

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 that the demand drop was a critical factor for understanding 2001 prices.
- The ITC completely ignored the arguments about Micron’s own technical shortcomings, 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 each party, and with respect to each 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 to 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 – 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.

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 to 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 Leather* 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 defensible 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 by 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 to 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 Article 1.1 (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 Article 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)

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.

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).