the loan limit waiver, not the decision to participate in the loan itself.[11]

* * *

16. To what extent was the USD 1.35 billion GDS offering taken into account by the DOC with respect to its finding of entrustment / direction of Hynix's creditors?

Comment:

39. The DOC did not consider the $ 1.25 billion GDS offering in the context of entrustment or direction. Rather, the DOC discussed this issue only in the context of "benefit", in determining whether the May 2001 GDS could serve as an equity benchmark for the October 2001 debt-equity swap.[12] Remarkably, the DOC did acknowledge that a successful GDS did represent a contingency upon which other actions under the May restructuring were dependent,[13] but the implication was simply ignored.

* * *

17. Was the participation by "small" creditors accounting for approximately 20% of the debt in the October Restructuring countervailed?

Comment:

40. Yes. DOC countervailed the entire amount of the October restructuring not represented by Citibank, including all debt forgiveness, debt-for-equity swaps, and maturity extensions effected by all participants in the process.

* * *

B. QUESTIONS TO KOREA

18. Please comment on the following paragraphs of the Opening Statement of the US at the Second Substantive Meeting of the Panel:

> **§ 24 : Korea's concession that the transactions made under the KFB Fast Track Programme constitute financial contribution, but could still serve as benchmarks for determining benefit;**

[10] DOC Decision Memorandum at 50.
[11] *Id*. at 51-52.
[12] Id. at 90-91.
[13] Id. at 20.

Answer:

41. The United States is mischaracterizing the Korean argument about the KDB Programme. The United States is blurring the distinction between the bonds held by the KDB itself, and the bonds that were held by the other Korean private banks. Under this programme, banks that already held the Hynix bonds had to buy back and refinance some portion of those bonds. Most of the bonds were then repackaged and sold to investors as "investments trusts" (like mutual funds). The KDB itself held only a portion of the bonds.

42. Our point at page 15 of the Korean answer to Panel Question #23 was simple: even if the KDB is deemed to be a public body and thus the bonds held by the KDB could constitute a financial contribution, there are other banks holding identical bonds on identical terms. We do not agree with the US premise that the other private Korean banks were entrusted or directed, an argument developed extensively in the Korean submissions in this proceeding. Thus if any of the private Korean banks are found not to have been entrusted or directed, those banks could and should serve as benchmarks for that small portion of the bonds held by the KDB.

43. Moreover, for both the bonds held by the KDB and the bonds held by private Korean banks, the comparison of interest rates to market interest rates confirms the lack of any benefit. If the market price for three-year debt in Korea is about 7 per cent in 2001, then it is hard to see how refinancing bonds at interest rates ranging from 10.99 to 12.56 per cent can constitute a benefit.

* * *

§ 45 : no requirement in the SCM Agreement that the period examined for the subsidies inquiry cover the entire period examined for the injury determination.

Answer:

44. Although we agree there is no such specific requirement in the SCM Agreement, this US argument mischaracterizes the Korean argument. We never attack the DOC finding for investigating a period shorter than the ITC period, or attack the ITC for examining a period longer than the DOC period.

45. Our point is simply that proper causation analysis takes into account the existence or non-existence of temporal correlation. In this case, we do not believe any temporal correlation exists, and this absence of correlation calls into serious question any ITC conclusion about the existence of a causal link.

* * *

19. With reference to Figure US-1, does Korea contest the DOC's conclusion that each of the Group B creditors were controlled by GOK? Please explain.

Answer:

46. Yes. We disagree with several aspects of this conclusion.

47. First, we disagree with the US premise that ownership alone constitutes control for purposes of any analysis under Article 1.l(a). As Korea has argued, the Public Fund Oversight Act and the Memoranda of Understanding ensured that those banks in which the GOK had to take ownership would continue to make day-to-day decisions independently.

48. Second, we further disagree with the assumption that the capacity to control implies the same meaning as entrustment or direction. In the case of a private body (such as a bank) in which the government has a shareholding (minority or majority) allowing it to exercise a decisive influence over the private body's operations, the mere fact that the private body is under government control is not sufficient to presume that a measure adopted by that body has been "directed" by the government. It must be established that the government has actually exercised its control to direct the bank to participate in the measure. The other interpretation would -- in plain contradiction with the text of Article 1.1(a)(1)(iv) of SCM Agreement -- replace a more explicit standard of "direction" with a looser "control" standard.

49. Third, the KEB was not controlled by the GOK. Two different GOK entities each held a portion smaller than the largest shareholder, Commerzbank. When Commerzbank made its substantial investment in KEB, it asserted significant managerial control, including assigning a Commerzbank official to chair the loan committee. Given the relative shareholding and the operational control by Commerzbank officials, it makes no sense to conclude the KEB was being controlled by the GOK.

50. Fourth, the KFB was not controlled by the GOK. Newbridge Capital, a US financial firm, held 51% of the shares. Like Commerzbank, once Newbridge made this investment it assumed significant managerial control over day-to-day operations. Indeed, the US argument itself demonstrates the degree of KFB independence, even in the face of alleged pressures from others to take certain actions.

51. Fifth, we note that the investment trusts and financing companies are not owned or controlled by the GOK. This is a new aspect of the US argument, not part of the original DOC rationale.

52. Finally, the US assertion of "control" is at odds with the actual experience of many of these banks to decide not to participate in various parts of the Hynix restructuring. With respect to the December 2000 syndicated loan, since Hynix was trying to obtain 1000 billion won, but could only arrange 800 billion in loans, why did not Seoul Bank, Peace Bank, Kwangju Bank, or Kyongnam Bank make up some or all of the shortfall, if they were being controlled by the GOK? These banks, like the others, were making their own decisions. Similarly, the United States characterized all banks as participating in the October 2001 restructuring, even those that refused to provide any new funds or even agree to debt-equity swaps (Kwangju Bank, Kyongnam Bank, and KFB). If these banks were "controlled", why did they not provide the new loans that Hynix needed?

* * *

20. With reference to Figure US-1, does Korea contest the DOC's conclusion that each of the Group B creditors were entrusted or directed by GOK ? Please explain.

Answer:

53. Yes, we disagree with this conclusion as well. The discussion in answer to Question 19 above applies here as well. We would note the following additional points.

54. First, the conclusion of entrustment or direction makes absolutely no sense for the October 2001 restructuring. KFB and several others refused any new loans, and instead exercised Option No. 3 and then mediation to obtain the liquidation value of their outstanding debt, in accordance with the value set by the Arthur Anderson valuation report. That such banks would be deemed entrusted or directed is not supported by any plausible review of the facts.

55. Even for the other banks, the DOC drew conclusions based on extremely limited evidence. Notwithstanding its claim not to be relying upon general pronouncements, that is precisely what the United States uses as "evidence" for the October restructuring. Against this evidence, the DOC never analyzed or acknowledged the strong self-interest these banks had in trying to make restructuring work. Those banks with the largest stakes had the most to lose from bankruptcy and the most to gain from debt restructuring. This self-interest is a crucial part of the overall context and evidence that any reasonable authority would have considered. The problem in this case is that the DOC analysis put on blinders, and deemed any consideration of existing debt to be irrational and therefore irrelevant. This approach makes no sense as an effort to understand the decisions of Korean investors operating in a Korean market context.

56. Second, the conclusion of entrustment or direction also does not make any sense for the May 2001 restructuring. The May 2001 restructuring involved primarily rolling over existing debt at basically the same interest rates. By doing so, the banks allowed Hynix to obtain $1.25 billion in new equity capital, which was conditioned on the banks agreeing to roll over existing debt rather than absorbing the new equity capital to pay off existing debt. The foreign investors wanted new money to be used for capital spending and R&D spending, not just allowing existing Korean creditors to cash out. Against this context, the US "evidence" of entrustment or direction simply does not allow a reasonable and objective authority to draw the conclusions that the DOC drew in this case.

57. We have addressed the failings in the US evidence of entrustment or direction at length, and we need not repeat those arguments here. Those arguments apply to the entities listed in Group B, as well as the others in Group C. The US approach pays too little attention to the legal standard of Article 1.1(a)(1)(iv), too little attention to the compelling reasons the banks had for participating in the Hynix restructuring, and too much attention to sensational remarks by Korean politicians.

ANNEX E-6

ANSWERS OF THE UNITED STATES TO THE PANEL'S QUESTIONS TO THE PARTIES FOLLOWING THE SECOND SUBSTANTIVE MEETING OF THE PANEL

6 August 2004

Table of Reports Cited in These Answers

EC – Tube or Pipe Fittings	*European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, Report of the Panel, as modified by the Appellate Body, adopted 18 August 2003
US – Wheat Gluten	*United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, Report of the Appellate Body adopted 19 January 2001
Brazil – Aircraft	*Brazil – Export Financing Programme for Aircraft*, Panel Report, WT/DS46/R, Report of the Panel, as modified by the Appellate Body Report on other grounds, adopted 20 August 1999
US – Softwood Lumber	*United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, Report of the Appellate Body adopted 14 February, 2004
US – Oil Country Tubular Goods Sunset Reviews	*United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R, Report of the Panel circulated 16 July 2004 (unadopted)
Argentina – Hides and Leather	*Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, Report of the Panel adopted 16 February 2001
US – DRAMS	*United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, Report of the Panel adopted 19 March 1999

A. QUESTIONS TO THE UNITED STATES

1. Please comment on the following paragraphs of Korea's Opening Statement at the Second Substantive Meeting of the Panel:

§ 20: the hypothetical of Hynix being the lowest price twice, but 98 other suppliers being each the lowest price once;

1. Korea's hypothetical is not informative with respect to the issues raised in this dispute. To appreciate why this is so, it is first necessary to put the ITC's price undercutting analysis in context.

2. The ITC compared the weighted-average price of subsidized subject imports with the weighted-average price of the domestic industry's US shipments for eight specific standard DRAM products over a monthly time series spanning the period from January 2000 to March 2003. These comparisons comported with the relevant enquiry under Articles 15.1 and 15.2 of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) concerning the price effects of the subsidized subject imports on the domestic industry. Based on these comparisons, the ITC found increasing undercutting at high margins (often greater than 20 per cent) in the majority of instances by subsidized subject imports. It also found consistent and substantial undercutting for particular high-revenue products to particular channels of distribution at specific points during the period of investigation.[1]

3. Although there is no requirement in the SCM Agreement to do so given the facts of the DRAMs investigation, in response to Hynix's argument, the ITC also examined the pricing data on a disaggregated basis by both brand name and by source. The ITC determined that even a disaggregated analysis showed that subject DRAM products from Hynix's Korean facilities were the lowest-priced product "more often than DRAM products from any other source".[2] In other words, the disaggregated analysis of the pricing data confirmed the ITC's finding of significant price undercutting by subsidized subject imports.

4. Korea seeks to divert the Panel's attention from the significance of these findings by introducing hypotheticals concerning the ITC's disaggregated pricing analysis that have no bearing on the facts of the DRAMs investigation.[3] In its initial hypothetical, Korea assumed that there were 10 sales for which different suppliers were competing, that Hynix was the lowest priced source 2 times, and that eight other suppliers were the lowest priced source on at least one occasion.[4] Korea has now modified the hypothetical such that Hynix was the lowest priced source twice, but 98 other suppliers were each the lowest priced source once.[5]

5. These hypotheticals are meaningless for several reasons. First, Korea overlooks the fact that subsidized imports from Korea were the lowest-priced source in a disaggregated analysis of the

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[1] *See, e.g.*, USITC Pub. 3616 at 23-24, V-3 to V-9 & Tables V-1 to V-18 (Exhibit GOK-10).

[2] *See, e.g.*, USITC Pub. 3616 at 24 (Exhibit GOK-10).

[3] Korea also calls attention to the fact that the ITC did not reveal in the public version of its opinion the percentage of times that Hynix was the lowest-priced source under the disaggregated analysis of the pricing data. As we have pointed out in our previous submissions, however, Korea has not challenged the ITC's treatment of this information as confidential, nor has Korea challenged the ITC's summary of this confidential information as inadequate under Articles 12.4 or 22.5 of the SCM Agreement. This information is confidential because it identifies the percentage of times that a single subject foreign producer, Hynix of Korea, was the lowest-priced supplier in the US market based on a disaggregated analysis of the pricing data.

[4] *First Written Submission by the Republic of Korea*, 19 April 2004, para. 161 [hereinafter "Korea First Submission"].

[5] *Second Substantive Meeting; Oral Statement of the Government of Korea*, 21 July 2004, para. 20 [hereinafter "Korea Second Oral Statement"].

pricing data. This was so notwithstanding the fact that the DRAMs investigation involved an industry where there were *thousands* of transactions (and not only one hundred transactions, as Korea posits) over a 39-month investigation period and where the products for which the pricing data were gathered were highly substitutable for one another.

6. Second, the ITC's disaggregated pricing analysis was based on the data of only those few key suppliers to the US market. By contrast, Korea's second hypothetical is predicated on the existence of *99* suppliers, a scenario which even Korea admits is "extreme".[6] In the view of the United States, it is more than extreme; it is completely divorced from the factual record of the DRAMs investigation.

7. The ITC's disaggregated analysis of the pricing data was based on an examination of reported pricing information concerning *eight* sources of DRAM products from the four major players in the US market: (1) subsidized subject imports produced by Hynix in Korea; (2) Hynix-brand products produced in the United States; (3) Micron-brand products produced in non-subject countries; (4) Micron-brand products produced in the United States; (5) Infineon-brand products produced in non-subject countries; (6) Infineon-brand products produced in the United States; (7) non-subject Samsung-brand products produced in Korea; and (8) Samsung-brand products produced in the United States.[7] Subsidized subject imports were the lowest-priced product more often than any of these other sources, and at a magnitude that was greater than would be expected if each source were the lowest-priced product one-eighth of the time, as might be expected in an industry like this involving a fungible product and the rapid dissemination of pricing information.[8] The disaggregated analysis showed that subsidized subject imports were the lowest-priced DRAM products more often than any of the major US sources of DRAM products. Hynix's subsidized subject imports were the lowest priced more often than Micron's US DRAM products; Hynix's subsidized subject imports were the lowest priced more often than Infineon's US DRAM products; Hynix's subsidized subject imports were the lowest priced more often than Samsung's US DRAM products; and finally, Hynix's subsidized subject imports were the lowest priced more often than DRAM products from Hynix's own Eugene, Oregon facility.

8. Thus, based on both the weighted-average comparison of prices for subsidized subject imports and US shipments of DRAM products by the domestic industry and the disaggregated analysis of the pricing data, the ITC reasonably concluded that subsidized subject imports significantly undercut the domestic industry's DRAM prices.

9. To the extent that Korea is also arguing in the above-referenced paragraph 20 that the prices of non-subject imports are somehow relevant to the ITC's analysis of price undercutting by subsidized subject imports, Korea fails to identify any requirement in Article 15.2 of the SCM Agreement for an investigating authority to examine non-subject imports in that context. An investigating authority's analysis of price undercutting pursuant to the plain text of Article 15.2 is limited to a comparison of the subsidized subject imports and the like product produced by the domestic industry.

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[6] Korea Second Oral Statement, para. 20.

[7] *See First Written Submission of the United States of America*, May 21, 2004, para. 375 [hereinafter "US First Submission"]. Hynix conceded early in the DRAMs investigation that there were only four major players globally and in the US market (Samsung, Micron, Hynix, and Infineon, in decreasing order of magnitude). *See, e.g.*, Conference Transcript at 117-118 (Exhibit US-95).

[8] Indeed, the ITC's disaggregated analysis was conservative. There were instances where certain products were the *only* source in the market (*e.g.*, because other firms were not yet capable of selling those products) and yet they were considered the lowest-priced source. Had the ITC only considered instances where there were sales from more than one brand-name source in a particular month, the undercutting frequency for subsidized subject imports based on a disaggregated analysis by both brand name and by source would have been even higher.

10. Nevertheless, the ITC did examine the weighted average price of non-subject imports. It determined that the undercutting frequency by non-subject imports was lower than, and increased less than, the undercutting frequency of subsidized subject imports during the period of investigation.[9] The ITC found that "subject imports undersold non-subject imports in a majority of instances".[10] Moreover, notwithstanding Korea's focus throughout this dispute on Samsung's non-subject imports, the ITC's disaggregated analysis of the pricing data revealed that subsidized subject imports produced by Hynix in Korea were more often priced lower than Samsung's non-subject imports. Similar statements can also be made with respect to the other two major non-subject import suppliers (Micron and Infineon). Hynix's subsidized subject imports were the lowest priced more often than Micron's non-subject DRAM products, and Hynix's subsidized subject imports were the lowest priced more often than Infineon's non-subject DRAM products.

§ 22: the ITC's focus on relatively small changes in the frequency of underselling, while ignoring dramatically different volumes of non-subject imports;

11. There are a number of flaws with Korea's arguments in the referenced paragraph 22. Once again, Korea attempts to challenge the adequacy of the ITC's price undercutting analysis by shifting the discussion to non-subject imports. However, as noted above, the focus of Article 15.2 of the SCM Agreement is on the significance of the price undercutting by subsidized subject imports, not non-subject imports.

12. There is simply no way that a reasonable investigating authority could have dismissed the significance of the undercutting by subsidized subject imports in the DRAMs investigation, regardless of the price undercutting by non-subject imports. Subsidized subject imports undercut the domestic like product in the majority of comparisons examined at high margins (often over 20 per cent), and at increasing frequencies. Undercutting occurred with respect to each of the major channels of distribution (PC OEMs, non-PC OEMs, and non-OEMs). Undercutting was also consistent and substantial for particular high-revenue products to particular channels of distribution at specific points during the period of investigation. For example, by the end of the period examined, undercutting to PC OEMs – the most significant sales channel – reached *100 per cent* of all price comparisons.[11] As the ITC explained, such significant price disparities would not normally be expected in a commodity-type market, and these high margins could be expected to have "particularly deleterious effects on domestic prices".[12]

13. Furthermore, this is one of many instances where Korea discusses the record evidence in a vacuum. Korea appears to argue in favour of the adoption of some abstract notion of what is "substantial" or "significant", while eschewing the relationship of facts to the particular circumstances in which they arise. For example, Korea speaks of "relatively small changes in the frequency of underselling" and "dramatically different volumes of non-subject imports". Nowhere, however, does the SCM Agreement identify any "change" in undercutting or in volume as by definition "small", "dramatically different", or any other such term. This is entirely logical, because in the abstract, no such change can automatically be regarded as "significant" or "insignificant".

14. As we have emphasized in our submissions to the Panel, and as the ITC emphasized throughout its final determination, it is only when the factual data are examined in terms of the conditions of competition in the particular industry that an otherwise abstract figure or change has meaning. The ITC's determination evinced how the agency put the facts of the DRAMs investigation

[9] *See, e.g.*, USITC Pub. 3616 at 25 & n.164 (Exhibit GOK-10).
[10] *See, e.g.*, USITC Pub. 3616 at 25 n.164 (Exhibit GOK-10).
[11] *See, e.g.*, USITC Pub. 3616 at 23-24 & nn.155, 165 (Exhibit GOK-10).
[12] *See, e.g.*, USITC Pub. 3616 at 24 (Exhibit GOK-10).

in context.[13] By contrast, in its submissions to the Panel, Korea has opted to examine the evidence in a vacuum and to characterize trends concerning subsidized subject imports as "small" and trends concerning non-subject imports as "dramatic".

15. Korea ignores the following key facts about the DRAMs industry: (1) subsidized subject imports were highly substitutable for domestically produced DRAMs products; (2) demand was inelastic so that lower prices were unlikely to generate additional purchases; and (3) information about the prices that a handful of suppliers were offering was transmitted extremely quickly to purchasers, including through mechanisms such as most favoured customer and best price clauses and other such mechanisms.[14] Thus, a given volume or a given volume increase of DRAM product imports – absolutely or relative to domestic production or consumption – has a greater effect on the domestic industry than it would for a highly differentiated product.

16. In the DRAMs investigation, the pricing data showed extreme price undercutting by subsidized subject imports. In addition, other record evidence reinforced these findings, showing that even purchasers that may have been reluctant to commit large portions of their purchases to the financially troubled Hynix freely used Hynix's low-priced offers as a bargaining tool to ratchet down prices from other potential suppliers.[15] Articles 15.1 and 15.2 of the SCM Agreement, which employ disjunctive language, plainly contemplate that there may be cases where there are significant adverse price effects without any increase in subject import volume, such as where the domestic industry lowers its prices in order to retain market share.[16]

17. In the referenced paragraph, Korea also repeats its mistaken assertion that the ITC "ignored" non-subject import volume. The ITC's determination demonstrates otherwise. The ITC explicitly recognized that non-subject imports "increased market share by a substantially larger amount than subject imports". At the same time, however, the ITC found that "subject import volume and pricing were themselves sufficient to have a significant negative impact on the domestic industry".[17]

18. The ITC considered the possible effects of the increasing volumes of non-subject imports on domestic prices. Whereas it is our understanding that most other Members do not even collect pricing information on non-subject imports, the ITC collected such data in the DRAMs investigation. The ITC examined the pricing data concerning non-subject imports by means of a weighted-comparison and by means of a disaggregated analysis by brand-name and by source. It recognized that there were instances where non-subject imports undersold the domestic industry.[18] The ITC also looked at the timing, magnitude, and frequency of the undercutting by non-subject imports. The undercutting frequency by non-subject imports was lower than, and increased less than, the undercutting frequency of subject imports during the period of investigation. In particular, while subject imports were increasing their undercutting frequency between 2000 and 2001 from 51 per cent of all observations to 56 per cent of all observations, the frequency of undercutting by non-subject imports was fairly steady at 46.6 per cent of instances in 2000, and 47.7 per cent in 2001. Undercutting by subsidized

[13] *See, e.g., Answers of the United States of America to the Panel's Questions to the Parties Following the First Substantive Meeting of the Panel*, 9 July 2004 (Answer to Question 20) [hereinafter "US Answers to Panel Questions"], regarding how the ITC examined the volume data in context; *Second Written Submission of the United States*, 9 July 2004, paras. 73 to 91 [hereinafter "US Second Submission"], regarding how the ITC examined the price effects of the subsidized subject imports in context.

[14] *See, e.g.*, USITC Pub. 3616 at 22-23 (Exhibit GOK-10).

[15] *See, e.g.*, Hearing Transcript at 23, 50, 72-75 (Exhibit US-94).

[16] Of course, the ITC found, based upon record evidence, that there were significant increases in the volume of subsidized subject imports during the time period covered by the DRAMs investigation.

[17] *See, e.g.*, USITC Pub. 3616 at 21 (Exhibit GOK-10).

[18] *See, e.g.*, USITC Pub. 3616 at 25 (Exhibit GOK-10).

subject imports increased to 69.8 per cent of all observations in 2002, about 10 percentage points higher than the percentage for non-subject imports in that year (60.7 per cent).[19]

19. In other words, between 2000 and 2001, when DRAMs prices experienced historically unprecedented severe declines[20], it was subsidized subject imports whose undercutting frequency was increasing, not non-subject imports. Moreover, the frequency and magnitude of undercutting by subject imports continued to increase into 2002, as prices continued to decline.[21] The ITC determined that "[w]hile non-subject import market share grew, the primary negative impact on the domestic industry was due to lower prices, and on this point, subject imports, themselves, were large enough and priced low enough to have a significant impact. This is so regardless of the adverse effects caused by non-subject imports".[22] The ITC evaluated the growing market share of non-subject imports and concluded that while non-subject imports were having "adverse effects" on the domestic industry, subsidized subject imports themselves were having a significant negative impact on the domestic industry.[23]

20. There is nothing in the SCM Agreement that prevents an investigating authority from determining that subsidized subject imports materially injure the domestic industry, even if non-subject imports are larger, or increase by a larger amount, than subject imports. Nor is there any language in the SCM Agreement that prevents an investigating authority from making an affirmative determination if the volume or price effects of non-subject imports are also having an adverse impact on the domestic industry.

21. Indeed, the plain text of Article 15.5 contemplates that a domestic industry may be being injured by one or more other known factors at the same time that subject imports are materially injuring the domestic industry. It specifies that "The authorities shall also examine any known factors other than the subsidized imports *which at the same time are injuring* the domestic industry ... ." (emphasis added). The key is simply that the investigating authority is to take care not to attribute injury caused by the other factors to the subsidized subject imports.[24]

22. Even though Korea purports to agree with the United States that the SCM Agreement does not require that subject imports be the "sole cause" of the material injury experienced by the domestic industry[25], the reality is otherwise. Korea's arguments related to the referenced paragraph 22 do amount to an assertion that subject imports must be the sole cause in order for an investigating authority to make an affirmative injury determination. In order to obscure the harm caused by subsidized subject imports, Korea insists on comparing the relative size of the volume of subject imports and non-subject imports and their relative volume increases, as well as the level of undercutting attributable to each.

23. The discussion above demonstrates how the ITC carefully examined non-subject imports to identify the nature and extent of any injurious effects that non-subject imports were having on the domestic industry in order to ensure that it did not attribute injury from other factors to the subsidized subject imports. Korea simply has failed to demonstrate that a reasonable investigating authority could not have come to the same conclusion based on the record evidence as did the ITC.

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[19] *See, e.g.*, USITC Pub. 3616 at 25 & n.164 (Exhibit GOK-10).
[20] *See, e.g.*, USITC Pub. 3616 at 24 (Exhibit GOK-10).
[21] *See, e.g.*, USITC Pub. 3616 at 24, 25 & n.164 (Exhibit GOK-10).
[22] *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10).
[23] *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10).
[24] SCM Agreement, Article 15.5.
[25] *See, e.g.*, Korea Second Oral Statement, para. 28.

§ 26: the issue of correlation, in the context of causal nexus: what changed from 2000, when the domestic DRAMS industry had record performance, and 2001, when price fell and industry profits plunged;

24. As we have explained in previous submissions, Korea's assertions concerning the lack of correlation between subsidized subject imports and the material injury suffered by the domestic industry are predicated largely on Korea's erroneous assumption that "volume" does not mean the volume of subsidized subject imports, but instead means the volume of all Hynix-brand products being sold in the US market, including those produced at Hynix's Eugene, Oregon plant. Korea does so because it is only by reference to brand-name volume that Korea is able to make the assertion that the volume of Hynix brand products was "declining" during the period of investigation. However, Hynix products produced in Oregon were not subsidized subject imports; instead, they were the production of the US domestic industry.

25. Korea has failed to demonstrate that a brand-name analysis was required under the SCM Agreement given the facts of the DRAMs investigation. Once the focus is shifted from Korea's faulty "brand" enquiry to the relevant enquiry under the SCM Agreement, the causal nexus between the subsidized subject imports and the material injury experienced by the domestic industry is readily apparent.

26. In the referenced paragraph 26, Korea focuses on changes between 2000 and 2001. However, as is evident from the final determination, the ITC examined all of the factors described in Articles 15.1, 15.2, and 15.4 of the SCM Agreement based on the thirty-nine months between January 2000 and March 2003. The ITC also discussed the intervening changes between 2000 and 2001 and between 2001 and 2002, and it also examined the data for the first quarter of ("interim") 2002 and interim 2003.[26]

27. Drawn from Figure US-5 is a summary of the data pertaining to the period between January 2000 and March 2003, as well as a summary of the data for the period between 2000 and 2001:

During the Period of Investigation[27]

Subsidized subject imports

- Volume significant in absolute terms, increased significantly absolutely and relative to both US. production and consumption (20-21, 24).
- Significant price undercutting at increasing frequencies and at increasingly higher margins, reaching 100 per cent for key products by 2002 (22-24 & n.164).
- Significant price depression, and other factors could not explain the price depression (24-25).
- Hynix is uncreditworthy (1/1/2000 to 6/30/2002); unequityworthy at 10/2001 debt-to-equity swap; DOC determined Hynix total net countervailable subsidy for 1/1/2001 to 6/30/2002 of approximately $2 billion, or a subsidy rate of 44.71 per cent *ad valorem* (19).

Domestic industry

- Increasing US shipments in terms of bits, but declining unit values; declining market share.
- Small and relatively stable end-of-period inventories.
- Overall decline in average production capacity and wafer starts.
- Increase in capacity utilization, but capacity utilization is expected to be high in this industry.

[26] *See, e.g.*, USITC Pub. 3616 at 20 to 28, Table C-1 (Exhibit GOK-10).

[27] References in parentheses are to the corresponding pages of the report of the ITC's final determination, USITC Pub. 3616 (Exhibit GOK-10).

- Idling of certain production capacity and deferral of upgrades and expansions of production facilities and equipment.
- Four US producers ceased DRAM production in the United States.
- Increasing production quantities in terms of bits, but increases were smaller than increases in apparent US consumption.
- General declines in employment and wages over the period of investigation.
- Due to a large decline in unit sales value, operating income declined from a $2.7 billion profit in 2000 to a loss in excess of $2 billion in 2001, and losses continued into 2002.
- As a ratio to net sales, operating income was 32.2 per cent in 2000 then became a loss of 79.2 per cent in 2001 and a loss of 50.8 per cent in 2002; declines in capital expenditures (26-27, Tables III-1, III-5, IV-4, C-1).

Between 2000 and 2001

Subsidized subject imports

- Volume significant in absolute terms, significant increases (absolutely, relative to US production/consumption) (20-21).
- Significant undercutting, no matter how data viewed, frequency increasing from 51 to 56 % (22-24 & n.164).
- Precipitous price declines across all products, most severe price decline in DRAMs history (24).
- Anti-Dumping order on DRAM products from Hynix/predecessors revoked 10/5/2000 (19 & n.141).
- Hynix is uncreditworthy (1/1/2000 to 6/30/2002), unequityworthy at 10/2001 debt-to-equity swap (19).

Domestic industry

- Increased US shipments.
- Declining unit values.
- Declining market shares.
- Small and relatively stable end-of-period inventories.
- Declining average production capacity.
- Declining wafer starts.
- Slight increase in capacity utilization, but capacity utilization is expected to be high in this industry.
- Certain production capacity idled.
- Upgrades and expansions of production facilities and equipment deferred.
- Declines in production quantities measured in bits.
- General declines in employment and wages.
- Due to a large decline in unit sales value, operating income declined from a $2.7 billion profit in 2000 to a loss in excess of $2 billion in 2001.
- As a ratio to net sales, operating income was 32.2 per cent in 2000 then became a loss of 79.2 per cent in 2001.
- Declines in capital expenditures (26-27, Table C-1).

28. As these summaries and the additional data summaries provided in Figure US-5 illustrate, there was a very strong correlation between the volume (and the increases both absolutely and relative to both domestic production and consumption) of the subsidized subject imports and the adverse impact on the domestic industry. There was a strong correlation between the significant price undercutting by the subsidized subject imports and the significant price declines experienced during the period of investigation. There was a strong correlation between these price declines and the

adverse impact on the domestic industry. There was also a strong correlation between the timing of the subsidies and the adverse impact on the domestic industry.

29. Indeed, to provide a further example of the changes occurring between 2000 and 2001 using even more detailed data, we refer the Panel to the pricing data summaries in the ITC's report. As the ITC recognized, PC manufacturers accounted for the vast majority of the revenues on sales of DRAM modules.[28] In 2000, Hynix's subsidized subject imports in this sales channel were priced *above* the domestic industry in fully 75 per cent of all observed price comparisons.[29] In 2001, this pattern reversed itself profoundly when Hynix *undercut* the domestic industry's module prices to this important segment in 68 per cent of all price comparisons.[30] Price undercutting for modules to PC OEMs remained at 68 per cent of observations in 2002.[31]

§ 33: the selection of data on record about product substitutability;

30. Contrary to Korea's suggestion, the ITC was not selective in its use of record data concerning product substitutability. The ITC found that within the DRAM product family, DRAM products of similar density, access speed, and variety (regular DRAM, VRAM, SGRAM, etc.) were generally interchangeable "regardless of the country of fabrication".[32] Thus, standard products of a similar density, access speed, and variety were substitutable with one another regardless of country source. However, as explained by the ITC, a more limited degree of interchangeability existed among different varieties of DRAMs, as well as among those with different addressing modes/access speeds.[33] Thus, substitutability was more limited and had to occur at the design phase for DRAM products of different varieties or different addressing modes.

31. Whereas the record indicated, and the ITC found, that nearly all of the subject imports and domestically produced DRAM products were standard DRAM products[34], such was not the case with non-subject imports. The ITC collected data on the percentage of imported products and US shipments of DRAM products in 2001 and 2002 that were "standard" DRAM products, Rambus DRAM products, and other "specialty" DRAM products. Questionnaire respondents were asked to differentiate the reported information for Rambus DRAM products containing dice fabricated in Korea by "Samsung" and the portion containing dice fabricated in Korea by "others", and to differentiate the reported information for specialty DRAM products containing dice fabricated in Korea by "Samsung" and the portion containing dice fabricated in Korea by "Others".[35] As the United States previously explained[36], Rambus or specialty DRAM products accounted for approximately one-fifth of all US shipments of non-subject imports in 2001. The corresponding percentage in 2002 was somewhat higher than in 2001.

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[28] *See, e.g.*, USITC Pub. 3616 at 15, 23 n.152 (Exhibit GOK-10).
[29] *See, e.g.*, USITC Pub. 3616 at Table V-18 (Exhibit GOK-10).
[30] *See, e.g.*, USITC Pub. 3616 at Table V-18 (Exhibit GOK-10).
[31] *See, e.g.*, USITC Pub. 3616 at Table V-18 (Exhibit GOK-10).
[32] *See, e.g.*, USITC Pub. 3616 at 17 (Exhibit GOK-10). As an example, the ITC's report explained that a 64 Mb SDRAM manufactured by the subject Korean producer should be fully interchangeable with a similarly configured domestically produced device, as well as with a non-subject import. *Id*. at I-10.
[33] This substitution often must occur during the design phase of the electronic system. For example, according to numerous questionnaire responses, after an electronic system has been designed to operate using a specific type of DRAM, the system would likely not function optimally using a different type. Similarly, with regard to the different addressing modes, once a memory controller has been designed for an electronic system, a specific addressing mode such as EDO or SDRAM has also been designed in. *See, e.g.*, USITC Pub. 3616 at 17, I-10 (Exhibit GOK-10).
[34] *See, e.g.*, USITC Pub. 3616 at 22, 23 n.151, I-10, II-6, Table II-2 (Exhibit GOK-10).
[35] *See, e.g.*, Importers' Questionnaire at question II-10(a) (Exhibit GOK-44(b)).
[36] US Answers to Panel Questions (Answer to Question 17).

32. Thus, some of the non-subject imports sold in the US market during the period of investigation consisted of standard DRAM products that were interchangeable with the corresponding standard DRAM products produced by Hynix in its subject Korean facilities and by the domestic industry. However, a significant portion of non-subject imports were non-standard products. The ITC appropriately took into account these factual differences.

33. In this regard, we reiterate that the eight products for which pricing data was collected in the DRAMs investigation were all "standard" DRAM products.[37] No pricing information was collected on RAMBUS or specialty DRAM products. Thus, when the ITC determined that subsidized subject imports were undercutting the domestic industry at greater frequencies and at larger margins than non-subject imports, this conclusion was based on the pricing behaviour for standard DRAM products.[38]

§ 34: the portion of subject imports underselling in 2001 was 5% of the market, whereas the portion of non-subject imports underselling was 27% of the market;

34. There are several flaws with the arguments set forth in paragraph 34. First, Korea insists that a comparison of the undercutting by subsidized subject imports with a comparison of the undercutting by non-subject imports is somehow required. However, such a comparison has no foundation in the text of the SCM Agreement or in reports reviewing countervailing or antidumping duty determinations.

35. The ITC separately examined the volume and price effects of subsidized subject imports and their impact on the domestic industry, and it separately examined the volume and price effects of non-subject imports on the domestic industry, but there was no requirement that it compare and contrast the two. So long as subsidized subject imports themselves materially injured the domestic industry, and so long as the ITC provided a satisfactory explanation of the nature and extent of the injurious effects non-subject imports were having on the domestic industry to show that it did not attribute the injury from other factors to the subsidized subject imports, then the ITC complied with the requirement to separate and distinguish other factors, as articulated by the Appellate Body. As explained above in the response to the question concerning paragraph 22, the ITC satisfied these requirements in the DRAMs investigation.

36. The second flaw in Korea's arguments relates to the figures cited by Korea. As we have explained in prior submissions, Korea's calculation of Hynix's market share is skewed.[39] In paragraph 34, Korea compounds the problem by netting its flawed market share figure for Hynix and the market share for the domestic industry from 100 per cent and calling the remainder the market share for non-subject imports (even though it is at best the market share for non-subject imports *plus* the market share for importers of subsidized subject imports other than Hynix).

37. Korea then multiplies these suspect market share figures by the frequency with which those imports undersold the domestic industry's DRAM products and pronounces that in 2001 the portion of undercutting by subject imports was about 5 per cent of the market, but the portion of undercutting by non-subject imports was about 27 per cent of the market. Leaving aside the problems with the underlying market share figures, Korea's calculation attempts to use the undercutting data for a purpose for which it is not suited. The undercutting data shows the number of monthly comparisons in which the weighted average subject import price was below the weighted average price of the

[37] *See, e.g.*, USITC Pub. 3616 at 23 (Exhibit GOK-10).
[38] *See, e.g.*, USITC Pub. 3616 at 25 n.164 (Exhibit GOK-10).
[39] *See, e.g.*, US Second Submission, paras. 114 to 118; *Opening Statement of the United States of America at the Second Substantive Meeting of the Panel*, 21 July 2004, paras. 34-36 [hereinafter "US Second Oral Statement"].

domestic like product. The undercutting comparisons are for specific products and do not even cumulatively account for all of the sales of either subject imports or of the domestic like product during the period of investigation. Consequently, there is no basis whatsoever to take the percentage of months where there was undercutting by the subject imports and then to multiply that by the market share of subject imports to derive a figure that purports to reflect what percentage of shipments in the US market were undersold by subject imports. For exactly the same reason, the data collected by the ITC cannot be used to posit a percentage of the market which was undersold by non-subject imports, as Korea presents to the Panel, for a specific product type. Contrary to Korea's implication, the frequency of undercutting, while significant in and of itself, says nothing about the quantity of imports in the observed months that were undercutting the domestic like product. Instead, this figure reflects that the weighted-average price of the imports in question for each of those months was lower than the weighted-average price of the domestic industry's DRAM products.

38. Moreover, the proxies that Korea uses also do not take into consideration the magnitude of undercutting involved or the effects that a company engaging primarily in undercutting has on the market. A company that consistently undercuts prices as Hynix did has a disproportionate effect on prices in the market as opposed to a company that does not consistently undercut prices.

> **§ 37: the ITC does not explain why the effect of supplier competition was attributed to the small change in subject import market share, rather than the much larger market share of non-subject imports and the rate at which non-subject imports were gaining market share;**

39. We addressed the major flaws in this argument in our responses above to paragraphs 20, 22, and 34 of Korea's Second Oral Statement. We refer the Panel to those responses, including the discussions of the problems with Korea's characterization of data in the abstract without any factual context and Korea's dependence on an assumption that subsidized subject imports must be the "sole cause" of material injury to the domestic industry. Simply because Korea does not like the explanation that the ITC provided does not detract from the fact that the ITC's explanation is at least as thorough and comprehensive as those explanations provided by other investigating authorities in cases where their analyses have been found to be WTO-consistent by WTO reviewing bodies.[40]

> **§ 39: the key missing point – non-attribution required the ITC to separate and distinguish the role of subject import supply sources from domestic and non-subject import supply sources;**

40. The cited statement from paragraph 39 was made in connection with Korea's argument that the ITC "completely ignored" increases in supply/capacity by DRAMs producers that occurred during the period of investigation. As we pointed out in previous submissions, however, the ITC *agreed* with Hynix that there were capacity increases during the period of investigation, and it expressly relied on the same exhibits that Hynix did to support this finding.

41. Moreover, the ITC took account of these capacity increases (whether they are called capacity increases or supply increases)[41] as part of its consideration of the DRAMs business cycle and the manner in which the DRAMs business cycle and other factors (such as the product life cycle and a slowing in demand growth) affected DRAM prices during the period of investigation.

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[40] *See* US Second Submission, paras. 109-113.

[41] *See, e.g.*, Hearing Transcript at 205 (Exhibit US-122) (in which Hynix's counsel concurs that in this industry where producers need to operate at high capacity utilization levels in light of the high fixed costs associated with DRAMs production, capacity equals supply).

42. Based on its analysis of the pricing data, the ITC ascertained that prices for nearly every pricing product and channel of distribution declined substantially over the period of investigation. It observed that prices for domestic products and subsidized subject imports followed the same general trends and were generally similar for sales to PC OEMs across all products. More particularly, the product-specific data showed price declines of 70 to 90 per cent from late 2000 through 2001, a modest rebound in early 2002, then a further decline over the course of 2002. The ITC identified record evidence indicating that the price decline in 2001 was the "most severe in history".[42]

43. The ITC examined other possible reasons for these price declines. Regardless of the label attached to these factors – or whether a particular factor encompassed "sub-factors" – it is clear from the face of the ITC's determination that the ITC examined the *product life cycle* and the DRAMs *business cycle* that is characterized by repeated "boom" and "bust" periods as other possible reasons for the price declines.[43]

44. Based on its evaluation of the record evidence in this investigation, the ITC determined that "[w]hile slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor".[44] The ITC determined that these price declines were far greater than the 20 to 30 per cent that Micron – or even the 40 per cent that Hynix *itself* – reported would be expected on an annual basis.[45]

45. The ITC concluded that the increasing frequency of undercutting by subsidized subject imports from 2000 to 2002 corresponded with the substantial decline in US prices over those same years. The ITC further concluded that in the absence of significant quantities of subsidized subject imports competing in the same product types at relatively low prices, domestic prices would have been substantially higher.[46]

46. In the referenced paragraph 39, Korea asserts that a "lone footnote" is not enough, and that "to look at capacity in the aggregate simply does not allow the necessary analysis" because this "factor is not one that can be subsumed within another and required independent analysis to be analyzed at all." (Citation omitted).

47. The ITC's evaluation of supply/capacity, described above, can hardly be characterized as a "lone footnote", nor does Korea provide any support for its assertion that an investigating authority's examination must take place in the text. Nor is there any support for Korea's assertion that analysis of supply/capacity is "not one that can be subsumed within another and required independent analysis to be analyzed at all". Korea's argument conflicts with the findings of panels in disputes reviewing antidumping determinations wherein investigating authorities' analyses have been found to be WTO-consistent in situations where the authorities analyzed factors that were subsumed within other factors.[47]

48. The ITC clearly separated and distinguished the role of subject import supply sources from domestic and non-subject import supply sources. The ITC's examination and explanation is more fully described above in response to questions concerning paragraphs 20, 22, 34, and 37. Moreover, it

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[42] *See, e.g.*, USITC Pub. 3616 at 24 (Exhibit GOK-10).

[43] *See* US First Submission, paras. 454-457, which identify in more detail where in the ITC's final determination the examination of these factors took place.

[44] *See, e.g.*, USITC Pub. 3616 at 24-25 (Exhibit GOK-10).

[45] *See, e.g.*, USITC Pub. 3616 at 24-25, I-11 (Exhibit GOK-10); Hearing Transcript at 157-161, 267-68 (Exhibit US-94).

[46] *See, e.g.*, USITC Pub. 3616 at 24-25 (Exhibit GOK-10).

[47] *See, e.g.*, US Second Submission, paras. 109 to 112 (citing, *inter alia*, *EC – Tube (Panel)*).

is important to bear in mind that the ITC's analysis of subject and non-subject imports was not based only on a macro-economic analysis of trends and projected causes. The ITC also contacted purchasers of DRAM products, and those purchasers identified Hynix as a source of low-priced DRAM products and confirmed that the domestic industry lost sales and/or revenues due to competition from Hynix.[48] This anecdotal evidence is a further indication that the ITC did "separate and distinguish" the subsidized subject imports from non-subject imports, and that it did find independent evidence that low prices of the subsidized subject imports were injuring the US industry.

§ 49: appearance of control where none exists, nothing suggests that the GOK would intervene in day-to-day credit decisions of various banks;

49. In the referenced paragraph 49, Korea asserts that there is "nothing" in the Prime Minister's Decree, the Public Fund Oversight Act, or any specific MOU, "to suggest that the GOK *would* intervene in the *day-to-day* credit decisions of the various banks". (Emphasis added.) There are several problems with this statement.

50. First, the DOC did not find that the cited measures suggested that the GOK necessarily *would* intervene in banks' credit decisions. Instead, the DOC reasonably found, based upon their plain text, that these measures gave the GOK the *ability* to intervene in banks' credit decisions should it choose to do so.

51. For example, Prime Minister Decree No. 408, on its face, gave the GOK legal authority to intervene in the lending decisions of a bank in the exercise of the GOK's shareholder rights.[49] The Decree also permitted supervisory agencies to request "cooperation" from financial institutions for the purpose of stabilizing financial markets or attaining the "goals of financial policy".[50] Another legislative action considered by the DOC was the Public Fund Oversight Act. This law required Korean private banks to sign contractual commitments with the government – MOUs – in exchange for the massive recapitalizations received from the GOK. The MOUs provided for GOK intervention in a bank's fiscal operations.[51]

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[48] *See, e.g.*, USITC Pub. 3616 at 25 (Exhibit GOK-10).

[49] The decree was issued in November 2000, precisely when the GOK began pursuing its Hynix bailout policy.

[50] *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4); Prime Minister Decree No. 408, Articles 5 and 6 (Exhibit GOK-45). The investigation record reflects that on more than one occasion, the GOK did, in fact, request "cooperation" from various creditors to assist Hynix. For example, an FSS official stated: "It is unsound that both Hyundai Electronics and the creditor group, the banks which agreed to resolve the liquidity of Hyundai Electronics, are refusing to provide support even resorting to expedient measures. Now that we have *requested for cooperation* using multiple channels, we are expecting support to be provided sooner or later." *Financial Community's Support for Hyundai Electronics—A US Subsidiary Facing Insolvency Risk*, MAEIL ECONOMIC DAILY, March 7, 2001 (emphasis added) (translated version) (Exhibit US-69). The FSS also invited officials from Shinhan Bank and Hanmi Bank to a meeting to "*request their cooperation*" when several banks retracted their earlier promises to increase purchase limits on Hynix's export bills of exchange ("D/A loans"). *Creditor Group Conflicts With Government Over Supporting Hyundai Group*, MAEIL ECONOMIC DAILY, 2 February 2001 (emphasis added) (translated version) (Exhibit US-68). A 7 March 2001 Maeil Economic Daily article further commented that, "[a]s things are going awry, the Financial Supervisory Service is desperately 'making every effort', as the highly-placed official of FSS calls the presidents of the banks concerned, urging that the limit be extended following the convening of people from the appropriate banks to make an earnest *request for cooperation*." *Financial Community's Support for Hyundai Electronics – A US Subsidiary Facing Insolvency Risk*," MAEIL ECONOMIC DAILY, 7 March 2001 (emphasis added) (translated version) (Exhibit US-69).

[51] *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4); *Government of Korea Verification Report* at 4 (referencing Exhibits 1-2 through 1-6) (Exhibit US-12). During the investigation, the DOC requested the GOK to produce an MOU, but it declined to do so. *See* US Second Oral Statement, para. 8.

52. An additional legislative action considered by the DOC was the Corporate Restructuring Promotion Act (CRPA), which was enacted immediately prior to Hynix's October restructuring and refinancing. The DOC found that the CRPA permitted a handful of Hynix's creditors to dictate restructuring terms to other Hynix creditors,[52] and provided the Financial Supervisory Service (FSS), a government entity, with formal power to request creditors' assistance, and to instruct creditors not to press payment claims, with respect to Hynix's restructuring.[53] As discussed in response to Questions 2 and 6, below, the DOC did not rely upon the mandatory nature of the CRPA, in and of itself, or in the abstract, as evidence of entrustment or direction. Rather, the DOC found that the mandatory nature of the CRPA, *coupled with the specific factual circumstances present in this case*, provided an effective tool through which the GOK was able to effectuate its Hynix policy.

53. Another problem with the referenced paragraph 49 is that the DRAMs investigation simply was not about the "day-to-day" credit decisions of banks. Instead, it involved extraordinary government action aimed at ensuring that billions of dollars were funnelled to a company that the GOK regarded as so important that it would not be left to the mercies of the marketplace and allowed to fail.

54. Finally, the United States has never contended – nor did the DOC find – that the GOK *needed* to intervene on a daily basis with the banks in order to entrust or direct them to assist Hynix. The GOK only needed to intervene as necessary to ensure that the banks stayed in line. The DOC reasonably found that the aforementioned measures gave the GOK the ability to intervene as it considered necessary. Furthermore, the DOC found that record evidence made clear that the GOK *did* intervene in banks' credit decisions.

§ 76: the argument regarding the size of Citibank's loan.

55. As explained in prior US submissions, the DOC rejected loans from Hynix's private creditors for use as a benchmark because it found those loans to be government financial contributions (with the exception of loans from Citibank). After consideration of record evidence, the DOC also rejected loans from Citibank for use as a benchmark. The reasons why the DOC rejected Citibank as a suitable benchmark can be summarized as follows:[54]

– Citibank's involvement was small in absolute and percentage terms compared to the involvement of the government-owned and controlled banks.

– Citibank itself acknowledged that its participation was only a symbolic gesture.[55]

– There was substantial record evidence that Citibank's risk assessment of Hynix was influenced by the GOK's policy to support Hynix and prevent its failure. For example, a Citibank official stated that Citibank needed a clear signal from the Korean banks that they were willing to support Hynix before they would commit funds.

– Record evidence showed that Citibank was influenced by the significant and continuing involvement of the GOK in propping up Hynix, rather than by its belief that Hynix was a commercially worthy credit risk in its own right.[56]

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[52] *Issues and Decision Memorandum* at 54-55 (Exhibit GOK-5).

[53] *Government of Korea Verification Report* at 19 (Exhibit US-12).

[54] For a more extensive discussion of the DOC's rejection of Citibank as a benchmark, see US First Submission, paras. 197-204.

[55] *See Hynix Verification Report* at 19 (Exhibit US-43).

[56] US First Submission, paras. 200-201.

– Citibank and SSB were the exclusive financial advisors to Hynix, and reaped significant fees from this engagement – fees that would justify the token participation on the restructuring packages.

– Evidence showed that Citibank's involvement with Hynix was viewed by Citibank as a stepping stone toward a larger and more lucrative role in helping the GOK to resolve other structural problems in the Korean financial market.

56. Other "unusual aspects" relevant to Citibank's decision to participate in the syndicated loan include the fact that despite its long involvement in the Korean financial market dating back to the 1960s, Citibank was not a lender to Hyundai Electronics or Hynix prior to the December 2000 Syndicated Loan. Furthermore, Citibank did not extend any financing to Hynix other than in GOK entrusted and directed restructurings (and was not a participant in the KDB Fast Track Program). In addition, Citibank's participation in those restructurings was on the same terms as were applicable to government entrusted and directed participants. Citibank also did not seek internal credit approval for its portion of the syndicated loan until after Korean banks had committed to the arrangement. Finally, Citibank did not base its lending decisions on independent credit analyses that a commercial bank normally would consider, but rather upon the assessment of Hynix that SSB prepared for purposes of advancing a plan to restructure Hynix's debt.

57. Thus, contrary to Korea's assertions in the referenced paragraph 76, the DOC did not reject Citibank's lending to Hynix based solely on the relative size of that lending. Instead, the DOC properly rejected Citibank loans as a benchmark on *multiple grounds*, one of which was the size of such loans.

58. Under Article 14(b) of the SCM Agreement, a "benefit" is measured as the difference between "the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market".[57] Thus, under Article 14(b), one must compare what Hynix actually paid on the government loans with what it *would have paid* had it been forced to obtain all of that financing on the market. For example, to measure the benefits of the KRW 700 billion portion of the syndicated loan directed to Hynix by the GOK, Article 14(b) requires an examination of what Hynix would have paid if it had been obligated to obtain the full KRW 700 billion on the market. The relevant question under Article 14(b), therefore, is whether Citibank (or another lender) would have extended to Hynix the full KRW 800 billion credit (without any participation from the GOK-directed banks, and without any governmental interference) on the same favourable terms as the KRW 100 billion loan. The answer is an unequivocal "no".

59. The record demonstrated that Citibank's decision to participate in the syndicated loan, even in its very limited capacity, was conditioned on the behaviour of the GOK-directed banks. As the DOC found in its investigation,

> For example, in regard to the syndicated loan, Citibank officials stated that Citibank wanted to show its commitment, but did not want to be the "lender of last resort" and "needed a clear signal from the ROK banks" that they were willing to support Hynix

[57] The Panel in *Brazil – Aircraft*, para. 7.24, found that a determination of the existence of benefit should be based upon "objective benchmarks … reflecting the terms under which the beneficiary of the financial contribution would be operating in the absence of the government financial contribution." In addition, in *US – Softwood Lumber*, para. 103, the Appellate Body found that, for purposes of establishing the existence of benefit, an investigating authority may reject proposed benchmarks shown to have been distorted by government involvement in the market.

> as well, and that Citibank did not seek internal credit approval for its portion of the syndicated bank loan until after the ROK banks had committed to the arrangement ... . In a similar vein, Citibank officials indicated that Citibank had decided to "ride" with the ROK banks to see if Hynix could make it as an ongoing concern, and that Citibank made a bet that the ROK banks would protect their exposure.[58]

These statements by Citibank officials indicate that Citibank would not have extended credit on comparable terms (or perhaps not at all) absent the participation of the government entrusted and directed banks.

60. As noted, the loans provided by Citibank represented a small fraction of the full amount of the syndicated loan. If Citibank had provided the entire amount, the financial risk (and hence the interest rate) would have been greater. The increased risk stems from three factors:

- Citibank's overall exposure (based simply on the size of the loan) would have been much higher;
- Citibank would have had no assurance that the GOK-directed banks would have been willing to support Hynix; and
- While the advisory fees earned by Citibank provided meaningful protection against potential losses on a small loan, they would have provided no meaningful protection were Citibank to have financed the full syndicated loan.

61. Given the record evidence, the DOC reasonably concluded that Citibank loans to Hynix, including its portion of the syndicated loan, were unsuitable as benchmarks.

2. With regard to para. 32 of the Second Written Submission of the US, are the "actions that directly evinced entrustment and direction" those set forth in section 1(a) – (c) of that submission? Is the US arguing that there is both direct and indirect evidence of entrustment / direction?[59]

62. Yes, it is the US position that there is both direct and indirect (also referred to as "circumstantial") evidence of government entrustment or direction. Reliance on both types of evidence is entirely consistent with the SCM Agreement.[60] In fact, circumstantial evidence, secondary sources, and reasonable inferences are often essential analytical tools, as prior panels have acknowledged.[61]

63. As we have noted previously, recognition of the importance of both types of evidence and the reasonable inferences to be drawn from the evidence as a whole is particularly important in the case of indirect subsidies. This is because, given the very nature of such subsidies, there may often be little,

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[58] *Issues and Decision Memorandum* at 9-10 (Exhibit GOK-5), citing *Hynix Verification Report* at 19, 20 (Exhibit US-43).

[59] In order to better address the Panel's questions, we have broken our answer to Question 2 into two parts.

[60] *See, e.g., US - OCTG Sunset*, para. 7.296, in which the panel noted that "there are no rules in the Anti-Dumping Agreement as to the type of evidence that can support an investigating authority's findings". The same holds for the SCM Agreement.

[61] *See, e.g., Argentina – Bovine Hides*, para. 11.28 (complainant clearly may establish the existence of an export restriction on the basis of circumstantial evidence); *US - Wheat Gluten*, para. 174 (a panel must draw inferences on the basis of all the facts of record relevant to the particular determination to be made); and *US - DRAMS*, para. 6.79 (panel found that investigating authority properly relied on secondary sources).

if any, direct evidence of the government's role. Thus, reliance on these analytical tools is essential if Article 1.1(a)(1)(iv) of the SCM Agreement is to have any meaning.

64. As noted above, there was both direct and indirect evidence of government entrustment and direction in the DRAMs investigation. For example, there was direct evidence that the GOK decreed publicly, on numerous occasions, that Hynix would not be allowed to fail and that the GOK gave explicit instructions aimed at fulfilling that goal. There is also direct evidence in the form of the Kookmin prospectus that the GOK directed the lending decisions of banks in which the GOK had a relatively small proportion of voting shares. Moreover, there is a host of secondary sources that document the GOK's adoption and implementation of its Hynix bailout policy.

65. With respect to the phrase "[i]n addition to taking actions that directly evince entrustment and direction", the United States was distinguishing between the government actions described in paragraphs 32-36 that enabled Hynix's creditors to fulfill their assigned task of resolving the Hynix financial crisis (*i.e.*, credit limit waivers and coercion of credit rating agencies) and evidence that more directly supported the conclusion that the GOK, in fact, entrusted or directed them to undertake that task. The United States did not mean to suggest that all of the evidence discussed in sections 1(a)-(c) was "direct" – as opposed to "indirect" – evidence of entrustment or direction. Moreover, regardless of whether a particular piece of evidence is labelled "direct", "indirect" or "circumstantial", it is all relevant. The real issue is whether, based upon all of that evidence, the DOC could reasonably conclude that the GOK entrusted or directed Hynix's creditors to resolve the company's financial crisis.

Why is mandatory participation under the CRPA included as an "action [...] that directly evinced entrustment and direction", when at para. 33 of its replies to the Panel's questions, the US asserts that "[t]he DOC did not find that mandatory participation under the CRPA constituted, in and of itself, entrustment or direction"?

66. As discussed above, the United States did not mean to suggest that all of the evidence discussed in section 1(a)-(c) was "direct" evidence of entrustment and direction. Moreover, with respect to the CRPA, classification is not straightforward, because the CRPA did not represent a single piece of evidence, but rather a host of facts specific to Hynix.

67. With respect to the CRPA itself, as a law viewed *in the abstract*, the DOC did not find that mandatory participation under the CRPA, in and of itself, constituted entrustment or direction. The CRPA did not, however, operate in a vacuum. As detailed in the previous US submissions, the structure of the CRPA enables a handful of the largest creditors to dominate the restructuring process and to dictate the results to every other creditor.

68. The CRPA mandated that all Hynix creditors participate in the Creditors Council. As previously noted, the GOK enacted the CRPA in August 2001, precisely at the time when Hynix and other Hyundai Group companies were on the brink of bankruptcy and required significant financial assistance to avoid financial failure.[62] As GOK officials noted at verification, "the National Assembly passed the Corporate Restructuring Promotion Act ('CRPA') to make sure that the banks could not avoid *participating in workouts*".[63] A Ministry of Finance official stated that: "[w]e've decided to force all creditor financial institutions to take part in the meetings in order to prevent some of them

[62] US First Submission, para. 84.

[63] *Issues and Decision Memorandum* at 54 (Exhibit GOK-5), citing *Government of Korea Verification Report* at 8 (Exhibit US-12).

from refusing to attend and pursuing their own interests by taking advantage of bailout programmes".[64]

69. Further, the CRPA provides the GOK with a very valuable tool to prevent creditors from seeking to liquidate a troubled company. Pursuant to Article 14, at the request of the lead creditor bank, the FSS can prevent creditors from placing a company in liquidation. This is precisely what the FSS did in the Hynix bailout.[65] While Korea has attempted to minimize the impact of this provision[66], this provision effectively forecloses any and all creditors from seeking liquidation unless and until the GOK's objectives are achieved through the CRPA procedures.

70. With respect to the DRAMs investigation, the Creditors' Council was dominated by creditors that were owned and controlled by the GOK. In turn, the GOK had a stated, public policy that it would not allow Hynix to fail, and had taken, and continued to take, actions aimed at ensuring that Hynix did not fail. Under these *specific, factual circumstances*, the DOC reasonably concluded that the GOK was able to use the CRPA as a mechanism to ensure that all Hynix's creditors participated in the restructuring and recapitalization measures benefiting Hynix. For example, by naming the KEB, the GOK's lead bank for Hynix, as head of the Council, the GOK positioned itself to take full advantage of the KEB's longtime role as agent and facilitator of the GOK's credit and management decisions.[67] In short, the GOK knew that it could entrust or direct the banks to carry out the task of saving Hynix.

71. The following excerpt from a news report, entitled '*Gangster-Style' Solution for Hynix*, underscores the significance of the CRPA when, as in the DRAMs investigation, the Creditors' Council is dominated by government-owned and controlled banks:

> Bank executives are about to have a meeting of the "Financial Institution Council" to pass a resolution of the support plan for Hynix Semiconductor. The executives of the main creditor banks, Korea Exchange Bank and other banks such as Hanvit, Korea Development Bank, and Chohung Bank, have smiles on their faces. In contrast, the executives of Shinhan, KorAm, Hana, Korea First, and Kookmin Bank stepped glumly into the meeting room. They were supposed to cast "aye" votes that would

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[64] *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4), citing *Foreign Banks Required to Attend Creditor Meetings for Ailing Firms*, KOREA TIMES, July 22, 2001; *Issues and Decision Memorandum* at 60 (Exhibit GOK-5).

[65] *Government of Korea Verification Report* at 19 (Exhibit US-12).

[66] Korea Second Oral Statement, para. 39.

[67] *Issues and Decision Memorandum* at 56-57 (Exhibit GOK-5); *Hynix Verification Report* at 13-14 (Exhibit US-43). At verification, KEB officials confirmed that GOK had traditionally followed the main bank principle, and that the KEB had a long history of being the main bank for the Hyundai Group. *Hynix Verification Report* at 12 (Exhibit US-43). Also, record evidence reflected the following: "Main banks were designated by the government on the basis of the bank's exposure to chaebols; for each chaebol, the government designated a bank, who has the largest exposure to that chaebol, as the main bank of the chaebol. Once designated, however, the main bank was not changed even if the main bank lost its status as the principal source of credit to the chaebol." *Corporate Governance in Korea*, Il Chong Nam *et al.*, KOREA DEVELOPMENT INSTITUTE (from Organisation for Economic Co-operation and Development conference on Corporate Governance in Asia: A Comparative Perspective) (Seoul, March 3-5, 1999) ("In short, main banks acted as *de facto* government agents in terms of regulation and monitoring.") at 2 (copy attached as Exhibit US-131). In effect, "[T]he principal transaction banks have been largely the agent of the GOK in their supervisory role. As such, PTBs were more concerned about whether corporate clients' behaviors were conforming to the government rules and regulations rather than trying to help them with their investment and financing plans." *Korea's Economic Crisis and Corporate Governance*, Sang-Woo Nam, SCHOOL OF PUBLIC POLICY AND MANAGEMENT, KOREA DEVELOPMENT INSTITUTE (undated) at 47 (copy attached as Exhibit US-132).

The United States notes here that all of the new exhibits attached to these answers were part of the administrative record before the DOC.

> bring themselves losses on the order of several tens of billions of won, up to 100 billion won. It is no wonder they could not be light-hearted.
>
> On that day, the "ayes" carried the day on the Hynix support proposal. However, practically no one thought that the proposal passed due to merit, or that the proposal was convincing and reasonable.
>
> On 30 October, Korea Exchange Bank sent a unilateral notice to commercial banks, "As for the banks which do not agree to the support proposal, their debts will be paid off based on liquidation value." In other words, those banks will have to give up some 85% of their receivables. This picture has another angle that is difficult to understand. They say they intend to keep Hynix alive. But then, why would they use the value of a liquidated concern as opposed to the value of a continuing concern?
>
> Korea Exchange Bank went on to attach another condition: As for the remaining receivables of 15% or so after the payoff, they will not be paid in cash. Instead, they will be paid in 5-year term Hynix debentures.
>
> The message was loud and clear: "Do not even think of opposing this plan."
>
> Banks initially went ballistic: "It doesn't make any sense, its just plain ridiculous." However, they ended up giving their consent, "swallowing the mustard while crying in tears," as the old Korean saying goes. There simply wasn't any room for any other choice. The result in support was all set in advance.... Another aspect was that the state-affiliated banks were coercing commercial banks in the private sector. The government and the creditor group may breathe a sigh of relief after keeping Hynix alive in this way.[68]

72. Thus, given the facts of the DRAMs investigation, it is easy to see why and how the GOK could entrust and direct Hynix's creditors to save the company. The GOK was able to use the CRPA to determine the outcome of Council deliberations so as to assist Hynix.

3. Please comment on Korea's argument (para. 128 of Korea's Second Written Submission) that "there is simply no evidence indicating that Shinhan, Hana, or KorAm bank were entrusted or directed by the GOK to extend their portion of the syndicated loan". What evidence of entrustment / direction did the US rely on in respect of the participation of these banks in the syndicated loan? Even if one does not accept Korea's argument on the need for specific banks to be directed to perform specific tasks, is it not necessary for an investigating authority to point to evidence showing that creditors included in the finding of entrustment/direction were actually entrusted / directed ?

73. With respect to the second part of the question, the United States agrees that there must be evidentiary support warranting the inclusion of creditors in a finding of entrustment/direction. If, however, by use of the words "evidence showing that creditors ... *were actually* entrusted/directed" (emphasis added), the Panel is suggesting that it is necessary for authorities to have *direct* evidence for every bank and every event, the United States would not agree.

74. As the United States has noted previously, governments typically have a wide range of tools at their disposal to deliver a financial contribution indirectly, and these tools may vary greatly in terms of their transparency. Where governments have political reasons for wanting to obscure their role in

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[68] *'Gangster-Style' Solution for Hynix*, DONG-A DAILY (1 November 2001) (copy attached as Exhibit US-133).

providing assistance to a particular company or industry, they may choose to employ less transparent methods of delivering assistance. Thus, cases involving indirect subsidies can present particular challenges for an investigating authority attempting to gather facts and figure out what really happened. As the European Communities noted, in practice, evidence of entrustment/direction is more likely to be circumstantial than direct.[69]

75. In light of these considerations, if Article 1.1(a)(1)(iv) of the SCM Agreement is to have any meaning, it is essential to recognize the importance of examining, on a case-by-case basis, all of the evidence, including direct and circumstantial evidence, surrounding possible government entrustment or direction. In other words, an investigating authority must be able to assess the evidence in light of the totality of circumstances. These circumstances would include not only the specific actions taken by a government, but also the greater context for those actions, including any governmental interest in, and control over, the private parties it is alleged to be entrusting or directing; any inducements of the private bodies allegedly taking action at the government's behest; any governmental policies concerning the company or industry that allegedly benefits from government entrustment or direction; and the views of objective third party observers and scholars who are knowledgeable about a government's policies and practices regarding intervention in the decision-making of firms.

76. Turning to the first part of the Panel's question concerning the three banks – Shinhan, KorAm and Hana – the DOC properly found that the Hynix bailout constituted one cohesive programme with several interrelated phases, one of which was the syndicated loan. The programme took place over a relatively short period of time, was undertaken by the same GOK officials at each stage, was coordinated by the same lead bank at each stage, and reflected the same types of tactics at each stage (the enactment of laws, waivers from those laws, threats and coercion). Figure US-3 illustrates how, at each stage, the bailout continuously rolled over debt from one stage to the next. Moreover, while they avoid use of the term "bailout", the GOK and Hynix have conceded that there was a single programme.[70]

77. Second, there was evidence that these three particular banks – Shinhan, KorAm and Hana – were among the banks the GOK had successfully threatened into participation at other stages of this single program. For example, the FSC called Shinhan and KorAm to a meeting at FSC offices on 2 February 2001 to request their "cooperation" when they expressed reluctance to maintain the D/A financing.[71] In addition, the GOK threatened KorAm into participating in the May restructuring when the bank refused to take over its share of the May 2001 1.0 trillion won convertible bond package (34.7 billion won worth) due to Hynix's failure to deliver a written pledge to use its best effort to reduce its debt.[72] The FSS severely rebuked KorAm, with one FSS official stating: "If KorAm does not honor the agreement, we will not forgive the bank."[73] The same FSS official further threatened

[69] Third Party Submission by the European Communities, 26 May 2004, para. 8.

[70] For example, Hynix stated that, in September 2000, "Citibank and SSB, Hynix' financial advisors retained to devise a financial restructuring plan, presented a fully integrated proposal to completely realign the financial structure of Hynix ... . The important point, for purposes of this submission, is that many of the financial transactions that are separately identified in the [Department's] questionnaire (each with their own sub-heading) were, in fact, all part of Citibank and SSB's original integrated plan for a complete financial restructuring of Hynix." *Hynix Questionnaire Response* (27 January 2003) at 14 and 15 (Exhibit US-119). In a later submission, the GOK stated that the December 2000 syndicated loan "was the first step in a several stage financial plan developed and implemented by SSB over the 2000-2001 period." *GOK Questionnaire Response* (February 4, 2003) at A-1 (copy attached as Exhibit US-134).

[71] *Creditor Group Conflicts With Government Over Supporting Hyundai Group*, MAEIL ECONOMIC DAILY, 2 February 2001 (Exhibit US-68).

[72] *Issues and Decision Memorandum* at 60 (Exhibit GOK-5); *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).

[73] *KorAm Reluctantly Continues Financial Support for Hynix*, KOREA TIMES, 21 June 2001 (Exhibit US-64).

stern measures against the bank, such as disapproving new financial instruments and subjecting the bank to a tighter audit.[74] In addition, in April 2001, the FSS threatened to fine Hana Bank if it failed to provide emergency liquidity to Hyundai Petrochemical, which was a part of the Hyundai Group that was going through the corporate workout process.[75]

78. Third, there was the other evidence of entrustment/direction that was not specific to these three banks. This evidence is discussed elsewhere in these answers and in prior US submissions, and the United States will not repeat those discussions here.

79. Finally, all of this evidence had to be considered in the context of Hynix's dismal financial condition. This, too, has been discussed elsewhere, and the United States will not repeat the discussion here other than to note that none of the three banks in question produced any sort of legitimate credit analysis in connection with the syndicated loan, or, for that matter, any other phase of the bailout.

80. In sum, there was evidence that the GOK had a policy to bailout Hynix; there was evidence that this policy consisted of a single programme; there was evidence that at various points the GOK applied pressure on the three banks; and for every phase of the bailout programme there was evidence of GOK entrustment/direction, albeit not always specific to these three banks. In light of this evidence, it was reasonable for the DOC to infer that the GOK entrusted/directed Shinhan, KorAm and Hana to participate in the syndicated loan. Indeed, in light of the evidence, the inference that the GOK did not entrust/direct these banks to participate in the syndicated loan seems implausible.

4. At para. 18 of its Answers to the Panel's questions, the US asserts that "The DOC did not find specifically that government-owned and controlled private entities 'were instruments through which the GOK entrusted/directed other entities'. Rather, the DOC found, for example, that the GOK exercised control over Hynix's creditors generally through government-owned and controlled banks, because those banks played a dominant role in the Creditors Councils." Does the US response mean that control over creditors through government-owned and controlled private entities is not relevant to the issue of entrustment / direction of those creditors? How does the concept of the exercise of control over creditors differ from the notion of entrustment / direction of those creditors?

81. The Panel is correct that the DOC did not find that the government-owned and controlled banks were "instrumentalities" through which the GOK entrusted or directed other creditors. To the contrary, the DOC found that it was the GOK that entrusted or directed Hynix's creditors. However, the DOC also found that the GOK's task was facilitated by its ownership and control over banks that dominated the Hynix Creditors' Council.

82. The US response at paragraph 18 does not mean that control over creditors is irrelevant to the issue of entrustment/direction of those creditors. While government control over a private party may not be essential to a finding of entrustment/direction, the presence of control may provide direct or circumstantial evidence of entrustment/direction.

83. With respect to the Panel's question concerning the difference between the concept of "control" over creditors and the notion of "entrustment/direction" of those creditors, in the abstract, a government could have control over a private entity, but never entrust or direct the private entity to do

[74] *KorAm Reluctantly Continues Financial Support for Hynix*, KOREA TIMES, 21 June 2001 (Exhibit US-64).

[75] *Corporate Restructuring and Reform: Lessons from Korea*, W. Mako, KOREAN CRISIS AND RECOVERY, David T. Coe & Se-jik Kim, eds., 2002, at 213-14 (Exhibit US-20).

anything. Conversely, a government could entrust or direct a private entity which it did not control, at least in the sense of ownership control.

84. In assessing the variety of ways a government wields power such that it may entrust or direct a private body, the political, cultural and socio-economic context for its actions is particularly germane. This is particularly true in the case of Korea, where the government's clout over the banks is widely acknowledged, and rooted in decades of close collaboration between the government and the financial sector and Korea's strategic industries.

85. In this regard, the example of Kookmin Bank – a Group C bank in Figure US-4 – is instructive. The GOK had a relatively low ownership interest in Kookmin as compared to the Group B banks – a mere 15.1%.[76] However, in a sworn statement to the US Securities and Exchange Commission, Kookmin admitted that the GOK could direct its credit practices.[77] In addition, the GOK hand-picked Kookmin's CEO, Kim Sang-Hoo, former Vice Chairman of the FSC, "to speak for the government in the second-stage restructuring plan with Kookmin and other banks."[78] As with the other creditors, the GOK also blocked Kookmin from finding Hynix in default.[79]

86. Thus, there was more than ample evidence on the DOC record that, even though the Group C banks were not controlled by the GOK purely on the basis of GOK ownership, the GOK nonetheless had the ability to direct their behaviour.

5. At para. 20 of the US Answers to Panel questions, the US asserts that "the motives of private investors are not germane" to the issue of entrustment / direction. At para. 24, however, the US argument of entrustment / direction relies on private creditors knowing what was good for them. If entrustment / direction is based on creditors knowing what is good for them, doesn't that imply an analysis of their motives?

87. By the statement at paragraph 24 of our written answers that "this was a situation where the GOK said to the banks: 'If you know what's good for you, you are going to help us bail out Hynix,'" the United States was not intending to suggest that the issue of entrustment or direction requires an analysis of the bank's motives. The United States did, however, wish to convey the GOK's ability to obtain the banks' cooperation through punitive measures and threats thereof.

6. At para. 33 of its Answers to the Panel's questions, the US asserts that "[t]he DOC did not find that mandatory participation under the CRPA constituted, in and of itself, entrustment or direction. Rather, the DOC found that the GOK used the CRPA as a vehicle to effectuate the GOK's Hynix policy". Does this mean that the alleged mandatory nature of the CRPA is not relevant to the issue of entrustment / direction?[80]

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[76] Bank for International Settlements, "The Banking Industry in the Emerging Market Economies: Competition, Consolidation and Systemic Stability," BIS Papers No. 4 at 95 (August 2001) (Exhibit US-13). The 15.1% figure included preferred stock.

[77] *Issues and Decision Memorandum* at 58-59 (Exhibit GOK-5); *Kookmin Bank Prospectus* (18 June 2002) at 22 (Exhibit US-46); *Kookmin Bank Prospectus* (September 10, 2001) (Exhibit US-45); *see also* Government Control of Banks Diehard, KOREA TIMES (13 March 2000) (Exhibit US-127); *Kookmin Urges Seoul to Sell off its Stake*, FINANCIAL TIMES (10 November 2001) (copy attached as Exhibit US-137).

[78] *Government Control of Banks Diehard*, KOREA TIMES (13 March 2000) (Exhibit US-127); *Highhanded Companies Sued for Unilateral Shareholders Meeting*, KOREA TIMES (April 5, 2000) (copy attached as Exhibit US-138); *Seoul Pushes for a New 'Big Bang' in Banking*, ASIA TIMES (18 March 2000) (copy attached as Exhibit US-139); *Soundness of Financial Sector Still Remains Remote*, KOREA TIMES (2 September 2002) (copy attached as Exhibit US-140).

[79] *GOK Verification Report* at 19 (Exhibit US-12).

[80] In order to better address the Panel's questions, we have broken up our answer to Question 6 into three parts.

88. As stated above in response to Question 2, the DOC's finding that the GOK used the CRPA as a "vehicle" to effectuate the GOK's Hynix policy does not mean that the mandatory nature of the CRPA was not relevant to the issue of entrustment or direction. Rather, it was the mandatory nature of CRPA, *coupled with the specific factual circumstances present in the DRAMs investigation and the application of the CRPA to the Hynix bailout*, that constituted evidence of GOK entrustment/direction.

How does the notion of entrusting / directing someone to carry out an objective differ from using something as a vehicle to have someone effectuate that objective?

89. If the United States understands the question correctly, the difference is perhaps best described as the difference between ends and means. In abstract, the "ends" is entrustment/direction and the "means" is the method used to entrust/direct. In the context of the DRAMs investigation, the ends was the entrustment/direction of Hynix's creditors to provide assistance to Hynix, and the CRPA was a means by which the GOK entrusted/directed those creditors to provide such assistance. As an evidentiary matter, the means used can be informative in ascertaining the ends.

If the October 2001 restructuring had occurred in isolation, would the CRPA in and of itself have been sufficient evidence of entrustment /direction?

90. The United States is not in a position to state definitively what the relevant DOC decisionmaker would find if faced with the situation hypothesized by the Panel. However, it seems quite unlikely that entrustment/direction would be found if the CRPA was the only piece of evidence.

91. Of course, in the DRAMs investigation, the CRPA was not the only evidence of entrustment or direction pertaining to the October bailout. There was other evidence, and the extent of the additional evidence of entrustment or direction in October must be put in its proper perspective.

92. With the enactment of the CRPA, Hynix's Creditors' Council was formalized. As previously discussed, Hynix's Creditors' Council was dominated by government-owned and controlled banks. Furthermore, even before the October restructuring, the KEB had been hand-picked by the GOK as the lead bank, and was in charge of the Creditor Group and acted as a liaison between the banks and the GOK. The implications of this structure in terms of the evidence necessary to support a finding of entrustment or direction should not be underestimated. That is, the advantage of the Council structure and having the KEB as lead bank was that the GOK could utilize one bank as point person and avoid having to dictate terms to each Council member individually.

93. In addition, by the time of the October bailout, the GOK was aware that its Hynix bailout policy was coming under increased international scrutiny. In particular, the United States had begun to raise its concerns regarding the subsidization of Hynix directly with Korea.[81] Press reports reflected that due to rising trade tensions, the GOK could no longer afford to openly discuss supporting Hynix. As one commentator stated, "Whenever the creditor group attempts to shy away from providing support, the government has talked to them, or even twisted their arms, to bring support for Hynix. The government has to avoid trade disputes while trying to keep Hynix alive. Hence the government is not in a position to openly talk about support."[82] Another commentator

[81] *See, e.g., GDS Offering Memorandum* at 90 (copy attached as Exhibit US-151) (acknowledging that the "United States Trade Representative has challenged the KDB Fast Track Debenture Programme ... as constituting a preferential governmental subsidy in contravention of subsidy regulations of the World Trade Organization. A draft resolution disputing the programme was submitted to the United States Congress in February 2001 and remains under review.").

[82] *Hynix, Will it Really Survive?*, NEWSMAKER, NO. 439 (August 30, 2001) (copy attached as Exhibit US-141).

observed that with the increasing pressure from abroad, the GOK could soon be grappling with a full-fledged WTO dispute, stating: "Of course the government is very aware of this, and is likely to tread very carefully."[83] Yet another commentator stated in August: "Our government is squirming and cringing over these viewpoints from overseas. If the government goes all out to keep Hynix alive, it will surely be on a collision course with trade friction overseas."[84]

94. Under these circumstances, one would expect the GOK to be more circumspect in its implementation of its Hynix bailout policy. Nonetheless, there was evidence of the GOK's entrustment/direction, albeit evidence of a more circumstantial nature.

95. In July 2001, DRAMs prices fell drastically and Hynix still faced a liquidity crisis. The GOK reiterated its commitment to keeping Hynix afloat, and, during the planning of the October restructuring, continued its practice of public commentary aimed at ensuring the banks' cooperation.

96. For instance, on 3 August 2001, the GOK gave a clear indication to Hynix's creditors that they had no choice but to capitulate to GOK demands when Deputy Prime Minister Jin Nyum reaffirmed the GOK's strong and unwavering commitment to Hynix: "In the event that the creditor group is unable to resolve the Hynix Semiconductor issue, the government will come forward and make a quick decision ... . If Hynix says it needs an additional 1 trillion won, and if the creditor group cannot make a decision whether or not to provide additional support, the financial authorities should decide. We cannot simply leave it blindly to the creditor group."[85] Apparently realizing his excessive candor, Jin quickly added: "This should not be viewed as if the government is running the financial sector. It is not."[86]

97. There is no doubt that Minister Jin's remarks impacted the actions of the banks. The article states: "Accordingly, Korea Exchange Bank, the main creditor bank, and Salomon Smith Barney (SSB), the financial manager, are talking about possible additional support from the creditor group, including debt restructuring."[87] A separate report stated: "Jin also urged the creditor financial institutions of Hynix Semiconductors to speedily resolve the troubled firm's liquidity crisis by forcing more drastic restructuring of the memory chip maker in return for financial support."[88]

98. In connection with these statements, in August 2001, one report noted that "[w]henever the creditor group attempts to shy away from providing support, the government has talked to them, or even twisted their arms, to bring support for Hynix".[89] It also observed: "For years Hynix has been

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[83] *An Expensive Decision*, ASIAMONEY (September 2001) (copy attached as Exhibit US-142).

[84] *Hynix Practically in Default, What's the Problem*?, CHOSUN DAILY (29 August 2001) (translated version) (Exhibit US-25).

[85] *Deputy Prime Minister Chin, 'Government will Take Actions to Turn Around Hynix'*, KOREA ECONOMIC DAILY (4 August 2001) (translated version) (copy attached as Exhibit US-143).

[86] *Deputy Prime Minister Chin, 'Government will Take Actions to Turn Around Hynix'*, KOREA ECONOMIC DAILY (4 August 2001) (translated version) (Exhibit US-143); *see also Jin Vows to Eliminate Uncertainties Thru Furthering Restructuring Efforts*, KOREA TIMES (4 August 2001) (copy attached as Exhibit US-144). The New York Times, reporting on former Deputy Prime Minister and Minster of Finance Jin Nyum's views in this regard, stated: "His preference for a hands-off stance by the government did not necessarily extend to some of the giant corporate invalids that the country is trying to deal with, like Daewoo Motor and Hynix Semiconductor." *Korean Official Defends Seoul's Efforts on Economy*, THE NEW YORK TIMES, (23 February 2002) (copy attached as Exhibit US-145).

[87] *Deputy Prime Minister Chin, 'Government will Take Actions to Turn Around Hynix'*, KOREA ECONOMIC DAILY (4 August 2001) (translated version) (Exhibit US-143).

[88] *Jin Vows to Eliminate Uncertainties Thru Furthering Restructuring Efforts*, KOREA TIMES (4 August 2001) (Exhibit US-144).

[89] *Hynix, Will it Really Survive?*, NEWSMAKER, NO. 439 (30 August 2001) (copy attached as Exhibit US-141).

considered a "second Daewoo" by various market voices. The government and the creditor group are scrambling to turn it around and keep it alive, but the market is not convinced of the possibility of its success ... . The government and the creditor group have absolutely decided to keep it alive."[90]

99. Another August report stated that "[A]s for the government, it is difficult for them to give up on Hynix because the ruin of Hynix would symbolize the demise of the DJ [Kim Dae Jung] Administration's "Big Deal" policy (the artificial merger of Hyundai Electronics and LG Semiconductor.)"[91] A short time later, Deputy Prime Minister Jin publicly criticized delays by Hynix creditor banks in putting together the upcoming bailout as further jeopardizing Hynix's financial situation.[92]

100. In September 2001, Keun-Yung Lee, Chairman of the Financial Supervisory Commission stated in a news conference: "Of three problematic companies, the government will determine how to handle Daewoo Motor and Hynix Semiconductor Inc. by the end of September."[93] Several days before a meeting of Hynix's creditors in mid-September 2001, he said that when they met, they would strike a compromise on the bailout plan for Hynix, and disclosed knowingly that: "All the related parties are committed to resolving the Hynix matter as soon as possible."[94]

101. In addition, in connection with the October bailout, the GOK rewarded certain Hynix creditors by allowing them to utilize preferential tax provisions available only to lenders of companies involved in formal court reorganization. Under Korean law, banks could qualify for tax deductions for bad debt when the debtor was in a court-supervised reorganization, composition, or mandatory composition under Article 44 of the Special Law on Tax Reduction and Exemption. Although Hynix was not in bankruptcy status under Article 44, the Korean Office of Tax Administration issued a special exception authorizing loans of 1.5 to 1.6 trillion won held by five Hynix creditor banks to be considered as tax deductible expenses.[95] Absent this favour from the Office of Tax Administration, those creditors would not have qualified for this preferential and significant tax treatment.[96]

102. The DOC properly considered this evidence in the context of Hynix's utterly dismal financial condition at the time of the October bailout. Over the course of the summer of 2001, Hynix's financial situation had deteriorated to near insolvency. Standard and Poor's had lowered Hynix's credit rating to selective default[97], and Hynix had overdue payments of US$202.1 million owed to its US subsidiary.[98] As Standard and Poor's noted in an 16 August 2001 revision to Hynix's rating, "the outlook revision reflects the worsening prospects for Hynix's profitability and cash flow protection measures amid a severe market downturn in the company's mainstay dynamic random access memory (DRAM) business". The notification went on to note that "in the second quarter of 2001, the

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[90] *Hynix, Will it Really Survive?*, NEWSMAKER, NO. 439 (30 August 2001) (Exhibit US-141).

[91] *Hynix Practically in Default, What's the Problem*?, CHOSUN DAILY (29 August 2001) (translated version) (Exhibit US-25).

[92] *See Banks Open Talks on Hynix Lifeline*, BBC NEWS (September 3, 2001) (copy attached as Exhibit US-147).

[93] *FSC Chairman Promises Sale of Daewoo Motor This Month*, KOREA HERALD (10 September 2001) (copy attached as Exhibit US-148).

[94] *FSC Chairman Promises Sale of Daewoo Motor This Month*, KOREA HERALD (10 September 2001) (Exhibit US-148).

[95] *The Office of National Tax Administration's Decree to Recognize the Creditors' Write-Off of the Hynix Loan as a Tax Deductible Expense … May Give Rise to an Issue of Preferential Treatment*, KOREA ECONOMIC DAILY (6 November 2001) (translated version) (copy attached as Exhibit US-149).

[96] *The Office of National Tax Administration's Decree to Recognize the Creditors' Write-Off of the Hynix Loan as a Tax Deductible Expense … May Give Rise to an Issue of Preferential Treatment*, KOREA ECONOMIC DAILY (6 November 2001) (translated version) (Exhibit US-149).

[97] *See Standard and Poor's Press Release* (5 October 2001) (copy attached as Exhibit US-150).

[98] *See GDS Offering Memorandum* at 57 (Exhibit US-151).

company posted an operating loss of Korean won (W) 266 billion, compared with an operating profit of W69 billion in the first quarter of the year. EBITDA net interest coverage for the second quarter of the year is estimated at 1.0-1.5 times, an extremely low level". The notification also reflected the commonly held belief that Hynix would require another bailout, noting "current harsh market conditions are once again tightening Hynix's liquidity position, making it difficult for the company to undertake enough capital spending to improve, or even maintain, its technological and cost competitiveness. The company is likely to require additional financial support from its creditors to maintain its competitive position in the global DRAM market while meeting its debt obligations in 2001 and 2002".[99]

103. Clearly, the May bailout had simply not been enough to put Hynix back on its feet, and the GOK and the banks it owned and controlled would once again have to step in to provide another, even larger, bailout in October. Yet, notwithstanding this, none of Hynix's creditors produced a legitimate commercial risk analysis. Hynix's dismal financial condition and the absence of such analyses served to reinforce the DOC's conclusion that Hynix was being kept alive by virtue of GOK entrustment/direction of Hynix's creditors.

104. Finally, the United States believes that it is not possible to view the October bailout in isolation. In this regard, Korea has attempted to characterize the October bailout as disconnected from the events of November 2000, when the Economic Ministers first met to launch the Hynix bailout. This is simply untrue. A brief chronology of events should suffice to demonstrate the link between the GOK's actions in November 2000 and the October 2001 bailout:

November 2000 – The GOK's top Ministry officials meet and order the KEB and the KEIC to execute their plan for Hynix "perfectly," and the FSC meets to grant the credit limit waiver.

December 2000 – The GOK Ministers plan the KDB Programme and decide to designate the lions share of it for Hynix and other Hyundai companies; Ministers meet with Citibank officials to plan the 800 billion won syndicated loan; and the KEIC guarantees the loans made in connection with the syndicated loan.

January 2001 – Economic Ministers meet again to hammer out the D/A financing plan for Hynix, forcing cooperation from the KEB and KEIC.

February 2001 – Economic Ministers meet again to follow up on the D/A financing, and the FSC calls Shinhan and KorAm to a mandatory meeting to request their "cooperation".

March 2001 – The FSC orders all Hynix creditors to a meeting at FSC offices to secure their commitments on the D/A financing "in the form of a covenant" and requires the formation of the Hynix Creditor Council.

April 2001 – The Economic Ministers meet yet again to follow up on the D/A financing, and the GOK meets again with Citibank.

May 2001 – The May restructuring occurs and a KEB official echoes the GOK's continuing support for Hynix on the basis of the economic and strategic consequences of its survival, stating "[i]f Hynix is placed under receivership, [the ROK's] exports will be severely battered

[99] *See Standard and Poor's Press Release* (5 October 2001) (Exhibit US-150).

[because] Hynix accounts for 4 per cent of exports. As far as I know, the government is now working out a series of powerful measures to ensure the survival of [Hynix]."[100]

June 2001 – The GOK threatens to sanction KorAm Bank – a bank without substantial GOK ownership – and KorAm then reverses its decision not to participate in the Hynix June 2001 convertible bond offering (part of the May restructuring programme).

August 2001 – Deputy Prime Minister Jin Nyum announces in a breakfast meeting with businessmen at the Korea Press Center that, "[i]n the event that the [Hynix] creditor group is unable to resolve the Hynix Semiconductor issue, the government will come forward to make a quick decision." He then stated, "[i]f Hynix says it needs an additional 1 trillion won, and if the creditor group cannot make a decision whether or not to provide additional support, the financial authorities [i.e. the FSS, FSC and MOFE] should decide. We cannot simply leave it blindly to the creditor group." He added: "This should not be viewed as if the government is running the financial sector. It is not."[101]

September 2001 – The Chairman of the FSC states in a news conference: "Of three problematic companies, the government will determine how to handle Daewoo Motor and Hynix Semiconductor Inc. by the end of September."[102] In that same month, in a prospectus filed with the US Securities and Exchange Commission, Kookmin admits that the GOK can direct its lending decisions.

October 2001 – The GOK leads the October 2001 bailout, engineering the restructuring under the CRPA.

105. As this brief chronology shows, from the period November 2000 to October 2001, the record before the DOC contained evidence of GOK activity in virtually every month. Thus, the notion that the October bailout was somehow disconnected from the other major events that made up the overall Hynix bailout simply cannot be supported on the basis of the evidence before the DOC. To the contrary, the GOK never wavered in its Hynix policy. The October bailout was merely the last in a series of interrelated, overlapping actions undertaken by the GOK to assist Hynix during the DOC's period of investigation.

7. What was the evidence of entrustment / direction in respect of Pusan?

106. Regarding evidence pertaining specifically to Pusan, Pusan, along with other Hynix creditors, reportedly met on multiple occasions directly with GOK officials to discuss assisting Hynix.[103] Pusan

[100] *Creditors Deny Hynix Receivership Rumors*, KOREA TIMES (4 May 2001) (Exhibit US-26).

[101] *Deputy Prime Minister Chin, "Government will Take Actions to Turn Around Hynix,"* KOREA ECONOMIC DAILY (4 August 2001) (translated version) (Exhibit US-118).

[102] *FSC Chairman Promises Sale of Daewoo Motor This Month*, KOREA HERALD (10 September 2001) (Exhibit US-148).

[103] *Meetings on 12/20/00: Self-Rescue Before Asking for Help*, THE KOREA ECONOMIC DAILY (11 January 2001) (translated version) (Exhibit US-81); *1/9/01: Government and Creditor Group 'Bewildered' by Hyundai Electronics 'Dogged Clamoring'*, KOOKMIN DAILY (January 11, 2001) (translated version) (Exhibit US-82); *Self-Rescue Before Asking for Help*, THE KOREA ECONOMIC DAILY (11 January 2001) (translated

was subject to the KEB's authority as Hynix's lead bank, and regularly attended KEB-convened Hynix creditor meetings.[104] In addition, the GOK waived the statutory credit limits so that Pusan could participate in the KDB bond programme[105], and the GOK compelled its participation in Hynix's bailout through the CRPA.[106] Furthermore, like the other creditors, the GOK forced it to participate in the 10 March 2001 meeting between Hynix's creditors and the FSC.[107] Like the other creditors, the GOK also blocked it from finding Hynix in default.[108]

107. Other relevant evidence is the fact that the GOK's Hynix bailout policy consisted of a single programme, and the evidence of entrustment/direction that does not pertain specifically to Pusan. Finally, there is the context in which the DOC had to consider this evidence, which included the facts relating to Hynix's dismal financial situation and the fact that Pusan offered no legitimate credit risk analysis for assisting Hynix. These factors are discussed in more detail in the response to Question 3, above.

8. Regarding Figure US-4, the different proportions of council vote held by group A, B and C creditors in respect of the October 2001 restructuring do not add up to 100%. Please explain.

108. The percentages set forth in Figure US-4 are approximate, because the precise percentages are business proprietary. Thus, the exact percentages have been ranged, and the discrepancy noted by the Panel reflects this ranging.

109. According to Figure US-4, Group A creditors accounted for over 15% of the Council vote, Group B creditors accounted for over 50% of the Council vote, and Group C creditors accounted for over 18% of the Council vote for the October 2001 restructuring. The remaining portion of the Council vote for the October 2001 restructuring – approximately 17% – was held by over 90 separate entities, such as investment trust companies, leasing, financing companies, and other financial institutions. Many of these other financial entities were wholly owned subsidiaries of, or majority owned by, one of Hynix's Group A or Group B creditors.

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version) (Exhibit US-81); *3/10/01: The Grace Period Decision for Three Affiliates of Hyundai Group – Stories of Inside and Outside*, KOREAN SEOUL ECONOMIC DAILY (11 March 2001) (translated version) (Exhibit US-79); *Grace Period Discussion on Hyundai Electronics*, MAEIL ECONOMIC DAILY (March 10, 2001) (translated version) (copy attached as Exhibit US-136); *The Creditor Group Finalizes Financing Package for 3 Hyundai Affiliates*, NAEOE ECONOMIC DAILY (10 March 2001) (translated version) (Exhibit US-78); *GOK Verification Report* at 18-19 (Exhibit US-12).

[104] *Hynix Verification Report* at 13, 14, 16 (Exhibit US-43).

[105] *Issues and Decision Memorandum* at 51-52 (Exhibit GOK-5); *GOK Verification Report* at 16-17 (KDB Fast Track Programme blanket waiver) (Exhibit US-12).

[106] CRPA, Art. 2 (Exhibit US-51).

[107] *3/10/01 Meeting with FSC: Bank Should be Allowed to Make Decision on the Matter of Support for Specific Companies*, MAEIL ECONOMIC DAILY (March 11, 2001) (copy attached as Exhibit US-146); *Grace Period Discussion on Hyundai Electronics*, MAEIL ECONOMIC DAILY (10 March 2001) (translated version) (Exhibit US-136); *Hynix, Will it Really Survive?*, NEWSMAKER, No. 439 (August 30, 2001) (Exhibit US-141); *Never-ending Aid for Hyundai*, KOREA TIMES (12 March 2001) (Exhibit US-80); *Seoul's Continuing Support Spawns Fresh Debate Over HEI's Viability*, KOREA HERALD (14 March 2001) (copy attached as Exhibit US-157); *The Creditor Group Finalizes Financing Package for 3 Hyundai Affiliates*, NAEOE ECONOMIC DAILY (10 March 2001) (translated version) (Exhibit US-78); *The Grace Period Decision for Three Affiliates of Hyundai Group – Stories of Inside and Outside*, KOREAN SEOUL ECONOMIC DAILY (11 March 2001) (translated version) (Exhibit US-79); GOK Verification Report at 18-19 (Exhibit US-12).

[108] GOK Verification Report at 19 (Exhibit US-12).

9. What was the basis for the DOC's finding that Citibank was not entrusted/directed?

110. During the investigation, Micron argued in its petition that DOC should treat lending from Citibank as having been "entrusted and directed" by the GOK.[109] Micron argued that, in light of the long-standing relationship between Citibank and the Government of Korea reaching back to the 1960s, the evidence suggested that "Citibank was asked, if not directed, by the GOK to provide the loan to Hynix on concessionary terms. Such GOK encouragement is tantamount to government directed credit of a debt-restructuring package that was achieved on non-commercial terms."[110]

111. The DOC, however, determined that there was no government direction or entrustment of Citibank. The DOC's determination was based principally on its findings that Korean branches of foreign banks were not subject to GOK direction, and that loans by Citibank in particular were not directed by GOK. As stated in the DOC's *Final Determination*:

> [W]e note that, in past cases, we have found that loans from ROK branches of foreign banks are not subject to the direction of the GOK.... As part of this finding, we found in past cases that loans from Citibank were not directed by the GOK.... Based on these past findings, we have determined that the lending and credit practices of Citibank are not directed by the GOK. However, as discussed in Comments 1 and 5, below, while we find that Citibank's loans from prior periods are acceptable for use as a benchmark, we find that Citibank's loans relating to the Hynix restructuring are not appropriate for use as benchmarks.[111]

112. One of the past cases cited by the DOC, in which it addressed whether foreign banks were subject to government direction is *Stainless Steel Plate in Coils From the Republic of Korea*. In that case, the DOC explained the basis for its finding of no government control or direction over foreign banks (and Korean branches of foreign banks) as follows:

> Petitioners' contention that record evidence establishes that the Korean branches of foreign banks were subject to the same GOK controls and direction that applied to domestic commercial banks is not supported by the record. The record evidence cited by petitioners does not amount to GOK control and direction of these institutions' operations and lending practices.
>
> First, the 1996 and 1998 OECD reports do not support petitioners' arguments. While the 1996 OECD report discusses funding levels by foreign banks in Korea, nowhere does that report state that these banks were subject to the GOK's control or direction. Moreover, the 1998 OECD Report, in discussing the weakness of the Korean banking system, and in attributing responsibility for that weakness partly to the government's direct and indirect intervention in the operations of commercial banks, mentions only domestic commercial banks, not foreign banks....
>
> Petitioner's reliance on the reports issued by the Presidential Commission for Financial Reform, quoted by the Department in the Credit Memo, is equally

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[109] *Countervailing Duty Petition* (1 November 2002) at 57 (copy attached as Exhibit US-135)

[110] *Micron's 14 March 2003 Comments to the US Department of Commerce* at 77 (copy attached as Exhibit US-152); *see also Micron Case Brief* (22 May 2003), at 73 n.213 ("Citibank's close and long-standing relationship with the GOK suggests that Hynix's Citibank loans were either directed by the GOK or made by Citibank to curry favour with the GOK) (copy attached as Exhibit US-153); and *Financial Experts Report* at 8 ("As for the participation of foreign banks, such as Citibank, the expert stated that these banks understand the political system in Korea and work it in their favour.") (Exhibit GOK-30).

[111] *Issues and Decision Memorandum* at 17 (Exhibit GOK-5).

> misplaced. The section of the Presidential Report titled "Deregulation of Access to Foreign Capital Markets," cited by petitioners refers to regulations governing access to foreign capital markets, not regulations governing foreign currency-denominated loans from domestic branches of foreign banks in Korea.[] Regulations governing access to foreign capital markets are quite separate from those governing domestic branches of foreign banks in Korea.... This has nothing to do with any GOK controls over the operations of domestic branches of foreign banks....
>
> ... Their [foreign banks'] source of funds was from their head offices and, as respondents correctly illustrate, the appointment of their senior officials was not subject to influence by the GOK. Petitioners proffer no evidence that foreign banks in Korea were "inescapably influenced by the controls on every other sector of the banking industry." Rather, they speculate that these banks would be no less influenced than their Korean counterparts by the lead of the Korean Development Bank and the Bank of Korea to extend credit to certain government-favoured projects. This is not a conclusion reached by any of the commercial bankers at verification, and petitioners do not point to any evidence that would support this contention.[112]

113. The DOC's conclusions regarding the lack of entrustment and direction of Korean branches of foreign banks applied only to that category of banks, and *not* to Korean banks that may have had some level of foreign ownership. Such banks were Korean commercial banks, subject to all Korean banking laws, regulations and oversight. Moreover, most of these Korean commercial banks, including Shinhan, KorAm, Kookmin, Hana, and H&CB, had some level of government ownership, even when there was also some foreign ownership. Moreover, for each of these banks, the GOK was the single largest shareholder based on both common and preferred shares. These banks were thus a distinct category from wholly foreign banks that operated branches within Korea.

10. In its Second Written Submission to the Panel, the US refers to the Kookmin Prospectus in a section entitled "GOK Ownership and Control of Hynix's creditors". Does the US argue that GOK's 15.1% shareholding resulted in GOK control over Kookmin?

114. Although government ownership is a relevant factor to be considered in an analysis of entrustment or direction, the United States is *not* arguing that the GOK's ownership interest in Kookmin *per se* allowed it to control the bank. In the section of our submission referred to in the Panel's question, the United States was refuting Korea's claim that the GOK was legally precluded from intervening in the banking sector.[113] In doing so, we did not limit our analysis to government control by virtue of ownership. Rather, we discussed the issue of the GOK's legal rights as a shareholder, *plus* the evidence related to Kookmin. We specifically cited Kookmin's SEC prospectus as evidence of government control or influence over banking decisions, even in a situation where the GOK had only a 10 per cent voting interest. The key point made by the Kookmin prospectus is that it represents a formal acknowledgment by the bank that, at the behest of the GOK, it made loans to troubled high-technology borrowers that it would not otherwise make. Moreover, Kookmin's annual report expressly listed Hynix, a high-technology company, as its top troubled borrower. In addition, Kookmin's rationale for assisting Hynix echoed the government's objectives referenced in Kookmin's

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[112] *Stainless Steel Plate in Coils From the Republic of Korea, Final Negative Countervailing Duty Determination*, 64 Fed. Reg. 15530, 15542 (31 March 1999) (copy attached as Exhibit US-154). The DOC's analysis of direction of credit in the *Stainless Steel Plate in Coils From the Republic of Korea* investigation forms part of the record in the instant investigation. *See Direction of Credit Memorandum*, Attachment 4 at 17 (Exhibit US-8).

[113] The United States recognizes that this may not have been clear from the heading of the section.

SEC prospectus.[114] The DOC reasonably found this to be compelling evidence of government entrustment or direction of Hynix's creditors, which, when considered in light of all the other evidence, provided a sound basis for its determination that the Hynix bailout was a government financial contribution.

11. In reply to question 1 from the Panel, the US stated that "the constituent parts of the subsidy programme ... included the 800 billion won syndicated loan, the KDB Fast Track bond programme, the May 2001 restructuring package, the October 2001 restructuring package, and the benefits conferred by these and other financial contributions, such as D/A loans, made as part of the Hynix bailout." Please specify an exhaustive list of the constituent parts of the alleged subsidy programme.

115. The constituent parts of the subsidy programme were the 800 billion won syndicated loan, the KDB Fast Track bond programme, the May 2001 restructuring package, and the October 2001 restructuring package. Benefits conferred under the subsidy programme during the period of investigation were attributable to all types of new and restructured loans (including bonds), as well as debt forgiveness, debt-to-equity swap, and retroactive interest rate reduction prior to the swap. The following is a list of the specific types of financial instruments that the DOC countervailed: syndicated loan; KDB bonds; convertible bonds; new loan (in lieu of convertible bonds) from the Industrial Bank of Korea, a government entity; foreign currency loans (new and/or restructured); KDB Industry Facility loans (new and/or restructured); short-term loans (new and/or restructured); usance loans (new and/or restructured); overdraft loans (new and/or restructured); general loans (new and/or restructured); D/A loans (new and/or restructured); five-year, zero-interest debentures; retroactive interest rate reduction prior to debt-to-equity swap; debt held by investment trust companies; operating and capital leases; various other loans (new and/or restructured).[115]

12. Please comment on para. 182 of Korea's Second Written Submission. In particular, does the US accept that the Hynix-only import figures are a reasonable proxy for the total import figures?

116. No, the United States does not accept that the Hynix-only import figures are a reasonable proxy for the total import figures. The United States has discussed in detail subject import volume and the increasing trends in subject import volume both absolutely and relative to domestic production and consumption during the period of investigation.[116] Notwithstanding the constraints imposed on the United States by virtue of the confidentiality of the underlying data, the United States provided as much information as possible within the confines of its obligations to protect the confidentiality of the underlying information. We refer the Panel to prior US submissions for an explanation of why the Hynix-only import figures are an unacceptable proxy, an explanation of why Korea's compilation of Hynix's data is flawed compared to the US compilation in Confidential US Figure 1, and some observations based on the Hynix-only data.[117]

117. Indeed, given Korea's failure to challenge the ITC's treatment of this data as confidential and its failure to challenge as inadequate the ITC's summary of the confidential information in the public version of its report, Korea's continuing attempt to assign values to the confidential data is unwarranted. Under the terms of Article 12 of the SCM Agreement, the United States is obligated to protect the confidentiality of data submitted during the ITC's investigations. However, *all*

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[114] See US Second Submission, para. 18, and the materials cited therein; *see also Issues and Decision Memorandum* at 59 (Exhibit GOK-5).

[115] *See Hynix 2001 Audited Financial Statements* at 38-41 (Exhibit US-125), and *October Restructuring Package* (Exhibit GOK-23(e)).

[116] *See* US Answers to Panel Questions (Answers to Questions 15 and 18).

[117] US Second Submission, paras. 114 to 118; and US Second Oral Statement, paras. 34-36.

confidential information collected by, submitted to, and relied upon by the ITC was made available to counsel for interested parties, including Hynix's counsel, under the terms of an administrative protective order.

13. Please comment on Korea's argument regarding the difference between the US submission and the ITC report regarding the extent of the "portion" speciality products (para. 211 of Korea's Second Written Submission). Please comment on Korea's argument regarding the ITC's use of "value estimates" in respect of those speciality products (para. 212 of Korea's Second Written Submission).

118. In its written submissions, the United States has characterized the amount of non-subject imports consisting of Rambus and specialty DRAM products as "significant". This was the same term that Hynix used during the ITC's investigation.

119. In a postconference brief that Hynix and Samsung submitted jointly during the preliminary phase of the ITC's investigation, they emphasized that Samsung, whose US shipments of DRAM products were an important portion of US shipments of non-subject imports during the period of investigation, offered products that "differ[ed] *substantially* from and were not interchangeable with products made by US producers."[118] Thus, by Hynix's own admission, Samsung's imports were less likely to compete with US-produced products than Hynix's imports.

120. Hynix and Samsung further asserted that "[n]o domestic producer makes Rambus chips, to the best of our knowledge, and Micron's witness Mr. Sadler acknowledged ... that, 'there's only one significant supplier of RAM Bus {sic} DRAM; that would be Samsung from Korea.'"[119] They noted "the incontrovertible fact is that Rambus now accounts for a *significant* percentage of Samsung's US sales, ***, as shown in SSI's questionnaire response".[120] Hynix and Samsung also emphasized that "irrefutable evidence exists that a *very significant* proportion of Samsung's US sales had no competition from" Micron, Infineon, and Hynix.[121]

121. As another example, they noted that another "significant market segment" where Samsung had not materially injured the domestic industry was in double data rate ("DDR") DRAM products, which are technically not specialized products, but leading edge SDRAM products. They pointed to evidence that Samsung was clearly out in front of other suppliers in terms of DDR penetration.[122] For all of these reasons, they argued, imports of Samsung's Rambus, specialty, and leading edge DRAM products could not have materially injured the domestic industry.[123]

122. There was also extensive testimony by witnesses at the Commission's hearing about the extent to which non-subject imports consisted of Rambus and specialty DRAM products.[124]

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[118] *See, e.g.*, 27 November 2002 Postconference Brief of Hynix and Samsung at 52 (Exhibit US-100) (emphasis added).

[119] *See, e.g.*, 27 November 2002 Postconference Brief of Hynix and Samsung at 50-56 (Exhibit US-100).

[120] *See, e.g.*, 27 November 2002 Postconference Brief of Hynix and Samsung at 50 n.69 (Exhibit US-100) (emphasis added).

[121] *See, e.g.*, 27 November 2002 Postconference Brief of Hynix and Samsung at 53 (Exhibit US-100) (emphasis added).

[122] *See, e.g.*, 27 November 2002 Postconference Brief of Hynix and Samsung at 55-56 (Exhibit US-100).

[123] *See, e.g.*, 27 November 2002 Postconference Brief of Hynix and Samsung at 50-56 (Exhibit US-100).

[124] *See, e.g.*, Hearing Transcript at 168-175, 258-260 (Exhibit US-94).

123. The ITC confirmed the validity of these arguments through its data collection efforts. The ITC collected information from importers on the percentage of imported products and US shipments of DRAM products in 2001 and 2002 that were "standard" DRAM products, Rambus DRAM products, and other "specialty" DRAM products. Importers were asked to differentiate the reported information for Rambus DRAM products containing dice fabricated in Korea by "Samsung" and the portion containing dice fabricated in Korea by "Others" and to differentiate the reported information for specialty DRAM products containing dice fabricated in Korea by "Samsung" and the portion containing dice fabricated in Korea by "Others".[125] The responses indicated that a significant percentage of non-subject DRAM products were non-standard DRAM products, such as Rambus or specialty DRAM products.[126] Korea does not challenge the ITC's treatment of this information as confidential under either Article 12.4 or Article 22.5 of the SCM Agreement. Because the Panel requested a non-confidential summary of the underlying confidential percentage, we confirmed in response to question 17 of the Panel's Questions Following the First Substantive Panel Meeting that of all US shipments of non-subject imports in 2001, approximately one-fifth were Rambus or specialty DRAM products. The corresponding percentage in 2002 was somewhat higher than in 2001.

124. The information collected by the ITC concerning the share of imports that were "standard", "specialty", "Rambus", and "other" DRAM products was based on the value share of the questionnaire respondents' total US shipments. The ITC provided draft questionnaires to the parties during the final phase of its investigation in which it proposed collecting this data on a value-basis. In Hynix's comments on the questionnaire responses, Hynix never asked the ITC to collect the data on a quantity basis as well.

125. In its answer to question 16 of the Panel's Questions Following the First Substantive Panel meeting, Korea asserts based on "public evidence" that Rambus DRAM products accounted for less than 10 per cent of total DRAM sales by Samsung, which Korea characterizes as the major supplier of Rambus DRAMs. There are a number of problems with this assertion. First, Korea's estimate is based solely on Rambus DRAMs and does not even purport to consider specialty DRAM products. Second, the information cited by Korea is based on data for the global market gathered by Gartner/Dataquest, not the US market, whereas the data collected by the ITC was tailored to the US market. Finally, the percentage submitted by Korea conflicts with the percentage that Korea offered to the Panel during the First Substantive Panel Meeting. It is the recollection of the United States that in response to a question from the Panel, Korea's counsel estimated that Rambus and specialty DRAM products accounted for approximately 20 per cent of all non-subject import shipments to the US market. When the United States enquired as to the source of this estimate in the ITC record, Korea's counsel responded that he had asked Hynix the previous night and that 20 per cent was Hynix's estimate based on its knowledge of the market.

14. In response to Question 23 from the Panel, the US asserts that although the ITC determined that non-subject imports were responsible for "the bulk of the market share lost by domestic producers during the period of investigation," it identified two reasons why it did not find the volume of non-subject imports as significant as otherwise would be suggested. First, the ITC referred to the composition of non-subject imports. Second, the ITC referred to the price effects of non-subject imports. How do these two factors qualify the loss of market share? Wouldn't any impact resulting from the composition and price effects of non-subject imports already be reflected in the market share data? For example, wouldn't the fact that non-subject imports include speciality products mean that they would have taken less market share from domestic producers, and that this consideration is therefore already reflected in the market share data?

[125] *See, e.g.*, Importer's Questionnaire at question II-10(a) (Exhibit GOK-44(b)).
[126] The exact percentage is confidential.

126. The scope of the DRAMs investigation included standard DRAM products as well as specialty and Rambus DRAM products.[127] As we confirmed during the Second Substantive Panel meeting, no party ever argued that Rambus or specialty DRAM products should have been excluded from the scope of the investigation, and no party ever argued that Rambus or specialty DRAM products were a separate domestic like product(s). Hynix affirmatively argued that there was a single domestic like product consisting of DRAM products that corresponded to the scope of the investigation.[128]

(1) As a result, the figures for apparent domestic consumption and the market share data discussed in the ITC's final determination and, for example, in Table C-1 of the accompanying data tabulations includes Rambus and specialty DRAM products as well as standard DRAM products.

(2) Because domestic producers' and Hynix's subject DRAM production facilities in Korea did not produce Rambus or specialty DRAM products, their market shares reflected exclusively shipments of their standard products. The market share for non-subject imports, however, includes US shipments of standard, Rambus, and specialty DRAM products from non-subject sources.

(3) Thus, the relative losses in market share of the domestic industry vis à vis subsidized subject imports from Korea (as manifested for example in an increasing ratio of subsidized subject imports to domestic industry production) cannot be due to specialty products.

(4) Korea has provided data to this Panel indicating that demand for Rambus DRAMs in particular peaked during the period of investigation.[129] This period also corresponded with an increase in the volume and market share of non-subject imports.

(5) In addition, we wish to reiterate that the pricing data collected by the ITC pertained solely to "standard" DRAM products. No pricing data was collected on Rambus or specialty DRAM products. With respect to the standard DRAM products, non-subject imports were underselling the domestic industry at lower margins and at lower frequencies than subsidized subject imports. Even a disaggregated analysis of the pricing data by brand name and by source revealed that subsidized subject imports produced by Hynix in Korea were the lowest priced source more often than any other source, including more often than any of the suppliers of non-subject imports to the US market.

(6) With respect to price effects, the ITC did not state that the market share gains of non-subject imports were qualified by the prices of non-subject imports, but that the "impact" of non-subject imports on the domestic industry was qualified by their lesser price effects. As the ITC explained, non-subject imports undercut the domestic industry at a lower frequency than subject imports did, providing some support for finding that non-subject imports had "less impact" than their absolute and relative volumes might otherwise indicate.[130] The ITC further emphasized that the "primary negative impact" on the domestic industry was due to lower prices and, on this point, subject imports were large enough and priced low enough to have a significant impact "regardless of the adverse effects caused by non-subject imports".[131] Thus, the ITC qualified the "impact" of non-subject imports which, despite their larger volume, had less of a price effect on the industry and caused less of the injury suffered by the industry (lost profits in particular) due to import undercutting and price depression.

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[127] *See, e.g.*, USITC Pub. 3616 at 4 (Exhibit GOK-10).

[128] *See, e.g.*, USITC Pub. 3616 at 5 (Exhibit GOK-10).

[129] *See, e.g.*, Korea's Second Written Submission para. 213; Korea's First Written Submission paras. 253 to 254; Exhibit GOK 19(c).

[130] *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10).

[131] *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10).

(7) Finally, we would like to reiterate that price undercutting does not necessarily lead to market share changes. It can cause a loss of profits or revenues to the domestic industry when it drives prices down, even when purchasers are not willing to commit a large, or any, portion of their purchases to subsidized imports.

15. Did the DOC conclude that the KEB was entrusted or directed to (a) participate in the Syndicated Loan and/or (b) seek a loan limit waiver?

127. The DOC found that the GOK entrusted and directed all Hynix creditors (except Citibank) to participate in all phases of the Hynix bailout during the period of investigation. This finding, based on the evidence as described in the previous US submissions, included the KEB's participation in the syndicated loan.

128. With respect to the loan limit waiver, the GOK's entrustment/direction of KEB to participate in the syndicated loan required the KEB to take whatever actions were necessary to render it eligible to participate. As previously noted, the November 2000 letter from the Economic Ministers to the Presidents of the KEIC and the KEB, included an instruction to seek a waiver of the ceiling on loans.[132]

129. With respect to loan limit waivers, the DOC did find that the GOK's actions enabled Hynix's creditors, including the KEB, to participate in the restructuring and recapitalization of Hynix in situations where they would have been prohibited by law because they were already above legal lending limits.[133] Specifically, in a November 2000 meeting, the Economic Ministers concurred on a "resolution of special approval" by the FSC to increase certain banks' ceiling limits for single borrowers, as requested by the KEB on behalf of Hynix's creditors.[134] The FSC subsequently approved credit limit increases for Hynix' creditors "in order to allow them to participate in the Hynix restructuring process".[135] Without the GOK's special intervention, there would not have been enough participants to raise the 800 billion won December 2000 syndicated loan.[136] The DOC found that the GOK waivers "ensured the successful kickoff of Hynix' restructuring".[137]

16. To what extent was the USD 1.35 billion GDS offering taken into account by the DOC with respect to its finding of entrustment / direction of Hynix's creditors?

130. Contrary to Korea's assertions,[138] the DOC did, in fact, consider Korea's contention that the creditor banks' participation in the May restructuring was contingent upon the success of the June 2001 GDS offering.[139] However, the DOC did not find Korea's contention persuasive.

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[132] *See* US First Submission, para. 48, and materials cited therein.

[133] *Government of Korea Questionnaire Response* (3 February 2003), Exhibit 8 (Banking Act, Article 35) (Exhibit US-53).

[134] *Results of Discussions at the Economic Ministers' Meeting*, letter from Ministry of Finance and Economy (28 November 2000) (translated version) (Exhibit US-28).

[135] *Issues and Decision Memorandum* at 50-51 (Exhibit GOK-5); *Government of Korea Verification Report* at 16 (Exhibit US-12).

[136] *See, e.g., Hyundai Electronics May Seek Loans Beyond Borrowing Limit*, AFX NEWS LIMITED, AFX-ASIA (1 December 2000) (Exhibit US-54); *Panel to Approve Excess Credit Provision to Hyundai Electronics*, KOREA HERALD (2 December 2000) (translated version) (Exhibit US-55); *see also Government of Korea Verification Report* at 16 (Exhibit US-12).

[137] *Issues and Decision Memorandum* at 52 (Exhibit GOK-5).

[138] Korea Second Submission, paras. 68-69

[139] *Issues and Decision Memorandum* at 39 (Exhibit GOK-5).

131. As a practical matter, the massive May 2001 restructuring package came *before* the June GDS offering. Hynix creditors met and voted to provide such a package on 7 May 2001. The new loans and debt restructuring included in the May package were a focal point of the GDS Offering Memorandum, which was provided to potential share purchasers.[140] In the Offering Memorandum, the May restructuring was labelled "Concurrent Financing Transactions", and was characterized as a central portion of the overall recapitalization plan for Hynix. Along with the KDB Fast Track Program, it was presented as the cornerstone for restoring Hynix's liquidity.[141] The Offering Memorandum also noted that the May restructuring would close "substantially concurrently", with the closing of the GDS[142], thus highlighting the automaticity of the assistance agreed to in May. Finally, the "Risk Factors" section of the Offering Memorandum did not even mention the "contingency" related to the May bailout – something that surely would have, and should have, been featured prominently, if in fact, such a risk existed.[143] Overall, the characterization of the May restructuring in the Offering Memorandum clearly gave the impression that the funds and restructuring would be forthcoming, and immediate.

132. In addition, Korea's assertion also was contradicted by the Offering Memorandum's discussion of the GOK's direct support of Hynix through the KDB fast track program. The KDB fast track programme was in operation before the May restructuring package and was never conditioned upon the result of the GDS offering. In fact, the Offering Memorandum expressly specified in numerous places how the GOK stood behind Hynix. In order to demonstrate GOK's continuing support to Hynix, the Offering Memorandum specifically stated that, "as a supplement to the May restructuring package, approximately 2.0 trillion won in additional financing was expected to continue to be available to Hynix from 31 May 2001 through the remainder of 2001 under the debenture rollover programme sponsored by KDB".[144] Thus, Hynix was clearly relying on the support of the GOK in selling its GDS shares and the alleged contingency – assuming *arguendo* that it actually existed – was largely inconsequential.

133. It also was noteworthy that the GOK pushed Korea's investment trust companies to purchase Hynix corporate debentures in May as a way to support the GDS offering.[145] According to press reports, the FSS called on the investment trust companies to buy Hynix convertible bonds as part of the May restructuring, saying that attracting foreign capital for Hynix could not be done without cooperation of the investment trust companies.[146]

134. Finally, even after the May announcement was made, but before the GDS offering closed, Hynix creditor banks entered into an agreement on 12 June 2001, setting the terms of the underwriting agreement for the issuance of the KRW 1,000 billion of convertible bonds.[147] If it was truly the case that the banks were waiting until the successful conclusion of the GDS to decide whether to proceed with the May bailout, why would they meet again before the GDS even closed to work out the details and then sign an agreement with respect to the terms of the underwriting?

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[140] *Hynix GDS Offering Memorandum* at 4-5 (Exhibit US-151).
[141] *Hynix GDS Offering Memorandum* at 4 (Exhibit US-151).
[142] *Hynix GDS Offering Memorandum* at 4 (Exhibit US-151).
[143] *Hynix GDS Offering Memorandum* at 18-32 (Exhibit US-151).
[144] *Hynix GDS Offering Memorandum* at 4 (Exhibit US-151).
[145] *Hynix GDS Offering Memorandum* at 6 (Exhibit US-151). The Offering Memorandum described under the title of "Proposed Investment Trust Refinancing Transaction," that certain Korean investment trust companies were contemplating a potential investment of approximately 680 billion won in aggregate principal amount of Hynix debentures.
[146] *Creditor Group ... Asks Investment Trust Companies to Take Over 750 Billion Won of Hynix Corporate Debentures*, THE KOREA ECONOMIC DAILY (May 30, 2001) (translated version) (copy attached as Exhibit US-155); *see also Finance/Conflict Between Banks and Investment Trust {Companies} Over Support for Hynix*, DONG-A DAILY (May 4, 2001) (translated version) (copy attached as Exhibit US-156).
[147] *Hynix GDS Offering Memorandum* at 5 (Exhibit US-151).

135. Thus, the DOC reasonably declined to accept the argument that the May restructuring package was conditioned upon the GDS offering. If anything, the "condition" to the May restructuring was nothing more than a "symbolic gesture" designed to disguise the true nature of the May restructuring.

17. Was the participation by "small" creditors accounting for approximately 20% of the debt in the October Restructuring countervailed?

136. We understand the Panel's use of the term "small creditors" as referring to those members of the Hynix Creditor's Council other than those listed by name in Figure US-4 (*i.e.*, those grouped under "investment trust companies and other financing companies"). These creditors accounted for approximately 17 per cent of the council vote at the time of the October 2001 restructuring. The DOC countervailed all of the debt held by the "small creditors" that was affected by the October restructuring.

137. As discussed in response to Question 8, above, many of these financial entities were subsidiaries of, or majority owned by, one of Hynix's Group A or Group B creditors. Further, we note that Hynix itself attributed 100% of the debt affected by the October restructuring to the 18 creditors included in Figure US-4, plus HSBC.[148]

[148] *See* Exhibit GOK-23(e). HSBC was a bank that was not included in Figure US-4 because it was not part of the Creditors' Council and, thus, did not vote on the October restructuring package.

TABLE OF EXHIBITS

Exhibit US-	Title of Exhibit
131	*Corporate Governance in Korea*, Il Chong Nam *et al.*, KOREA DEVELOPMENT INSTITUTE (from Organization for Economic Co-operation and Development conference on Corporate Governance in Asia: A Comparative Perspective) (Seoul, 3-5 March 1999)
132	*Korea's Economic Crisis and Corporate Governance*, Sang-Woo Nam, SCHOOL OF PUBLIC POLICY AND MANAGEMENT, KOREA DEVELOPMENT INSTITUTE (undated)
133	*'Gangster-Style' Solution for Hynix*, DONG-A DAILY (1 November 2001)
134	*GOK Questionnaire Response* (4 February 2003)
135	*Countervailing Duty Petition* (1 November 2002)
136	*Grace Period Discussion on Hyundai Electronics*, MAEIL ECONOMIC DAILY (10 March 2001) (translated version)
137	*Kookmin Urges Seoul to Sell off its Stake*, FINANCIAL TIMES (10 November 2001)
138	*Highhanded Companies Sued for Unilateral Shareholders Meeting*, KOREA TIMES (5 April 2000)
139	*Seoul Pushes for a New 'Big Bang' in Banking*, ASIA TIMES (18 March 2000)
140	*Soundness of Financial Sector Still Remains Remote*, KOREA TIMES (2 September 2002)
141	*Hynix, Will it Really Survive?*, NEWSMAKER, NO. 439 (30 August 2001)
142	*An Expensive Decision*, ASIAMONEY (September 2001)
143	*Deputy Prime Minister Chin, 'Government will Take Actions to Turn Around Hynix'*, KOREA ECONOMIC DAILY (4 August 2001) (translated version)
144	*Jin Vows to Eliminate Uncertainties Thru Furthering Restructuring Efforts*, KOREA TIMES (4 August 2001)
145	*Korean Official Defends Seoul's Efforts on Economy*, THE NEW YORK TIMES, (23 February 2002)
146	*Bank Should be Allowed to Make Decision on the Matter of Support for Specific Companies*, MAEIL ECONOMIC DAILY (11 March 2001)
147	*Banks Open Talks on Hynix Lifeline*, BBC NEWS (3 September 2001)

148	*FSC Chairman Promises Sale of Daewoo Motor This Month*, KOREA HERALD (10 September 2001)
149	*The Office of National Tax Administration's Decree to Recognize the Creditors' Write-Off of the Hynix Loan as a Tax Deductible Expense … May Give Rise to an Issue of Preferential Treatment*, KOREA ECONOMIC DAILY (5 November 2001) (translated version)
150	Standard and Poor's Press Release (5 October 2001)
151	*Hynix GDS Offering Memorandum*
152	*Micron's 14 March 2003 Comments to the US Department of Commerce*
153	*Micron Case Brief* (22 May 2003)
154	*Stainless Steel Plate in Coils From the Republic of Korea, Final Negative Countervailing Duty Determination,* 64 Fed. Reg. 15530 (31 March 1999)
155	*Creditor Group ... Asks Investment Trust Companies to Take Over 750 Billion Won of Hynix Corporate Debentures*, THE KOREA ECONOMIC DAILY (3 May 2001) (translated version)
156	*Finance/Conflict Between Banks and Investment Trust {Companies} Over Support for Hynix*, DONG-A DAILY (4 May 2001) (translated version)
157	*Seoul's Continuing Support Spawns Fresh Debate Over HEI's Viability*, KOREA HERALD (14 March 2001)

ANNEX E-7

COMMENTS OF THE REPUBLIC OF KOREA ON ANSWERS OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE SECOND SUBSTANTIVE MEETING

13 August 2004

1. The Government of Korea ("GOK") appreciates this opportunity to comment upon several items of new evidence introduced by the United States in its response to the questions posed by the Panel after the second substantive meeting. Below, we cite the relevant paragraph and/or note to which the comments refer, and then follow with the specific comments.

Para. 70, fn. 67

2. At para 70, the United States introduces two studies undertaken by the Korea Development Institute (Exhibits US-131 and US-132), not cited in the DOC Decision Memorandum and not previously provided to the panel, to support the argument that the KEB acted as a vehicle of the GOK's financial policy decisions. The problem with these studies is that they primarily pertain to the pre-1997 period. As the GOK extensively noted in its first submission, Korea's financial crisis in 1997 spawned several reform initiatives. These reforms render the KDI studies dated. Moreover, as the GOK has discussed elsewhere, it was foreign-based Commerzbank, not the GOK, that controlled the day-to-day management of KEB.

Para. 76, fn. 70

3. The United States has introduced new evidence to bolster an old point: it has now cited excerpts from a GOK questionnaire response to the DOC as further evidence that the Korean side somehow conceded that all Hynix restructuring was part of a single, overarching "programme" to bailout Hynix.[1]

4. The Korean side never made any such concession. Although the early stages of the Hynix restructuring may have been interrelated as parts of a Citibank and SSB led restructuring effort, Korea has consistently argued that the October 2001 restructuring was fundamentally different. Although Korea has already addressed this point with respect to the statements of Hynix, the United States now cites a statement made by the Government of Korea in its 13 February 2003 questionnaire response in an effort to buttress its argument. We request that the panel review the cited page from the GOK's response. That review will definitively resolve the issue – the GOK made no such assertion and none can be reasonably implied from the statements it did make.

5. The United States argues for a "single programme" because it realizes that its case otherwise has major factual gaps that cannot be filled with the evidence. Paragraph 76 argues for a single program, because the remainder of this answer provides no evidence directly responding to the specific question: what evidence did the United States rely upon to conclude that the GOK entrusted

[1] *See* Exhibit US-134.

or directed Shinhan, Koram, or Hana to participate in the syndicated loan? The United States cites to no evidence on this point, and can only cite to evidence related to other transactions and other banks. The GOK believes such efforts to extrapolate from other evidence does not meet the legal standard of Article 1.1(a)(1)(iv).

Para. 79

6. The United States asserts that neither Shinhan, Koram, nor Hana produced any "sort of legitimate credit analysis" to support their decision to extend the syndicated loan.[2] This new factual assertion has several problems.

7. First, the United States cites to no evidence for this factual assertion. As the DOC verification reports indicate, the DOC spent most of its time at verification meeting with KEB, Kookmin, and Citibank. The DOC had a very brief meeting with Shinhan, and no meeting at all with Koram and Hana.[3]

8. Second, this assertion is at odds with the evidence on the record. Citibank made a loan of 100 billion won as part of the syndicated loan. Regardless of when the loan approval was obtained, Citibank did obtain approval to make this large loan. It is simply not credible for the DOC to assert that Citibank made a loan of about US$ 80 million without going through appropriate credit approval. Since Citibank was leading the syndicated loan effort, and was committing to provide 100 billion won itself, it is quite reasonable for other banks to commit to much less than the 100 billion. Shinhan committed to only 50 billion won; Koram committed to 20 billion won; and Hana committed to 30 billion won. Regardless of what other internal loan approval that each bank undertook, this fact alone provides very strong evidence that these Korean banks had a reasonable basis to make this particular loan.

9. The United States tries to impugn the Citibank loan assessment process.[4] But this argument is also inconsistent with the evidence. Specifically, this undocumented factual assertion is at odds with *two* Affidavits submitted by Tom Fallows, the senior Citibank official that had day-to-day responsibility for Citibank's participation in the Hynix restructuring. In a March 2003 Affidavit,[5] Mr. Fallows affirmed the following facts:

- "After extensive analysis of Hynix's financial situation, and Hynix's competitive position in the DRAM market, SSB and Citibank designed a comprehensive restructuring and recapitalization plan for Hynix."[6]

- "Our decision to become a new Hynix lender [in December 2000] was made on the basis of Citibank's standard credit policies and procedures. Given the size of the transaction and the non-investment grade standing of Hynix, the credit process required much more senior approval than would be the normal case for ordinary Korean deals. The Citibank credit process functions separately and apart from SSB, which provided the financial advisor services to Hynix described above.[7]

[2] US Answers to Questions, para. 79.
[3] *See* Exhibit GOK-31, pp. 11-24.
[4] *See* US Answers to Questions, para. 56.
[5] Exhibit GOK-26.
[6] *Id*., para. 6.
[7] *Id*. at para. 12.

10. Thus, a senior Citibank official specifically told the DOC that it had used a heightened credit evaluation process, and that process was separate from any SSB evaluations. In a May 2003 Affidavit, Mr. Fallows affirmed the following facts:

- "We also explained to the Commerce Department [during the Commerce Department's visit] that Citibank's decision to participate in the Hynix restructuring was based on thorough and detailed assessment of Hynix's long-term viability at that time from one of the best analysts in the industry, Jonathan Joseph. At the time, Mr. Joseph was the premier analyst covering Micron and the industry. We explained to the Commerce Department that Mr. Joseph's report in reply to our request was that (1) Hynix had very good technology, (2) was a lower cost producer compared to competitors, and (3) because of its sheer size (following the merger of LG) would be able to handle the costs associated with ever changing technology. Mr. Joseph's basic conclusion was that Hynix should be seen as a "long-term survivor".[8]

11. We, again, respectfully urge the Panel to review the two Citibank affidavits for the most accurate description of how and why Citibank participated in the Hynix restructuring.

12. In this connection, we note that the new Exhibit US-154, quoted by the United States in paragraph 112, reinforces this point. In this prior case, the DOC specifically relied upon the testimony of commercial bankers that foreign banks would make their own decisions. Yet in this case, the DOC decided that Citibank was somehow being influenced by the very same vague "pressures" that the DOC had specifically rejected in prior cases as being insufficient. This conclusion to reject Citibank is not supported by the evidence in this case.

13. The syndicated loan in fact made perfect commercial sense, as the first step in an effort to restructure the outstanding Hynix debt, and made it possible for the company to refinance and service that debt. The ultimate success at raising $1.25 billion of new equity capital from foreign investors confirmed the validity of this initial restructuring effort. That the DRAM market continued to deteriorate in the summer of 2001 does not undermine the reasonableness of the restructuring efforts earlier in the year.

Para. 85

14. The United States seeks to buttress its argument that the GOK could direct the actions of Kookmin Bank. Yet, in so doing, the United States provides more articles as exhibits that were never addressed in the DOC Decision Memorandum. Exhibit US-137 is offered to illustrate GOK influence over Kookmin, when all the article identifies is Kookmin's concern over "reputation" related to the minority GOK stake in the bank. The same article goes on to note that Kookmin refused to issue fresh loans to Hynix, while others extended new financing, and that the Deputy Prime Minister Jin Nyum denied putting pressure on domestic banks.

15. Other new articles offered but never cited in the DOC Decision Memorandum are used by the United States to support the assertion that the GOK "handpicked" Kookmin's CEO. This includes Exhibits US-138 through US-140. While the United States offers this statement as fact, its own Exhibits do no such thing. Exhibit US-138 plainly identifies the statement as an allegation. Exhibit US-139 addresses the accusations of bank unionists, not any affirmation that the GOK directed the placement of Kookmin's CEO. Finally, it is unclear how Exhibit US-140 in any way supports the US assertion.

[8] Exhibit GOK-29, para. 17.

16. As a general matter, what these and other articles illustrate is that you have to read the US factual assertions very carefully, line-by-line with the articles used to support them. The disconnects are frequent.

Para. 96

17. The US offers a new article at Exhibit US-144, not previously provided the panel, to support its assertion that the Deputy Prime Minister forced banks to finance Hynix. Yet, all the article states is that the Deputy Prime Minister "urged the creditor financial institutions of Hynix Semiconductors to speedily resolve the troubled firm's liquidity crisis by forcing more drastic restructuring of the memory chip maker in return for financial support".

Para. 100, fn. 93

18. The United States has found and cited another general pronouncement by a government official.[9] The United States uses this alleged comment to bolster its argument that the GOK was somehow behind the October 2001 restructuring.

19. There are several points worth noting about this particular piece of "evidence". First, this article is nowhere cited in the DOC Decision Memorandum. This article was one of the hundreds of articles mentioning Hynix that Micron placed on the record before the DOC.

20. Second, this article relates primarily to Daewoo, not to Hynix. The FSC Chairman was quoted as saying "Of three problematic companies, the government will determine how to handle Daewoo Motor and Hynix Semiconductor Inc. by the end of September." The only other statement related to Hynix included the Chairman's explanation that:

> [O]nce creditors of Hynix Semiconductor meet this week, they would strike a compromise on the bailout plan for the troubled memory chipmaker. "All the related parties are committed to resolving the Hynix matter as soon as possible", he said.
>
> In addition, the top financial supervisor said that despite some confusion, the sell-off of the three Hyundai financial units to American International Group (AIG) is making progress and that tangible results are expected before the end of October.

21. The general comment about "how to handle" the Hynix restructuring must be read in the context of this more detailed statement later in the story. The FSC official was acknowledging the divergent views among the creditors, and the need to work out some compromise in accordance with the CRPA framework. This is hardly compelling or even persuasive evidence of GOK interference in the October restructuring. Indeed, that is probably why the DOC did not even bother to cite the article in the first instance.

22. But at this stage, the United States appears to be searching for any additional evidence to somehow bolster its claim that the GOK was entrusting or directing the October 2001 restructuring. This new piece of "evidence" adds very little to what the United States has already argued.

Para. 101, fn. 95-96

23. The United States presents two new articles, not previously provided to the panel, to argue that Hynix creditors received preferential tax treatment related to the October restructuring package. Yet the articles cited in support of the US claim are factually incorrect. First, the tax deduction for

[9] *See* Exhibit US-148.

bad debt in connection with the October restructuring was not made pursuant to Article 44, as suggested by the United States, but rather pursuant to the Enforcement Decree of the Corporate Tax Act. Article 62 1.2 of that Act provides for tax deductions for bad debt if they meet the standards of bad debt specified in the Bank Control Regulations of the FSS. The Hynix debt met the standard set forth in the FSS regulations. Since these regulations apply to all corporate debt, Hynix's creditor banks did not obtain any preferential treatment. They met the same standard that applies to bad debt for any other creditor.

Para. 113

24. At para 113, the United States seems to be drawing a dichotomy between Korean branches of foreign banks and Korean banks with foreign ownership in that only the latter are subject to Korean banking laws and regulations. This is an assertion never advanced in the DOC's determination. Moreover, this new US implication is wrong. Pursuant to Article 59 of the Banking Act, all Korean branches of foreign banks, including Citibank, are subject to all applicable Korean laws and regulations.

Paras. 137-142

25. The United States has now offered excerpts from the GDS Offering Memorandum to support its argument that the May 2001 restructuring was not conditioned on the success of the GDS offering.[10] But these excerpts prove just the opposite.

26. The United States simply misstates the conditions that applied to the GDS in an attempt at *post hoc* rationalization. Although the US focuses on the term "concurrent financing" within the GDS Offering Memorandum, a simple review of that Offering Memorandum reveals that the "concurrent financing" obligations made by the banks were subject to a "principal condition", and namely "completion of sales of equity and/or debt securities generating aggregate gross proceeds of W1,300 billion".[11] The "concurrent financing" obligations linked to that "principal condition" were listed just after this statement and included all the elements of the May 2001 package.[12] Indeed, this "principal condition" was spelled out in the very same pages cited by the United States in its answer.

27. The United States also asserts that the "Risk Factors" section of the Offering Memorandum did not even mention the contingency related to the May package.[13] Once again, the United States is incorrect. Under the sub-heading "If we are unable to carry out our recapitalization plans, our financial condition may be adversely affected" in the "Risk Factors" section, the Offering Memorandum plainly states that:

> The success of our recapitalization initiatives, as summarized in "Offering Memorandum Summary – Recapitalization Initiatives and Business Restructuring" is *critical for our business*.[14]

[10] Exhibit US-151.
[11] Exhibit US-151 at 4.
[12] *Id*. at 4-5.
[13] US Answers to Questions, para. 131.
[14] Exhibit US-151 at 19 (emphasis added).

28. The summary to which the statement refers is the same summary that sets forth the "principal condition" attached to the financing. This is the same summary that the United States has cited as not discussing the condition, but which plainly states the condition.

ANNEX E-8

COMMENTS OF THE UNITED STATES ON NEW FACTUAL INFORMATION PROVIDED IN THE REPUBLIC OF KOREA'S ANSWERS TO THE PANEL QUESTIONS FOLLOWING THE SECOND SUBSTANTIVE MEETING

13 August 2004

Question 14

1. In its August 6 answers, Korea provides for the first time its estimates of the relative volumes of subject imports and non-subject imports that were undercutting domestic prices in 2000 and 2002.[1] These figures were computed in the same manner as the estimates of the relative volumes of subject imports and non-subject imports that were undercutting prices in 2001 that Korea previously submitted to the Panel[2], and suffer from the same defects.[3] Additionally, the new data are based upon selective portions of confidential import data that the United States has previously shown are not an appropriate proxy for the actual subject import data.[4]

2. The United States wishes to reiterate that there is no basis for substituting Korea's own, less accurate data – including the new data provided in the Korea Second Answers – for that used by the ITC. Korea has not challenged the ITC's treatment of the data in question as confidential. Indeed, at the second meeting with the Panel, Korea highlighted the sensitivity surrounding the treatment of confidential information when it justified its own failure to provide certain information to the DOC – even on a confidential basis under the terms of a protective order – by invoking Korean bank secrecy laws. Moreover, Korea has not challenged as inadequate the ITC's summary of the confidential information in the public version of its report. Under the terms of Article 12 of the SCM Agreement, the United States is obligated to protect the confidentiality of data submitted during the ITC's investigation. The United States has provided as much information as possible within the confines of its obligations. Moreover, all confidential information collected by, submitted to, and relied upon by the ITC was made available to counsel for interested parties, including Hynix's counsel, under the terms of an administrative protective order.

Question 16

3. In paragraph 39 of the Korea Second Answers, Korea makes the factual assertion that the DOC did not consider the GDS offering in the context of entrustment/direction. As indicated in paragraph 137 of the US Second Answers, however, the DOC did consider Hynix's GDS arguments in the context of entrustment/direction.[5] What Korea fails to explain is that Hynix's sole reference to

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[1] *The Republic of Korea's Answers to the Panel Questions Following the Second Substantive Meeting*, 6 August 2004, para. 33 [hereinafter "Korea Second Answers"].

[2] *Second Substantive Meeting – Oral Statement of the Government of Korea*, 21 July 2004, para. 34.

[3] *Answers of the United States of America to the Panel's Questions to the Parties Following the Second Substantive Meeting of the Panel*, August 6, 2004, paras. 34-38 [hereinafter "US Second Answers"].

[4] US Second Answers, para. 116.

[5] In its response to Question 16, the United States mistakenly ascribed the argument to Korea, rather than Hynix.

the GDS in the context of entrustment/direction was to cite it as evidence in support of its argument that the banks were acting based on the company's financial condition.[6] The DOC did not consider this GDS argument to be relevant to the issue of entrustment/direction. As the DOC stated, "[w]hether the terms are sufficiently affected by government action so as to make the provision actionable is a factual element that is relevant to the measurement of 'benefit,' not 'financial contribution.'"[7] Accordingly, the DOC properly addressed the facts surrounding the GDS in the context of "benefit", as Korea acknowledges.[8] Neither Hynix, nor any other party, ever argued in the underlying investigation that the very existence of any contingency related to the May restructuring evinced a lack of government entrustment/direction.

4. Korea's new argument that the very existence of any contingency in connection with the May restructuring evinces a lack of entrustment/direction is fundamentally flawed and, as discussed in our response to Question 16, is not supported by the record evidence.[9] As the United States discussed with the Panel, it is entirely consistent with the concept of entrustment/direction – *i.e.*, giving someone responsibility for a task – to leave the details to the discretion of the entity entrusted/directed. The concern of the government is that the task be performed, not necessarily *how* it is performed. Those entrusted/directed to perform the task may have various options for fulfilling that objective, some of which may be contingent on other events or factors. The fact that the precise method the private entities ultimately used to perform the task may have been contingent on certain events does not in any way suggest that the government did not entrust/direct the entity to carry out the task in the first instance. Thus, the GDS contingency does not obviate the evidence that the GOK entrusted/directed Hynix's creditors to solve the company's financial crisis – one way or another. In this particular case, the irrelevance of the alleged "contingency" is underscored by the timing of, and the facts surrounding, the GDS offering relative to the May restructuring, as evidenced by the Offering Memorandum itself, as discussed in our response to the Panel's question.

Question 17

5. In paragraph 49 of the Korea Second Answers, Korea makes the factual assertion – without citation to record evidence – that Commerzbank was "the largest shareholder" and had "operational control" of the KEB. In fact, the GOK was the largest single shareholder of the KEB. The fact that the GOK's 43.17% interest was held by two GOK entities is immaterial – KEB's own ownership structure chart lists *total GOK ownership* (43.17%) as compared to Commerzbank (32.55%) and public shares (24.28%).[10] KEB was properly included in Group B (private entities owned/controlled by the GOK) of Figure US-4.

6. In paragraph 51 of the Korea Second Answers, Korea makes the factual assertion – again without citation to record evidence – that the investment trusts and financing companies referenced in Figure US-4 "are not owned or controlled by the GOK". In fact, record evidence substantiated that many of these financial entities were wholly owned subsidiaries of, or majority owned by, public entities and private entities owned/controlled by the GOK.[11]

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[6] *Issues and Decision Memorandum* at 39 (Comment 1) (Exhibit GOK-5) (summary of Hynix's arguments).

[7] *Issues and Decision Memorandum* at 47 (Exhibit GOK-5).

[8] *See, e.g., Preliminary Determination*, 68 Fed. Reg. at 16777 (Exhibit GOK-4); *Issues and Decision Memorandum* at 87 and 90-91 (Comment 7) (Exhibit GOK-5).

[9] US Second Answers, paras. 137-142.

[10] *See KEB Ownership Structure Chart* (2001) (copy attached as Exhibit US-158). The KEB ownership figures represent voting shares as of March 2001, as all preferred shares were accorded voting rights at that time. *See* Figure US-4 ("**" notation and source document *GOK Supplemental Questionnaire Response* (March 11, 2003)) at 29 (Exhibit US-36).

[11] *See Chart of Hynix Creditors* (June 16, 2003) (Exhibit US-37).

ANNEX F

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2	Fewer DRAM Companies Dominate the Market
3	DRAM Prices Have Become Much More Volatile
4	Prices Decline Over Time, But Are Consistent On Global Basis
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Exhibit Korea-	Title of Exhibit
1	*DRAMs and DRAM Modules from Korea* [Inv. No. 701-TA-431 (Preliminary)], Institution of Countervailing Duty Investigation and Scheduling of Preliminary Phase Investigation, 67 Fed. Reg. 68176, 8 November 2002
2	*DRAMs and DRAM Modules from Korea* [C-580-851], Notice of Initiation of Countervailing Duty Investigation, 67 Fed. Reg. 70927, 27 November 2002

Exhibit Korea-	Title of Exhibit
3	*DRAMs and DRAM Modules from Korea* [Inv. No. 701-TA-431 (Preliminary)], Preliminary Injury Determination, 67 Fed. Reg. 79148, 27 December 2002
4	*DRAMs and DRAM Modules from Korea* [C-580-851], Preliminary Affirmative Countervailing Duty Determination, 68 Fed. Reg. 16766, 7 April 2003
5	*DRAMs and DRAM Modules from Korea* [C-580-851], Final Affirmative Countervailing Duty Determination, 68 Fed. Reg. 37122, 23 June 2003, and Issues and Decision Memorandum for the Final Determination
6	*DRAMs and DRAM Modules from Korea* [C-580-851], *Notice of Amended Final Affirmative Countervailing Duty Determination:*, 68 Fed. Reg. 44290, 28 July 2003
7	*DRAMs and DRAM Modules from Korea* [Inv. No. 701-TA-431 (Final)], Final Injury Determination, 68 Fed. Reg. 47607, 11 August 2003
8	*DRAMs and DRAM Modules from Korea* [C-580-851], Notice of Countervailing Duty Order, 68 Fed. Reg. 47546, 11 August 2003
9	*DRAMs and DRAM Modules from Korea* [Inv. No. 701-TA-431 (Preliminary)], *Determinations and Views of the Intl. Trade Commission*, USITC Pub. No. 3569, December 2002
10	*DRAMs and DRAM Modules from Korea* [Inv. No. 701-TA-431 (Final)], *Determination and Views of the Intl. Trade Commission*, USITC Pub. No. 3616, August 2003
11	RESERVED
12	*In the Matter of DRAMs and DRAM Modules from Korea* [Inv. No. 701-TA-431 (Preliminary)], Transcript of the Intl. Trade Commission Staff Conference, 22 November 2002
13	*In the Matter of DRAMs and DRAM Modules from Korea* [Inv. No. 731-TA-431 (Final)], Transcript of the Intl. Trade Commission Hearing, 24 June 2003
14	Hynix Presentation Material at the Intl. Trade Commission Hearing, 24 June 2003
15	19 U.S.C. 1677
16	*Dynamic Random Access Memory Semiconductors of One Megabit and Above from Taiwan* [Inv. No. 731-TA-811 (Final)], Determination and Views of the Intl. Trade Commission, USITC Pub. No. 3256, December 1999
17	Respondents' Joint Post-Conference Brief, 2 December 2002 (a) Hynix Answers to Commission Staff Questions (b) Micron London Roadshow
18	Hynix Semiconductor's Pre-Hearing Brief; *DRAMs and DRAM Modules from Korea* [Inv. No. 731-TA-431 (Final)], 19 June 2003 (a) Hynix Pre-Hearing Brief Selected Articles (b) Berenberg Bank Sector Analysis--Semiconductors, 9 July 2002

Exhibit Korea-	Title of Exhibit
	(c) Micron Computing and Consumer Group Update Presentation, January 2003 (Excerpts) (d) DRAM Market Forecast: Déjà vu (Cahners In-Stat Data) (e) ICIS-LOR Competitive Analysis (f) Micron Year in Review 2001 and 2002 (g) Morningstar.com Financial Summary (h) IDC Competitive Analysis (i) Gartner/Dataquest Data for Market Share (j) Micron 4Q 2002 Conference Call Excerpts (k) Strategic Marketing Associates/International Fabs on Disks
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20	Final Comments of Hynix Semiconductor: *DRAMs from Korea* [Inv. 701-TA-431(Final)], 21 July 2003
21	Hynix's Questionnaire Response to the Department of Commerce, 27 January 2003 (a) Citibank/SSB Engagement Letter (b) KRW 800 Billion Loan Agreement (c) GDR Offering Memorandum (d) Audited Financial Reports 1998-June 2002 (e) KRW 994.1 Billion Bond Table (f) April 17 SSB Private Capitalization Proposals (g) Outside Expert Analysis on Hynix Market Position (h) Creditor Financial Institution's Council Meeting Agenda -- October Restructuring

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24	Hynix's Initial Arguments on the Directed Credit Issue, 10 March 2003
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29	Citibank Affidavit of 22 May 2003
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34	Calculations for the Final Determination for Hynix Semiconductor, Inc., 16 June 2003
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43	Semiconductor Forecast: First Quarter 2004
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49	Evidence Submitted to the USDOC To Prove Absence Of GOK Influence Over KorAm Bank
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