ANNEX C

REBUTTAL SUBMISSIONS OF PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION BY THE REPUBLIC OF KOREA

19 July 2004

I. SUBSIDY ISSUES

A. The Scope Of "Entrusts Or Directs"

1. The meaning of "entrusts or directs" imposes legal limits

1. The United States acknowledges but then ignores the legal limitations imposed by Article 1.1(a)(i)(iv). In particular, the United States has ignored the core meaning of both of these key terms.

(a) Text

2. Both the word "entrusts" and the word "directs" convey the basic meaning of carrying out some specific action. The United States claims that guidance or suggestions alone would be sufficient to establish "entrusts or directs". Yet "directs" has a much stronger meaning, and conveys the idea of ordering the private party to do something. Also, in light of the French and Spanish texts, the most appropriate interpretation of the English word "directs" must be the meaning of ordering a private body to take some action.

3. The term "entrusts" also conveys the idea of the person who is entrusting already having something to be entrusted. Thus the government must already have something that is going to be "entrusted" to the private body. Accordingly, in the context of the Hynix restructuring, the only relevant term is the concept of "directs" since the restructuring was both privately organized and carried out.

(b) Context

4. Both the words "entrusts" and "directs" are verbs, and Article 1.1(a)(1)(iv) has important textual guidance about the object of these two verbs, and what that object must be. *First*, the entrustment or direction must apply to "a private body". *Second*, that private body must be entrusted or directed "to carry out" something. Since the private body is not being entrusted or directed to "carry out" some action, any discretion being left to the private body is thus fundamentally at odds with this notion of "carry out". *Third*, the action being entrusted or directed is not some generalized policy or wish, but rather one of the concrete actions specified in Article 1.1(a)(1).

(c) Object and purpose

5. Unlike the US assertion, Korea never argued that entrustment or direction had to be expressed in writing. By "explicit", our argument means some concrete action directed to some specific person to do some specific action. This narrow approach is quite proper in that the entire WTO framework regulates governmental action, not private action.

2. US-Export Restraints

6. The United States tries to downplay the relevance of *US-Export Restraints*, by arguing that panel decision considered a different factual context. But this effort to distinguish *Export Restraints* fails on two levels. First, the panel in that case was clearly offering its own reading of the specific text at issue here. Second, that panel also wisely explained the problems with an overbroad reading of "entrusts or directs". In particular, the panel distinguished carefully between government interventions and actions that by their nature rise to the level of "entrusts or directs".

3. The US approach of considering general evidence is flawed

7. The United States repeatedly invokes the argument that it was considering the evidence in its totality. Korea notes that this approach is deeply flawed on a number of levels. Among others, under the US approach, an authority could countervail as an impermissible subsidy a loan from a bank without a single shred of evidence about that particular bank or that particular loan. Also, the US theory has no temporal limits.

4. The actions of private bodies

8. The United States also mischaracterizes the Korean argument about private bodies. Indeed, the actions of private parties are very much part of the evidence that must be assessed to see whether the authorities have in fact met the necessary legal standard.

B. The DOC "Evidence" With Respect To Specific Transactions

1. October 2001 Restructuring

9. The US evidence with regard to the October restructuring utterly fails for the following reasons. First, the United States makes serious factual misstatements about the CRPA. Moreover, the United States paints the CRPA as a trap with no escape, notwithstanding the numerous procedural safeguards built into the text of the law itself. Finally, the United States makes broad allegations about FSS monitoring that lack relevance. Moreover, under the US theory of "entrusts or directs", all the Korean banks were being told what to do. Yet as well borne out by the October 2001 restructuring, different banks made different choices based on their own commercial considerations.

2. May 2001 Restructuring & December 2000 Syndicated Loan

10. The US evidence with respect to the May restructuring has the following flaws. *First*, the United States repeats its flawed assertions about "blocking majority" and about alleged GOK influence over all of Hynix's creditors through shareholding in certain of them. *Second*, the United States mischaracterizes the Prime Minister's Decree No. 408 while citing to the MOUs as somehow providing a mechanism of control. *Fourth*, the mistaken press reports and the KorAm denials were provided to the DOC, but the United States continue to brush them aside. Most egregious of all, the United States says not one word about the GDR equity offering that was the necessary precondition for the May 2001 restructuring. With respect to the December 2000 syndicated loan, the United States stresses the results of the Economic Ministers meetings, but draws conclusions far beyond what an objective authority would conclude based on these facts.

C. The DOC's Other General "Evidence"

1. General problems with the US approach

11. In general, the United States cites evidence regardless of the time period and regardless of the connection to the Hynix restructuring. The United States also makes numerous factual misstatements.

12. In addition, there are several problems with the evidence of an alleged policy to save Hynix. The core US argument in this regard focuses on the Economic Ministers meetings in late 2000. But this discussion illustrates the shortcomings in the US approach. The United States also argues that Hynix was somehow exempt from its review of financially insolvent companies, citing a single newspaper article as evidence. Yet the FSS/FSC never exercised any pressure to exempt any companies from the list of companies to be liquidated.

2. Alleged control over creditors

(a) Signalling & Ownership

13. The United States repeatedly invokes the idea of "signalling". The problem for the US theory is that such evidence is legally irrelevant to the issue of entrusts or directs. The United States also invokes GOK ownership in the banks, but in so ding, ignores the various procedural safeguards imposed by the GOK.

(b) Kookmin Prospectus

14. The United States makes much of the Kookmin prospectus, but this approach to the Kookmin prospectus overlooks several important pieces of evidence. Among others, the possibility of GOK influence is belied by the actual actions of Kookmin in the October restructuring.
Prime Minister's Decree & Public Funds Oversight Act/MOUs

(c) Prime Minister's Decree & Public Funds Oversight Act/MOUs

15. The United States mischaracterizes the Prime Minister's Decree No. 408. As Korea already explained, the United States completely ignores Article 1 of the Decree. Instead the United States mischaracterizes other parts of the Decree. The United States ALSO cites to the MOUs as somehow providing a mechanism of control. Unlike the US assertion, however, the purpose of the MOUs is to ensure that the bank can recover quickly following its Normalization Plan so that the GOK can recover the public funds injected into the bank as fast as possible.

(d) CRPA

16. The United States describes the basic CRPA process, but then makes several serious mischaracterizations. The United States argues the Creditors Council gave only limited options, but this claim ignores the context of the restructuring. The United States also erroneously argues that the CRPA does not provide any real choices.

(e) Role of FSS

17. One of the more disingenuous US arguments is the effort to take normal bank regulation and turn it into another mechanism of control. Unlike the US claim, when a government regulatory agency decides whether to grant an exception to a regulatory limit, that government agency may consider a wider range of factors.

(f) Alleged Coercion

18. The United States cites numerous press articles about alleged pressure on KFB. But in the end, the actual behaviour of KFB is hardly consistent with the US theory of coercion. The United States goes on to raise two other irrelevant points that have nothing to do with Hynix.

D. The DOC's Determination of "Benefit"

1. Requirements of Articles 1.1 and 14

19. With respect to the existence of a benefit, Article 14 applies very concrete terms focused on the "usual" or "prevailing" conduct in the market under investigation, or "comparable" conduct. In *US – Lumber*, the Appellate Body found that the "the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is *very limited*". The US claims that the Appellate Body's holding in *US – Lumber* must be restricted to Article 14(d) on that basis. But such a reading completely ignores the clear preference found in Article 14 for primary benchmarks.

(a) Scope of Article 14(b) & (a)

20. Under Article 14(b), comparable must first be defined by what a firm can "actually obtain on the market". In this case the market in question is first and foremost Korea. Thus, to the extent Hynix obtained loans in Korea from lenders the DOC did not prove were "directed" by the GOK to extend credit to Hynix, those loans are "comparable". Under Article 14(a), the issue turns on what is the "usual investment practice of private investors in the territory" of the member. Even if the DOC can prove that some creditors were entrusted or directed by the government to purchase equity, it is not the basis to discard all investors as benchmarks.

2. DOC improperly rejected all Korean private banks

21. The DOC's benefit findings in this case are simply overbroad. The syndicated loan is a perfect example. With respect to Korean private banks, there is simply no evidence indicating that Shinhan, Hana, or KorAm bank were entrusted or directed by the GOK. These banks cannot be discarded as benchmarks simply because the DOC had suspicions or evidence concerning GOK entrustment or direction of other creditors.

3. DOC improperly rejected all equity benchmarks

22. Under Article 14(a), the applicable standard is whether the equity investment is consistent with the "usual investment practice" in Korea. Moreover, the text of Article 14(a) makes quite explicit that the benchmark standard for behavior is that of investors in Korea. Given the liquidation value as estimated by Arthur Andersen, banks with large amounts of outstanding debt could quite reasonably decide to further invest in Hynix. The United States tries to brush aside the Arthur Andersen determination of liquidation value based on some dispute about the date of the report. Yet this argument fails on several levels. The United States also tries to brush aside "Prospect Theory". This US argument is both sloppy and wrong because, among others, this is hardly a "marginal economic theory".

4. DOC improperly rejected Citibank as a suitable benchmark

(a) Rejecting Citibank is inconsistent with Article 14(b)

23. The DOC's rationale for rejecting Citibank as a suitable benchmark was based on a "circumspect finding" of "unusual aspects" in connection with Citibank's loans to Hynix. Yet in light of what the Appellate Body has found in *US - Lumber*, this rationale does not meet the standard set forth in Article 14(b).

(b) The DOC's rationale for rejecting Citibank is not supported by positive evidence

24. The United States continues to insist on viewing Citibank's loans in the context of total financing. Such approach, however, underscores the danger of allowing an investigating authority to utilize whatever methodology of its choice. Also, when one considers Citibank's participation in the transactions as they occurred, it is very much comparable to the commitments of other Hynix creditors in those transactions.

5. Korean default rates

25. Even assuming DOC was somehow correct in its approach to creditor benchmarks, there was no basis to ignore Korean default rates in calculating its "uncreditworthy" interest rate benchmark. At the very least, the DOC was obliged to explain why the US data related or referred to prevailing market conditions in Korea. Yet if failed to do so.

E. The DOC Determined "Specificity" Inconsistently with Article 2

26. The United States argues that specificity is the "natural consequence of the nature of the subsidy at issue". Yet by failing to analyze the constituent elements of the Hynix restructuring, the United States failed to comply with the requirements of Article 2.

27. The United States also tries to ignore the "extent of diversification" requirement by arguing that Korea is not a small developing country. But as the United States itself admits, this language "requires a consideration of the broader economic context" within which the alleged subsidy operates. The Korean economy is well known for having a small number of large industry groups. Thus in a Korean context, debt restructuring of a chaebol will automatically mean that a large value of debt will be involved. Yet the United States has adopted an approach whereby any time a Korean chaebol has to restructure, that restructuring is deemed specific.

II. INJURY ISSUES

A. The Requirements Of Article 15.1

28. As pointed out in Korea's First Submission, the standard of review in this case sharpens the meaning of the terms positive evidence and objective examination found in Article 15.1. The Appellate Body has clearly stated that Article 11 of the DSU does not allow for a rubber stamp of a competent authority's determination, including its selection of facts and how it applies those facts in given case.

29. Also, as Appellate Body in *US – Lamb Meat* made clear, verifiable facts are not necessarily positive evidence of injury, and an examination of incomplete or inadequate facts does not make an examination objective.

B. US Interpretation of the Causation Standard

30. The US reading of Article 15.5 of the SCM Agreement would render the causation requirement of that provision largely meaningless. In its First Submission, the United States resists what is now well-established principle that Article 15.5 requires authorities to disentangle causes, including subject imports, so as not to attribute injury to subject imports caused by other factors.

1. Interpretation of "causal relationship"

31. Article 15.5 requires a demonstration that there normally be a coincidence of, or correlation between, subject imports and declining domestic industry performance trends. In its First Submission, Korea provided the Panel with just such a temporal analysis. The United States offered no comparable analysis, either within the ITC report or in its First Submission.

32. In its First Submission, the United States argues that the concepts of *causation* are unique to the Agreement on Safeguards given the higher *injury* standard contained in that Agreement. The GOK disagrees. First, concepts of causation and injury comprise distinct legal elements under both agreements. Also, although the terms "link" and "relationship" appear different, in fact, a careful review of the plain meaning of both terms shows that they are interchangeable. Moreover, the French and Spanish texts confirm that the terms "relationship" and "link" have essentially the same meaning.

2. The non-attribution requirement in Article 15.5

33. Unlike the US assertion, Korea never used the term "isolate" in the context of causation, and specifically with respect to non-attribution. Rather, Korea has argued that an authority must separate and distinguish the injury caused by subject imports, consistent with the Appellate Body's determination in *US - Hot-Rolled Steel*.

34. Under Article 15.5, as the Appellate Body in *US - Lamb Meat* made perfectly clear, an authority cannot leave non-attribution to a simple recitation of other causal factors or some superficial discussion of the relative importance of different causes.

35. Korea takes further exception to US claims that Korea advocates a "sole cause" standard. Korea makes no such argument. In fact, it appears that the US favours what is in essence a "tangential cause" standard. Such a position cannot be supported by the Agreement text. Indeed, the purpose of the non-attribution analysis required by Article 15.5 is not merely to discern whether subsidized imports are a cause of injury in any form, but whether they are a cause of material injury.

36. Also as the Appellate Body in *US - Hot-Rolled Steel* made clear, imports must be causing *the injury* which justifies the imposition of duties. If it is something less, duties are unwarranted.

C. The US Failure To Identify Positive Evidence

1. The ITC Finding of Significant Volume

(a) Korean market share data

37. The US criticisms of the market share data relied upon by Korea are both wrong and disingenuous. The United States is wrong to allege that Korea compared a quantity based market share figure for domestic shipments with a value-based market share figure for Hynix. Quite to the contrary, Korea notes that a quantity measure was used to derive the market share figures provided in Figure 9 of Korea's First Submission.

38. The United States is disingenuous when it states that Korea's estimate of non-Hynix subject imports is "troubling". Contrary to the US assertion, the estimates that Korea provided were the best possible estimates given the constraints imposed by the United States.

39. Also, the ITC's decision to make the entire record confidential is not only not necessary to protect confidentiality but also is at tension with the ITC's own past practice (i.e. "three or more" rule). The United States argues that under its "one company with 75 per cent or two companies with 90 per cent rule", it could not provide this data publicly. Yet nothing prevents the United States from providing this information to the Panel with a request for confidentiality. Second, under the US rule itself, the Panel can have a high degree of confidence that the portion omitted is not material.

40. In sum, Korea vigorously disputes the ITC's factual conclusion that the data demonstrate that any increase in the volume of subsidized imports was "significant". The only way to resolve this critical issue is to examine the *actual* quantity and value figures relied upon by the ITC in making its determination.

(b) Finding of "significant" increase

41. Under Article 15.1, there must be positive evidence supporting the specific conclusion that the volume of subject imports can be deemed "significant". In this case, the volume of subject imports was not significant.

42. First, this case did not involve a typical measure of units, such as tons of steel. Having chosen a measure of volume of imports that by definition would show huge increases, the United States cannot now claim the SCM Agreement has been satisfied based on such a measure of volume. Also, the ITC never explained how it took this unique factor into account.

43. Second, the importance of substitutability must apply on a consistent basis throughout the period. The focus here should be on what has changed over time, not what has always been true about the DRAM market. Third, the United States insists that the increase in market share was significant. But once again the United States substitutes assertion for analysis. Moreover, in light of the fact that the Hynix Oregon facility shut down during this period, the significance is even smaller.

(c) Hynix's US manufacturing facility

44. The United States tries to justify ignoring the shutdown of the Oregon facility, but this effort fails. Korea submits that Article 15.1 does not require the investigating authority to ignore *context* when assessing whether the volume of subject imports is significant. Subject Hynix imports and DRAMs from Hynix's Oregon facility were the same DRAM commodity product.

45. Given the complete substitutability between Hynix Korea and Hynix Eugene DRAMs, the ITC should have treated subject Hynix imports as merely replacing production at Hynix's Oregon facility. Korea submits that the evidence establishes that ALL of the increase in DRAMs imported in 2001 and 2002 was to replace the Hynix-Oregon produced DRAMs.

2. The ITC Finding of Price Effects

(a) Failure to justify specific decisions with positive evidence

46. The United States argues that the ITC's usual practice is not to disaggregate pricing by company, and that it would have been "arbitrary" to do so here. But this statement ignores Hynix's detailed arguments about the *particular circumstances of this case*, and the fact that the ITC Staff, in fact, did undertake the very analysis suggested by Hynix.

47 The ITC defence of its averaging methodology actually admits the defects in the rationale. Specifically, the United States noted that transaction-specific data "would be more suitable", admitting the reality that more detail is better than less detail in trying to understand pricing dynamics. But because transaction specific data sometimes is onerous to collect, the United States then swings to the opposite extreme, and largely ignores the disaggregated data *that it actually did collect in this case*.

(b) Price effects of subject imports

48. The United States asserts that Hynix undersold more often than any other source, a conclusion that it reaches only by distorting the presentation. It disaggregates the other suppliers into domestic and import sources, thus making them appear smaller. The United States also ignores the fact that during the investigation period, Hynix's US manufacturing facility shut down. Finally, the United States does not put the combined volume of the other suppliers into proper context. Even if Hynix was sometimes the lowest price source, the effects of that pricing must have been small because of the low and falling market share of Hynix DRAM shipments.

49. The US arguments about price depression are also without merit. Most importantly, the United States points to no positive evidence supporting its conclusion to blame imports for the price decline.

(c) The pricing analysis compiled by the ITC

50. Once again, Korea respectfully requests that the Panel instruct the United States to provide the actual confidential "lowest price" pricing data provided in *Appendix E* of the *ITC Staff Report*. We submit that such data is critically important for a proper analysis by the Panel of the claims being made in this dispute.

D. The Legal Requirement to Consider Other Factors

1. The importance of non-subject imports

51. There can be no dispute that non-subject imports dwarfed Hynix subject imports. In an attempt to obscure the importance and sheer magnitude of non-subject imports, the United States seeks to bolster the theory that competition between non-subject imports and domestic product was somehow attenuated because some non-subject imports consisted of RAMBUS and other specialty DRAM products.

52. In its First Submission, the United States notes that it "collected information on the percentage of imported products and US shipments" that were Rambus DRAM products and other "specialty" products. In fact, what the ITC collected were value estimates of those companies' share of 2002 shipments attributed to RAMBUS and other specialty DRAMs.

53. The record ignored by the ITC and the United States shows that the most significant player in the "speciality" market was Samsung. The record also shows that Samsung's Rambus DRAM production comprised only a small portion of its overall production.

2. The injurious effects of the unprecedented drop in the demand growth rate

54. Notwithstanding the record evidence showing that 2001 marked an unprecedented drop in demand in the two largest DRAM consuming sectors (PC and telecom), the United States would have this Panel believe that the information on the record was completely speculative or represented a minor event. Yet the *ITC's own data* demonstrate that by the end of the investigation period the

demand growth rate had dropped by nearly two-thirds. Also, Micron and Infineon explicitly acknowledged a direct correlation between the decline in the demand growth rate and harm to the domestic industry.

3. Increased capacity of other suppliers

55. What the evidence before the ITC demonstrated was that DRAM manufacturers other than Hynix were dramatically increasing their capacity. The ITC completely ignored this evidence. To date, neither the ITC nor the United States have adequately explained, or really even considered, the role of capacity expansion by producers other than Hynix on the performance of the domestic industry. Moreover, the data on relative capacity changes in this case strongly corroborated Hynix's argument that other suppliers were offering the lowest prices and had a much more substantial effect on price levels.

4. Injurious effects of Micron's technological difficulties

56. In its First Submission, Korea includes 16 paragraphs that provide evidence and argumentation concerning the significance of Micron's admitted technological difficulties on its financial performance. In response, the ITC merely provides a single footnote of just three sentences. As importantly, the US never recognizes that if Micron experiences difficulties, it has a substantial impact on the performance data for the industry as a whole.

E. The Condition of the Domestic Industry

57. In its discussion of the condition of the US DRAM industry, the United States largely repeats the recitation of facts that appeared in the ITC determination in the first instance. The United States takes apparent pride in its "wealth of data". But collecting data does not mean the data has been analyzed, or analyzed properly.

58. Yet with so much information about industry performance over time, with so much testimony by industry executives about how well they were doing relative to the business cycle, it simply defies belief that the ITC would continue with its "business as usual" measurement of trends in a vacuum. Such an approach is simply not an objective examination of positive evidence.

III. OTHER ISSUES

A. The Secret Meetings Were Inconsistent with Article 12.6

59. Contrary to the US argument, Korea was not objecting to the substance of the verification. Korea has a procedural objection that had no effect on the substance of what the DOC would do or would find out. The Korean request in this situation was quite modest as Korea requested only that counsel be allowed to observe the meetings. The decision by the DOC to proceed anyway, over the objections of Korea, was inconsistent with Article 12.6.

B. The United States Has Levied Duties Inconsistently with Article 19.4 of the SCM Agreement and Article VI.3 of GATT 1994

60. Under the US system, the final duty announced in the countervailing duty order has important consequences. First, this duty rate serves as the basis for a cash deposit that importers must pay, with serious trade consequences. Second, and more importantly, this cash deposit becomes the final duty to be collected, if no party requests an administrative review. Because of the pending court challenges under US law, the legal assessment may not yet be "final," but is still "definitive".

C. The Countervailing Duty Order is Properly Before This Panel

61. The United States argues that Korea did not provide any "indication" of the legal basis for its challenge to the countervailing duty order. Yet the two consultation requests of the GOK provide a fairly detailed explanation of the legal defects with the DOC and ITC determinations. Since the US countervailing duty order rests on the legal and factual foundations of these two agency findings, Korea was in fact providing a more than sufficient "indication" of the legal basis for its claim.

D. The Panel May Consider Any Evidence It Deems Appropriate

62. At the first meeting with the Panel the United States raised the argument that the Panel may only consider information submitted to the administering authorities. Korea believes this argument is wrong as a matter of law. The only relevant textual obligation on panels under the SCM Agreement is found in Article 11 of the DSU. Moreover, this more flexible approach makes sense. If the authorities have not asked the right questions, or did not clarify certain information, then those failures might well be part of the "objective assessment" that the panel must provide.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

19 July 2004

I. DOC'S SUBSIDY DETERMINATION WAS CONSISTENT WITH US WTO OBLIGATIONS

1. This dispute is not about the validity of a particular "approach" or a specific restructuring "mechanism".[1] Rather, this dispute is about the DOC's determination that the GOK-directed bailout of Hynix gave rise to countervailable subsidies, and whether that determination was inconsistent with the terms of the SCM Agreement.

2. **Entrustment or Direction:** Record evidence showed that the GOK adopted an explicit policy to keep Hynix from failing, and that the GOK took affirmative actions to entrust and direct Hynix's creditors to provide financial contributions to Hynix. The GOK did so by exercising control over Hynix's creditors in its multiple roles as lender, owner, legislator and regulator, and, where necessary, using coercion.

3. Early in the countervailing duty investigation, both the GOK and Hynix conceded – in fact argued – that the various bailout phases were part of a single overall restructuring programme for Hynix. The manner in which the various phases of the bailout programme overlapped and were interrelated is illustrated graphically in Figure US-3, entitled "The Constituent Parts of the Hynix Debt Restructuring".

4. The DOC gave a reasoned explanation of how the various aspects of the bailout were part of an overall programme. They were all driven by the same GOK policy to support Hynix; they occurred over a relatively short period of time; they were overlapping and interrelated; and the GOK's role was evident at each stage. Moreover, no Hynix creditors was allowed to say "no" to participating in the GOK's Hynix bailout programme.

5. Korea asserts that, legally, the government was precluded from intervening in the banking and financial sectors of Korea. A plain reading of the legal instruments cited by Korea belies Korea's assertion. Regardless of the "primary purpose" of the Decree No. 408, on its face, the Decree gave the GOK the legal authority to intervene in the lending decisions of a bank in the exercise of the GOK's shareholder rights. Similarly, with respect to the Public Fund Oversight Act, the law on its face provides for government intervention in the financial sector. For example, the Act required Korean private banks to sign contractual commitments with the GOK ("Memoranda of Understanding" or "MOUs") in exchange for the massive recapitalizations they received from the government. These MOUs provided the GOK with a contractual right to intervene in the day-to-day business and credit decisions of Korean banks.

6. Bank-specific evidence also belies Korea's assertions that the GOK was precluded from intervening in the banking and financial sectors of Korea. Statements in Kookmin Bank's June 2002 prospectus were a clear and unequivocal acknowledgment by a private bank that the GOK could and

[1] Indeed, the fact that the International Monetary Fund (IMF) may have recommended changes to Korea's corporate workout mechanisms, and that Korea adopted some form of the "London Approach" to restructurings, is irrelevant.

did influence its lending decisions. Moreover, Kookmin's financial statements suggested that the statements in its prospectus related to Hynix. Kookmin's 2001 Annual Report listed Hynix as its single largest financially troubled borrower.

7. With respect to the CRPA, the GOK enacted the CRPA precisely at the time when Hynix and other Hyundai Group companies were on the brink of bankruptcy and required significant financial assistance to avoid financial failure. Citibank officials characterized the CRPA as a way for the larger creditors to force their decisions on smaller creditors. Independent analysts, such as Standard and Poor's, noted that the CRPA provided the GOK with "a powerful voice in lending decisions", and concluded that the GOK could utilize its powers to "force some financial institutions to make new loans against their will" and "strip[] the financial services companies of their independence in lending decisions". Thus, while the CRPA may have been modelled in some respects on the so-called "London Approach", the GOK's version was government-driven, with the GOK playing a direct role in working out debts with financial institutions owned and controlled by the GOK.

8. The structure of the CRPA enabled a handful of banks – the "Creditors' Council" – to dominate the restructuring process, to establish the terms and details of the agreement, and to dictate the results to every other creditor, and this is what happened in the Hynix October restructuring. Citibank confirmed the effectiveness of this voting structure, stating that "creditor banks holding 75 per cent of Hynix' debt can impose their decisions on everyone else ... [and that, while] foreign creditors wanted more freedom to manoeuvre ... they didn't see that they had much choice ... ". Public entities, such as the KDB, and private entities owned and controlled by the GOK, were by far Hynix's largest creditors. Under the CRA/CRPA voting structure, even when these banks did not account for 75 per cent of the votes, they had sufficient voting power to block any actions that the minority creditors might propose. The DOC found that in both the May and October restructurings, GOK-owned and controlled banks held a majority of the voting rights; *i.e.*, a blocking majority.

9. It was impossible for any creditor to "walk away" from the Hynix bailout, and none did. The investigation record established that Hynix creditor banks did not have any choices beyond the three options offered under the proposed restructuring plan developed by Hynix's 18 largest creditors – which were public and private entities owned and controlled by the GOK – and presented to all creditors for a vote on 31 October 2001. There was no fourth option outside the plan approved by the Creditors' Council.

10. Option 3 is what Korea characterizes as "walking away" from Hynix and receiving "basically what they would have obtained in liquidation". Under the terms of Option 3, the banks were required to accept a five-year interest-free debenture from Hynix, thus condemning them to maintain a financial relationship with Hynix at least until 2006. In addition, what the Option 3 banks "obtained" was not comparable to what they might have received in liquidation.

11. In addition to taking actions that directly evinced entrustment and direction, the GOK also took actions to ensure that Hynix's creditors were in a position to effectuate the GOK's policy to rescue Hynix. In a November 2000 meeting, the Economic Ministers concurred on a "resolution of special approval" by the FSC to increase certain banks' ceiling limits for single borrowers, as requested by the KEB on behalf of Hynix's creditors. The FSC approved three credit limit increases for Hynix' creditors "in order to allow them to participate in the Hynix restructuring process". Korea claims that the waivers were simply a "modest" step. To the contrary, at the time of the DOC's investigation, the FSC had approved only five cases since January 2000 where an applicant bank applied to exceed its credit ceiling, four of which related to Hynix and other Hyundai Group companies. The record evidence showed that, far from applying "market principles", the FSC waived the credit ceiling for three of Hynix's creditors participating in the December 2000 syndicated loan for economic, social and political reasons. The salient fact is that the GOK waived the ceiling for every Hynix creditor that needed a waiver in order to participate in various restructuring events.

12. Another of the GOK's actions aimed at effectuating its policy to ensure the survival of Hynix was the GOK's pressure on credit rating agencies. Agencies cancelled plans to downgrade or were forced to upgrade credit ratings. Lower credit ratings would have made it more difficult for the GOK to continue its Hynix bailout programme, which was already the subject of intense criticism.

13. Governments may have political reasons for wanting to obscure their role in providing assistance to a particular company or industry. Thus, cases involving indirect subsidies can present particular challenges for an investigating authority attempting to gather facts and figure out what really happened. If Article 1.1(a)(1)(iv) is to have any meaning, it is essential to recognize the importance of examining, on a case-by-case basis, all of the evidence, including primary, secondary, and circumstantial evidence, surrounding possible government entrustment or direction.

14. In the case of the Hynix bailout, the reasonableness of the DOC's conclusion that the GOK entrusted or directed Hynix's creditors is not even a close call. The DOC considered a wide range of evidence. With respect to secondary sources, prior panel reports provide support for the DOC's reliance on secondary sources and the drawing of reasonable inferences based on the record evidence. In the DRAMs investigation at issue in this dispute, the secondary sources in the record have been shown to be credible and are often corroborated by other reports or documents. Moreover, the Appellate Body has recognized the permissibility of relying on reasonable inferences. Thus, it is not the *type* of evidence that matters. Rather, the issue is whether the domestic authority examined all the pertinent facts and provided an adequate explanation as to how the facts support its determination. The DOC did so in the DRAMs investigation.

15. **Benefit:** In determining the existence of a benefit, the issue is the position of the recipient "but for" or "absent" the government's financial contribution. Only by comparison to a market undistorted by the government's financial contribution is it possible to determine whether the recipient is better off than it otherwise would have been absent the financial contribution.

16. Article 14 does not redefine the concept of benefit in Article 1.1(b). Article 14 merely provides guidelines that must be followed in establishing "methods" for applying that concept to particular types of financial contributions. Therefore, each guideline in Article 14, including the guideline contained in Article 14(b), must be interpreted in a manner that is consistent with the meaning of the term "benefit" as used in Article 1.1(b) of the SCM Agreement.

17. With respect to Citibank, consistent with Article 14 of the SCM Agreement, the DOC examined the pertinent facts surrounding the loans and equity investments from Citibank and provided an explanation as to why they did not qualify as appropriate benchmarks. The reasons why the DOC rejected Citibank as a suitable benchmark are discussed extensively in the paragraphs 197-204 of the US first written submission.

18. With respect to the DOC's use of historical cumulative default rates published by Moody's Investor Service to calculate the uncreditworthy benchmark rate used to measure the benefit to Hynix, nothing in Article 14 of the SCM requires that the DOC use Korean default rates to measure loans benefits. In fact, the DOC examined but rejected the Korean default rates provided by Hynix. First, there was no information provided with the rates offered by Hynix that would have allowed the DOC to ascertain how they were calculated. Second, there was nothing indicating that the historical rates were cumulative average rates, as required under the DOC's regulations. Only cumulative rates provide the probability of default over the full term of the loan, as opposed to a single year. Third, the default information submitted by Hynix was unreliable on its face, because the data suggested that the default rate for the lowest rated debt was lower than the default rate for the highest rated debt. This inverse relationship made no sense. Accordingly, the DOC reasonable declined to rely on the rates offered by Hynix, because they lacked sufficient information and appeared unreliable on their face.

19. **Specificity:** As detailed in the US first written submission, the DOC demonstrated, based on positive evidence, that the GOK-directed bailout was specific in fact to Hynix, and thus actionable under the SCM Agreement. Although Korea disputes whether the bailout was government-directed, it has not disputed that Hynix was the beneficiary of a planned financial restructuring programme. The DOC also examined corporate usage of the CRA/CRPA to substantiate its specificity determination. The DOC found that, based on data provided by the GOK, the Hyundai Group companies received an extraordinarily large percentage of financial restructuring and recapitalization aid and that Hynix alone received a very high percentage of such aid. It is axiomatic that an analysis of disproportionate use is comparative. Korea has simply argued for use of a different comparative benchmark; argument should not be confused with WTO obligation.

20. **Meetings with Experts:** There is no requirement in Article 12.6 that investigating authorities must permit counsel for the government of the Member in question to be present for its meetings with financial experts. The Panel should reject Korea's new version of the facts and its Article 12.6 claim.

II. THE ITC'S INJURY DETERMINATION WAS CONSISTENT WITH US WTO OBLIGATIONS

21. **Volume Analysis:** The ITC examined the volume of subsidized subject imports in three ways: (1) in terms of billions of bits; (2) as a ratio to domestic production; and (3) as a share of apparent US consumption. All three measurements increased over the period of investigation. In light of the undisputed high degree of substitutability between subsidized subject imports and the domestic like product, the ITC found that the volume of subject imports on an absolute basis, as well as the increase in the volume of subject imports both absolutely and relative to both production and consumption in the United States, was "significant".

22. The United States has previously explained why Korea's brand-name argument has no legal basis under the SCM Agreement given the facts of this investigation. Korea has not rebutted this argument. Nor has it shown that the ITC's rejection of Hynix's factual explanation for the increased volume of subsidized subject imports was unreasonable.

23. Korea continues to place a great deal of emphasis on relative market share increases. However, there is no legal support for Korea's assertion that increases in market share are the only indicia that matter for an affirmative material injury analysis.

24. Korea's volume arguments continue to ignore the importance of the conditions of competition in this industry to the ITC's volume analysis. As the ITC emphasized, its findings about the volume of subject imports were reinforced by the substantial degree of substitutability between subject imports and domestically-produced DRAM products. The commodity-like nature of domestic and subject imported DRAM products magnified the ability of a given volume of imports to impact the domestic market and industry.

25. Korea disregards the fact that the degree of product fungibility, price sensitivity, and market differentiation can be relevant in assessing the significance of a given import volume or of a given increase of import volume absolutely or relative to domestic production or consumption. In an investigation involving a highly fungible product, a specific volume or a specific increase of import volume absolutely or relative to domestic production or consumption can be more harmful than a similar increase for a highly differentiated product, because it is more likely to have a direct impact on the market. Given how quickly information is disseminated in the DRAMs industry, it is not surprising that purchasers were reluctant to commit large portions of their purchases to the financially troubled Hynix, although they were free to use Hynix's low-priced offers to ratchet down prices from other potential suppliers.

26. **Price Effects:** The ITC engaged in one of the most data-intensive, complex pricing analyses it has ever undertaken. The pricing data the ITC collected were clearly representative, accounting, by value, for approximately 45.9 per cent of domestic producers' and 36.9 per cent of subject imports' US shipments in 2002. Based on a weighted-average comparison of the price of domestic shipments with the weighted average price of subsidized subject imports for each month of that time period, the ITC found significant price undercutting by subsidized subject imports.

27. The level of detail of pricing data obtained by the ITC provided unassailably accurate head-to-head price comparisons. The level of accuracy and objectivity of examination permitted by the monthly series of weighted-average price comparisons by product and by channel of distribution was remarkable. These data permitted the ITC to determine in those monthly periods for which price comparisons were available whether the subsidized subject imports were underselling or overselling the domestic like product and by what margins. Based on this extensive data, the ITC ascertained that for the majority of possible comparisons, subsidized subject imports undercut the domestic like product at high margins (often over 20 per cent), and at increasing frequencies (from 51 per cent of possible comparisons in 2000 to 56 per cent in 2001 and 70 per cent in 2002). The ITC identified significant price undercutting to each of the three main channels of distribution (PC OEMs (*i.e.*, original computer equipment manufacturers), other OEMs, and non-OEMs). The ITC also found that undercutting was consistent and substantial for particular high-revenue products to particular channels of distribution at specific points during the period of investigation. The ITC went well beyond the approach found to be WTO-consistent by the panel in *EC – Tube*.

28. The ITC also went well beyond the requirements of the SCM Agreement by collecting and evaluating pricing data on non-subject imports. Korea's argument in its opening statement that the ITC "ignored the prices of non-subject imports" in its pricing analysis is simply wrong.

29. The pricing data show that the underselling frequency by non-subject imports was lower than, and increased less than, the underselling frequency of subsidized subject imports between 2000 and 2002. In particular, while subject imports were increasing their underselling frequency between 2000 and 2001 from 51 per cent of all observations to 56 per cent of all observations, the frequency of underselling by non-subject imports was fairly steady at 46.6 per cent of instances in 2000, and 47.7 per cent in 2001. Underselling by subsidized subject imports increased to 69.8 per cent of all observations in 2002, or about 10 percentage points higher than the percentage for non-subject imports in that year (60.7 per cent). Consistent with the data, the ITC concluded that for these "standard" pricing products, subsidized subject imports undersold non-subject imports in a majority of instances.

30. Equally without merit is Korea's argument that the ITC should have examined the pricing data on a brand-name basis. There is no requirement in the SCM Agreement to analyze price effects on a brand-name basis, nor does Korea identify one. In the DRAMs investigation, use of the brand-name analysis urged by Hynix would not reflect the source country of the DRAM products and would be utterly inconsistent with the requirement under the SCM Agreement to examine the effect "of the subsidized imports" on the "like product," the product produced by the domestic industry. On the other hand, by comparing the weighted-average price of subsidized subject imports with the weighted-average price of domestic shipments for each time period, the ITC's methodology in this investigation addressed the inquiry posed by Article 15.2 – the assessment of the price effects of the subsidized imports on the domestic industry.

31. In any event, the ITC *also examined* the pricing data on a disaggregated basis (broken down both by brand name and by source). Even a disaggregated analysis showed that subsidized subject imports were the lowest-priced product "*more often than DRAM products from any other source*".

32. Contrary to Korea's repeated arguments, the ITC did not "largely ignore" the "particular and unique competitive dynamics of the DRAM market". The ITC identified several reasons why the

factual data on undercutting was probative. These included the high degree of substitutability between subject imports and the domestic DRAM products, the overlapping customers and channels of distribution to which subject imports and the domestic DRAM products were sold, the inelasticity of demand, and the importance of price in this particular industry.

33. A finding of undercutting, let alone significant undercutting, is not a prerequisite to an affirmative injury determination. Article 15.2 of the SCM Agreement specifically provides that "[n]o one or several of these factors can necessarily give decisive guidance". Nevertheless, it is clear that, under the analysis the ITC conducted in this investigation, there was *significant* undercutting by subsidized subject imports.

34. The ITC also found that subsidized subject imports depressed prices to a significant degree. Korea does not challenge the ITC's finding that there was significant price depression by subsidized subject imports. Instead, to the extent Korea mentions price depression at all, it is in connection with its argument that the ITC did not adequately consider factors other than subsidized subject imports in its price effects analysis. In its discussion of the ITC's causation analysis, the United States has addressed and rebutted Korea's argument.

35. **Impact of Subsidized Imports :** The ITC found that many indicators of domestic industry performance declined over the period of investigation. These included capacity, production, market share, employment, and hourly wages. The domestic industry's operating performance also declined. The ITC also found that domestic producers reduced capital expenses during the period of investigation. The ITC explicitly acknowledged that for some of the impact factors, there were positive trends in the data at specific points during the period of investigation. But, it further analyzed the data and explained why, even for factors showing increases, the value of such "improvements" was limited.

36. Korea does not contest the positive evidence supporting these findings. Instead, Korea continued to reference snippets of information that it believes would support a different conclusion than the ITC reached. This approach ignores the fact that the ITC examined the domestic industry, as well as the evidentiary record, *as a whole*, as required by Article 15.4 and Article 16.1 of the SCM Agreement. Other panels have recognized the importance of this language, including the panels in *Mexico – HFCS* and *EC – Tube.*

37. Moreover, Korea's arguments about individual domestic producers are also flawed and/or based on a selective reading of the evidence. The public statements that Korea continues to assert show that the US DRAM industry was doing well often pertain to the individual company's global operations on all products, not just DRAMs. Indeed, the two randomly selected quotations from Micron that Korea asserts show how the domestic industry purportedly assessed its own condition reinforce rather than detract from the ITC's impact findings. Neither statement establishes nor was intended to suggest that the identified factors show that Micron or the domestic industry did not suffer injury. Rather, they show that, because of good management practices, Micron expected to survive, despite the significant injury that it had suffered.

38. **Article 15.5 Analysis:** The ITC's analysis was also consistent with the requirements of Article 15.5 of the SCM Agreement. The ITC found that the domestic industry producing DRAM products was materially injured by reason of the subsidized subject imports of DRAM products from Korea. The ITC demonstrated a causal nexus between the subsidized subject imports of DRAM products from Korea and the material injury suffered by the domestic industry through its examination of the volume, price effects, and impact of the subsidized subject imports on the domestic industry. No one or several of these factors was decisive. Rather, the material injury determination – and, thus, the ITC's causation analysis – was based on an analysis of these factors collectively. Thus, in the DRAMs investigation, the ITC integrated the causation discussion and its discussion of how it ensured that it did not attribute material injury from other factors to the subject

imports into its analysis of the volume, price effects and impact of subject imports. While this approach is not required by the SCM Agreement, it is certainly consistent with the Agreement. Korea fails to show otherwise.

39. Korea's arguments reveal that it believes that in investigations like the DRAMs investigation, where there are several factors that may be injuring the domestic industry, an investigating authority is precluded from making an affirmative material injury determination. Korea's argument has no basis in the provisions of the SCM Agreement. Appellate Body reports also lend the argument no support.

40. The ITC also examined other known factors to ensure that it did not attribute injury from those factors to the subsidized subject imports. In so doing, the ITC properly separated and distinguished other known factors from the subsidized subject imports by providing a satisfactory explanation of the nature and extent of the injurious effects of the other known factors, as distinguished from the injurious effects of the subsidized subject imports. This is all that is required, even in the context of the Safeguards Agreement.

41. For example, with respect to the business cycle, the ITC found that because growth in demand for DRAM products has been continuous, but supply increases are sporadic, supply and demand in this industry tend to be chronically out of equilibrium, giving the market its characteristic "boom" and "bust" business cycle. The ITC also determined that largely because of the perpetual improvements in production efficiencies experienced by this industry, prices are usually declining. At the same time, the ITC determined that the business cycle (and other factors affecting prices) simply did not explain the unprecedented severity of the price declines that occurred from 2000 to 2001 and that persisted through 2002. Nor could it explain the increasing frequency of underselling by subsidized subject imports during the period of investigation.

42. The ITC's examination of other known factors is identical to the methodology upheld by the panels in *EC – Tube* and *Egypt – Rebar*. The panel in *Egypt – Rebar* did not require the "non-attribution" findings of the investigating authority to be based on an econometric model or some sophisticated quantification exercise. All that the panel in *Egypt – Rebar* required was that the "non-attribution" findings be based on a meaningful explanation as to why the effects of the subsidized imports did not "overlap" with (that is, were notionally distinct from) those of another factor causing injury at the same time. In the DRAMs investigation, the ITC found that the *subsidized imports had price effects that significantly exceeded those of non-subject imports*, and that other factors – such as the operation of the business cycle (including by virtue of capacity/supply increases); slowing in the growth of demand; and the product life cycle – could not explain the unprecedented price declines experienced during the period of investigation. Therefore, it is clear that subsidized imports had their own, independent, injurious effects.

43. As in *EC – Tube*, the ITC found that effects of one factor (capacity expansions) were subsumed within the effects of another factor (the operation of the business cycle), and determined that the effects of the latter factor could not explain the totality of the injury observed (cumulative price declines that ranged as high as 90 per cent, well in excess of the "usual" ranges). These findings supported the ITC's conclusion about the causal nexus between the subsidized subject imports and the injury to the domestic industry.

E. Korea does not Dispute the ITC's Treatment of Certain Data as Confidential and Offers no Basis for the Panel to Request Confidential Data

44. Finally, in its opening statement and its oral responses to the Panel's questions during the first Panel meeting, Korea requested that the Panel ask the United States to provide the entire confidential final determination of the ITC, as well as the entire confidential data tabulations that formed the ITC's report in this investigation. Korea also suggested that if the ITC did not provide such information that the Panel look to **Confidential US Figure 1**. As we have previously explained, Korea has failed to demonstrate why any or all such confidential information would be necessary or appropriate in this dispute.

45. Reports reviewing other investigating authorities' antidumping determinations – such as *Thailand – H-Beams* – have recognized that it is objective for investigating authorities to base their determinations on the entire agency record (including confidential data). Thus, it was objective for the ITC to base its injury determination on a review of the entire record, and not just data that could be released in the public version of an opinion.

46. With respect to Korea's suggestion that the Panel look to **Confidential US Figure 1**, for the reasons set forth in paragraph 300 of the US first submission, we continue to urge the Panel not to rely on the selective confidential information that Korea has provided in this dispute. Nevertheless, should the Panel be inclined to examine the data summarized in **Confidential US Figure 1**, the United States makes the following observations based solely on a comparison of the limited confidential data before the Panel concerning Hynix Semiconductor America's imports and Hynix Semiconductor America's US shipments of imported subsidized subject DRAM products with non-confidential information contained in the ITC's final report.

* The ratio of subject imports to domestic production increased enormously from 2000 to 2002.

* Even based only on Hynix Semiconductor America's reported data, it is clear that subsidized subject imports gained market share between 2000 and 2001 while domestic producers were losing market share. Likewise, although both the domestic industry and subsidized subject imports lost market share between 2001 and 2002, reliance solely on Hynix Semiconductor America's reported data shows that subsidized subject imports maintained their market share better than the domestic industry between 2001 and 2002 at a time of slowing demand.

* Confidential Figure US-1 also reveals information about the magnitude of the absolute increases in subject import volume.