

## ANNEX E

### PANEL'S QUESTIONS, ANSWERS AND COMMENTS OF PARTIES

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## ANNEX E-1

### QUESTIONS TO THE PARTIES FOLLOWING THE FIRST SUBSTANTIVE MEETING OF THE PANEL

Each party may address/comment on questions addressed to the other party.

#### A. QUESTIONS TO THE UNITED STATES

##### 1. Alleged subsidization

1. At paras 235 and 236 of its first written submission, the US refers to "the Hynix bailout" as the "the subsidy program". What are the relevant constituent parts of that alleged subsidy programme?
2. For each alleged financial contribution forming part of the "Hynix bailout" "program", please specify which private entities participated in that financial contribution, and what evidence of entrustment and/or direction the ITC relied on in respect of each of those private entities.
3. With regard to paras 139 and 146 of the US first written submission, please list which Hynix creditors the DOC considered to be "government-owned and controlled", which were treated as "government-owned", which were designated as "majority-owned by the government", and which were treated as public bodies. Please explain how the US defines each of these terms for the purpose of these proceedings, and the consequential rationale for the designation made by the DOC with respect to each of the relevant entities.
4. Did the DOC find that "government-owned and controlled" banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?
5. Did the DOC find that "majority-owned by the government" banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?
6. Did the DOC find that "government-owned" banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?
7. Assume a government announces publicly that it is going to restructure a bankrupt industry and that, although it would prefer to do so with the assistance of private investors, it would do so on its own if necessary. Assume that private investors decide to participate in that restructuring, purely on the basis of the government's statement that it is going to keep that industry afloat. Leaving aside issues of benefit concerning the terms of the restructuring, should an investigating authority find that those private investors had been entrusted or directed by the government to participate? Why, or why not?

8. Please comment on Korea's assertion (para. 51 of its oral statement) that many creditors "walked away" from the October 2001 restructuring. Doesn't this suggest that those creditors were able to act independently of any GOK desire to restructure Hynix? Please explain.

9. The US argued at the first substantive meeting that KFB was "brought into line" after initially resisting GOK efforts to require it to participate in the Hynix restructuring. Korea denies this, arguing that KFB ultimately did not participate in the October 2001 restructuring. Please comment.

10. The US asserted at the first substantive meeting that creditors were required to participate in the October 2001 restructuring by virtue of the CRPA. Was such alleged mandatory participation relied on by the DOC as evidence of entrustment and/or direction? If yes, please indicate where this issue is addressed in the DOC's determination. If not, why not?

11. With regard to the May and October 2001 restructurings, the parties have referred to option 3 as the exercise of "appraisal rights". Please comment. Was the exercise of appraisal rights any different from liquidation? Please explain.

12. The US asserted at the first substantive meeting that this case is not about a comparison of different WTO Members' restructuring frameworks. At para. 21 of its oral statement, however, the US seems to have argued that an investigating authority could reasonably have found that a reasonable investor would not have invested in Hynix because it was "technically insolvent". Doesn't this suggest a *per se* rule that all "technically insolvent" companies should be liquidated? Please explain.

13. At para. 17 of its oral statement, the US refers to alleged pressure on credit rating agencies. Is this evidence of entrustment / direction of private creditors? If not, what is the relevance of this evidence to the DOC's determination of subsidization? Please explain.

14. At para. 18 of its oral statement, the US refers to KEB's rationale for participating in the May and October 2001 restructurings. Is it surprising that a public body would act on the basis of social and economic policy considerations? Why does the fact that a public body creditor acted on non-commercial principles necessarily mean that other private body creditors also did so?

## 2. Alleged injury

15. At para. 316 of its first written submission, the US states that the ITC explained that although it opined that "the use of bits as a unit of measurement [could] present difficulties for [its] analysis", it nevertheless found that the absolute volume of subsidized subject imports and the increase in that volume relative to US production and consumption was "significant".

- (i) What were the reasons why the ITC nevertheless found that the absolute volume of subsidized subject imports and the increase in that volume relative to US production and consumption was "significant"?
- (ii) Where were those reasons set forth in its Determination and Views (Exhibit GOK-10) (or any other relevant document)?
- (iii) The last paragraph of page 21 of the ITC's Determination and Views states that the ITC's "findings about the volume of subject imports are reinforced by the substantial degree of substitutability between subject imports and domestic shipments". If the finding that the absolute volume of subsidized subject imports is significant is "reinforced" by considerations of substitutability, what is the initial basis for that

finding? In other words, what is the initial basis that is then "reinforced" by considerations of substitutability?

- (iv) Was the ITC's determination of material injury and/or causation based on its finding that the absolute volume of subsidized subject imports was "significant"? Was this finding relevant to its determination? Would the ITC not have made its determination of material injury and/or causation but for its finding that the absolute volume of subsidized subject imports was "significant"?

16. Please comment on Korea's statement that there was no displacement of US workers resulting from Hynix's Eugene facility "swapping customers" with Hynix's Korean facility.

17. At para. 40 of its oral statement, the US asserts that the ITC determined that "a significant portion of non-subject imports were Rambus and speciality DRAM products". On the basis of a non-confidential presentation/summary of the underlying proprietary information, please indicate what percentage of non-subject imports were Rambus and speciality products?

18. On the basis of a non-confidential presentation/summary of the underlying proprietary information, please set out the basis for the ITC's finding that the volume of subsidized subject imports was "significant".

19. The US argued at para. 424 of its first written submission that the causal analysis for countervail was different than the causal analysis for safeguards. The US based its argument on the different injury thresholds set forth in the SCM and Safeguards Agreements respectively. How does the injury threshold determine the requisite degree of causal nexus? In other words, what is it about the need to find serious injury in the case of safeguards that makes the causation standard different than in countervail, where material injury need to be established?

20. The US noted at the first substantive meeting that Article 15.5 of the SCM Agreement refers to a "causal relationship" between the subsidized imports and the material injury to the domestic industry, whereas Article 4.2(b) refers to a "causal link" between increased imports and the serious injury to the domestic industry. Does this explain the alleged difference in the applicable causation standards? Please explain.

21. The US asserts at para. 424 of its first written submission that "the 'causal relationship' of the SCM Agreement is ... different from the 'causal link' requirement of the safeguards Agreement". At para. 443 of its first written submission, the US refers to the ITC "demonstrating a causal link". At para. 419, the US refers to the need to establish a "causal relationship". How credible is the US assertion that the term "causal link" differs from the term "causal relationship" if the US fails to distinguish between those two concepts in its written submission?

22. At para. 424 of its first written submission, the US appears to argue that the ITC applied the "causal relationship" standard. Is this a correct understanding of the US argument? Please explain.

23. Please explain how the ITC complied with the causation standard described at para. 427 of the US first written submission. In particular, how did the US "separate and distinguish" the injurious effects of non-subject imports?

24. How do the causation standards of "causal link" (Article 4.2(b) of the Safeguards Agreement) and "causal relationship" (Article 15.5 of the SCM Agreement) differ in practice?

25. Korea noted at the first substantive meeting that the Argentina-Footwear panel, in respect of a safeguards dispute, stated (para. 8.238) that an absence of coincidence, or correlation, "would create

serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present" (italics in original). Does the US consider that such panel ruling is not relevant to the present proceedings because it concerns causation in the context of safeguards, and not countervail? Please explain.

B. QUESTIONS TO KOREA

1. Alleged subsidization

26. Korea stated at the first substantive meeting that the more concrete the designated task, the more specific the target entity, the more confident one could be of the existence of entrustment/direction. Does the fact that concrete tasks and specific addresses increases confidence in a finding mean that the finding is precluded in circumstances where the designated task is less concrete and the addressee is not clearly specified? Isn't it simply more difficult – but not necessarily impossible - to establish entrustment / direction in such circumstances? Isn't the discussion about formal/explicit as opposed to informal/implicit entrustment / direction really an issue of evidence, rather than law? Please explain / comment.

27. Korea asserts at para. 59 of its oral statement that "the plain meaning of 'entrusts or directs' poses the core questions of 'who' is being directed to do 'what'". How does the plain meaning of that text (leaving aside the ruling of the US - Export Restraints panel) mean that such core questions can only be answered by reference to explicit and formal acts of government?

28. Is Korea challenging the DOC's determination that the KDB Fast Track Program constitutes a subsidy? If so, please refer to the relevant part(s) of Korea's first written submission.

29. How were the Creditors' Councils composed during the period of the DOC's investigation? How did the composition of those Creditors' Councils change over that period?

30. Korea indicated at the first substantive meeting that participation in the October 2001 Creditors' Council was mandatory, by virtue of the CRPA.

- (i) Why did the CRPA make participation in Creditors' Councils mandatory?
- (ii) What, if any, sanctions applied to creditors that (a) refuse to participate in the Creditors' Council, and / or (b) refuse to abide by the terms of the restructuring agreed on within the Creditors' Council?
- (iii) If participation in the Hynix Creditor's Council was mandatory, didn't that mean that participation in the Hynix restructuring was mandatory? Please explain.
- (iv) Was there a statutory option available to creditors, other than the three options designated by the Creditors' Council?
- (v) How were the terms of the three options determined?
- (vi) Was there any difference between the value of appraisal rights under option 3 and liquidation value? Please explain.

31. At para. 45 of its oral statement, Korea asserts that DOC "reversed its prior finding" that all commercial banks in Korea were controlled by GOK. When was any such "prior finding" made by the DOC, and what is the relevance of that case to the Hynix restructuring?

32. Korea stated during the First Substantive meeting with the Panel that Korean investors were entitled to rely on the prospect theory. Is this case really about which economic theory the Korean investors were entitled to rely on? Isn't it rather about which economic theory the DOC was required to apply under the terms of the SCM Agreement?

2. Alleged injury

33. What is the relevance of note 47 to Article 15.5 of the SCM Agreement for the purpose of establishing the requisite "causal relationship"?

34. Does Korea claim that the ITC's finding of significant price depression is inconsistent with the SCM Agreement? If so, please specify where this claim is addressed in Korea's first written submission.

35. Regarding para. 14 of Korea's oral statement, did subject Hynix imports and DRAMs from Hynix's Oregon facility compete with other US produced DRAMs on the same terms / under the same conditions of competition? Would this be relevant to the issue of whether or not the ITC should have treated subject Hynix imports as merely replacing production at Hynix's Oregon facility?

36. Korea argues that Hynix's subject imports were merely replacing sales by Hynix's Eugene facility. Korea refers in this regard to "customer swapping". Leaving the present case to one side, imagine a case in which the volume of imports increases during the period of investigation because a domestic company ceased manufacturing operations in order to "re-tool" up at the very beginning of that period, and sourced its product (for resale) from unrelated subject exporters instead. If the resultant absolute increase in imports during the period of investigation was significant, would an investigating authority be entitled to rely on that in its injury determination?

37. Is Korea arguing – as alleged by the US at para. 39 of its oral statement – that subject imports must be the sole cause of injury in order for the requisite causal link to be established between the subsidized imports and injury? If so, please comment on the finding of the Hot-Rolled Steel panel (DS184) that the USITC was not required to demonstrate that dumped imports alone caused material injury (para. 7.260 of that report).

38. Please comment on para. 431 of the US first written submission. Does Korea argue that the ITC should have "isolate[d] subject imports or the effects of the subject imports and other known factors on the domestic industry"? Please explain.

39. Please comment on the US remarks regarding Korea's use of volume / market share data sources set forth at paras 292-294 of the US first written submission.

40. Please comment on the US argument (para. 32 of its oral statement) that there is no obligation under the SCM Agreement for a brand-name analysis of price undercutting. If Korea disagrees, please indicate which provisions of the SCM Agreement provide for this obligation.

## ANNEX E-2

### QUESTIONS TO THE PARTIES FOLLOWING THE SECOND SUBSTANTIVE MEETING OF THE PANEL

Each party may address/comment on questions addressed to the other party.

#### A. QUESTIONS TO US

1. Please comment on the following paragraphs of Korea's Opening Statement at the Second Substantive Meeting of the Panel:

§ 20 : the hypothetical of Hynix being the lowest price twice, but 98 other suppliers being each the lowest price once;

§ 22 : the ITC's focus on relatively small changes in the frequency of underselling, while ignoring dramatically different volumes of non-subject imports;

§ 26 : the issue of correlation, in the context of causal nexus: what changed from 2000, when the domestic DRAMS industry had record performance, and 2001, when price fell and industry profits plunged;

§ 33 : the selection of data on record about product substitutability;

§ 34 : the portion of subject imports underselling in 2001 was 5% of the market, whereas the portion of non-subject imports underselling was 27% of the market;

§ 37 : the ITC does not explain why the effect of supplier competition was attributed to the small change in subject import market share, rather than the much larger market share of non-subject imports and the rate at which non-subject imports were gaining market share;

§ 39 : the key missing point – non-attribution required the ITC to separate and distinguish the role of subject import supply sources from domestic and non-subject import supply sources;

§ 49 : appearance of control where none exists, nothing suggests that the GOK would intervene in day-to-day credit decisions of various banks;

§ 76 : the argument regarding the size of Citibank's loan.

2. With regard to para. 32 of the Second Written Submission of the US, are the "actions that directly evinced entrustment and direction" those set forth in section 1(a) – (c) of that submission? Is the US arguing that there is both direct and indirect evidence of entrustment / direction? Why is mandatory participation under the CRPA included as an "action [...] that directly evinced entrustment and direction", when at para. 33 of its replies to the Panel's questions, the US asserts that "[t]he DOC did not find that mandatory participation under the CRPA constituted, in and of itself, entrustment or direction"?

3. Please comment on Korea's argument (para. 128 of Korea's Second Written Submission) that "there is simply no evidence indicating that Shinhan, Hana, or KorAm bank were entrusted or directed by the GOK to extend their portion of the syndicated loan". What evidence of entrustment / direction did the US rely on in respect of the participation of these banks in the syndicated loan? Even if one does not accept Korea's argument on the need for specific banks to be directed to perform specific tasks, is it not necessary for an investigating authority to point to evidence showing that creditors included in the finding of entrustment/direction were actually entrusted / directed ?
4. At para. 18 of its Answers to the Panel's questions, the US asserts that "The DOC did *not* find specifically that government-owned and controlled private entities 'were instruments through which the GOK entrusted/directed other entities'. Rather, the DOC found, for example, that the GOK exercised control over Hynix's creditors generally through government-owned and controlled banks, because those banks played a dominant role in the Creditors Councils." Does the US response mean that control over creditors through government-owned and controlled private entities is not relevant to the issue of entrustment / direction of those creditors? How does the concept of the exercise of control over creditors differ from the notion of entrustment / direction of those creditors?
5. At para. 20 of the US Answers to Panel questions, the US asserts that "the motives of private investors are not germane" to the issue of entrustment / direction. At para. 24, however, the US argument of entrustment/direction relies on private creditors knowing what was good for them. If entrustment/direction is based on creditors knowing what is good for them, doesn't that imply an analysis of their motives?
6. At para. 33 of its Answers to the Panel's questions, the US asserts that "[t]he DOC did not find that mandatory participation under the CRPA constituted, in and of itself, entrustment or direction. Rather, the DOC found that the GOK used the CRPA as a vehicle to effectuate the GOK's Hynix policy". Does this mean that the alleged mandatory nature of the CRPA is not relevant to the issue of entrustment/direction? How does the notion of entrusting / directing someone to carry out an objective differ from using something as a vehicle to have someone effectuate that objective? If the October 2001 restructuring had occurred in isolation, would the CRPA in and of itself have been sufficient evidence of entrustment/direction?
7. What was the evidence of entrustment / direction in respect of Pusan?
8. Regarding Figure US-4, the different proportions of council vote held by group A, B and C creditors in respect of the October 2001 restructuring do not add up to 100%. Please explain.
9. What was the basis for the DOC's finding that Citibank was not entrusted/directed?
10. In its Second Written Submission to the Panel, the US refers to the Kookmin Prospectus in a section entitled "GOK Ownership and Control of Hynix's creditors". Does the US argue that GOK's 15.1% shareholding resulted in GOK control over Kookmin?
11. In reply to question 1 from the Panel, the US stated that "the constituent parts of the subsidy programme ... *included* the 800 billion won syndicated loan, the KDB Fast Track bond program, the May 2001 restructuring package, the October 2001 restructuring package, and the benefits conferred by these and other financial contributions, such as D/A loans, made as part of the Hynix bailout." Please specify an exhaustive list of the constituent parts of the alleged subsidy programme.
12. Please comment on para. 182 of Korea's Second Written Submission. In particular, does the US accept that the Hynix-only import figures are a reasonable proxy for the total import figures ?



13. Please comment on Korea's argument regarding the difference between the US submission and the ITC report regarding the extent of the "portion" speciality products (para. 211 of Korea's Second Written Submission). Please comment on Korea's argument regarding the ITC's use of "value estimates" in respect of those speciality products (para. 212 of Korea's Second Written Submission).

14. In response to Question 23 from the Panel, the US asserts that although the ITC determined that non-subject imports were responsible for "the bulk of the market share lost by domestic producers during the period of investigation", it identified two reasons why it did not find the volume of non-subject imports as significant as otherwise would be suggested. First, the ITC referred to the composition of non-subject imports. Second, the ITC referred to the price effects of non-subject imports. How do these two factors qualify the loss of market share? Wouldn't any impact resulting from the composition and price effects of non-subject imports already be reflected in the market share data? For example, wouldn't the fact that non-subject imports include speciality products mean that they would have taken less market share from domestic producers, and that this consideration is therefore already reflected in the market share data?

15. Did the DOC conclude that the KEB was entrusted or directed to (a) participate in the Syndicated Loan and/or (b) seek a loan limit waiver?

16. To what extent was the USD 1.35 billion GDS offering taken into account by the DOC with respect to its finding of entrustment / direction of Hynix's creditors?

17. Was the participation by "small" creditors accounting for approximately 20% of the debt in the October Restructuring countervailed?

B. QUESTIONS TO KOREA

18. Please comment on the following paragraphs of the Opening Statement of the US at the Second Substantive Meeting of the Panel:

§ 24 : Korea's concession that the transactions made under the KFB Fast Track Programme constitute financial contribution, but could still serve as benchmarks for determining benefit;

§ 45 : no requirement in the SCM Agreement that the period examined for the subsidies enquiry cover the entire period examined for the injury determination.

19. With reference to Figure US-1, does Korea contest the DOC's conclusion that each of the Group B creditors were controlled by GOK? Please explain.

20. With reference to Figure US-1, does Korea contest the DOC's conclusion that each of the Group B creditors were entrusted or directed by GOK? Please explain.

## ANNEX E-3

### REPUBLIC OF KOREA'S ANSWERS TO THE PANEL QUESTIONS

9 July 2004

#### A. QUESTIONS TO THE UNITED STATES

We only set forth below only those questions (for the United States) to which the GOK also provides an answer.

##### 1. Alleged subsidization

1. At paras. 235 and 236 of its first written submission, the US refers to “the Hynix bailout” as the “the subsidy program”. What are the relevant constituent parts of that alleged subsidy programme?

**GOK ANSWER:** Korea simply notes that the four elements set forth at paragraphs 129 through 151 identify the same four elements that the United States discussed in the first meeting with the Panel: the December 2000 syndicated loan; the KDB Fast Track Programme, the May 2001 restructuring, and the October 2001 restructuring.

\* \* \* \*

2. For each alleged financial contribution forming part of the “Hynix bailout” “programme”, please specify which private entities participated in that financial contribution, and what evidence of entrustment and/or direction the ITC relied on in respect of each of those private entities.

**GOK ANSWER:** This question is primarily for the United States to answer. Korea simply notes that any evidence identified by the United States must be carefully reviewed to determine whether and to what extent that evidence in fact relates to that specific constituent element of the alleged subsidy programme.

\* \* \* \*

3. With regard to paras. 139 and 146 of the US first written submission, please list which Hynix creditors the DOC considered to be “government-owned and controlled”, which were treated as “government-owned”, which were designated as “majority-owned by the government”, and which were treated as public bodies. Please explain how the US defines each of these terms for the purpose of these proceedings, and the consequential rationale for the designation made by the DOC with respect to each of the relevant entities.

**GOK ANSWER:** This question is for the United States. Korea will review the answer provided by the United States, and confirm for the Panel the factual accuracy of the statements being made about the various Korean banks.

\* \* \* \*

**4. Did the DOC find that “government-owned and controlled” banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?**

**GOK ANSWER:** Korea looks forward to this clarification of the US position on this issue. We note the text of Article 1.1(a)(1)(iv) requires that the government be the party taking the action to entrust or direct. Korea believes that this provision does not allow actions by private parties to serve as the factual or legal basis for a finding of entrustment or direction.

\* \* \* \*

**5. Did the DOC find that “majority-owned by the government” banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?**

**GOK ANSWER:** See answer to Q4 above.

\* \* \* \*

**6. Did the DOC find that “government-owned” banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?**

**GOK ANSWER:** See answer to Q5 above.

\* \* \* \*

**7. Assume a government announces publicly that it is going to restructure a bankrupt industry and that, although it would prefer to do so with the assistance of private investors, it would do so on its own if necessary. Assume that private investors decide to participate in that restructuring, purely on the basis of the government’s statement that it is going to keep that industry afloat. Leaving aside issues of benefit concerning the terms of the restructuring, should an investigating authority find that those private investors had been entrusted or directed by the government to participate? Why, or why not?**

**GOK ANSWER:** No, this hypothetical would not justify a finding of entrustment or direction. Article 1.1(a)(1)(iv) involves government actions that require private actors to take some action. Both “entrusts” and “directs” convey the core meaning of a private party being told what to do.

Article 1.1(a)(1)(iv) is not about government actions that may or may not have some effect on the incentives of private parties to take actions. As the panel in *US–Export Restraints* recognized, governments intervene in markets in many different ways.<sup>1</sup> For example, central banks set interests rates that have enormous influence on whether and how financial transactions take place, and the risk associated with those transactions. The key issue under Article 1.1(a)(1)(iv) is not about whether the government is affecting the incentives, but whether the government is requiring certain actions to be taken through private intermediaries.

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<sup>1</sup> *United States -- Measures Treating Export Restraints as Subsidies*, Report of the Panel, WT/DS194/R, 29 June 2001 (“*US - Export Restraints*”), para. 8.31.

**8. Please comment on Korea's assertion (para. 51 of its oral statement) that many creditors "walked away" from the October 2001 restructuring. Doesn't this suggest that those creditors were able to act independently of any GOK desire to restructure Hynix? Please explain.**

**GOK ANSWER:** At the first meeting with the Panel, the United States stressed that these creditors still had to take substantial write-offs of their Hynix debt, and suggested that such a situation is not "walking away."

Korea would like to note two points. First, such write-offs were inevitable -- after all, the situation involved a heavily indebted company in a restructuring. Write-offs are a very common part of such restructuring. The United States has not indicated -- and indeed, cannot indicate -- any scenario in which the creditors could have avoided such write-offs.

Second, the key issue at play in the October 2001 restructuring was which creditors would provide any new funds to facilitate the overall restructuring. Creditors were given an incentive to do so -- they could convert a higher portion of their debt to equity, lower the amount of the write-offs, and see whether and to what extent the equity would allow the banks to recover a higher percentage of their investment in Hynix. But ultimately, it was for each creditor to decide what to do. In Korea's view, any creditor that did not extend new loans was essentially "walking away," particularly those creditors who chose Option 3 and declined both new loans and any debt for equity swap.

\* \* \* \*

**9. The US argued at the first substantive meeting that KFB was "brought into line" after initially resisting GOK efforts to require it to participate in the Hynix restructuring. Korea denies this, arguing that KFB ultimately did not participate in the October 2001 restructuring. Please comment.**

**GOK ANSWER:** To clarify for the Panel, KFB participated in the December 2000 syndicated loan, and the May 2001 restructuring. KFB did not participate in the KDB Fast Track Programme, and did not participate in the October 2001 restructuring by refusing any new funds, by declining any debt-equity swap, and by exercising its appraisal rights. KFB may have been part of the restructuring at the outset -- under the CRPA, all creditors are part of the overall process -- but KFB eventually exercised its statutory rights under the CRPA to walk away with basically the same amount it could have received in liquidation.

\* \* \* \*

**10. The US asserted at the first substantive meeting that creditors were required to participate in the October 2001 restructuring by virtue of the CRPA. Was such alleged mandatory participation relied on by the DOC as evidence of entrustment and/or direction? If yes, please indicate where this issue is addressed in the DOC's determination. If not, why not?**

**GOK ANSWER:** Korea addresses a similar issue in its response to Question #30 below.

\* \* \* \*

**11. With regard to the May and October 2001 restructurings, the parties have referred to option 3 as the exercise of "appraisal rights". Please comment. Was the exercise of appraisal rights any different from liquidation? Please explain.**

**GOK ANSWER:** Korea addresses a similar issue in its response to Question #30 below.

\* \* \* \*

**12. The US asserted at the first substantive meeting that this case is not about a comparison of different WTO Members' restructuring frameworks. At para. 21 of its oral statement, however, the US seems to have argued that an investigating authority could reasonably have found that a reasonable investor would not have invested in Hynix because it was "technically insolvent". Doesn't this suggest a *per se* rule that all "technically insolvent" companies should be liquidated? Please explain.**

**GOK ANSWER:** Although the United States denied that its position was a *per se* rule, the logic of the US position is in fact a *per se* rule. The US view is that a reasonable investor only looks at narrow financial indicators. The US view precludes a reasonable investor from considering broader economic factors. The US view also precludes a reasonable investor from having a different perspective as an "inside investor". For example, under the US view, a bank that has a large amount of outstanding debt is not allowed to consider the effect of a new loan on the probability of recovering the existing loan. Given the narrow focus of the US-style "reasonable investor," that investor is applying a *per se* rule.

\* \* \* \*

**13. At para. 17 of its oral statement, the US refers to alleged pressure on credit rating agencies. Is this evidence of entrustment / direction of private creditors? If not, what is the relevance of this evidence to the DOC's determination of subsidization? Please explain.**

**GOK ANSWER:** In Korea's view, this argument about credit agencies is an example of US arguments that have nothing to do with the entrustment or direction of specific Hynix creditors to make specific transactions.

We also note that the evidence of this alleged pressure is based on press reports that were subsequently denied by the relevant Korean Government agencies.<sup>2</sup>

\* \* \* \*

**14. At para. 18 of its oral statement, the US refers to KEB's rationale for participating in the May and October 2001 restructurings. Is it surprising that a public body would act on the basis of social and economic policy considerations? Why does the fact that a public body creditor acted on non-commercial principles necessarily mean that other private body creditors also did so?**

**GOK ANSWER:** At the outset, we would like to clarify that KEB is a private commercial bank in Korea, and is not a "public body". This appears to be a typographical error, and refers instead to KDB.

Korea would like to clarify one aspect of this question. In Korea's view, it is more accurate to think of "commercial principles" as being a full consideration of all aspects of a proposed transaction. Of course, a major focus will be on then profitability of the transaction. But it is also appropriate for an institution to consider the broader economic and social context of proposed transaction. For example, a loan that avoids bankruptcy for a major company might well prevent bankruptcies of that company's suppliers. Or a bank with a substantial presence in one national market might well view loans that help develop the overall economy and a positive longer-term

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<sup>2</sup> See GOK Exhibit 58.

development for the bank. These factors are indeed “commercial” even if they do not all relate to the short-term profitability of a particular loan.

\* \* \* \*

**2. Alleged injury**

**15.** At para. 316 of its first written submission, the US states that the ITC explained that although it opined that “the use of bits as a unit of measurement [could] present difficulties for [its] analysis”, it nevertheless found that the absolute volume of subsidized subject imports and the increase in that volume relative to US production and consumption was “significant”.

- (i) **What were the reasons why the ITC nevertheless found that the absolute volume of subsidized subject imports and the increase in that volume relative to US production and consumption was “significant”?**

**GOK ANSWER:** Since the ITC determination does not state any reasons, and the US First Submission is also quite unclear on this point, Korea also wonders what rationale and what framework the ITC used for assessing the “significance”.

\* \* \* \*

- (ii) **Where were those reasons set forth in its Determination and Views (Exhibit GOK-10) (or any other relevant document)?**

**GOK ANSWER:** Korea believes that the ITC determination does not answer this key question. The ITC determination stated these conclusions without any explanation.

\* \* \* \*

- (iv) **Was the ITC’s determination of material injury and/or causation based on its finding that the absolute volume of subsidized subject imports was “significant”? Was this finding relevant to its determination? Would the ITC not have made its determination of material injury and/or causation but for its finding that the absolute volume of subsidized subject imports was “significant”?**

**GOK ANSWER:** We note that the ITC determination strongly suggests the outcome would have been different. We note that at page 27 of the ITC Final Determination<sup>3</sup>, the ITC states that “subject imports, themselves, were large enough and priced low enough to have a significant impact”. The ITC then goes on: “Given our findings about the significant volume of subject imports....” Thus, the determination as written makes clear that the ITC determination rested very much on the fact in this case that the ITC considered import volume to be significant.

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**16. At para. 40 of its oral statement, the US asserts that the ITC determined that “a significant portion of non-subject imports were Rambus and speciality DRAM products”. On the basis of a non-confidential presentation/summary of the underlying proprietary information, please indicate what percentage of non-subject imports were Rambus and speciality products?**

**GOK ANSWER:** We address this issue in our Second Submission, and provide concrete public evidence about the lack of importance of Rambus DRAMs. Rambus DRAMs accounted for less than 10 per cent of total DRAM sales by Samsung, the major supplier of Rambus DRAMs. *See* also GOK Exhibit 63. Given that Samsung was the predominate Rambus supplier, this fact means that *at least* 90 per cent of non-subject imports were standard DRAMs that competed directly with US production.

\* \* \* \*

**17. The US argued at para. 424 of its first written submission that the causal analysis for countervail was different than the causal analysis for safeguards. The US based its argument on the different injury thresholds set forth in the SCM and Safeguards Agreements respectively. How does the injury threshold determine the requisite degree of causal nexus? In other words, what is it about the need to find serious injury in the case of safeguards that makes the causation standard different than in countervail, where material injury need to be established?**

**GOK ANSWER:** Korea believes that the injury standards and the causation standards are distinct, and the higher injury standard in the safeguards context does not require a higher causation standard. The causation standards in the SCM and Safeguards Agreements each speak for themselves, as discussed below.

\* \* \* \*

**18. The US noted at the first substantive meeting that Article 15.5 of the SCM Agreement refers to a “causal relationship” between the subsidized imports and the material injury to the domestic industry, whereas Article 4.2(b) refers to a “causal link” between increased imports and the serious injury to the domestic industry. Does this explain the alleged difference in the applicable causation standards? Please explain.**

**GOK ANSWER:** Although the terms are different, in fact a careful review of the plain meaning of both terms shows that there are for this purpose interchangeable terms. If we start with the dictionary definitions of both terms, we find that “link” is defined as a verb to mean “connect or join”, “connect causally”, to be joined or connected, and is defined as a noun as “a connecting part”, or “to establish or maintain a connection”. Relationship is defined as “a connection, an association”, and “related” is defined as “having relation”, or “connected”.<sup>4</sup> The common thread in all of these

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<sup>3</sup> GOK Exhibit 10.

<sup>4</sup> *See* GOK Exhibit 46.

definitions is the core idea of some connection -- in other words, finding some causal connection between the imports and the alleged injury (either serious or material) to the domestic industry.

Moreover, the French and Spanish texts confirm this reading. In the French versions, Article 15.5 of the SCM Agreement uses the term "lien" where the English version uses the word "relationship" and Article 4.2(b) of the Safeguards Agreement uses the identical word "lien" where the English version used the word "link". This French word translates as "connection" or "link" or "tie".<sup>5</sup> The same pattern occurs in Spanish, which uses the word "relacion" in both places. This Spanish word translates as "connection".<sup>6</sup>

Thus, as a matter of the plain meaning of the English terms and the use of identical terms in the French and Spanish versions, Korea submits that the terms "relationship" and "link" have essentially the same meaning -- having some causal "connection".

\* \* \* \*

**19. Please explain how the ITC complied with the causation standard described at para. 427 of the US first written submission. In particular, how did the US "separate and distinguish" the injurious effects of non-subject imports?**

**GOK ANSWER:** For the reasons we set forth at some length in our Second Submission, Korea believes ITC did not separate and distinguish these other causes.

\* \* \* \*

**20. How do the causation standards of "causal link" (Article 4.2(b) of the Safeguards Agreement) and "causal relationship" (Article 15.5 of the SCM Agreement) differ in practice?**

**GOK ANSWER:** They do not. As we discuss in answer to Question #20 above, the two terms actually mean the same thing. Moreover, even if there were some very subtle difference in the nuance of meaning, that nuance would not have any practical relevance. Korea believes that in both phrases the key word is "causal," the idea of the imports under investigation bringing about the injury to the domestic industry. The word "causal" conveys all of the substantive content in these phrases, and that word is identical. The difference between "link" and "relationship" is not significant.

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<sup>5</sup> See GOK Exhibit 47.

<sup>6</sup> See GOK Exhibit 48.



B. QUESTIONS TO KOREA

1. Alleged subsidization

**21. Korea stated at the first substantive meeting that the more concrete the designated task, the more specific the target entity, the more confident one could be of the existence of entrustment/direction. Does the fact that concrete tasks and specific addresses increases confidence in a finding mean that the finding is precluded in circumstances where the designated task is less concrete and the addressee is not clearly specified? Isn't it simply more difficult – but not necessarily impossible - to establish entrustment / direction in such circumstances? Isn't the discussion about formal/explicit as opposed to informal/implicit entrustment/direction really an issue of evidence, rather than law? Please explain / comment.**

**GOK ANSWER:** Korea believes there are both legal and evidentiary aspects to this issue. From a factual perspective, there must be sufficient evidence of “entrusts or directs”. By referring to concrete tasks and specific entities, Korea’s comments at the first substantive meeting sought to address this factual aspect of the issue.

Korea also believes, however, there is an important legal dimension to this issue. “Entrusts or directs”, when read in light of the plain meaning of these words, the context of these words, and their object and purpose, imposes a legal minimum necessary to establish “entrusts or directs”. In other words, there are some government objectives that are so vague and so loosely directed to no one in particular that the legal standard for “entrustment or direction” simply cannot be said to have been met.

Put differently, there are some government actions that have so little connection to the specific actions set forth in Article 1.1(a) or to specific entities that an authority simply cannot label those actions as “entrustment or direction” of a private entity to do anything.

\* \* \* \*

**22. Korea asserts at para. 59 of its oral statement that “the plain meaning of ‘entrusts or directs’ poses the core questions of ‘who’ is being directed to do ‘what’“. How does the plain meaning of that text (leaving aside the ruling of the US - Export Restraints panel) mean that such core questions can only be answered by reference to explicit and formal acts of government?**

**GOK ANSWER:** The meaning of treaty text must be discerned by reference to the plain meaning, when read in context and in light of the object and purpose of the language. Korea believes that all of these interpretative elements are important to understanding the proper meaning of “entrusts or directs”. Moreover, Korea does not argue that the government actions must be formal acts of government. Any such formal acts would probably fall more properly under one of the specific government actions enumerated elsewhere under Article 1.1(a)(1). With these clarifications in mind, we would like to address the specific question. We discuss these interpretative issues at more length in our second submission, but we would like to emphasize the main points in response to this question.

Both the word “entrusts” and the word “directs” convey the basic meaning of carrying out some specific action. That is why Korea has stressed the importance of “what” is being entrusted or directed. The definitions cited by the United States themselves underscore this point. In paragraph 157 of its First Submission, the United States highlights that “entrust” means give a person

responsibility for a task, or to commit the execution of a task to a person. Similarly, in paragraph 158 of its first submission, the United States highlights that “directs” means to do a thing.

But both of these words are verbs, and to understand better the object of these verbs one must turn to the context in which these words are being used. Article 1.1(a)(1)(iv) has important textual guidance about the object of these two verbs, and what that object must be. There are several elements worth noting.

First, the entrustment or direction must apply to “a private body”. That is why Korea has stressed the “who” that is being entrusted or directed. The text of Article 1.1(a)(1)(iv) requires such a focus.

This language makes clear that some kinds of entrustment or direction will not fall within the meaning of Article 1.1(a)(1)(iv) because the government has not been targeting a “private body”. In other words, if the government orders a public body to take some action, that entrustment or direction of a public body is legally irrelevant to the issue of whether a private body has been directed. The text is quite explicit in focusing on the government action toward a private body, and simply does not allow authorities to string together a series of indirect and increasingly remote entrustment or direction through one or more public bodies. Unless the government itself is entrusting or direction, the requirement of the text has not been met.

Similarly, the public body cannot be the source of entrustment or direction. The text of Article 1.1(a)(1)(iv) is quite explicit that the government must be the one entrusting or directing. Thus, although a public body can make a loan that constitutes a “financial contribution”, a public body cannot be the source of any entrustment or direction. Second, that private body must be entrusted or directed “to carry out” something. This additional phrase reinforces the importance of “what” is being entrusted or directed. There must be something concrete that can be carried out. A Korean bank can make a loan, but it cannot “save” a company.

But at the same time, this language also sheds light on the proper interpretation of “entrusts or directs”. The private body is not being entrusted or directed to consider some action, or to assist some action, but to “carry out” some action. Any discretion being left to the private body is fundamentally at odds with this notion of “carry out”. Thus, any time banks have a choice, it is hard to imagine how they can have been entrusted or directed to “carry out” a certain action.

In this particular case, the Korean banks considered various loans to Hynix, but were never entrusted or directed to “carry out” these specific loans. In fact, at no point of the various parts of the Hynix restructuring did every bank participate. This poses a logical dilemma for the US argument in this case. If the US theory is that all Korean banks were being entrusted or directed to save Hynix, why were many banks able to ignore this entrustment or direction? The only logical answer is that the individual banks were making their own decisions, and thus were not being entrusted or directed to “carry out” anything.

Third, the action to be carried out is “one or more of the type of functions illustrated in (i) to (iii)”. In other words, the action being entrusted or directed is not some generalized policy or wish, but rather one of the concrete actions specified earlier in Article 1.1(a)(1). The action must be a grant, a loan, an equity transfer, or some other specific action, not some generalized act of “saving” a company or of preventing bankruptcy. This specific language reinforces the importance of the “what” that is being entrusted or directed.

Finally, the text imposes an additional requirement. The private body must be entrusted or directed to carry out some specific action, and that action must meet the additional requirement that it, “in no real sense, differs from practices normally followed by government”. This idea of not differing

from normal government practices takes on particular importance in this dispute. A number of aspects of the Hynix restructuring belie the notion that banks were acting as mere extensions of the government. Consider the May 2001 restructuring. This restructuring transaction was contingent on the success of the new GDR equity offering, a feature hardly common on typical government loans. If the Korean Government had truly wanted banks to “carry out” loans that they would otherwise not make, there would have been no explicit contingency.

\* \* \* \*

**23. Is Korea challenging the DOC’s determination that the KDB Fast Track Programme constitutes a subsidy? If so, please refer to the relevant part(s) of Korea’s first written submission.**

**GOK ANSWER:** Yes. Korea does not challenge the conclusion that the KDB Fast Track Programme constituted a “financial contribution”. Our argument at paragraphs 481 and 482 of Korea’s First Submission meant to clarify and respond to US efforts to infer from the KDB Fast Track Programme entrustment or direction of other Hynix creditors.<sup>7</sup>

A “subsidy” finding, however, has two other elements. Korea challenges the existence of any benefit from the KDB Fast Track Programme. Our arguments in paragraphs 517 through 520 apply generally to all aspects of the Hynix restructuring: private Korean banks and the average interests being paid by Korean banks in general serve as a benchmark to establish that any refinancing obtained under the KDB Fast Track Programme did not constitute a benefit.

Our first submission addressed at some length the arguments about foreign private bodies (paragraphs 521 through 546), because this aspect of the DOC decision was particularly egregious. Citibank participated in the December 2000 syndicated loan, the May 2001 restructuring, and the October 2001 restructuring. Citibank did not participate in the KDB Fast Track Programme, because Citibank did not hold any maturing Hynix bonds at that time. Citibank was a new lender to Hynix. The failure specifically to mention the KDB Fast Track Programme in Section D.2(a)(2), however, does not mean we did not intend the argument under Section D.2(a)(1) to apply to the KDB Fast Track Programme. We apologize for any confusion on this point.

In particular, Korea notes the following key points: First, the real issue about the KDB Fast Track Programme related only to the portion of the bonds held by the KDB and by the other Korean banks. The DOC did not countervail the 70 per cent of the refinanced bonds that were subsequently repackaged as CBOs.<sup>8</sup> Thus, only 30 per cent of the total being refinanced is at issue.

Second, the various private Korean banks that refinanced Hynix bonds did so on the same terms as those accepted by the KDB – in particular, at the same interest rates. Thus although the DOC found KDB to be a public body, any financial contribution associated with that public body did not constitute a benefit.

Third, the information before the DOC showed that the effect interest rates being paid on refinanced Hynix bonds ranged from 10.99 per cent to 12.56 per cent, which was much higher than the average interest rates prevailing in Korea at that time for third year loans -- 9.3 per cent in 2000 and 7.1 per cent in 2001.<sup>9</sup> For all of these reasons, the bonds refinanced through the KDB Fast Track Programme did not constitute a benefit.

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<sup>7</sup> See also paragraphs 425-428 of the GOK First Submission.

<sup>8</sup> See *Decision Memorandum*, at 82 provided in GOK Exhibit 5.

<sup>9</sup> See GOK Exhibit 60.

In addition, Korea challenges the specificity of the KDB Fast Track Programme. The arguments in Section E of our first submission, paragraphs 557 through 577 apply generally to the various parts of the Hynix restructuring.

As the United States acknowledges in paragraph 57 of its first submission, the KDB Fast Track Programme was designed to address systemic problems in the Korean capital markets.<sup>10</sup> The United States then tries to argue that the Programme was designed for Hynix, and cites the fact the announcement occurred before the recommendation even occurred.<sup>11</sup> The problem with this theory, however, is that the United States has its facts wrong. As the DOC itself acknowledged at page 15 of the Government of Korea verification report, there were two meetings of the creditors: one on 28 December and another on 4 January.<sup>12</sup> In fact, the creditors recommended Hynix for the KDB Fast Track Programme at the 28 December meeting. Thus a key part of the US logic for finding the Programme to be specific to Hynix rests on a factual misunderstanding.

\* \* \* \*

**24. How were the Creditors' Councils composed during the period of the DOC's investigation? How did the composition of those Creditors' Councils change over that period?**

**GOK ANSWER:** On 10 March 2001, the first Creditors' Council was formed for Hynix restructuring based on a private agreement between Hynix's creditors. The council consisted of the following 17 banks: KEB, KDB, Woori, Chohung, Kookmin, H&CB, Shinhan, Hana, Koram, Seoul, KFB, NACF, Peace, Busan, Kyungnam, Kwangju, and IBK. In August 2001, Citibank joined the Council increasing the number of member banks to 18. The first Hynix Creditors' Council consisted of 17 banks with debt exposure to Hynix as of 30 November 2000. Since Citibank had no claims against Hynix as of this date, which was before the December 2000 syndicated loan had been finalized, it was excluded from the initial Creditors' Council.

On 4 October 2001, a new Creditors' Council was formed under the CRPA consisting of 104 financial institutions with debt exposure to Hynix. The breakdown of these 104 institutions was as follows: Banks (21), investment trust companies (14), and others (69).

On 10 October 2001, 3 banks (Kwangju, Kyungnam and HSBC) exercised appraisal rights thereby severing their ties with the council.

On 30 October 2001, the number of participating institutions increased to 115. The breakdown was as follows: Banks (18), investment trust companies (15), and others (82).

On 7 November 2001, the KFB walked away from the Council through its exercise of appraisal rights.

\* \* \* \*

**25. Korea indicated at the first substantive meeting that participation in the October 2001 Creditors' Council was mandatory, by virtue of the CRPA.**

**(i) Why did the CRPA make participation in Creditors' Councils mandatory?**

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<sup>10</sup> See also *Decision Memorandum*, at 22-23, provided at GOK Exhibit 5 (DOC discussion of Fast Track Programme).

<sup>11</sup> US First Submission, at para. 59.

<sup>12</sup> See GOK Exhibit 61.

**GOK ANSWER:** The CRPA was designed to facilitate restructuring indebted companies. The broader the participation in such restructuring efforts, the more effective the restructuring. Under prior restructuring regimes, some creditors had tried to “free ride”, by leaving the burden of restructuring on the larger creditors, but then insisting on complete payment of their smaller debts.

Since this “free riding” made it more difficult to achieve fair restructuring arrangements, the Korean legislature decided that all creditor must participate in restructuring under the framework of the CRPA. Under Article 24.1 of the CRPA, a Creditors’ Council consists of all financial institutions with debt exposure to a potentially insolvent company.<sup>13</sup>

Under this provision, however, participation in the Creditors’ Council lasts only for a minimal period of time (usually until the first Creditors’ Council meeting) during which each creditor can decide on its own whether to take part in the restructuring measure being contemplated by the council or not.

When a certain financial institution decides not to participate in the underlying restructuring process, it can either choose not to attend the first council meeting, or participate at the first meeting, and then subsequently exercise appraisal rights as provided under Article 29.1 of the CRPA. Thus although the CRPA is mandatory in the sense that every creditor is essentially deemed part of the Creditors’ Council, and has the rights to participate, the CRPA does not require creditors to remain or to participate against their wishes.

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- (ii) **What, if any, sanctions applied to creditors that (a) refuse to participate in the Creditors’ Council, and / or (b) refuse to abide by the terms of the restructuring agreed on within the Creditors’ Council?**

**GOK ANSWER:** Where a creditor institution refuses to participate in the Creditors’ Council, that institution will be entitled to exercise appraisal rights. Once these rights are exercised, that creditor will no longer belong to the Creditors’ Council. According to Article 24.1 of the CRPA, a Creditors’ Council consists of creditor financial institutions. Under Article 2.1, the term ‘creditor financial institution’ means a legal or natural person who extends credits to the business enterprise concerned. When a financial institution exercises its appraisal rights, its claims against the distressed company all extinguish, and *as such*, it no longer qualifies as a ‘creditor financial institution’ under the CRPA. Accordingly, it can no longer belong to the council. There are no statutory limits or restrictions imposed on exercise of appraisal rights.

On the other hand, where a creditor does not exercise its appraisal rights, it is deemed to have agreed to the restructuring and is thus required to carry out applicable measures put forward by the Creditors’ Council, subject to the constraint that any measure must win the support of those creditors representing at least 75 per cent of the outstanding debt.

Where a creditor incurs damages to other creditors by failing to keep the council resolution, the aggrieved party(ies) can seek damages pursuant to Article 30 of the CRPA. We note that the financial supervisory authorities or the government more generally do not have any legal rights to take any measures against the breaching creditor.

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<sup>13</sup> See GOK Exhibit 22-(c).

- (iii) **If participation in the Hynix Creditor's Council was mandatory, didn't that mean that participation in the Hynix restructuring was mandatory? Please explain.**

**GOK ANSWER:** No. All creditors had to come to the table. Whether and how they participated in the deliberations in the Creditors' Council was up to the individual creditor. In addition, once the deliberations had hammered out a set of options, the individual creditors could make their choice among those options, or exercise their other rights under the statute as described below. Almost immediately after the Creditors' Council formed, two banks (Kwangju and Kyungnam) with 100 per cent GOK ownership, and a foreign bank (HSBC) exercised their appraisal rights and walked away. Any other bank could have exercised the same rights, and one other -- KFB - eventually did. So, no bank was forced to participate in the Hynix restructuring against its will.

\* \* \* \*

- (iv) **Was there a statutory option available to creditors, other than the three options designated by the Creditors' Council?**

**GOK ANSWER:** At the outset, it is useful to distinguish Option 3 in the Hynix October 2001 restructuring and appraisal rights more generally. In the context of the October restructuring, Option 3 specifically referred to the buyout price ("BOP") and terms of payment for dissenting creditors as crafted by the Hynix Creditors' Council. As discussed above, the terms and conditions of this particular option were negotiable as the dissenting creditors group was entitled to exercise appraisal rights.

Both in the context of the Hynix October 2001 restructuring and the CRPA framework more in general, appraisal rights refer to the statutory right bestowed on dissenting creditors under the CRPA to decline such terms of payment and buyout price as may be proposed by the Creditor Council, if these conditions are deemed unreasonable or otherwise unacceptable. Appraisal rights thus reflect procedural rights for the dissenting creditors, including multiple layers of dispute settlement mechanism as follows:

- 1) first, bilateral consultation phase under Article 29.4 during which the council proposes a BOP and terms of payment for dissenting creditors;
- 2) if 1) fails, then mediation phase under Article 29.5 begins where the mediation committee requests the council and opposing creditors to jointly select an accounting firm to compute a mutually agreeable BOP; and
- 3) lastly, court action pursuant to Article 33.2

The primary purpose of mandating appraisal rights is to ensure maximum procedural fairness and transparency for opposing creditors as a group.

It is to be noted that at the time of the October 2001 restructuring, the proposal for Option 3 by the Creditors' Council prompted a negotiation between the Council and dissenting creditors about the terms of payment for the latter as initially set out in Option 3. Unhappy with the outcome of this bilateral consultation, the dissenting creditors group went on to invoke the dispute settlement apparatus under the CRPA as a means of reifying and protecting their appraisal rights.

The CRPA does not limit or restrict the range of options that can be made available to creditor institutions. The range and particulars of these options are determined by the Creditors' Council on its own accord. In addition, the Creditors' Council can amend the details of the existing options, as well as add new options to the menu of choices that are already on the table by passing a resolution.

\* \* \* \*

(v) **How were the terms of the three options determined?**

**GOK ANSWER:** KEB, which is the principal creditor bank of the Hynix Creditors' Council, proposed Option 1 (including debt-to-equity swaps and extension of new lines of credit) on the basis of several market studies prepared by outside consultants for review by the creditor group.

For those banks that opposed to the extension of new loans under Option 1, Option 2 was proposed (debt to equity conversion & forgiveness of the remaining debt), which was finalized after a Council resolution.

In the meanwhile, the banks that balked at both of the options above were automatically entitled to exercise appraisal rights under the CRPA. Under the CRPA, the buyout price ("BOP") and terms of payment for dissenting creditors are decided by a mutual agreement between the Creditors' Council and the dissenting creditors. The Creditors' Council proposes the BOP and terms of payment for the dissenting creditors group in accord with the CRPA, and the parties then negotiate to resolve this issue

In the case of Hynix, the Option 3 banks objected to the Creditors' Council proposal and subsequently asked for mediation with the mediation committee as provided under Article 31 of the CRPA.

\* \* \* \*

(vi) **Was there any difference between the value of appraisal rights under option 3 and liquidation value? Please explain.**

**GOK ANSWER:** Under the CRPA, the buyout price ("BOP") for opposing creditors is determined by a consultation between the council and each opposing creditor. Upon mutual agreement, the BOP can be something other than the liquidation value of the company at stake.

On the other hand, where the Creditors' Council and the dissenting creditors fail to reach agreement, a mutually appointed outside accounting firm will compute the BOP based on the appraisal value of the company.

In general, the BOP of secured debts is determined by the value of the underlying collateral, while that of unsecured debts largely by the liquidation value of the distressed company.

In Hynix's case, the Option 3 creditors rejected the initial BOP and terms of payment put forward by the Creditors' Council, asking for mediation under the CRP. After mediation processes, 100 per cent of these creditors' secured debts and 25.46 per cent of their unsecured debts were paid out in cash. We note that the mediation process ended up using the same liquidation value that had been determined by Arthur Andersen in its study of the liquidation value of Hynix.

To put this 25.46 per cent in broader context for the Panel, Korea reviewed the other instances in which creditors exercised appraisal rights in CRPA restructuring proceedings. Other than the Hynix restructuring, creditors in various cases received the following amounts as exercise of their appraisal rights: 6.17%, 15.4%, 19.5%, 20.8%, 29.4%, 29.43%, 27.26%, 32.3%, and 35.56%. The appraisal rights in the Hynix case were based on a neutral third party study by Arthur Andersen, and were well within the range of the value for appraisal rights found in other cases. We can provide whatever other details the Panel might consider useful. But the basic point is that the amount of the appraisal rights in the Hynix case was quite typical.

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**26. At para. 45 of its oral statement, Korea asserts that DOC “reversed its prior finding” that all commercial banks in Korea were controlled by GOK. When was any such “prior finding” made by the DOC, and what is the relevance of that case to the Hynix restructuring?**

**GOK ANSWER:** This finding was made through a number of DOC determinations. They are all cited in the DOC determination in this particular case.<sup>14</sup>

These prior findings are not relevant in this case for two reasons. First, the DOC itself reversed those prior finding based on the particular facts presented in this case about the post 1997 financial reforms and restructuring in Korea.<sup>15</sup> Second, those prior cases covered different periods of time and different factual circumstances.

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**27. Korea stated during the First Substantive meeting with the Panel that Korean investors were entitled to rely on the prospect theory. Is this case really about which economic theory the Korean investors were entitled to rely on? Isn’t it rather about which economic theory the DOC was required to apply under the terms of the SCM Agreement?**

**GOK ANSWER:** This case is not about any economic theory. Rather, this case is about whether the DOC properly applied the standard set forth in Article 14(a) of the SCM Agreement. That standard required the DOC to focus on the “usual investment practice” of private investors in the “territory of that member”. In other words, the standard required DOC to focus on the usual practice of Korean investors.

The evidence in this case demonstrated two key factual points. First, many of the Korean investors in Hynix equity were inside investors. Second, these inside investors were very much concerned about their existing investments, as well as the possible future return on any additional investment.

The legal error by DOC was to find that these concerns about existing investments were irrelevant. This concern about existing investments was very much part of the usual practice of Korea investors. Yet DOC simply deemed this factor to be irrelevant. The concerns of inside investors may or may not be relevant under US law. But such concerns are very much relevant under the applicable standard in Article 14(a).

Moreover, the focus on investors in the “territory of that member” is critical. If Korean investors feel a nationalist need to help save important companies, that consideration can affect the

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<sup>14</sup> See *Decision Memorandum*, at 12-15, provided as GOK Exhibit 5.

<sup>15</sup> See *id.* at 47-48 (not appropriate to follow past approach), at 70 (no direction of credit to semiconductor industry generally).



usual investment “practice” in Korea. The focus on investors in a particular country ensures that any such country specific preferences can and should be captured.

In this case, the DOC imposed the standard of a hyper rationale outside investor. The DOC investment standard was not the “usual investment practice” of a Korean investor. The DOC required its “investor” to care only about the profitability of the new investment.

We presented the discussion of prospect theory for two reasons. First, this theory helps explain the actual practice of the Korean banks that were investing in Hynix, as well as the practice of all inside investors around the world. Indeed, the genesis of prospect theory was the effort by scholars to understand the fundamental disconnect between the actual practice of inside investors compared to what economic theory relied upon by an investigating authority such as the DOC would have predicted.

Second, this more modern theory of investment decision making helps provide context for why the language of Article 14(a) focuses on “practice” rather than posing a particular rational investor standard. Put differently, if the usual investment practice is something other than narrowly defined profit maximization, then the government may make equity investments using the same standard. The government is not held to any higher standard than the “usual investment practice.”

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## 2. Alleged injury

### 28. What is the relevance of note 47 to Article 15.5 of the SCM Agreement for the purpose of establishing the requisite "causal relationship"?

**GOK ANSWER:** Note 47 identifies at Paragraphs 15.2 and 15.4 of the SCM Agreement a non-exhaustive list of indicia of domestic industry performance (*e.g.*, prices, output, sales, market share, profits, productivity, return on investments, capacity utilization, *etc.*), trends in which must bear a relationship to the presence of subsidized imports. Specifically, a causal relationship between subsidized imports and “decline[s]”<sup>16</sup> in these indicia must be established before a CVD order may be imposed. At the most fundamental level, it is a temporal analysis; there should normally be a coincidence of, or correlation between, import and performance trends. As noted in our brief, this inter-linkage has been explored more closely in the context of Articles 3.2, 3.4 and 3.5 of the AD Agreement and under Article 4.2 of the Agreement on Safeguards<sup>17</sup>, but it is no less relevant in the context of the SCM Agreement.

We would further add that there are two levels to this aspect of the causation analysis when considering the effect of subsidized imports (or dumped imports for that matter), as distinguished from the analysis required under the Agreement on Safeguards. Whereas an analysis under the Agreement on Safeguards is focused solely on the effects of “increased imports,” the United States correctly notes in its first submission that the SCM Agreement requires an assessment of the *volume* of the *subsidized* imports.<sup>18</sup> Thus, both import trends and subsidy trends are important. If imports are declining, it is difficult to show any correlation or relationship between those imports and declines in domestic industry performance. If the domestic industry’s performance begins declining well in advance of alleged conferral of subsidies on the imports in question, the relationship between the two is also suspect. In this case, both factual circumstances were present.

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<sup>16</sup> Art. 15.4 of the SCM Agreement.

<sup>17</sup> GOK First Submission, at paras. 220-225.

<sup>18</sup> US First Submission, at paras. 424.

**29. Does Korea claim that the ITC's finding of significant price depression is inconsistent with the SCM Agreement? If so, please specify where this claim is addressed in Korea's first written submission.**

**GOK ANSWER:** Yes. In its first submission, Korea addressed the US arguments about price effects generally, and also addressed specific aspects of the underselling analysis in more detail. In particular, our argument that price effects were not "significant" applies to both the price undercutting and price depression arguments.<sup>19</sup>

Article 15.2 does not talk about price depression in the abstract. Low prices alone are not enough. Rather the textual requirement is to find whether the "effect of such [subsidized] imports is otherwise to depress prices to a significant degree". No one in this case disputed that DRAM prices fell in 2001 and 2002. The relevant issue under both Article 15.2 and Article 15.5, however, is why did the prices fall.

In particular, three of the arguments from Korea's First Submission about pricing related specifically to price depression. First, the argument at paragraphs 142 through 144 about price leadership relates to price depression. The ITC definition of price leadership has nothing to do with whether subject import prices are higher or lower than other prices -- the question asks only for an indication of which firm[s] is having a "significant impact" on price. Thus, when the customers responded to this question, and failed to identify Hynix as the price leader, the customers were basically indicating that the effects of Hynix imports were not to depress prices to a significant degree.

Second, the argument about substitutability at paragraphs 164 through 170 also applies to the analysis of price depression. The core ITC argument was that prices would have been higher -- an argument about price depression or suppression, not about price undercutting. The ITC tried to rebut certain Hynix arguments about the role of non-subject imports by comparing the relative rates of price undercutting, but the argument itself was about why DRAM prices were so low.

Third, the argument about other causes summarized at paragraphs 171 through 174 also applies to price depression. As noted above, Article 15.2 requires that price depression consider the role of subject imports in bringing about the price depression. Thus, arguments about alternative causes are legally relevant under both Article 15.2 and Article 15.5.

\* \* \* \*

**30. Regarding para. 14 of Korea's oral statement, did subject Hynix imports and DRAMs from Hynix's Oregon facility compete with other US produced DRAMs on the same terms / under the same conditions of competition? Would this be relevant to the issue of whether or not the ITC should have treated subject Hynix imports as merely replacing production at Hynix's Oregon facility?**

**GOK ANSWER:** The answer to the first question is yes. Subject Hynix imports and DRAMs from Hynix's Oregon facility were the same DRAM commodity product. And as a *commodity product*, there is no question that both subject Hynix imports and DRAMs from Hynix's Oregon facility competed with all other DRAM suppliers on the same terms and under the same conditions of competition.

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<sup>19</sup> See GOK First Submission, at para. 131.

The answer to the second question is also yes. Given the complete substitutability between Hynix Korea and Hynix Eugene DRAMs, the ITC should have treated subject Hynix imports as merely replacing production at Hynix's Oregon facility. One of the most significant errors in the ITC's determination is the refusal of the ITC to examine the volume of imports *in context*. Korea submits that the evidence establishes that ALL of the increase in DRAMs imported in 2001 and 2002 was to replace, not an addition to, the Hynix-Oregon produced DRAMs. The chart below demonstrates this fact:

**Hynix's Market Share by Country of Production<sup>20</sup>**

	2000	2001	2002
DRAMs produced by Hynix Oregon	6.3%	1.1%	0.2%
DRAMs produced by Hynix Korea	6.7%	9.0%	8.9%
Total Hynix US Shipments	13.0%	10.1%	9.1%

The above chart demonstrates that, effectively, the ITC "had blinders on" when it examined whether import volume had increased over the period examined. The ITC focused myopically on the fact that Hynix's *subject imports* had increased from 6.7% per cent of the market to 9.0% of the market, but effectively ignored *why* there was increase in imports. Korea submits that an "objective examination" required that the ITC consider whether the reason for the increase should change the usual assumptions that exist about the adverse effect of increased market share held by subject imports; that is, that an increase in imports steals volume that otherwise would have gone to domestic producers.

An increase in the market share held by subject imports is possible direct evidence of subject imports having an adverse *volume* effect on the domestic industry *only when* it can be shown that the subject imports took away sales that otherwise would have been captured by the domestic industry. Such evidence does not exist in this case. As the above evidence demonstrates, in the real world, Hynix did not win business from the domestic industry during the period 2000-2001 or during the period 2001-2002. Hynix's total share of the US market *actually decreased* during these periods. Accordingly, the evidence demonstrates that the subject imports were simply a replacement of volume that Hynix had already been supplying from its US production facility.

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**31. Korea argues that Hynix's subject imports were merely replacing sales by Hynix's Eugene facility. Korea refers in this regard to "customer swapping". Leaving the present case to one side, imagine a case in which the volume of imports increases during the period of investigation because a domestic company ceased manufacturing operations in order to "re-tool" up at the very beginning of that period, and sourced its product (for resale) from unrelated subject exporters instead. If the resultant absolute increase in imports during the period of investigation was significant, would an investigating authority be entitled to rely on that in its injury determination?**

<sup>20</sup> See GOK Exhibit 41 (Hynix's US Importer's Questionnaire Response to the ITC).

**GOK ANSWER:** If the domestic company that ceased its manufacturing operations for re-tooling was the only or predominate domestic producer, then we submit the answer is no; the investigating authority would not be permitted to rely on the increase in subject imports to justify an affirmative injury determination. In such a situation, the imports helped, not harmed, the domestic industry.

A somewhat harder question arises if there were other domestic producers from which the domestic (re-tooling) company could have sourced product during its temporary shut-down of manufacturing. On the one hand, if such other domestic producers existed, it would be correct to conclude that subject imports prevented other domestic producers from having a temporary increase in their sales during the re-tooling by the domestic company.

On the other hand, it far from certain that this fact alone could properly justify an affirmative finding of “significant” volume effects. In Korea’s view, if the increase is simply to allow the same company to maintain its existing customer relationships, such an increase cannot be deemed significant.

The key is *context*. In most trade cases a significant increase in subject imports is evidence that the foreign exporters have taken away business from domestic producers. In the normal case, imports occur precisely because the particular company does not have a domestic manufacturing base, and must import. When the exporting company has a domestic manufacturing base, the analysis must be different. That is why Article 15.2 does not impose a numerical threshold. Some increases that might appear large at first impression, may well prove not to be “significant” when objectively considered in context.

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**32. Is Korea arguing – as alleged by the US at para. 39 of its oral statement – that subject imports must be the sole cause of injury in order for the requisite causal link to be established between the subsidized imports and injury? If so, please comment on the finding of the Hot-Rolled Steel panel (DS184) that the USITC was not required to demonstrate that dumped imports alone caused material injury (para. 7.260 of that report).**

**GOK ANSWER:** Nowhere has Korea argued that subject imports must be the sole cause of injury for the requisite causal relationship to be established between the subsidized imports and injury. Korea has argued, however, that causation must be established between subsidized imports and injury to the domestic industry. Causation is not clearly established where a competent authority has failed to undertake the appropriate analyses prescribed by the SCM Agreement. We believe the US allegation largely reflects its inability to accept the non-attribution requirement under Article 15.5 of the SCM Agreement; the same requirement under Article 3.5 of the Antidumping Agreement, and Article 4.2(b) of the Agreement on Safeguards that have been the subject of several Appellate Body determinations.<sup>21</sup> It misconstrues the obligation to separate and distinguish the effects of subsidized imports as an argument by Korea that imports be the sole cause of injury. In sum, there can be cases where multiple causes are present and an affirmative injury finding is warranted. In other cases,

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<sup>21</sup> See *United States -- Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan*, Report of the Appellate Body, WT/DS184/AB/R, 24 July 2001 (“*US - Hot-Rolled Steel*”), at para. 223; *United States -- Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Report of the Appellate Body, WT/DS202/AB/R, 15 February 2002, at para. 217; *United States -- Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Report of the Appellate Body, WT/DS166/AB/R, 19 January 2001, at para. 70; *United States -- Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Report of the Appellate Body, WT/DS177/AB/R, WT/DS178/AB/R, 1 May 2001, at para. 179.

however, where a proper causation analysis is completed, including *inter alia*, a proper non-attribution analysis, it is possible to discern that imports are not a cause of material injury.

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**33. Please comment on para. 431 of the US first written submission. Does Korea argue that the ITC should have "'isolate[d]' subject imports or the effects of the subject imports and other known factors on the domestic industry"? Please explain.**

**GOK ANSWER:** At the outset we note the Korea never used the term “isolate” in the context of causation in its first submission. In addition to incorrectly stating Korea’s position, the US is simply confusing the issue. Article 15.5 of the SCM Agreement states “authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry . . .”. More importantly, Article 15.5 states that “injuries caused by these other factors must not be attributed to the subsidized imports”. This is the crux of the non-attribution requirement; the same requirement found in the Agreement on Safeguards at Article 4.2(b) and the AD Agreement at Article 3.5. In interpreting the identical language in Article 3.5 of the AD Agreement, the Appellate Body stated:

In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not “attributed” to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. *If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors.* Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.<sup>22</sup>

In short, it is unclear what the US even implies by the word “isolate”, nor is the issue relevant. Ultimately, an authority must ensure that injury caused by other factors is not attributed to imports. This may only be accomplished by separating causes, including imports, and distinguishing them. Offering assumptions about the effects of imports and other causes is insufficient. There must be an objective assessment and adequate explanation. Again, Korea is not advancing an argument that imports be a sole cause of material injury; but the effects of imports must be understood. As the Appellate Body clearly stated, “in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury . . .”.<sup>23</sup>

\* \* \* \*

**34. Please comment on the US remarks regarding Korea's use of volume / market share data sources set forth at paras. 292-294 of the US first written submission.**

**GOK ANSWER:** The US criticisms of the market share data relied upon by Korea are both wrong and disingenuous.

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<sup>22</sup> US – *Hot-Rolled Steel*, at para. 223 (emphasis added).

<sup>23</sup> *Id.*

The United States is wrong to allege that Korea compared a quantity-based market share figure for domestic shipments with a value-based market share figure for Hynix. A quantity measure -- billions of bits -- was used to derive the market share figures for subject imports, non-subject imports and domestic industry provided in Figure 9 of Korea's First Written Submission. In GOK Exhibit 62 we provide a "map" detailing how the market share figures were derived.

The USG is disingenuous when it states that Korea's estimate of non-Hynix subject imports is "troubling" because Korea did not take into account the fact that the record evidence demonstrated that there were 12 companies that had imported subject merchandise from Korea.<sup>24</sup> In fact, it is this argument by the USG that is troubling. Korea very much wanted to utilize the actual subject import volume in its arguments, but could not do so because the ITC made virtually the entire factual record confidential. The estimates that Korea provided were the best possible estimates given the constraints imposed by the United States.

The ITC's decision to make the entire record confidential, however, was not only not necessary to protect confidentiality but also was at tension with the ITC's own past practice. In virtually all other cases the ITC has followed a "three or more" rule. If three or more companies in a particular category (*i.e.*, importers) provided data, in all other cases the ITC has made the total of that category (*i.e.*, subject imports) public. The United States itself admits that there were 12 importers of the subject merchandise<sup>25</sup>, yet the United States refuses to make available to the Panel and to Korea the actual quantity/market share of subject imports, arguing the need to preserve confidentiality.

In its first submission and at the first meeting with the Panel, the United States argued that under its "one company with 75% or two companies with 90% rule," it could not provide this data publicly.<sup>26</sup> We have two comments. First, nothing prevents the United States from providing this information to the Panel with a request for confidentiality. With the passage of time, the market sensitivity of volume, market share, and other information fades.

Second, under the US rule itself, the Panel can have a high degree of confidence that the portion omitted -- subject imports by the 12 importers other than Hynix itself -- is not material. Hynix is quite confident that during this period of time it was the largest importer of Hynix brand DRAMs. Hynix is not aware of -- nor was there any argument about -- large volumes of gray market imports by importers other than Hynix itself. If the Panel is willing to make this assumption -- or ask the United States for confirmation -- then the Panel can know with confidence that the Hynix-only figures are a reasonable proxy for the total figures that the United States has not yet disclosed.

Korea submits that there is no reason for there to be any data issues or disagreements in this case. There is no reason why the United States cannot provide the actual volume data so that both sides can argue about -- and the Panel can itself decide -- what the actual figures mean, rather than pointless criticisms of each other's estimates.

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**35. Please comment on the US argument (para. 32 of its oral statement) that there is no obligation under the SCM Agreement for a brand-name analysis of price undercutting. If Korea disagrees, please indicate which provisions of the SCM Agreement provide for this obligation.**

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<sup>24</sup> US First Submission, at para. 293.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at para. 297.

**GOK ANSWER:** Korea respectfully disagrees. Article 15.1 of the SCM Agreement requires a determination of injury to be based on positive evidence and involve an objective examination.

Article 15.2 requires a determination that price undercutting be “significant”, and that the allegedly subsidized imports must have an “effect” on domestic prices. Korea submits that when the facts of a particular industry render a particular approach to price undercutting meaningless, that approach is no longer permissible under Article 15.2. Unless the particular approach allows a meaningful examination of “effect” and “significant”, that approach can and should be found inconsistent with Article 15.2, read in light of Article 15.1 and Articles 15.4 and 15.5.

Article 15.4 requires that the examination of the impact of subsidized imports “shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry (emphasis added)”, and specifically refers to “factors affecting domestic prices.” Likewise, Article 15.5 requires “the demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities (emphasis added),” and footnote 47 links the price effects from Article 15.2 to the causation analysis under Article 15.5.

In this case, the ITC specifically recognized a number of key features of the global DRAM industry that were highly relevant to the issue of pricing, such that it was obliged to consider a brand-name analysis of pricing. Specifically, the ITC recognized:

- “The parties agreed that the increasingly global nature of the DRAMs market, both in terms of producers as well as purchasers, is an important consideration.”<sup>27</sup>
- US producers own fabrication facilities in multiple other countries; major purchasers are “multinational computer equipment manufactures that source DRAMs and DRAM modules globally.”<sup>28</sup>
- “The commodity nature of standard DRAMs and low transportation costs mean that DRAMs and DRAM modules can, and are, easily shifted from one customer location to another, or purchases shifted from one source to another . . . . The major DRAM producers can and do shift DRAMs and DRAM production to and from alternative markets.”<sup>29</sup>
- Major PC OEMs (i.e., the largest consumer of DRAMs), “purchase products under contracts from multiple sources, including most if not all the major producers of DRAM products.”<sup>30</sup>
- “Many responding purchasers reported differences between DRAMs and DRAM modules from different firms, but were unable to determine the country of fabrication.”<sup>31</sup>

The ITC’s public record further reveals that two of the four major producers were also US importers -- Infineon and Samsung.<sup>32</sup> The public record further reveals that Micron (also one of the

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<sup>27</sup> ITC Final Determination, at 18, provided at GOK Exhibit 10.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 22.

<sup>31</sup> *Id.* at II-8.

<sup>32</sup> *Id.* at 24.

big four producers) operated facilities in Italy, Japan, and Singapore.<sup>33</sup> Moreover, the ITC recognized that “non-subject imports increased market share by a substantially larger amount than subject imports”<sup>34</sup>, and that the domestic industry exported a large and growing share of DRAM products production.

What these findings and information reveal is that: (1) a global industry exists dominated by four major producers, including Samsung, Micron, Infineon and Hynix; (2) DRAM products and production shift freely from location to location and source to source; and (3) brand is more important and certainly more recognizable than origin. These are relevant economic factors having a bearing on the US domestic industry and are relevant to the issue of causation and injury. Articles 15.2, 15.4, and 15.5 of the SCM Agreement require that they be examined, and that the examination be objective, consistent with Article 15.1 of the SCM Agreement.

Korea submits that the only objective examination of these factors as they relate to pricing, causation and injury in this particular case is to undertake a brand-name analysis of price undercutting. Not only is this the only objective means to explore price undercutting, but the fact remains that such an analysis was before the ITC. By the ITC’s own admission, these factors and information were known; they could not be summarily dismissed.

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<sup>33</sup> *Id.* at 18.

<sup>34</sup> *Id.* at 21.



## **ANNEX E-4**

### **ANSWERS OF THE UNITED STATES TO THE PANEL'S QUESTIONS TO THE PARTIES FOLLOWING THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

9 July 2004

#### **TREATMENT OF BUSINESS PROPRIETARY INFORMATION**

The United States notes that, with one exception, the entire text of these answers and the accompanying exhibits is public information. The one exception is the US answer to Question 16 from the Panel, which contains business proprietary information ("BPI") derived from the BPI exhibits attached to Korea's first written submission. The BPI information in the answer to Question 16 is noted with double brackets and a bold font.

Consistent with the request made by Korea in its first written submission, the Secretariat and the Panel should treat the bracketed information in the answer to Question 16 as confidential.

**Table of Reports Cited in These Answers**

<i>EC – Tube and Pipe Fittings</i>	<i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/R, Report of the Panel, as modified by the Appellate Body, adopted 18 August 2003</i>
<i>EC – Tube and Pipe Fittings (AB)</i>	<i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/R, Report of the Appellate Body adopted 18 August 2003</i>
<i>Thailand – H-Beams</i>	<i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and HBeams from Poland, WT/DS122/R, Report of the Panel, as modified by the Appellate Body, adopted 5 April 2001</i>
<i>US – Hot-Rolled Steel</i>	<i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, Report of the Panel, as modified by the Appellate Body, adopted 23 August 2001</i>
<i>US – Hot-Rolled Steel (AB)</i>	<i>United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, Report of the Appellate Body adopted 23 August 2001</i>
<i>US – Lamb</i>	<i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/AB/R, WT/DS178/AB/R, Report of the Appellate Body adopted 16 May 2001</i>
<i>US – Steel Safeguards</i>	<i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, Report of the Panel, as modified by the Appellate Body, 10 December 2003</i>
<i>US – Steel Safeguards (AB)</i>	<i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS/258/AB/R, WT/DS259/AB/R, Report of the Appellate Body, adopted 10 December 2003</i>
<i>US – Wheat Gluten</i>	<i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R, Report of the Appellate Body adopted 19 January 2001</i>

## QUESTIONS TO THE UNITED STATES

### Alleged Subsidization

**1. At paras 235 and 236 of its first written submission, the US refers to “the Hynix bailout” as the “the subsidy program”. What are the relevant constituent parts of that alleged subsidy programme?**

1. The US Department of Commerce (DOC) found that the series of measures taken by the Government of Korea (GOK) – and the financial institutions that the GOK entrusted or directed – constituted a “single {subsidy} programme,” the objective of which was “the complete financial restructuring of Hynix in order to maintain the company as an ongoing concern”.<sup>1</sup> As such, the DOC’s reference to the “single {subsidy} program” encompassed the GOK’s policy and the resulting series of actions taken to support Hynix and prevent its failure from 1999 through the end of the DOC’s period of investigation.<sup>2</sup> Specifically, the constituent parts of the subsidy program identified by the DOC included the 800 billion won syndicated loan, the KDB Fast Track bond program, the May 2001 restructuring package, the October 2001 restructuring package, and the benefits conferred by these and other financial contributions, such as D/A loans, made as part of the Hynix bailout.<sup>3</sup>

**2. For each alleged financial contribution forming part of the “Hynix bailout” “program”, please specify which private entities participated in that financial contribution, and what evidence of entrustment and/or direction the [DOC] relied on in respect of each of those private entities.**

2. Figure US-4 contains a chart that lists the banks that participated in the four government-directed financial restructuring and recapitalization measures that made up the Hynix bailout. For the sake of completeness, it includes both public and private bodies that were government-owned and controlled, as well as other private bodies.

3. With respect to the evidence relied on in respect of each of the “private entities”, the DOC did not engage in the type of bank- and transaction-specific analysis advocated by Korea. As previously explained, there is no basis in subparagraph (iv) of Article 1.1(a)(1) of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) for such an analysis.<sup>4</sup> Approximately 10-18 banks participated in each of the four bailout measures<sup>5</sup>, and there were hundreds of individual financial contributions (e.g., loans) made by each of these banks under the auspices of the four measures. An interpretation of subparagraph (iv) that would require explicit and/or formal evidence of government entrustment or direction to each bank with respect to each contribution would render the circumvention of subparagraph (iv) a simple matter.

4. The US first submission sets out in great detail the evidentiary basis for the DOC’s finding of government entrustment and direction. The evidence showed that the GOK adopted an explicit policy to keep Hynix from failing. The evidence also showed that the GOK took affirmative actions to entrust and direct Hynix’s creditors to provide financial contributions to Hynix during the period of

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<sup>1</sup> *Issues and Decision Memorandum* at 48 (Exhibit GOK-5); see also *First Written Submission of the United States of America* (May 21, 2004), para. 35, note 31 [hereinafter “US First Submission”].

<sup>2</sup> *Issues and Decision Memorandum* at 19-24 (Exhibit GOK-5).

<sup>3</sup> See US First Submission, paras. 127-151.

<sup>4</sup> See US First Submission, paras. 164-170.

<sup>5</sup> Because of the mandatory nature of the Corporate Restructuring Promotion Act and the options devised by the Creditors’ Council, all of Hynix’s creditors were required to participate in the October restructuring and refinancing of Hynix. This included the 18 banks listed in Figure US-4, as well as other small creditors, many of which were owned by one of the 18 major creditors.

investigation. The GOK did so by exercising control over Hynix's creditors in its multiple roles as lender, owner, legislator and regulator. When necessary, the GOK used coercion as a means of effectuating its Hynix policy. In some instances, the evidence is bank-specific; in other instances, the evidence is event-specific. In other instances, the evidence of government entrustment and direction is relevant on a program-wide basis or with respect to all Hynix creditors.

5. For example, some important evidence – such as a number of the quoted statements by GOK officials – was not linked either to specific events or banks. Nevertheless, such evidence established the GOK's role in entrustment or direction generally during the bailout period. Consider one such quoted statement by Deputy Prime Minister Jin Nyum, who stated, “[i]f Hynix says it needs an additional 1 trillion won, and if the creditor group cannot make a decision whether or not to provide additional support, the financial authorities [*i.e.*, the FSS, FSC and MOFE] should decide. We cannot simply leave it blindly to the creditor group”.<sup>6</sup> This sort of key evidence was not particular to any one bank, but was directed more generally to all Hynix creditors.

6. On another occasion, an official from the Office of the President of Korea stated, “Hyundai is different from Daewoo. Its semiconductor and constructions are Korea's backbone industries. These firms hold large market shares of their industries, and these businesses are deeply-linked with other domestic companies. Thus, these firms should not be sold off just to follow market principles.”<sup>7</sup>

7. The evidence before the DOC included official GOK documentation of high-level meetings and directives; GOK laws; the investigative report of Korea's Grand National Party investigation of the GOK's preferential policies for Hynix and other Hyundai Group *chaebol*; reports of direct meetings between GOK officials and Hynix/Hyundai creditors, confirmed by supporting documentation; sworn submissions to US and Korean regulatory agencies, and reports and website materials of Korean banks; numerous direct quotes from GOK officials in interviews and press conferences; public statements of Hynix's creditors; US Government reports; IMF and OECD reports; public statements of Hynix; book excerpts; newspaper reports; and the reports of scholars, analysts and experts on the GOK's control of the banks, direction of credit practices and Hynix's financial condition.

8. From this body of evidence, a reasonable, unbiased person could have reached the same conclusion as did the DOC; namely, that the GOK entrusted and directed Hynix's creditors to bail out the company.

**3. With regard to paras 139 and 146 of the US first written submission, please list which Hynix creditors the DOC considered to be “government-owned and controlled”, which were treated as “government-owned”, which were designated as “majority-owned by the government”, and which were treated as public bodies. Please explain how the US defines each of these terms for the purpose of these proceedings, and the consequential rationale for the designation made by the DOC with respect to each of the relevant entities.**

9. Paragraphs 139 and 146 discuss the dominant role played by the government-owned and controlled banks in both the May and October restructurings. The “government-owned and controlled” designation refers to: (A) creditors that the DOC found to be “public” bodies, and (B) to “private” creditors in which the GOK had 100 per cent ownership or was the single largest

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<sup>6</sup> Deputy Prime Minister Chin, “Government will Take Actions to Turn Around Hynix,” KOREA ECONOMIC DAILY (4 August 2001) (translated version) (Exhibit US-118). Apparently realizing his excessive candor, Jin quickly added: “This should not be viewed as if the government is running the financial sector. It is not.” *Id.*

<sup>7</sup> *The State Activism toward the Big Business in Korea, 1998-2000: Path Dependence and Institutional Embeddedness*, Jiho Jang, University of Missouri-Columbia (April 2001) (Exhibit US-17).

shareholder, and KFB (the GOK was not the largest single shareholder in KFB, but did own 49 per cent). Figure US-4, provided in response to Question 2, above, describes the basis for such classification (*i.e.*, the percentage of GOK ownership).

10. Through its administrative practice, the DOC has developed criteria to assess whether an entity should be considered a public body for purposes of a countervailing duty investigation. The relevant factors considered by the DOC are: (1) government ownership; (2) government presence on the entity's board of directors; (3) government control over the entity's activities; (4) the entity's pursuit of governmental policies or interests; and (5) whether the entity is created by statute.<sup>8</sup> In the DRAMs investigation, the DOC evaluated these factors in light of the evidence, and determined that the Korea Development Bank (KDB), the Industrial Bank of Korea (IBK) and other "specialized" banks in Korea were "government authorities"; *i.e.*, public bodies.<sup>9</sup> Consistent with Article 1.1(a)(1) of the SCM Agreement, the DOC treated financial contributions made by these government authorities as direct financial contributions by the GOK.

11. The designation "majority owned by the government" refers to those financial institutions in which the GOK was the majority shareholder at the time of the Hynix bailout, that is those banks in which the GOK had greater than 50 per cent ownership. In other words, it is a subset of "private" entities "owned and controlled" by the GOK (*i.e.*, in Figure US-4, every bank in Group B except the KEB and the KFB). Under its general practice, the DOC does not automatically treat an entity as a "government authority" merely because the government has an ownership stake in the entity (even a significant ownership stake).<sup>10</sup> In this case, the DOC found that the GOK majority-owned financial institutions did not meet the criteria for a "government authority." Therefore, the DOC had to determine whether the GOK entrusted or directed these entities to make financial contributions to Hynix.

12. Government ownership in an entity does, of course, have significance beyond the mere technical issue of how to treat financial contributions by the entity in a countervailing duty investigation. The mere fact that an entity is not treated as a public body does not mean that a government cannot or does not exercise control or substantial influence over it through its voting rights as a shareholder. In the DRAMs investigation, the DOC found that the GOK's ownership rights and privileges were in no way limited, and that as the single largest shareholder (or significant shareholder in the case of KFB) it was able to entrust and direct these banks.

**4. Did the DOC find that "government-owned and controlled" banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?**

**5. Did the DOC find that "majority-owned by the government" banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?**

**6. Did the DOC find that "government-owned" banks were entrusted/directed by GOK, or did it find that they were the instruments through which GOK entrusted/directed other entities?**

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<sup>8</sup> See US First Submission, para. 55, note 75; *Issues and Decision Memorandum* at 16 (Exhibit GOK-5).

<sup>9</sup> For purposes of domestic law, the DOC uses the term "government authority" instead of "public body."

<sup>10</sup> Korea has not challenged the DOC's designations of financial institutions as either public or private bodies. We note, however, that the approach taken by the DOC was conservative. Under Article 1.1(a)(1) of the SCM Agreement, the DOC reasonably could have considered as "public bodies" those Hynix creditors that were wholly-owned or majority-owned by the GOK.

13. The United States is answering Questions 4-6 together.

14. As discussed in response to Question 3 above, The “government-owned and controlled” designation refers to: (A) creditors that the DOC found to be “public” bodies, *and* (B) to “private” creditors in which the GOK had 100 per cent ownership or was the single largest shareholder, and KFB.

15. For purposes of Article 1.1(a)(1), a “public body” is treated in the same manner as a “government”. Nevertheless, depending upon the facts of a particular case, one may accurately refer to such public bodies as being owned and controlled by the government. In its *Final Determination*, the DOC found that financial contributions provided by public bodies – such as the KDB – were direct.<sup>11</sup> In other words, the DOC did not find, nor did it need to find, government entrustment or direction of the entities it found to be “public”. However, the DOC did find that “public” Hynix creditors – the KDB in particular – played a significant role in the GOK’s direction of the “private” Hynix creditors.<sup>12</sup>

16. The DOC found that all Hynix’s “private” creditors were entrusted and directed by the GOK. These “private” entities included both the “government-owned and controlled” private entities (Group B in Figure US-4) and other private entities (Group C in Figure US-4).

17. The designation “government owned and controlled private entities” encompasses entities that are 100 per cent GOK-owned, majority GOK-owned (*i.e.*, GOK ownership greater than 50 per cent), those in which the GOK was the single largest shareholder, and KFB in which the GOK ownership was significant (*i.e.*, 49 per cent).

18. The DOC did *not* find specifically that government-owned and controlled private entities “were instruments through which the GOK entrusted/directed other entities”. Rather, the DOC found, for example, that the GOK exercised control over Hynix’s creditors generally through government-owned and controlled banks, because those banks played a dominant role in the Creditors Councils. The voting rights in the Councils were based on the total credit exposure to Hynix. In both the May and October restructurings, the credit exposure of the government-owned and controlled banks far exceeded that of all other banks.<sup>13</sup>

19. The GOK has not disputed that government-owned and controlled banks had a significant presence in Hynix’s Creditors Councils. These banks could and did set the terms of the financial restructurings in May and October. The May Creditor’s Council consisted of only 17 banks. The government-owned and controlled banks accounted for over 70 per cent of the voting rights in that council. While their voting rights were somewhat lower at the October restructuring, the terms of the restructuring were set by the same 17 banks, with the addition of Citibank, before the full Creditors’ Council met to vote on the final package.<sup>14</sup> Even if other private banks (*i.e.*, those private entities not owned and controlled by the GOK (Group C in Figure US-4)) had desired an alternative outcome or financing based on different terms, they would have been incapable of bringing it about.

**7. Assume a government announces publicly that it is going to restructure a bankrupt industry and that, although it would prefer to do so with the assistance of private investors, it would do so on its own if necessary. Assume that private investors decide to participate in that restructuring, purely on the basis of the government’s statement that it is going to keep that**

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<sup>11</sup> US First Submission, para. 55; *Issues and Decision Memorandum* at 15-16 (Exhibit GOK-5).

<sup>12</sup> See US First Submission, paras. 55-78.

<sup>13</sup> *Issues and Decision Memorandum* at 53 and notes 18-20 (Exhibit GOK-5).

<sup>14</sup> *Hynix Verification Report* at 16 (Exhibit US-43).

**industry afloat. Leaving aside issues of benefit concerning the terms of the restructuring, should an investigating authority find that those private investors had been entrusted or directed by the government to participate? Why, or why not?**

20. As both Korea and the United States have previously stated, the focus of the financial contribution element in the definition of “subsidy” under Article 1.1 of the SCM Agreement is on the action of the government in making the financial contribution. The Panel’s question posits that private investors decide to participate in a restructuring on the basis of the government’s statement that it is going to keep a particular industry afloat. In determining whether there is a financial contribution – and more specifically under subparagraph (iv) of Article 1.1(a), whether the government entrusted or directed private actors to carry out a financial contribution function – the motives of private investors are not germane.

21. Whether a particular government action amounts to entrustment or direction is an evidentiary question. The Panel’s hypothetical posits merely that a government announces that it is going to restructure a bankrupt industry and it would prefer to do so with the assistance of private investors. The general government pronouncement posited by the Panel would not appear to evince government entrustment or direction under subparagraph (iv), which requires consideration of whether a government “gave responsibility to”, “ordered”, or “regulated the activities of” private bodies to “carry out” financial contribution functions, such as the transfer of funds.

22. Needless to say, the facts in this case do not involve general government pronouncements. As set forth in detail in our first submission, the record evidence shows that the GOK adopted an explicit policy to keep Hynix from failing. The evidence also shows that the GOK took affirmative actions to entrust and direct Hynix’s creditors to provide financial contributions to Hynix during the period of review. The GOK did so by exercising control over Hynix’s creditors in its multiple roles as lender, owner, legislator and regulator. The evidence also showed that, where necessary, the GOK engaged in coercion as a means of effectuating its Hynix policy.

23. The DOC’s record consists of thousands of pages of evidence, including official GOK documents of the GOK’s formal decision to assist Hynix in Economic Ministerial level meetings; the meeting minutes of the FSC; known GOK planning and meetings on the Hynix case; known reported meetings between the GOK, Hynix and its creditors; public statements by GOK officials; sworn statements by Hynix creditor banks admitting GOK entrustment or direction to the US Securities and Exchange Commission; memoranda of understanding (MOUs) between the government and the government-invested banks that permitted the GOK to fire bank officials; other statements or documents by Hynix creditors corroborating GOK entrustment or direction; multiple examples of GOK threats and coercive tactics; many observations by third party observers; the GOK’s pervasive ownership and control of the banks; direct lending by the GOK through the KDB; and the coordination of the bailout by the KEB, the GOK’s officially designated lead bank.

24. The record in this case thus paints a very different picture from the hypothetical posed by the Panel. This was not a situation where the GOK said to the banks: “We, the GOK, are going to bail out Hynix and we do hope you join us.” Instead, this was a situation where the GOK effectively told the banks: “If you know what’s good for you, you are going to help us bail out Hynix”.

25. Moreover, to resolve this dispute, it is not necessary for the Panel to articulate, in the abstract, the precise quantum or type of evidence necessary to support a finding of government entrustment or direction. Instead, the Panel’s task is much more straightforward. The Panel need only consider whether the DOC’s conclusion – that the GOK entrusted and directed Hynix’s creditors to bail out the financially distraught Hynix – was reasoned and adequate in light of the totality of the evidence before it. The United States submits that the DOC’s conclusion meets this standard.

**8. Please comment on Korea's assertion (para. 51 of its oral statement) that many creditors "walked away" from the October 2001 restructuring. Doesn't this suggest that those creditors were able to act independently of any GOK desire to restructure Hynix? Please explain.**

26. The statement that certain creditors "walked away" from the October restructuring implies that Hynix's creditors had real choices in determining to what extent, if any, they would participate in the financial restructuring. The United States disagrees with the GOK's characterization of the three options available to Hynix's creditors.<sup>15</sup>

27. The three options available to Hynix creditors were:

- (1) extend new loans to Hynix, convert a portion of their unsecured Hynix debt to equity, and extend maturities on the remainder;
- (2) withhold new loans, convert 100 per cent of secured loans and 28.46 per cent of unsecured loans to equity, and forgive the remainder; or
- (3) choose not to provide new loans or to convert loans into equity shares, and instead agree to convert a portion of their loan balances into five-year debentures at zero per cent interest. The portion converted into debentures was calculated based on 100 per cent of the secured loans and 25.46 per cent of the unsecured loans, based on the liquidation value of the company.

28. First, due to the requirements of the Corporate Restructuring Promotion Act (CRPA) under which the October bailout was conducted, no creditors were permitted to "walk away" from the October 2001 restructuring.<sup>16</sup> The CRPA applied to all conceivable forms of creditors and made participation in the Creditor Council mandatory.<sup>17</sup> Thus, as a result of the CRPA, all of Hynix creditors were forced to participate in the October restructuring. Hynix creditor banks had to select one of the three options listed above, and had to abide by the terms of the decision dictated by the banks that accounted for 75 per cent of Hynix's debt. As the United States noted in its first submission, "the CRPA gave Hynix's largest creditors – *i.e.*, the specialized banks and those owned and controlled by the GOK – the power to dictate restructuring terms to all other Hynix creditors."<sup>18</sup> In other words, no bank was free to make an independent deal with Hynix, nor was any bank able to force Hynix into liquidation. There was no "fourth way."

29. Second, it is misleading for the GOK to characterize "Option 3" as a "walk-away" provision. The GOK states that Option 3 was to "exercise appraisal rights against their outstanding debt based on the liquidation value of the company, as determined by an independent auditor, and walk away".<sup>19</sup> Contrary to the GOK's assertions, however, the banks that elected Option 3 did not, and could not, just "walk away".

30. The ongoing relationship between the Option 3 banks and Hynix was not a matter of liquidating and walking away. Nor did creditors obtain "what they could have obtained in

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<sup>15</sup> See US First Submission, paras. 88-93.

<sup>16</sup> It is important to note that the CRPA was enacted just prior to the October restructuring measures, with Hynix and other Hyundai Group companies as the most visible pending bankruptcies. US First Submission, para. 84. The CRPA was meant to improve on the voluntary Credit Restructuring Agreement (CRA) system, which had been roundly criticized by GOK officials because it permitted creditors to refuse to participate in corporate restructurings. *GOK Verification Report* at 7-8 (Exhibit US-12).

<sup>17</sup> Corporate Restructuring Promotion Act, Article 2.1 (Exhibit US-51).

<sup>18</sup> US First Submission, para. 88.

<sup>19</sup> Korea First Submission, para. 353.



liquidation”.<sup>20</sup> Instead, the relationship between the Option 3 banks and Hynix consisted of five elements that distinguished this situation from a typical liquidation process:

- First, as part of the CRPA processes described above, these banks had no independent rights to seek or establish the value of their outstanding credit to Hynix. Rather, their rights were dictated to them by the government-owned banks and the rest of the blocking majority on the Creditor Council.<sup>21</sup>
- Second, the banks were foreclosed from even seeking liquidation. Under the terms of the CRPA, at the request of the lead creditor bank, the Financial Supervisory Service (FSS), a government agency, could stop creditors that wanted to seek liquidation from exercising their rights to call loans and to move companies into receivership. In the case of Hynix, the FSS did request that banks refrain from exercising their creditor rights.<sup>22</sup>
- Third, two of the Option 3 banks, Kyongnam and Kwangju, were 100 per cent government-owned banks and were merged with another 100 per cent government-owned bank, Hanvit, in April 2001, to form Woori Financial Holdings.<sup>23</sup> As a result, there was no need for the GOK to funnel new money through these two banks (which had ceased to have separate legal identities, in any event), because Woori had already committed to assist Hynix by selecting Option 1.
- Fourth, as part of the recapitalization process, banks were subject to intense pressure from the GOK. Among other things, MOUs associated with the recapitalization of banks permitted GOK control over the hiring and firing of bank officials.
- Fifth, and most important, Korea implies that the banks were paid the liquidation value of their loans and that was the end of their relationship with Hynix. *Not true.* These banks were forced to accept an IOU in the form of an interest-free Hynix debenture that would not mature for another five years; *i.e.*, in 2006. In other words, the four banks selecting Option 3 (which, in any event, represented only a small fraction of total Hynix loans) *are still waiting to be paid.*

In sum, the choices available to the creditors at the October 2001 restructuring were clearly designed to ensure the continued survival of Hynix, at the expense of Hynix’s creditors.<sup>24</sup>

**9. The US argued at the first substantive meeting that KFB was “brought into line” after initially resisting GOK efforts to require it to participate in the Hynix restructuring. Korea denies this, arguing that KFB ultimately did not participate in the October 2001 restructuring. Please comment.**

31. First, it should be clarified that KFB *did* participate in the October 2001 restructuring. Indeed, under the terms of the CRPA, KFB did not have the legal right to refuse to participate in the October restructuring. (See Answer to Panel Question 8, above.) KFB chose Option 3 which meant that it received a zero coupon bond amounting to 100 per cent of its secured loans and 25.46 per cent of its unsecured loans based on the estimated liquidation value of Hynix. KFB was forced to write off

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<sup>20</sup> Korea Oral Statement, para. 51.

<sup>21</sup> US First Submission, para. 88.

<sup>22</sup> *GOK Verification Report* at 19 (Exhibit US-12).

<sup>23</sup> *GOK Verification Report* at 6 (Exhibit US-12).

<sup>24</sup> US First Submission, para. 90 (“This means that the option 3 banks will not actually receive what they were able to salvage from their loans to Hynix until 2006 and will not earn any interest on the money that is owed to them by Hynix, hardly a real choice.”)

the remainder of its loans under the terms of the CRPA. Three other banks also selected Option 3. In total, these banks forgave 234,000 million won, and took 81,000 million won in the form of the zero coupon bonds. This provided a considerable benefit to Hynix. Moreover, the KFB participated in other key parts of the subsidy program, including the Syndicated Loan, and the May restructuring.

32. Second, there was ample evidence in the DOC record demonstrating that the GOK applied considerable pressure both publicly and privately on KFB to ensure that KFB continued to participate in assisting Hynix.<sup>25</sup> Among other things, the GOK pulled \$77 million in deposits out of KFB after KFB balked at participating in the KDB Bond Program for Hynix; threatened to have government agencies cease all business with KFB; and threatened to have KFB's clients terminate their relationship with KFB.

**10. The US asserted at the first substantive meeting that creditors were required to participate in the October 2001 restructuring by virtue of the CRPA. Was such alleged mandatory participation relied on by the DOC as evidence of entrustment and/or direction? If yes, please indicate where this issue is addressed in the DOC's determination. If not, why not?**

33. The DOC did not find that mandatory participation under the CRPA constituted, in and of itself, entrustment or direction. Rather, the DOC found that the GOK used the CRPA as a vehicle to effectuate the GOK's Hynix policy.

34. As explained in our first submission, the CRPA gave Hynix's largest creditors – *i.e.*, the specialized banks and those banks owned and controlled by the GOK – the power to dictate restructuring terms to all other Hynix creditors. Hynix's Creditors' Council, dominated by specialized banks and government-owned and controlled banks, determined that: (1) no creditor would have the option to call in its debt, (2) no creditor would have the option to walk away without penalty, and (3) no creditor would have the option to remain an interest-earning creditor without extending new loans or forgiving significant debt on terms favorable to Hynix. The DOC found that these "choices" were extremely limited and highly favorable to Hynix, essentially keeping Hynix from complete bankruptcy. Furthermore, the terms of those "choices" were dictated by Hynix's government-owned and controlled creditors.<sup>26</sup>

35. During the investigation, the GOK conceded that the CRPA was introduced by the National Assembly "to make sure that the banks could not avoid participating in workouts".<sup>27</sup> Under the CRPA, all creditor banks were obligated to participate in the workout system.<sup>28</sup> The DOC found that this "provided the dominant GOK-owned and controlled [banks] with the ability to establish the financial restructuring terms over many more creditors".<sup>29</sup>

36. Thus, the evidence before the DOC showed that enactment of the CRPA considerably leveraged the GOK's already considerable power over Hynix's creditor banks. First, by naming Hynix's principal transactions bank as head of the council, the GOK positioned itself to take full advantage of the KEB's longtime role as agent and facilitator of government credit and management

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<sup>25</sup> For a description of the GOK's coercive tactics with respect to KFB, see US First Submission, paras. 105-113.

<sup>26</sup> *Preliminary Determination*, 68 Fed. Reg. at 16776 (Exhibit GOK-4); *Issues and Decision Memorandum* at 55 (Exhibit GOK-5).

<sup>27</sup> *Issues and Decision Memorandum*, at 53, n.19 (Exhibit GOK-5); *Government of Korea Verification Report* at 8 (Exhibit US-12).

<sup>28</sup> *Issues and Decision Memorandum* at 53, n.19 (Exhibit GOK-5).

<sup>29</sup> *Issues and Decision Memorandum* at 53, n.19 (Exhibit GOK-5).

decisions.<sup>30</sup> Second, the law made all creditors of an ailing firm subject to the Council's authority.<sup>31</sup> This requirement left KFB and other banks with non-GOK ownership little option but to participate in any restructuring and recapitalization measures.

**11. With regard to the May and October 2001 restructurings, the parties have referred to option 3 as the exercise of "appraisal rights". Please comment. Was the exercise of appraisal rights any different from liquidation? Please explain.**

37. First, we note that an exercise of "appraisal rights" only applied to the October bailout, because the May bailout involved only new lending and the restructuring of the payment terms on existing debt.

38. With respect to the October bailout, the four banks that selected Option 3 converted a portion of their loan balances into five-year debentures at zero per cent interest. The portion converted into debentures was calculated based on 100 per cent of the secured loans and 25.46 per cent of the unsecured loans, based on the liquidation value of the company. This conversion amounted to 81 million won. These banks wrote off all of the remaining loans to Hynix amounting to 234,000 million won.

39. The GOK has characterized this option as an exercise of appraisal rights, presumably because the amounts that were converted to five year zero coupon debentures (and consequently the amounts written off) were determined by reference to some estimated liquidation value of the company. However, Option 3 was not the same thing as a true exercise of appraisal rights as would be contemplated in a liquidation. Under a true exercise of appraisal rights, creditors would receive payment for some negotiated portion of their outstanding credit to the liquidated company. In this case, the Option 3 banks had no control over the amount of the liquidation value, nor what portion of that value they would recover. All of this was under the control of the GOK-owned and controlled banks, which dominated the Creditors Council. Moreover, the GOK, through the FSS, could prevent a creditor from exercising its creditor rights to call loans and to seek liquidation value. Most importantly, the Option 3 banks were *never paid* the liquidation value. Instead, they were given an IOU in the form of zero interest debentures that will not even come due until 2006. As explained in the answer to Question 8, above, in no way can Option 3 be considered the same as a liquidation.

**12. The US asserted at the first substantive meeting that this case is not about a comparison of different WTO Members' restructuring frameworks. At para. 21 of its oral statement, however, the US seems to have argued that an investigating authority could reasonably have found that a reasonable investor would not have invested in Hynix because it was "technically insolvent". Doesn't this suggest a per se rule that all "technically insolvent" companies should be liquidated? Please explain.**

40. In paragraph 21, the United States was discussing the issue of "benefit" and how Hynix's abysmal financial picture affected the calculation of the benefit. In its investigation, the DOC examined whether Hynix was equityworthy as a means to determine whether GOK-directed financial contributions, in the form of equity infusions, provided a benefit. This test is specifically foreseen in

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<sup>30</sup> *Issues and Decision Memorandum* at 56-57 (Exhibit GOK-5); *Hynix Verification Report* at 13-14 (Exhibit US-43).

<sup>31</sup> See CRPA, Article 2 (Exhibit US-51); *Hynix Verification Report* at 16 (Exhibit US-43); and *Foreign Banks Required to Attend Creditor Meetings for Ailing Firms*, Korea Times (July 22, 2001) (Exhibit US-52). A Ministry of Finance official stated that: "[w]e've decided to force all creditor financial institutions to take part in the meetings in order to prevent some of them from refusing to attend and pursuing their own interests by taking advantage of bailout programmes." *Id.* Thus, this law was not intended to modify the behaviour of domestic banks, which already felt compelled to attend all such meetings.

paragraph (a) of Article 14 of the SCM Agreement. The DOC concluded that such financial contributions provided a benefit to Hynix given that no “reasonable private investor” would have purchased equity from Hynix as Hynix was unequityworthy. As mentioned in paragraph 21, Hynix’s technical insolvency was one factor, along with its staggering losses and the worsening conditions in the DRAMs industry, supported this conclusion. However, the DOC did not inquire into whether “technical insolvency” warranted liquidation, as this was not a relevant issue in the DRAMs investigation.

**13. At para. 17 of its oral statement, the US refers to alleged pressure on credit rating agencies. Is this evidence of entrustment / direction of private creditors? If not, what is the relevance of this evidence to the DOC’s determination of subsidization? Please explain.**

41. Credit rating agencies obviously are not Hynix creditors. Nevertheless, the pressure put on the credit rating agencies to refrain from lowering Hynix’s credit ratings was illustrative of the extent to which the GOK was willing to intervene in the normal workings of the market to effectuate its policy of keeping Hynix afloat. This evidence also enhanced the credibility of the evidence indicating that the GOK engaged in coercion with respect to Hynix’s creditor banks.

**14. At para. 18 of its oral statement, the US refers to KEB’s rationale for participating in the May and October 2001 restructurings. Is it surprising that a public body would act on the basis of social and economic policy considerations? Why does the fact that a public body creditor acted on non-commercial principles necessarily mean that other private body creditors also did so?**

42. No, it is not surprising that a public body would act on the basis of social and economic policy considerations, although that, of course, does not alter the disciplines that WTO Members have accepted in the SCM Agreement. However, the DOC did *not* find that the KEB – the Korea Exchange Bank – was a public body. Instead, the DOC found that KDB, the IBK, and other specialized banks were public bodies.<sup>32</sup>

43. The United States understands how confusion might arise as to whether the KEB was a public body. The KEB was the GOK’s designated lead bank and the head of Hynix’s creditor council, the GOK was its single largest shareholder, the GOK regularly intervened in its management, and the GOK heavily capitalized the bank. The fact remains, however, that the KEB was a private entity, and, as such, would normally not be expected to articulate the government’s national economic and social policy concerns in deciding to assist Hynix. That it did, and that the GOK expressly ordered it to carry out its Hynix policy “perfectly” and required it to coordinate the actions of Hynix’s creditors, was simply further evidence that the GOK entrusted or directed the KEB and the other private Hynix creditors to assist Hynix.

### **Alleged Injury**

**15. At para. 316 of its first written submission, the US states that the ITC explained that although it opined that “the use of bits as a unit of measurement [could] present difficulties for [its] analysis”, it nevertheless found that the absolute volume of subsidized subject imports and the increase in that volume relative to US production and consumption was “significant”.**

- (i) **What were the reasons why the ITC nevertheless found that the absolute volume of subsidized subject imports and the increase in that volume relative to US production and consumption was “significant”?**

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<sup>32</sup> See US First Submission, paras. 55-56 and note 77.

- (ii) **Where were those reasons set forth in its Determination and Views (Exhibit GOK-10) (or any other relevant document)?**
- (iii) **The last paragraph of page 21 of the ITC's Determination and Views states that the ITC's "findings about the volume of subject imports are reinforced by the substantial degree of substitutability between subject imports and domestic shipments". If the finding that the absolute volume of subsidized subject imports is significant is "reinforced" by considerations of substitutability, what is the initial basis for that finding? In other words, what is the initial basis that is then "reinforced" by considerations of substitutability?**

44. The ITC based its volume analysis on data from confidential questionnaire responses that were reported in terms of billions of bits.<sup>33</sup> As the question indicates, the ITC recognized that use of bits as a unit of measurement could present difficulties, given that total bits are a function of chip density and product mix.<sup>34</sup> It is true that one would expect volume increases in the DRAMs industry if volume is measured in terms of bits, to the extent that total bits are a function of chip density and product mix, both of which changed over the period of investigation as demand for DRAM products continued to increase and as producers continued to move to higher density products.<sup>35</sup> The ITC explicitly recognized this reality.<sup>36</sup>

45. Nevertheless, bits were clearly the best possible unit of quantity in the DRAMs market. The ITC has consistently relied on bits as a unit of measurement in prior investigations involving DRAMs and synchronous random access memory semiconductors ("SRAMs"). As the ITC stated, "total bits are a uniform measure of the quantity of DRAM products."<sup>37</sup> Given the constant development of new product types in the DRAM market, measuring volume in terms of units rather than bits would yield a meaningless comparison. For example, were the ITC to compare the number of units of 64 Mb chips produced in 2000 with the number of 128 Mb chips produced in 2002, it would be comparing apples with oranges. Reliance on bits, as the ITC stated, was the only means of ensuring consistency across time periods.<sup>38</sup> Indeed, when asked at the Commission's hearing about the use of bits as the unit of measurement for volume in this industry, Hynix's witness (Mr. Tabrizi) agreed that bits was an appropriate measure.<sup>39</sup>

(1) The ITC found that the volume of subject imports absolutely and the increase in that volume over the period of investigation absolutely and relative to production and consumption in the United States was "significant".<sup>40</sup> Thus, the ITC used both absolute and relative measures of import volume. By their very nature, the relative comparisons addressed the concerns inherent in the use of absolute data associated with ever-increasing product densities over time. Under both types of measures, subject import volume increased between 2000 and 2002, as set forth in the ITC's final determination. The absolute volume of subsidized subject imports increased between 2000 and 2001 and between 2001 and 2002.<sup>41</sup> The ratio of subsidized subject imports to US production increased between 2000 and 2001.<sup>42</sup> While this ratio declined between 2001 and 2002, it was still higher than

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<sup>33</sup> See, e.g., USITC Pub. 3616 at 20 (Exhibit GOK-10).

<sup>34</sup> See, e.g., USITC Pub. 3616 at 20 (Exhibit GOK-10).

<sup>35</sup> See, e.g., USITC Pub. 3616 at 15 & n.92, 20 (Exhibit GOK-10).

<sup>36</sup> See, e.g., USITC Pub. 3616 at 20 (Exhibit GOK-10).

<sup>37</sup> See, e.g., USITC Pub. 3616 at 20 (Exhibit GOK-10).

<sup>38</sup> See, e.g., USITC Pub. 3616 at 20 (Exhibit GOK-10).

<sup>39</sup> See, e.g., Hearing Transcript at 250 (Exhibit US-122). Korea also agrees that this is an appropriate unit of measurement. See Korea First Submission, para. 91.

<sup>40</sup> See, e.g., USITC Pub. 3616 at 20 (Exhibit GOK-10).

<sup>41</sup> See, e.g., USITC Pub. 3616 at 20, Tables IV-4, C-1 (Exhibit GOK-10).

<sup>42</sup> See, e.g., USITC Pub. 3616 at 21, IV-3 (Exhibit GOK-10).

the ratio in 2000.<sup>43</sup> The ratio of subsidized subject imports to US shipments of DRAM products increased between 2000 and 2001, and also increased between 2001 and 2002.<sup>44</sup>

46. In terms of their share of apparent domestic consumption, subsidized subject imports increased their market share between 2000 and 2001 while the domestic industry was losing market share.<sup>45</sup> Both subsidized subject imports and the domestic industry lost market share between 2001 and 2002.<sup>46</sup> Although subsidized subject imports' market share declined between 2001 and 2002, the ITC ascertained that subsidized subject imports' market share in 2002 was still significantly higher than in 2000.<sup>47</sup> Moreover, subsidized subject imports' maintained their market share better than the domestic like product between 2001 and 2002 at a time when growth in demand was slowing.<sup>48</sup>

47. The ITC also considered the weight to accord interim 2003 data. Based on an examination of monthly shipment data reported by Hynix for the period January 2002 to March 2003, the ITC determined that the change in the volume of subsidized subject imports since the filing of the petition in November 2002 was related to the pendency of the investigation. Therefore, the ITC reduced the weight accorded to the data for the period after the filing of the countervailing duty petition (*i.e.*, the interim 2003 data). It noted that this finding was not inconsistent with record information showing an increase in the volume of subsidized subject imports from Korea between 2000 and 2001, after the October 5, 2000, revocation of the previous antidumping duty order on DRAMs from Korea and the restraining effects that it may have had on subject imports from the Hynix companies.<sup>49</sup>

(2) In its final determination, the ITC did not simply list these volume figures and trends. As the panel recognized in *Thailand – H-Beams*, it is important for investigating authorities to go an additional step. The panel in that report observed that “the authorities went beyond a mere recitation of trends in the abstract and put the import figures into context”.<sup>50</sup>

(3) There is no abstract way to determine whether a given volume or a given increase in that volume absolutely or relative to domestic production or consumption is “significant”. The answer to this inquiry will vary depending on the characteristics of a particular industry and the conditions of competition. Thus, it is logical that the SCM Agreement does not specify any absolute volume or any increase in volume absolutely or relative to domestic production or consumption that by definition is “significant”.<sup>51</sup>

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<sup>43</sup> See, e.g., USITC Pub. 3616 at 21, IV-3 (Exhibit GOK-10).

<sup>44</sup> See, e.g., USITC Pub. 3616 at 21 n.138, Table IV-5 (Exhibit GOK-10).

<sup>45</sup> See, e.g., USITC Pub. 3616 at 20, 26, Table C-1 (Exhibit GOK-10).

<sup>46</sup> See, e.g., USITC Pub. 3616 at 20, 26, Table C-1 (Exhibit GOK-10).

<sup>47</sup> See, e.g., USITC Pub. 3616 at 20, Table C-1 (Exhibit GOK-10).

<sup>48</sup> See, e.g., USITC Pub. 3616 at 20, 21, 24, 26 & n.174, Tables IV-4, IV-5, C-1 (Exhibit GOK-10).

<sup>49</sup> See, e.g., USITC Pub. 3616 at 21 & nn.140-41, Table IV-3 (Exhibit GOK-10).

<sup>50</sup> *Thailand – H-Beams*, para. 7.170.

<sup>51</sup> Indeed, the only purely quantitative measure in the SCM Agreement that has anything to do with volume is the reference in SCM Agreement Article 11.9 and SCM Agreement Article 15.3 to the volume of imports that is “not negligible”. Unlike in the counterpart provision of Article 5.8 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”), “negligible” is not more specifically defined in either of these SCM Agreement provisions. Even in the context of the AD Agreement, “negligible” is not defined by reference to domestic market share or production. See AD Agreement Article 5.8.

Negligibility was never an issue raised by any of the parties in the underlying agency proceeding. As the ITC determined, “[n]egligibility is not an issue in this investigation because subject imports from Korea constituted \*\*\* per cent of total imports of DRAMs in the most recent twelve months prior to the filing of the petition for which data are available, and are thus not negligible.” See, e.g., USITC Pub. 3616 at 14 n.79 (Exhibit GOK-10). Korea does not make any argument that the volume at issue in this case is “negligible” under either Article 11.9 or 15.3 of the SCM Agreement.

(4) Consistent with the approach endorsed by the panel in *Thailand – H-Beams*, the ITC took the additional step and put the import figures and trends into the factual context of the DRAMs industry and the facts of this particular investigation. Specifically, the ITC explained why the absolute volume of subsidized subject imports and the increases in that volume both absolutely and relative to production and consumption in the United States were “significant” in this investigation. The ITC stated that “[o]ur findings about the volume of subject imports are reinforced by the substantial degree of substitutability between subject imports and domestic shipments ...”.<sup>52</sup>

48. Korea does not contest the high degree of substitutability between subsidized subject imports and domestic shipments.<sup>53</sup> DRAMs of similar density, access speed, and variety (standard DRAM, VRAM, SGRAM, etc.) were generally interchangeable regardless of country of fabrication, and substitutability also existed between similarly configured DRAMs of different density, but to a more limited degree. Interchangeability existed among different varieties of DRAMs and among those with different addressing modes/access speeds, but often only if substitution occurred during the design of the electronic system.<sup>54</sup>

(5) It was appropriate for the ITC to consider substitutability in its volume analysis. Whether a product is fungible and price sensitive, or whether the market is highly differentiated can be relevant in assessing the significance of a given import volume or of a given increase of import volume absolutely or relative to domestic production or consumption. In the instant investigation, involving a completely fungible commodity, a given volume or a given increase of import volume absolutely or relative to domestic production or consumption is more harmful than in other cases involving highly differentiated products, because it is more likely to have a direct impact on the market particularly in terms of purchasers’ willingness to switch to or increase their purchasing of subsidized subject imports, and/or use the low price of subsidized subject imports as leverage to extract lower prices.<sup>55</sup> This is a factual determination properly made by the investigating authorities. As the ITC determined, “[t]he commodity-like nature of domestic and subject imported DRAM products magnifies the ability of a given volume of imports to impact the domestic market and industry”.<sup>56</sup>

49. Therefore, the ITC concluded that it was the high degree of substitutability between the subsidized subject imports and the domestic DRAM products that made the subsidized subject import volume and the increases in that volume both absolutely and relative to domestic production and consumption “significant” in this investigation, even in an industry where increases in volume measured in billions of bits might be expected.

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<sup>52</sup> See, e.g., USITC Pub. 3616 at 21 (Exhibit GOK-10).

<sup>53</sup> With respect to the degree of interchangeability between subsidized subject imports and domestic DRAMs products, 19 of 21 responding producers and importers reported that subject and domestic DRAMs products were generally used interchangeably, and 22 of 23 reported no important differences in product characteristics or sales conditions between them. The ITC found that throughout the period of investigation, Hynix produced many of the same product densities as domestic producers. Moreover, subject imports and domestic DRAM products were sold largely to the same customers and through the same channels of distribution. See, e.g., USITC Pub. 3616 at 22-23 & nn.145-147, II-1 to II-3 & n.3, II-4 to II-7, Tables II-1 to II-3, V-3 (Exhibit GOK-10).

<sup>54</sup> See, e.g., USITC Pub. 3616 at 22, I-8 to I-10 (Exhibit GOK-10); Hearing Transcript at 36-37, 53, 70-75, 168-175, 181-182 (Exhibit US-94).

<sup>55</sup> See, e.g., Hearing Transcript at 23 (So how do you compete? How are we supposed to compete against subsidies at that level? At least one answer is the following: You have to lower your prices through the floor to keep up with the subsidized prices of Hynix.); 50 (“Competition against subsidized imports from Hynix has forced Micron to cut prices in order to win orders and defend our business with US customers.”); 72-75 (“Artificially low prices that can be offered by someone who doesn’t have to pay his own bills are capable of having a harmful impact well beyond actual sales volume or market share.”) (Exhibit US-94).

<sup>56</sup> See, e.g., USITC Pub. 3616 at 21 (Exhibit GOK-10).

- (iv) **Was the ITC’s determination of material injury and/or causation based on its finding that the absolute volume of subsidized subject imports was “significant”? Was this finding relevant to its determination? Would the ITC not have made its determination of material injury and/or causation but for its finding that the absolute volume of subsidized subject imports was “significant”?**

50. In its volume analysis, the ITC found a “significant” absolute volume of subsidized subject imports as well as “significant” increases in that volume both absolutely and relative to both domestic production and consumption, as noted above.<sup>57</sup> In other words, it found that the volume of subsidized subject imports was “significant” based on each of the possible bases identified in Article 15.2 of the SCM Agreement. In its analysis of the price effects of subsidized subject imports, the ITC found significant undercutting and significant price depression by the subsidized subject imports.<sup>58</sup> Under Articles 15.1 and 15.2 of the SCM Agreement, no one or several of these factors can necessarily give decisive guidance. Given its findings concerning the volume and price effects of subsidized subject imports and declines in nearly all of the domestic industry’s performance indicators, the ITC concluded that subject imports were having a significant adverse impact on the domestic industry producing DRAM products.<sup>59</sup> The ITC also examined other known factors to ensure that it did not attribute injury from those factors to the subsidized subject imports, and concluded that the domestic industry producing DRAM products was materially injured by reason of subject imports from Korea that Commerce found to be subsidized.<sup>60</sup>

(6) In other words, the ITC’s finding that the absolute volume of subsidized subject imports was “significant” was only one aspect of its volume analysis, and, in turn, only one aspect of its material injury determination. To the extent that there are a number of ways of examining the volume and price effects of subsidized subject imports under SCM Agreement Articles 15.1 and 15.2, and no one or several of these factors can necessarily give decisive guidance, then the viability of the ITC’s material injury determination does not turn on any individual volume findings.<sup>61</sup> Moreover, the ITC’s affirmative injury determination relied not only on the multiple findings on volume but also its analysis of other factors concerning the price effects and impact of the subsidized subject imports on the domestic industry. Consequently, the ITC’s finding of a significant absolute volume of imports cannot by itself be characterized as “dispositive” of the ITC’s ultimate determination of material injury by reason of subject imports.

(7) Furthermore, in its final determination in this investigation, the ITC did not separately analyze “material injury” and “causation”, as the question appears to suggest. The ITC conducted what has been referred to by the agency’s US reviewing courts as a “unitary” analysis. In its “unitary” analysis in this investigation, the ITC did not ask, in the abstract, whether a domestic industry was experiencing material injury and then, if the answer was affirmative, proceed to a second determination of causation. Instead, the ITC asked whether a domestic industry was being materially

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<sup>57</sup> See, e.g., USITC Pub. 3616 at 20-21 (Exhibit GOK-10); see also, e.g., Hearing Transcript at pages 229 to 235 (Exhibit US-94) (containing dialogues between Commissioners Hillman and Koplan and Hynix’s counsel confirming that the confidential data showed increases in the volume of subsidized subject imports).

<sup>58</sup> See, e.g., USITC Pub. 3616 at 22-25 (Exhibit GOK-10).

<sup>59</sup> See, e.g., USITC Pub. 3616 at 25-27 (Exhibit GOK-10).

<sup>60</sup> See, e.g., USITC Pub. 3616 at 20-27 (Exhibit GOK-10).

<sup>61</sup> Thus, Korea is mistaken in its insistence that only increases in market share by subsidized subject imports matter. The text of Article 15.2 does not contain any requirement that the volume of subsidized subject imports increase, let alone that there be a “significant” increase in terms of market share. It is certainly possible to have significant adverse price effects without *any* increase in subsidized subject imports, if, for example, the domestic industry is forced by lower priced subsidized subject imports to lower its price in order to retain its market share.



injured “by reason of” subject imports as a unified question and then issued a single determination that subsumed the causation question, as evidenced by the ITC’s explicit findings: “Based on the record in this investigation, we determine that an industry in the United States is materially injured by reason of imports of {subsidized DRAMs from Korea}.”<sup>62</sup>

(8) The SCM Agreement does not require any particular methodology or methodologies to analyze material injury or causation. The unitary analysis applied by the ITC in this investigation is consistent with SCM Agreement Articles 15.1, 15.2, 15.4, and 15.5 because the material injury determination was based on a comprehensive analysis of all of the factors set forth in these provisions concerning the volume, price effects, and impact of subject imports on the domestic industry. No one or several of these factors was decisive. Rather, the material injury determination and thus the ITC’s causation analysis was based on an analysis of these factors collectively.

**16. Please comment on Korea’s statement that there was no displacement of US workers resulting from Hynix’s Eugene facility “swapping customers” with Hynix’s Korean facility.**

51. First, Korea is incorrect that there was a mere “swapping” of customers between Hynix’s Korean and Eugene facilities while Hynix upgraded the Eugene facility between July 2001 and January 2002. As we explained in Confidential US-Figure 1,<sup>63</sup> there is a missing factual predicate to Korea’s argument – that **[BCI: Omitted from public version]**.

(9) Second, even if Korea’s factual premise were correct, to the extent that Hynix used Korean workers and production facilities to produce DRAM products for the US market, its actions displaced US production, US productive capacity, and US workers. During the proceedings before the ITC, the agency included Hynix Semiconductor Manufacturing America in the domestic industry consistent with the position advocated by Hynix.<sup>64</sup> Thus, even if subsidized subject imports were replacing sales of the Eugene facility, that meant that they were replacing sales of a domestic producer and, *inter alia*, displacing US production facilities and employees.<sup>65</sup>

**17. At para. 40 of its oral statement, the US asserts that the ITC determined that “a significant portion of non-subject imports were Rambus and speciality DRAM products”. On the basis of a non-confidential presentation/summary of the underlying proprietary information, please indicate what percentage of non-subject imports were Rambus and speciality products?**

52. In a postconference brief that Hynix and Samsung submitted jointly during the preliminary phase of the ITC’s investigation, they emphasized that Samsung, whose US shipments of DRAM

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<sup>62</sup> USITC Pub. 3616 at 3 (Exhibit GOK-10); *see also id.* at 28 (“For the reasons stated above, we determine that the domestic industry producing DRAM products is materially injured by reason of subject imports of DRAM products from Korea that Commerce found to be subsidized.”)

<sup>63</sup> *See also, e.g.*, USITC Pub. 3616 at 21 n.139 (Exhibit GOK-10) (confidential discussion of the missing factual predicate is omitted from the public version of the last paragraph of the footnote, as indicated by the asterisks).

<sup>64</sup> *See, e.g.*, USITC Pub. 3616 at 12-14 (Exhibit GOK-10).

<sup>65</sup> The factual data on the public record of this investigation indicate declines in employment and employment-related indicia. Over the period 2000 to 2002, the number of hours worked in DRAM fab operations, hourly wages, and aggregate wages all fell. After two years of extraordinary losses (a 79.2 per cent operating loss in 2001, followed by a 50.8 per cent operating loss in 2002), the domestic industry was forced to lay off workers. US fab operations lost 2,378 production and related workers by the first quarter 2003. In sum, employment in fab operations by the end of the period of investigation was down 21 per cent from 2002, 18 per cent from 2001, 17 per cent from 2000, and 6 per cent from interim 2002. *See, e.g.*, USITC Pub. 3616 at 26-27, Table III-8 (Exhibit GOK-10). Employment-related information concerning assembly and module packaging operations is confidential.

products were an important portion of US shipments of non-subject imports during the period of investigation, offered products that “differ[ed] *substantially* from and were not interchangeable with products made by US producers”.<sup>66</sup> Thus, by Hynix’s own admission, Samsung’s imports were less likely to compete with US-produced products than Hynix’s imports.

53. Hynix and Samsung further asserted that “[n]o domestic producer makes Rambus chips, to the best of our knowledge, and Micron’s witness Mr. Sadler acknowledged ... that, ‘there’s only one significant supplier of RAM Bus {sic} DRAM; that would be Samsung from Korea.’”<sup>67</sup> They noted “the incontrovertible fact is that Rambus now accounts for a *significant* percentage of Samsung’s US sales, \*\*\*, as shown in SSI’s questionnaire response.”<sup>68</sup> Hynix and Samsung also emphasized that “irrefutable evidence exists that a *very significant* proportion of Samsung’s US sales had no competition from” Micron, Infineon, and Hynix.<sup>69</sup>

54. As another example, they noted that another “significant market segment” where Samsung had not materially injured the domestic industry was in double data rate (“DDR”) DRAM products, which are technically not specialized products, but leading edge SDRAM products. They pointed to evidence that Samsung was clearly out in front of other suppliers in terms of DDR penetration.<sup>70</sup> For all of these reasons, they argued, imports of Samsung’s Rambus, specialty, and leading edge DRAM products could not have materially injured the domestic industry.<sup>71</sup>

55. There was also extensive testimony by witnesses at the Commission’s hearing about the extent to which non-subject imports consisted of Rambus and specialty DRAM products.<sup>72</sup>

(10) The ITC confirmed the validity of these arguments through its data collection efforts.<sup>73</sup> The responses indicated that a significant percentage of non-subject DRAM products were non-standard DRAM products, such as Rambus or specialty DRAM products. The exact percentage is confidential. Korea does not challenge the ITC’s treatment of this information as confidential under either Article 12.4 or 22.5 of the SCM Agreement. Because the Panel requested a non-confidential summary of the underlying confidential percentage, we can confirm that of all US shipments of non-subject imports in 2001, approximately one-fifth were Rambus or specialty DRAM products. The corresponding percentage in 2002 was somewhat higher than in 2001.

(11) Based on this positive evidence, it was appropriate for both the ITC and Hynix to characterize the portion of non-subject imports that consisted of Rambus and specialty DRAM products as “significant”.

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<sup>66</sup> See, e.g., 27 November 2002 Postconference Brief of Hynix and Samsung at 52 (Exhibit US-100) (emphasis added).

<sup>67</sup> See, e.g., 27 November 2002 Postconference Brief of Hynix and Samsung at 50-56 (Exhibit US-100).

<sup>68</sup> See, e.g., 27 November 2002 Postconference Brief of Hynix and Samsung at 50 n.69 (Exhibit US-100) (emphasis added).

<sup>69</sup> See, e.g., 27 November 2002 Postconference Brief of Hynix and Samsung at 53 (Exhibit US-100) (emphasis added).

<sup>70</sup> See, e.g., 27 November 2002 Postconference Brief of Hynix and Samsung at 55-56 (Exhibit US-100).

<sup>71</sup> See, e.g., 27 November 2002 Postconference Brief of Hynix and Samsung at 50-56 (Exhibit US-100).

<sup>72</sup> See, e.g., Hearing Transcript at 168-175, 258-260 (Exhibit US-94).

<sup>73</sup> In the questionnaires issued in this investigation, the ITC collected information from importers on the percentage of imported products and US shipments of DRAM products in 2001 and 2002 that were “standard” DRAM products, Rambus DRAM products, and other “specialty” DRAM products. Importers were asked to differentiate the reported information for Rambus DRAM products containing dice fabricated in Korea by “Samsung” and the portion containing dice fabricated in Korea by “Others” and to differentiate the reported information for specialty DRAM products containing dice fabricated in Korea by “Samsung” and the portion containing dice fabricated in Korea by “Others.” See, e.g., Importer’s Questionnaire at question II-10(a) (Exhibit GOK-44(b)).

**18. On the basis of a non-confidential presentation/summary of the underlying proprietary information, please set out the basis for the ITC's finding that the volume of subsidized subject imports was "significant".**

56. In the global DRAMs market, there are only a handful of producers of DRAM products. As the ITC explained in its final determination, publicly available information about the DRAM industry did not provide usable, probative data with respect to the factors specified in US law (which correspond to factors under the SCM Agreement).<sup>74</sup> For that reason, the ITC relied on data from questionnaire responses consistent with its regular practice.<sup>75</sup> Because there are so few players in the market, there were several instances where even aggregated information from three or more companies was treated as confidential, consistent with the ITC's practice, because one or two of the companies represented such a large share of the aggregated information that revealing the aggregated data would reveal confidential information about individual concerns.<sup>76</sup>

(12) In the ITC's final determination in this investigation, the domestic industry's shipments, production, and market share data as well as the data concerning total apparent US consumption of DRAM products is not confidential.<sup>77</sup>

57. The volume of subject imports and the exact increase in subject imports both absolutely and relative to domestic production and consumption is not revealed, however, because this information is confidential.<sup>78</sup> Because the DOC found that Korean producer Samsung received only *de minimis* subsidies, for purposes of the ITC's final determination, there was only one foreign producer of subject merchandise, Hynix Semiconductor Inc. of Korea. Moreover, during the entire period of investigation, one importer accounted for at least 75 per cent of all subsidized subject imports and/or two importers combined accounted for at least 90 per cent of all subsidized subject imports. Thus, consistent with ITC practice, the aggregated data were considered to be confidential. The trends in the data concerning subject imports, however, are not confidential and they were discussed in the public version of the ITC's final determination.<sup>79</sup>

(13) The volume of non-subject imports and their market share also is not revealed in the public version of the ITC's final determination, because revealing this information would permit the derivation of the confidential data concerning subject imports. The trends in the data concerning non-subject imports and the fact that non-subject imports increased by "a substantially larger amount than subject imports", however, are not confidential and are discussed in the public version of the ITC's final determination.<sup>80</sup>

58. Thus, notwithstanding the constraints of the limited number of players in this market, the ITC endeavored to provide as much information as possible in the public version of its final determination. As evidenced by the extensive argumentation provided by Korea in this proceeding and Korea's failure to challenge the ITC's treatment of the information as confidential under either Article 12.4 or 22.5, we submit that the ITC provided a summary in sufficient detail to permit a reasonable understanding of the data.

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<sup>74</sup> See, e.g., USITC Pub. 3616 at 20 n.134 (Exhibit GOK-10).

<sup>75</sup> See, e.g., USITC Pub. 3616 at 20 n.134 (Exhibit GOK-10).

<sup>76</sup> See, e.g., US First Submission, paras. 297-298.

<sup>77</sup> See, e.g., USITC Pub. 3616 at Table C-1 (Exhibit GOK-10).

<sup>78</sup> See, e.g., USITC Pub. 3616 at ii, 20-21, Table C-1 (Exhibit GOK-10).

<sup>79</sup> See, e.g., USITC Pub. 3616 at 20-21 (Exhibit GOK-10).

<sup>80</sup> See, e.g., USITC Pub. 3616 at 20-21 (Exhibit GOK-10).

(14) The United States appreciates that the Panel has not asked it to provide any confidential information in these proceedings. With respect to the Panel's request that the ITC set out the basis for the ITC's finding that the volume of subsidized subject imports was "significant" on the basis of a non-confidential presentation/summary of the underlying proprietary information, unfortunately, there is not much beyond the response to question 15 above that can be provided without compromising the obligations of the United States under Article 12 to treat the underlying information as confidential. We refer the Panel to our response to question 15 above and also observe that throughout the period of investigation, the level of non-subject imports was at least five times the level of subject imports. Given the amount and type of information that was already discussed in the public version of the ITC's final determination and the US first written submission and the fact that Hynix has provided certain of its own confidential information to the Panel, we are unable to provide any further summary without compromising the confidential information reported by individual importers other than Hynix during the ITC's investigation. These importers voluntarily provided their confidential information at the ITC's request, notwithstanding the fact that the overwhelming majority of them were not even participants in the ITC's investigation.

**19. The US argued at para. 424 of its first written submission that the causal analysis for countervail was different than the causal analysis for safeguards. The US based its argument on the different injury thresholds set forth in the SCM and Safeguards Agreements respectively. How does the injury threshold determine the requisite degree of causal nexus? In other words, what is it about the need to find serious injury in the case of safeguards that makes the causation standard different than in countervail, where material injury need to be established?**

59. Before addressing the differences between safeguards and countervail, it is first necessary to describe the analysis conducted by the ITC. As explained above in response to Question 15(iv), in its final determination in the DRAMs investigation, the ITC did not separately analyze "material injury" and "causation", but instead conducted a "unitary" analysis. The ITC did not ask, in the abstract, whether a domestic industry was experiencing material injury and then, if the answer was affirmative, proceed to a second determination of causation. Instead, the ITC asked whether a domestic industry was being materially injured "by reason of" subject imports as a unified question, and then issued a single determination that subsumed the causation question. This is evidenced by the ITC's explicit findings: "Based on the record in this investigation, we determine that an industry in the United States is materially injured by reason of imports of {subsidized DRAMs from Korea}."<sup>81</sup> We further explained above why this unitary analysis is consistent with US obligations under the SCM Agreement.

(15) In ascertaining whether there is a causal nexus between subsidized imports and material injury to the domestic industry in countervailing duty investigations, investigating authorities must examine several factors. Article 15.1 of the SCM Agreement specifies that a final determination shall be based on "positive evidence" and an "objective examination" of the volume of the subsidized subject imports, their price effects, and their impact on the domestic industry. The investigating authority's obligation to examine these factors is further specified in Articles 15.2 and 15.4 (which provide further details concerning the investigating authority's examination of the volume, price effects, and impact of subsidized subject imports on the domestic industry). In addition, Article 15.5 provides that:

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<sup>81</sup> USITC Pub. 3616 at 3 (Exhibit GOK-10); *see also id.* at 28 ("For the reasons stated above, we determine that the domestic industry producing DRAM products is materially injured by reason of subject imports of DRAM products from Korea that Commerce found to be subsidized.") In conducting this analysis, the ITC also examined other known factors to ensure that it did not attribute injury from such factors to the subsidized subject imports.

It must be demonstrated that the subsidized imports are, through the effects<sup>47</sup> of the subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports  
...

Footnote 47 to the SCM Agreement indicates that the “effects” to which the first sentence of Article 15.5 refers are those set forth in Articles 15.2 and 15.4 (*i.e.*, the volume, price effects, and impact of the subsidized subject imports on the domestic industry).

(16) The unitary analysis applied by the ITC in this investigation integrates the questions of injury and causation in order to ascertain whether an industry has suffered material injury by reason of subsidized (or dumped) subject imports (in this case the imports from Korea found to be subsidized). This ensures that the ITC finds that those impact factors that demonstrate injury are in fact attributable to the imports under investigation.

(17) Turning to the differences between safeguards and countervail, there are several differences between the causation analysis specified in the SCM Agreement and that specified under the *Agreement on Safeguards* (Safeguards Agreement).

(18) The first, as previously discussed, is that under Article 15.5 of the SCM Agreement, the causation analysis in a countervailing duty investigation calls for consideration of the “effects” of the subsidies, and this in turn is related to the analysis of the volume, price effects, and impact of subsidized subject imports. There is no counterpart to this requirement in the Safeguards Agreement. This is because the Safeguards Agreement, in contrast to the SCM Agreement and the AD Agreement, does not involve unfairly traded imports and their effects.

60. Instead, a different inquiry is specified in the Safeguards Agreement. Article 4.2(a) of the Safeguards Agreement provides that

to determine whether increased imports have caused... serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

Article 4.2(b) further provides that an affirmative safeguards determination “shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof”.

61. Thus, under the Safeguards Agreement, there is an explicit reference to volume as there is under the SCM Agreement, but the nexus between the imports and the injury to the domestic industry under the Safeguards Agreement is explicitly dependent on the existence of the causal link between *increased* imports and the serious injury to the domestic industry. Under Articles 15.1 and 15.2 of the SCM Agreement, volume is a consideration, but no one or several of the factors mentioned can necessarily give decisive guidance. Moreover, unlike the “serious” injury standard set forth in Articles 2 and 4 of the Safeguards Agreement, the “material injury” standard of Article 15.5 of the SCM Agreement contains no requirement that the volume of subsidized subject imports be increasing

in order for relief to be provided. Under Article 15.5, the volume considerations also include examination of the absolute and relative volume levels, as well as increases either absolutely or relative to either production or consumption in the importing Member. These differences in the manner of analyzing volume between the Safeguards Agreement and the SCM Agreement are important, because the analysis of volume is a factor relevant to causation, *i.e.*, whether an industry has suffered injury by reason of imports, and not simply to the question of injury in the abstract.

62. Another difference is that there is no express requirement under the Safeguards Agreement to consider the price effects of imports (although competent authorities are free to do so). In contrast, Articles 15.1 and 15.2 of the SCM Agreement provide that in a countervailing duty investigation, an investigating authority “shall consider” the effect of the subsidized imports on prices, although, again, no one or several of the identified factors can necessarily give decisive guidance.<sup>82</sup>

63. Furthermore, although there is an express reference in the Safeguards Agreement to some of the same impact factors that are listed in the SCM Agreement, there are several additional factors listed in the SCM Agreement that have no explicit parallel in the Safeguards Agreement (although competent authorities are free to consider them). In addition, there is no language in the SCM Agreement parallel to the Safeguards Agreement concerning the evaluation of factors of an “objective and quantifiable nature”.

64. Also significant is the fact that the Safeguards Agreement involves a more rigorous injury standard. Under the Safeguards Agreement, the competent authority examines whether a “product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause *serious* injury to the domestic industry that produces like or directly competitive products.”<sup>83</sup>

65. As defined by Article 4.1(a) of the Safeguards Agreement, “serious injury” means a significant overall impairment in the position of a domestic industry. As the Appellate Body emphasized in *US – Lamb Meat*, “serious injury” is a much higher standard than “material injury”.<sup>84</sup> It stated:

We are fortified in our view that the standard of ‘serious injury’ in the Agreement on Safeguards is a very high one when we contrast this standard with the standard of ‘material injury’ envisaged under the Anti-dumping Agreement, the Agreement on Subsidies and Countervailing Measures (the ‘SCM Agreement’) and the GATT 1994. We believe that the word ‘serious’ connotes a much higher standard of injury than the word ‘material.’ Moreover, we submit that it accords with the object and purpose of the Agreement on Safeguards that the injury standard for the application of a safeguard measure should be higher than the injury standard for anti-dumping or countervailing measures ...<sup>85</sup>

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<sup>82</sup> Korea’s insistence that this proceeding is about the relative increase in the market share of subsidized subject imports (while largely ignoring the ITC’s findings concerning other factors, especially the adverse price effects of the subsidized subject imports) may explain the prominence of reports reviewing safeguards determinations in its arguments to the extent that volume considerations are more prominent in the text of the Safeguards Agreement.

<sup>83</sup> Safeguards Agreement, Article 2.1 (emphasis added).

<sup>84</sup> *US – Lamb Meat*, para. 124. Even in the context of reviewing safeguards determinations, however, the Appellate Body has stated that Article 4.2(b) of the Safeguards Agreement does not require that increased imports alone, in and of themselves, are causing serious injury. *See, e.g., US – Wheat Gluten*, paras. 70, 79. The same is true in the context of countervailing and antidumping duty investigations. *See, e.g., US – Hot-Rolled Steel (Panel)*, para. 7.260 (reviewing an antidumping duty determination).

<sup>85</sup> *US – Lamb Meat*, para. 124.

(19) Given the Safeguards Agreement's more rigorous injury standard and the fact that it does not provide the same level of detail as does the SCM Agreement as to how to ascertain the causal connection between the imports that are the subject of the investigation and the level of injury sustained by the domestic industry, one would expect that examination of causation would be different in an investigation under the Safeguards Agreement than in a countervailing duty investigation under the SCM Agreement.

66. Moreover, because the injury thresholds and relevant inquiries in safeguards and countervailing duty investigations are so different, there is no basis to assume the required nexus between the imports and the injury to the domestic industry in a safeguards investigation is the same as the required nexus between the imports and the injury to the domestic industry in a countervailing duty investigation.

**20. The US noted at the first substantive meeting that Article 15.5 of the SCM Agreement refers to a "causal relationship" between the subsidized imports and the material injury to the domestic industry, whereas Article 4.2(b) refers to a "causal link" between increased imports and the serious injury to the domestic industry. Does this explain the alleged difference in the applicable causation standards? Please explain.**

67. As explained in response to Question 19<sup>86</sup>, the United States believes that the differences in the applicable causation standards are due to differences in the relevant inquiries in terms of the factors expressly identified in the two Agreements. At the Panel's request, we have considered the use of the term "a causal relationship" in Article 15.5 of the SCM Agreement as opposed to the term "the causal link" in Article 4.2(b) of the Safeguards Agreement. Although there may be some semantic differences between the two terms<sup>87</sup>, upon further examination of the Agreements, we do not believe that the use of the different terms captures the difference in the applicable causation standards.

**21. The US asserts at para. 424 of its first written submission that "the 'causal relationship' of the SCM Agreement is ... different from the 'causal link' requirement of the safeguards Agreement". At para. 443 of its first written submission, the US refers to the ITC "demonstrating a causal link". At para. 419, the US refers to the need to establish a "causal relationship". How credible is the US assertion that the term "causal link" differs from the term "causal relationship" if the US fails to distinguish between those two concepts in its written submission?**

68. As explained in response to Questions 19 and 20, above, the causation standard of the SCM Agreement is different from the causation standard of the Safeguards Agreement.

(20) Although the questions of what nexus between the imports and the material injury to the domestic industry is required in a countervailing duty investigation, and whether this nexus is lower than that required in the context of a safeguards investigation, are important conceptually, their resolution is not pivotal to this proceeding. As is evident from the responses to these questions and the US first written submission (which refers in para. 419 to the need to establish a "causal relationship" and in para. 443 to the ITC as "demonstrating a causal link"), this was not a case where

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<sup>86</sup> See also, US First Submission, para. 424.

<sup>87</sup> "Link" is defined as being "[a] connecting part; esp. a thing or person serving to establish or maintain a connection; a means of connection or communication." *New Shorter Oxford English Dictionary* (5th ed. 2002) at 1604. In contrast, "relationship" is defined as "the state or fact of being related". *Id.* at 2520. "Related" is defined as "[h]aving relation." *Id.* "Relation", in turn, is defined as "the existence or effect of a connection, correspondence, or contrast between things; that particular way in which one thing stands in connection with one another; any connection or association conceivable as naturally existing between things". *Id.* (emphasis added).

only a low-level nexus existed between the subsidized subject imports and the material injury suffered by the domestic industry. The strength of the nexus between the subsidized subject imports and the material injury suffered by the domestic industry is further demonstrated by the ITC's reference to the "link" between the subsidized subject imports and the material injury suffered by the domestic industry in its final determination in this investigation. For example, in its discussion of the domestic industry's exporting activities, the ITC concluded that "while the industry's export performance played a role in the injury it experienced, it [did] not sever *the causal link* between subsidized subject imports and material injury to the domestic industry".<sup>88</sup>

(21) The United States wishes to make clear that the final sentence in paragraph 424 of its first written submission was not intended to suggest that the respective use of the terms "causal relationship" and "causal link" in the SCM and Safeguards Agreements indicated that a different standard applied. (Other textual differences between the two Agreements, however, do support such a construction, as noted above). Those terms were instead merely used as shorthand for the identified differences in the language of the two Agreements.

**22. At para. 424 of its first written submission, the US appears to argue that the ITC applied the "causal relationship" standard. Is this a correct understanding of the US argument? Please explain.**

69. The US argument is simply that the ITC's causation analysis in the DRAMs investigation was consistent with the requirements of the SCM Agreement.

(22) The ITC found that the domestic industry producing DRAM products was materially injured by reason of the subsidized subject imports of DRAM products from Korea. The ITC demonstrated a causal nexus between the subsidized subject imports of DRAM products from Korea and the material injury suffered by the domestic industry through its examination of the volume, price effects, and impact of the subsidized subject imports on the domestic industry.

**23. Please explain how the ITC complied with the causation standard described at para. 427 of the US first written submission. In particular, how did the US "separate and distinguish" the injurious effects of non-subject imports?**

70. Article 15.5 of the SCM Agreement provides that an investigating authority must demonstrate that subsidized imports are causing material injury based on an examination of all relevant evidence before the authority. It also provides in relevant part that:

The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which *may be relevant* in this respect *include, inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry. (emphasis added).

71. The Appellate Body, based upon language in the Safeguards Agreement and in its own reports reviewing safeguards determinations, has stated that "in order to comply with the non-attribution language[,] investigating authorities must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the

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<sup>88</sup> See, e.g., USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10) (emphasis added).



injurious effects of the [unfair] imports from the injurious effects of those other factors”.<sup>89</sup> Although the Appellate Body concluded in *US – Hot-Rolled Steel* that an investigating authority must “identify” the injury caused by other known factors, neither in that report nor in subsequent ones has the Appellate Body ever required the investigating authorities to “isolate” and “precisely quantify” the injurious effects of the unfair imports, for example, by means of econometrics or modelling.

72. Instead, with respect to the question of what it means to “separate and distinguish” the injurious effects of the unfair imports from the injurious effects of other known factors, the Appellate Body has stated that “[t]his requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the [unfair] imports”.<sup>90</sup>

(23) The Appellate Body has consistently stated that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of unfair imports from the injurious effects of the other known causal factors are not prescribed by the WTO agreements. Thus, “provided that the investigating authority does not attribute the injuries of other causal factors to [unfair] imports, it is free to choose the methodology it will use in examining the ‘causal relationship’ between [unfair] imports and injury”.<sup>91</sup>

(24) In this regard, there is no requirement to evaluate each or any of the factors referenced in the last sentence of SCM Agreement Article 15.5 in every countervailing duty investigation. As the panel found in *Thailand – H-Beams* regarding the parallel provision of the AD Agreement, “[t]he text of Article 3.5 indicates that the list of other possible causal factors enumerated in that provision is illustrative”. In order for the “known factors” obligation to be triggered, the Appellate Body has explained that the factor at issue must: “(a) be ‘known’ to the investigating authority; (b) be a factor ‘other than [subsidized] imports’; and (c) be injuring the domestic industry at the same time as the dumped imports”.<sup>92</sup> Regarding whether a factor is “known” to the investigating authority, the panel in *Thailand – H-Beams* found that other “known factors” would include factors “clearly raised before the investigating authorities by interested parties in the course of an AD investigation”.<sup>93</sup> It explained that investigating authorities are not required to seek out such factors on their own initiative.<sup>94</sup>

73. Whether or not the Panel agrees with Korea that they qualify as “other known factors”, it is clear from the ITC’s final determination that the ITC properly examined non-subject imports; other reasons for the price declines during the period of investigation; and the domestic industry’s actions.

(25) *Non-subject imports*: The ITC determined that non-subject imports were in the US market throughout the period of investigation and at absolute volumes that were higher than subsidized subject imports.<sup>95</sup> The ITC also recognized that some domestic producers were responsible for some of the non-subject imports.<sup>96</sup> Non-subject imports increased market share between 2000 and 2001 and between 2001 and 2002, an increase the ITC evaluated as a “substantially larger amount than subject imports”.<sup>97</sup> Although the ITC determined that non-subject imports were responsible for “the bulk of the market share lost by domestic producers during the period of investigation”, it identified two

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<sup>89</sup> *EC – Tube (AB)*, para. 188 quoting *US – Hot-Rolled Steel (AB)*, para. 226.

<sup>90</sup> *US – Hot-Rolled Steel (AB)*, para. 226.

<sup>91</sup> *EC – Tube (AB)*, para. 189, relying on *US – Hot-Rolled Steel (AB)*.

<sup>92</sup> *EC – Tube (AB)*, para. 175.

<sup>93</sup> *Thailand – H-Beams (Panel)*, para. 7.273.

<sup>94</sup> *Id.*

<sup>95</sup> See, e.g., USITC Pub. 3616 at 21, 25, 27, Tables IV-4, IV-5, C-1 (Exhibit GOK-10).

<sup>96</sup> See, e.g., USITC Pub. 3616 at 6, 10-11, 17, 18 (Exhibit GOK-10).

<sup>97</sup> See, e.g., USITC Pub. 3616 at 21, Tables IV-4, IV-5, C-1 (Exhibit GOK-10).

reasons why it did not find the volume of non-subject imports as significant as otherwise would be suggested.<sup>98</sup>

74. First, after examining the composition of non-subject imports, the ITC determined that a significant portion of non-subject imports were Rambus and specialty DRAM products for which domestic producers had no significant production during the period of investigation,<sup>99</sup> as discussed in more detail above in response to question 17. Contrary to Korea's repeated (and erroneous) characterization of "near complete interchangeability among domestic, non-subject, and subject imports" or "high substitutability" between subject and non-subject DRAM products,<sup>100</sup> non-subject imports were not as substitutable with subject or domestic DRAM products because their product mix was different.

75. Second, even those non-subject imports consisting of "standard" products did not have the price effects that subsidized subject imports did during the period of investigation. Although there is no requirement in the SCM Agreement for the investigating authority to collect such data – and, to our knowledge, most Members do not collect *any* pricing data on non-subject imports – the ITC collected pricing data on non-subject imports in this investigation. According to that pricing data, while the frequency with which non-subject imports undersold domestically produced DRAM products increased between 2000 and 2002, the underselling frequency by non-subject imports was lower than, and increased less than, the underselling frequency of subsidized subject imports between 2000 and 2002.<sup>101</sup> Thus, the ITC reasonably found that because non-subject imports were less substitutable for domestic DRAM products than were subsidized subject imports, and because non-subject imports undersold domestic DRAM products less frequently than subsidized subject imports did, non-subject imports had less of an impact than their absolute and relative volumes might otherwise have indicated.

76. Moreover, the ITC also found that, while non-subject imports' market share grew, the "primary negative impact" on the domestic industry was due to lower prices.<sup>102</sup> 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.<sup>103</sup>

77. Thus, it is clear that in its final determination, the ITC provided a satisfactory explanation of the nature and extent of the injurious effects of non-subject imports (including the volume and prices of non-subject imports) as distinguished from the injurious effects of the subsidized subject imports.

78. *Other possible reasons for the price declines:* Based on its analysis of the pricing data, the Commission ascertained that prices for nearly every pricing product and channel of distribution declined substantially over the period of investigation. It observed that prices for domestic products and subsidized subject imports followed the same general trends and were generally similar for sales

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<sup>98</sup> See, e.g., USITC Pub. 3616 at 27 (Exhibit GOK-10).

<sup>99</sup> See, e.g., USITC Pub. 3616 at 27 (Exhibit GOK-10).

<sup>100</sup> See, e.g., Korea First Submission, para. 166.

<sup>101</sup> In particular, non-subject imports undersold the domestic industry in 46.6 per cent of instances in 2000, 47.7 per cent in 2001, and 60.7 per cent in 2002 whereas subsidized subject imports undersold the domestic industry in 51.0 per cent of instances in 2000, 56.0 per cent in 2001, and 69.8 per cent in 2002. Consistent with these figures, the ITC concluded that for these "standard" pricing products, subsidized subject imports undersold non-subject imports in a majority of instances. See, e.g., USITC Pub. 3616 at 25 & n.164 (Exhibit GOK-10). Moreover, even based on a disaggregated analysis of the pricing data on these "standard" products by brand name and source, subsidized subject imports were the lowest-priced source more often than DRAM products from any other source, contrary to Korea's assertions. See, e.g., USITC Pub. 3616 at 24 (Exhibit GOK-10).

<sup>102</sup> See, e.g., USITC Pub. 3616 at 27 (Exhibit GOK-10).

<sup>103</sup> See, e.g., USITC Pub. 3616 at 27 (Exhibit GOK-10).

to PC OEMs across all products. More particularly, the product-specific data showed price declines of 70 to 90 per cent from late 2000 through 2001, a modest rebound in early 2002, then a further decline over the course of 2002. The ITC identified record evidence indicating that the price decline in 2001 was the “most severe in history”.<sup>104</sup>

79. The ITC examined other possible reasons for these price declines. Regardless of the label attached to these factors or if a particular factor encompassed “sub-factors”, it is clear from the face of the ITC’s determination that the ITC examined the *product life cycle* and the DRAMs *business cycle* that is characterized by repeated “boom” and “bust” periods (when *supply/capacity*, which increased during the period of investigation, outpaces *demand*, whose growth slowed at the end of the period of investigation) as other possible reasons for the price declines.<sup>105</sup>

80. Based on its evaluation of the record evidence in this investigation, the ITC determined that “[w]hile slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor”.<sup>106</sup> The ITC determined that these pricing declines were far greater than the 20 to 30 per cent that Micron or even the 40 per cent declines that Hynix *itself* reported would be expected on an annual basis.<sup>107</sup>

81. The ITC concluded that the increasing frequency of underselling by subsidized subject imports from 2000 to 2002 corresponded with the substantial decline in US prices over those same years and that in the absence of significant quantities of subsidized subject imports competing in the same product types at relatively low prices, domestic prices would have been substantially higher.<sup>108</sup>

82. At the first Panel meeting, Korea suggested that Hynix may have misunderstood the ITC’s question and that Hynix may not have meant that the average annual price decline was 40 per cent. Positive evidence from the ITC’s record, however, supports the ITC’s finding that the price declines experienced between 2000 and 2001 were far greater than even Hynix asserted would be the norm. In addition to the testimony of Hynix’s witness (Mr. Tabrizi) at the ITC’s hearing that has been previously cited<sup>109</sup>, in its brief filed after the ITC’s hearing, Hynix took another opportunity to respond to the same question that was posed by the ITC during the hearing. Hynix argued that the average annual price decline had increased in recent years, and once again estimated that the average annual decline was approximately 43 per cent. Hynix included historical data on average sales prices, but even these data did not include any year in which the price declines ranged as high as 90 per cent, as was the case between 2000 and 2001 according to the ITC’s pricing data.<sup>110</sup> In other words, it was reasonable for the ITC to have drawn the conclusions it did based on the evidence before it, such evidence including testimony and responses made by Hynix itself.

83. As this discussion shows, the ITC analyzed the nature and the extent of the injurious effects of other known factors that were affecting prices, and examined those factors in the factual context of the record in this investigation to ensure that it did not attribute injury from those factors to subsidized subject imports. The ITC provided a satisfactory explanation of the nature and extent of the injurious

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<sup>104</sup> See, e.g., USITC Pub. 3616 at 24 (Exhibit GOK-10).

<sup>105</sup> See US First Submission, paras. 454-457, which identify in more detail where in the ITC’s final determination the examination of these factors took place.

<sup>106</sup> See, e.g., USITC Pub. 3616 at 24-25 (Exhibit GOK-10).

<sup>107</sup> See, e.g., USITC Pub. 3616 at 24-25, I-11 (Exhibit GOK-10); Hearing Transcript at 157-161, 267-68 (Exhibit US-94).

<sup>108</sup> See, e.g., USITC Pub. 3616 at 24-25 (Exhibit GOK-10).

<sup>109</sup> See, e.g., Hearing Transcript at 267-68 (Exhibit US-94).

<sup>110</sup> See, e.g., Hynix’s July 2, 2003, Posthearing Brief at Exhibit 1 at 39-41 & Exhibit 19 (Exhibit US-121).

effects of other factors affecting prices (which could not explain the unprecedented price declines that took place in the US market) as distinguished from the injurious effects of the subsidized subject imports (which undersold the domestic industry at high margins and in increasing frequencies). Thus, the ITC satisfied any requirement to “separate and distinguish” those factors.

84. *The domestic industry’s actions:* The ITC also examined the domestic industry’s actions. Korea argues that because Micron focused more on moving from 0.15 micron to 0.11 micron technology than on moving from 0.15 micron to 0.13 technology, Micron was unable to supply the market with certain DDR products (256 Mb DDR products) based on the 0.13 technology and instead had to supply the market with those products made from 0.15 micron technology (which was more costly). In fact, the ITC collected pricing data on 256 Mb DDR266 SDRAMs.<sup>111</sup> The record indicated that volume demand for 256 Mb DDR DRAMs did not develop until the latter half of 2002, which was *after* Micron and the domestic industry had sustained their most significant losses.<sup>112</sup> Moreover, as the ITC analyzed the data, it determined that whatever negative effect any particular decisions may have had on Micron, they “could not explain the harm” experienced by the domestic industry as a whole.<sup>113</sup> This “harm was not isolated to Micron and was due mainly to lower prices”.<sup>114</sup>

85. Second, even though Hynix never even argued that exports might be another causal factor, the ITC nonetheless evaluated the domestic industry’s exporting activities.<sup>115</sup> The ITC identified the “increasingly global nature of the DRAMs market, both in terms of producers as well as purchasers.”<sup>116</sup> Analyzing the data, the ITC determined that the domestic industry exported “a large and growing share of its DRAM products production, although it [sold] a substantial portion (the majority in each of the full years 2000 through 2002) in the US market”.<sup>117</sup> The ITC determined that “[i]ncreasing export shipments offset to some degree the slower growth of the industry’s domestic sales and thereby allowed the industry to utilize more capacity than it would otherwise have done. However, falling unit sales values on export sales had a negative impact on the domestic industry’s profitability. The unit value of the industry’s export shipments fell substantially, although somewhat less than the unit value of the industry’s domestic sales.”<sup>118</sup> Based on this evaluation of the data, the ITC concluded that “while the industry’s export performance played a role in the injury it experienced, it [did] not sever the causal link between subsidized subject imports and material injury to the domestic industry”.<sup>119</sup>

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

(26) It is clear that in its examination of other known factors, the ITC went well beyond what has been found to be sufficient by other WTO panels. For example, in *EC – Tube and Pipe Fittings*, the panel examined Brazil’s claim that the EC did not adequately examine non-subject imports from Poland. The EC found that Brazil’s claim was not substantiated, apparently based on data from

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<sup>111</sup> See, e.g., USITC Pub. 3616 at V-3, Table V-10 (pricing product 5) (Exhibit GOK-10).

<sup>112</sup> See, e.g., Micron’s Posthearing Brief at Exhibit 3 at 19-21 (Exhibit US-96).

<sup>113</sup> See, e.g., USITC Pub. 3616 at 26 n.177 (Exhibit GOK-10).

<sup>114</sup> See, e.g., USITC Pub. 3616 at 26 n.177 (Exhibit GOK-10).

<sup>115</sup> See, e.g., USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10). The ITC noted in its determination that Hynix had not argued that exports were another causal factor.

<sup>116</sup> See, e.g., USITC Pub. 3616 at 18 (Exhibit GOK-10).

<sup>117</sup> See, e.g., USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10).

<sup>118</sup> See, e.g., USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10).

<sup>119</sup> See, e.g., USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10).

Eurostat that was not susceptible to verification because it was not available at such a level of detail. The panel reiterated that Poland “was not under investigation for selling the product at dumped prices in the EC market”. The panel found that although the investigating authority was required during the course of the investigation to satisfy itself as to the accuracy of the information supplied by interested parties upon which its findings were based, the EC’s consideration of Brazil’s argument was enough, and there was no inconsistency with Articles 3.1, 3.5 or 6.6 of the AD Agreement.<sup>120</sup> The fact that the ITC’s collection and evaluation of data concerning other known factors in this investigation exceeded the level considered adequate by the panel reviewing the EC’s determination in *EC – Tube and Pipe Fittings* provides yet another reason for this Panel to find that the ITC’s analysis of “other known factors” was consistent with the SCM Agreement.

**24. How do the causation standards of “causal link” (Article 4.2(b) of the Safeguards Agreement) and “causal relationship” (Article 15.5 of the SCM Agreement) differ in practice?**

87. As explained in the answers to Questions 19 and 20, above, the injury threshold and the relevant inquiry in a safeguards investigation differ from those involved in a countervailing duty investigation.

(27) These differences in the injury thresholds and relevant inquiries may have practical effects on the findings in those investigations. Or, depending on the factual circumstances of the investigations, the causation findings may not be so divergent. For example, there is no explicit requirement to consider price effects in a safeguards investigation, but there may be safeguards investigations where adverse price effects are relevant to the causal inquiry.

**25. Korea noted at the first substantive meeting that the Argentina-Footwear panel, in respect of a safeguards dispute, stated (para. 8.238) that an absence of coincidence, or correlation, “would create serious doubts as to the existence of a causal link, and would require a very compelling analysis of why causation still is present” (italics in original). Does the US consider that such panel ruling is not relevant to the present proceedings because it concerns causation in the context of safeguards, and not countervail? Please explain.**

88. Korea relies heavily in its first written submission on the *Argentina – Footwear* panel report, in which the panel stated in the context of reviewing a safeguards determination that an absence of coincidence or correlation “would create serious doubts as to the existence of a causal link, and would require a very compelling analysis of why causation still is present”. In a coincidence analysis, an authority examines trends in imports and overall trends in factors specified in the agreement, as well as their absolute levels; it ascertains whether, for example, movements or trends in factors concerning the imports correspond temporally with overall movements or trends in factors showing injury to the domestic industry.

89. In the answers to Questions 19 and 20, above, we set forth our concerns with the use of the Safeguards Agreement and reports reviewing safeguards determinations as tools for interpreting the provisions of the SCM Agreement concerning countervailing duty measures. Nevertheless, whether this Panel reviews the ITC’s material injury determination through the lens of a correlation analysis, the lens of a conditions-of-competition analysis, or some other lens, it is clear that the ITC’s causation analysis in the DRAMs investigation was consistent with US obligations under the SCM Agreement.

(28) For example, as discussed in more detail in our first written submission, there was a correlation between the volume (and the increases both absolutely and relative to both domestic production and consumption) of the subsidized subject imports and the adverse impact on the domestic industry. There was a correlation between the significant underselling by the subsidized

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<sup>120</sup> *EC – Tube (Panel)*, para. 7.389.

subject imports and the significant price declines experienced during the period of investigation. There was also a correlation between these price declines and the adverse impact on the domestic industry.

(29) In its causation analysis, the ITC also took into account several conditions of competition, including, for example: the importance of price in this industry; the high degree of substitutability between subsidized subject imports and domestically produced DRAM products; and the existence of a commodity-type market that reacts quickly to underselling through the rapid dissemination of pricing information to a limited number of purchasers including through such mechanisms as most-favoured-customer, best-price clauses, and other informal arrangements.

(30) Thus, unlike the situation described in the *Argentina – Footwear* case, in the DRAMs investigation there was a very clear nexus between the injury suffered by the domestic industry and the volume, price effects, and impact of the subsidized subject imports. The DRAMs investigation was not a case in which the subsidized subject imports were priced higher than the domestic industry's prices such that any depression in US prices could not be correlated to the subsidized subject imports. Nor is this a case in which the volume, market share, or ratio to domestic production of the subsidized subject imports was in decline. The contrasting volume and price trends of subject imports and the condition of the domestic DRAM industry over the period of investigation provided compelling evidence of the material injury caused by the subsidized subject imports from Korea.

(31) We also note that Korea's reliance on *Argentina – Footwear* ignores the more recent report in *US – Steel Safeguards*, in which the panel upheld certain aspects of the US safeguard measures concerning steel products, notwithstanding that for some of these measures, as the panel in that case noted, the United States "did not perform a coincidence analysis".<sup>121</sup>

(32) The panel in *US – Steel Safeguards* recognized that previous reports reviewing safeguards determinations had found that a coincidence finding was "central" to a causation analysis under the Safeguards Agreement.<sup>122</sup> At the same time, that panel recognized that Safeguards Agreement Article 4.2(b) does not prescribe the use of any particular methods or analytical tools for demonstrating causation, leaving it up to the competent authority to decide the method it considers most appropriate to determine causation.<sup>123</sup> In that report, the panel recognized that "there may be cases, for instance, where a competent authority does not undertake a coincidence analysis or does so, but the facts do not support a finding of causal link on the basis of such an analysis".<sup>124</sup> The panel found that in such situations, "reference could be made to the conditions of competition as between imports and domestic products with a view to providing a compelling explanation, in the absence of coincidence, as to why a causal link nevertheless exists".<sup>125</sup> Notably the panel continued that in its view, "consideration of the conditions of competition of the market in which the relevant imported and domestic products are being sold may generally prove insightful in respect of the issue of the causal relationship between increased imports and serious injury".<sup>126</sup> As the panel further explained, "the more complicated the factual situation, the more important it is for a number of factors to be taken into consideration".<sup>127</sup> The panel then upheld, subject to its review of the ITC's non-attribution

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<sup>121</sup> *US – Steel Safeguards (Panel)*, para. 10.295.

<sup>122</sup> *US – Steel Safeguards (Panel)*, para. 10.296.

<sup>123</sup> *US – Steel Safeguards (Panel)*, para. 10.294.

<sup>124</sup> *US – Steel Safeguards (Panel)*, para. 10.314.

<sup>125</sup> *US – Steel Safeguards (Panel)*, para. 10.314.

<sup>126</sup> *US – Steel Safeguards (Panel)*, para. 10.314.

<sup>127</sup> *US – Steel Safeguards (Panel)*, para. 10.323.

analysis, the ITC's causation analysis concerning hot-rolled bar and rebar that the panel ascertained was not based on a coincidence analysis but on a conditions of competition analysis.<sup>128</sup>

(33) Thus, while a correlation analysis may be one tool that an authority may employ to demonstrate causation, it is not the only such tool. A conditions of competition analysis is another tool that has been found to be adequate to demonstrate causation by a panel reviewing a safeguards determination.

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<sup>128</sup> *US – Steel Safeguards (Panel)*, paras. 10.424 to 10.430, 10.470 to 10.477. The Appellate Body explicitly declined to make findings on the issue of causation, and thus neither reversed nor upheld these findings. *US – Steel Safeguards (AB)*, para. 483.

## ANNEX E-5

### THE REPUBLIC OF KOREA'S ANSWERS TO THE PANEL QUESTIONS FOLLOWING THE SECOND SUBSTANTIVE MEETING

6 August 2004

Each party may address/comment on questions addressed to the other party

#### A. QUESTIONS TO US

##### 1. Please comment on the following paragraphs of Korea's Opening Statement at the Second Substantive Meeting of the Panel:

**§ 20: the hypothetical of Hynix being the lowest price twice, but 98 other suppliers being each the lowest price once;**

##### Comment:

1. During the second meeting with the Panel, the United States expressed frustration with not being able to respond directly to this hypothetical. Korea would like to note three points. First, any frustration is entirely within the control of the United States: it has the information that it is unwilling to disclose.

2. Second, the main point of this hypothetical is in fact a public fact: the United States methodology focused on the individual effect of each supplier, and never assessed the collective effective of all of these other suppliers. In our view, such an explanation is inherently defective and insufficient. It is simply not possible to assess the reasonableness of the US explanation without knowing the magnitude of the collective effect of these other suppliers charging lower prices than subject imports.

3. Third, there is strong support for the proposition that panels may draw adverse inferences against those parties that possess but withhold key information. The WTO Appellate Body has previously found that panels have "the legal authority and the discretion to draw inferences from the facts before it," including facts a party chooses not to release.<sup>1</sup>

4. The ITC in the first instance, and the United States now before this Panel, has decided to ignore or withhold the necessary information on the collective magnitude and effect of these others sources. This Panel may presume the information has been withheld because it is not favourable.

\* \* \*

**§ 22 : the ITC's focus on relatively small changes in the frequency of underselling, while ignoring dramatically different volumes of non-subject imports;**

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<sup>1</sup> *Canada – Aircraft (AB)*, para. 203; *see also US – Wheat Gluten (AB)*, paras. 171-172.



**Comment:**

5. See discussion below in response to Question 14.

\* \* \*

**§ 26 : the issue of correlation, in the context of causal nexus: what changed from 2000, when the domestic DRAMS industry had record performance, and 2001, when price fell and industry profits plunged;**

**Comment:**

6. No comment.

\* \* \*

**§ 33 : the selection of data on record about product substitutability;**

**Comment:**

7. No comment.

\* \* \*

**§ 34 : the portion of subject imports underselling in 2001 was 5% of the market, whereas the portion of non-subject imports underselling was 27% of the market;**

**Comment:**

8. See discussion in answer to Question 14 below.

\* \* \*

**§ 37 : the ITC does not explain why the effect of supplier competition was attributed to the small change in subject import market share, rather than the much larger market share of non-subject imports and the rate at which non-subject imports were gaining market share;**

**Comment:**

9. No comment.

\* \* \*

**§ 39 : the key missing point – non-attribution required the ITC to separate and distinguish the role of subject import supply sources from domestic and non-subject import supply sources;**

**Comment:**

10. No comment.

\* \* \*

**§ 49 : appearance of control where none exists, nothing suggests that the GOK would intervene in day-to-day credit decisions of various banks;**

**Comment:**

11. No comment.

\* \* \*

**§ 76 : the argument regarding the size of Citibank's loan.**

**Comment:**

12. No comment.

\* \* \*

**2. With regard to para. 32 of the Second Written Submission of the US, are the "actions that directly evinced entrustment and direction" those set forth in section 1(a) – (c) of that submission? Is the US arguing that there is both direct and indirect evidence of entrustment / direction? Why is mandatory participation under the CRPA included as an "action [...] that directly evinced entrustment and direction", when at para. 33 of its replies to the Panel's questions, the US asserts that "[t]he DOC did not find that mandatory participation under the CRPA constituted, in and of itself, entrustment or direction"?**

**Comment:**

13. No comment.

\* \* \*

**3. Please comment on Korea's argument (para. 128 of Korea's Second Written Submission) that "there is simply no evidence indicating that Shinhan, Hana, or KorAm bank were entrusted or directed by the GOK to extend their portion of the syndicated loan". What evidence of entrustment / direction did the US rely on in respect of the participation of these banks in the syndicated loan? Even if one does not accept Korea's argument on the need for specific banks to be directed to perform specific tasks, is it not necessary for an investigating authority to point to evidence showing that creditors included in the finding of entrustment/direction were actually entrusted / directed ?**

**Comment:**

14. No comment.

\* \* \*

4. At para. 18 of its Answers to the Panel's questions, the US asserts that "The DOC did not find specifically that government-owned and controlled private entities 'were instruments through which the GOK entrusted/directed other entities'. Rather, the DOC found, for example, that the GOK exercised control over Hynix's creditors generally through government-owned and controlled banks, because those banks played a dominant role in the Creditors Councils." Does the US response mean that control over creditors through government-owned and controlled private entities is not relevant to the issue of entrustment / direction of those creditors? How does the concept of the exercise of control over creditors differ from the notion of entrustment / direction of those creditors?

**Comment:**

15. No comment.

5. At para. 20 of the US Answers to Panel questions, the US asserts that "the motives of private investors are not germane" to the issue of entrustment/direction. At para. 24, however, the US argument of entrustment/direction relies on private creditors knowing what was good for them. If entrustment/direction is based on creditors knowing what is good for them, doesn't that imply an analysis of their motives?

**Comment:**

16. No comment.

\* \* \*

6. At para. 33 of its Answers to the Panel's questions, the US asserts that "[t]he DOC did not find that mandatory participation under the CRPA constituted, in and of itself, entrustment or direction. Rather, the DOC found that the GOK used the CRPA as a vehicle to effectuate the GOK's Hynix policy." Does this mean that the alleged mandatory nature of the CRPA is not relevant to the issue of entrustment / direction? How does the notion of entrusting / directing someone to carry out an objective differ from using something as a vehicle to have someone effectuate that objective? If the October 2001 restructuring had occurred in isolation, would the CRPA in and of itself have been sufficient evidence of entrustment /direction?

**Comment:**

17. No comment.

\* \* \*

7. What was the evidence of entrustment / direction in respect of Pusan?

**Comment:**

18. In over 140 pages of the DOC's unpublished Decision Memorandum, Pusan Bank is mentioned once, and only in reference to Hynix's argument that:

it is clear that the privately-controlled banks (including Citibank, Koram Bank, Shinhan Bank, Hana Bank, *Pusan Bank*, Kookmin Bank, Housing and Commercial Bank ("H&CB"), Korea First Bank ("KFB"), and KEB) acted independently of GOK influence when participating in the Hynix loans and restructurings. Hynix contends that the record evidence relating to these banks (if any was provided at all) either 1)

does not provide substantial evidence of GOK influence or control over the banks; 2) had nothing to do with Hynix; 3) did not refer specifically to the May or October restructuring, or the syndicated bank loan; 4) was based only on speculation; or 5) actually confirms the independence of certain banks. Thus, Hynix argues that loans or other funds from these banks cannot be deemed a financial contribution, and that these banks' should be used as benchmarks.<sup>2</sup>

\* \* \*

**8. Regarding Figure US-4, the different proportions of council vote held by group A, B and C creditors in respect of the October 2001 restructuring do not add up to 100%. Please explain.**

**Comment:**

19. No comment.

\* \* \*

**9. What was the basis for the DOC's finding that Citibank was not entrusted / directed?**

**Comment:**

20. At the second meeting with the Panel, the United States responded that since Citibank was a foreign bank, it did not find it to be entrusted or directed. This approach to Citibank, however, is at odds with the treatment of other Korean banks.

21. First, several of the other Korean banks were essentially controlled by foreign investors. The evidence before the DOC showed, for example, that KFB had 51 per cent foreign ownership as of 1999, Kookmin had 64.5 per cent foreign ownership as of June 2001, H&CB had 65.4 per cent foreign ownership by June 2001, KorAm had 59.5 per cent foreign ownership by 2000 (JP Morgan holding over 40 per cent by itself), KEB had 58.8 per cent foreign ownership as of June 2001, Shinhan had 52.1 per cent foreign ownership by 2000, and Hana had 52 per cent foreign ownership by the end of 2001.<sup>3</sup> If the control by foreign interests distinguished Citibank, this foreign control should have distinguished other Korean banks as well.

22. Second, the DOC disregarded Citibank as a benchmark by citing alleged influence by the GOK, and Citibank's desire to build its business in Korea. This rationale is in fact quite similar to the DOC argument for why other Korean banks were deemed entrusted or directed. The DOC rationale is internally inconsistent.

\* \* \*

**10. In its Second Written Submission to the Panel, the US refers to the Kookmin Prospectus in a section entitled "GOK Ownership and Control of Hynix's creditors". Does the US argue that GOK's 15.1% shareholding resulted in GOK control over Kookmin?**

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<sup>2</sup> DOC Decision Memorandum at 40 (emphasis added).

<sup>3</sup> See *Hynix's Initial Arguments on: The Independence of Korean Banks Hynix Paper on the Independence of Korean Banks*, pp. 10-28, GOK Exhibit 25.

**Comment:**

23. We note that foreign investors owned 64.5 per cent of Kookmin Bank as of June 2001<sup>4</sup>, and this substantial foreign ownership is part of the Kookmin's independence. No reasonable and objective authority would put such stress on the 15% GOK ownership, and so little attention on the 64.5 per cent foreign investor ownership.

We also note that the Kookmin prospectus refers to the possibility of influence, and never refers to any GOK control over lending decisions. Indeed, the Kookmin prospectus must be contrasted to the actual behavior of Kookmin in the October 2001 restructuring, where Kookmin refused to make any new loans to Hynix. A reasonable authority would not have concluded that Kookmin was "controlled" or even entrusted or directed based on these facts.

\* \* \*

**11. In reply to question 1 from the Panel, the US stated that "the constituent parts of the subsidy programme ... included the 800 billion won syndicated loan, the KDB Fast Track bond program, the May 2001 restructuring package, the October 2001 restructuring package, and the benefits conferred by these and other financial contributions, such as D/A loans, made as part of the Hynix bailout." Please specify an exhaustive list of the constituent parts of the alleged subsidy programme.**

**Comment:**

24. No comment.

\* \* \*

**12. Please comment on para. 182 of Korea's Second Written Submission. In particular, does the US accept that the Hynix-only import figures are a reasonable proxy for the total import figures ?**

**Comment:**

25. We note that that the Hynix figures are a reasonable proxy. The Panel can use either the Korean presentation of these figures, or the US presentation of these figures, since they are both basically the same. The problem with the US figures is that the United States did not bother to extend the analysis to quantify the amount of non-subject imports, which is a critical part of the analysis.

26. We also note given the US choice not to provide either the actual information or some other non-confidential version, the Panel has both the legal authority and discretion to draw adverse inferences.<sup>5</sup> In this case, the Panel can simply draw the inference that the Hynix figures are in fact a reasonable proxy.

\* \* \*

**13. Please comment on Korea's argument regarding the difference between the US submission and the ITC report regarding the extent of the "portion" speciality products (para. 211 of Korea's Second Written Submission). Please comment on Korea's argument regarding**

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<sup>4</sup> *Id.* at 19.

<sup>5</sup> See response to panel question 1 above.

the ITC's use of "value estimates" in respect of those speciality products (para. 212 of Korea's Second Written Submission).

**Comment:**

27. No comment.

\* \* \*

14. In response to Question 23 from the Panel, the US asserts that although the ITC determined that non-subject imports were responsible for "the bulk of the market share lost by domestic producers during the period of investigation," it identified two reasons why it did not find the volume of non-subject imports as significant as otherwise would be suggested. First, the ITC referred to the composition of non-subject imports. Second, the ITC referred to the price effects of non-subject imports. How do these two factors qualify the loss of market share? Wouldn't any impact resulting from the composition and price effects of non-subject imports already be reflected in the market share data? For example, wouldn't the fact that non-subject imports include speciality products mean that they would have taken less market share from domestic producers, and that this consideration is therefore already reflected in the market share data?

**Comment:**

28. We do not believe the ITC reasons adequately address the significance of the volume of non-subject imports. At the second meeting with the Panel, the United States argued that it did address the volume and increase in non-subject imports. But acknowledging a fact is not the same thing as analyzing that fact in an objective way. Even if we completely exclude the 20 per cent of the non-subject imports that the US contends do not compete (a characterization and argument with which we disagree), the remaining 80 per cent still dwarf the size and trends of the subject imports. It is not reasonable or logical to stress modest differences in the frequency of underselling while not taking into account the relative volumes of the subject versus non-subject imports.

29. Moreover, this logical defect is even more egregious given the ITC reason for stressing the small volume of subject imports. All of the ITC statements about commodity products and substitutability apply with equal force to that portion of the non-subject imports than are not RAMBUS or speciality products. If the small volume of subject import could have a more significant effect, that logic applies with even greater force to the much larger volume of non-subject imports that were growing faster than the subject imports.

30. Consider the following summary of the data before the ITC:

	<u>2000</u>	<u>2001</u>	<u>2002</u>
Market Share <sup>6</sup> – Subject	6.7	9.0	8.9
Market Share – Non-Subject	49.9	56.7	60.4
Frequency in Underselling <sup>7</sup> – Subject	51.0	56.0	69.8
Frequency in Underselling – Non-Subject	46.6	47.7	60.7

<sup>6</sup> See GOK First Submission, at para 250. The same analysis would apply if instead of the Hynix figures, we were to use the figures from US Figure 1, as summarized in the US Second Submission.

<sup>7</sup> See GOK Exhibit 5, ITC Determination at page 25, fn. 164.

31. The ITC stressed two points: the frequency of underselling was “lower”, and “increased less”, and therefore the trends in non-subject imports could be ignored. For each of these two points, the price data alone and then the price data viewed in light of the disparate volumes present interesting contrasts. We submit that the conclusions drawn from this data, although technically correct, are in fact fundamentally misleading, biased, and unsatisfactory.

32. At the outset, we note the basic point about market share. The growing market share of non-subject imports confirms the extent to which price competition by non-subject imports was having a dramatic effect in the market place. But objectively viewed, the data shows even more.

33. The ITC stressed the somewhat “lower” frequency of underselling: 4.4 per cent points in 2000, 8.3 percentage points in 2001, and 9.1 per cent points in 2002. But this focus on the difference obscures the fact that both subject and non-subject imports had a high frequency of underselling. Moreover, since this still high frequency of non-subject underselling applied to much greater volume of non-subject imports, the overall impact of non-subject imports would be much greater. Consider the relative volumes of imports that were underselling the domestic prices (in other words, the market share multiplied by the frequency of underselling<sup>8</sup>):

	<u>2000</u>	<u>2001</u>	<u>2002</u>
Market Share <sup>9</sup> – Subject	3.4	5.0	6.2
Market Share – Non-Subject	23.3	27.0	36.7

34. Thus, although the subject imports might have been underselling with a slightly greater frequency, that small difference in frequency is dwarfed by the much higher volume of non-subject imports. The volume of non-subject imports that were underselling was consistently five times larger than subject imports. The subject imports underselling the domestic price gained only 2.8 percentage points of market share, while the non-subject imports underselling the domestic price gained 13.4 percentage points. Thus the absolute magnitude and the change in magnitude were much greater for non-subject imports.

35. The ITC also stressed the somewhat lower rate of increase in underselling: subject imports underselling increased 18.8 per cent points, but non-subject imports increased only 14.1 percentage points over the 2000 to 2002 period. This difference is actually quite modest, since both subject and non-subjects increased their frequency of underselling. Relative to the fact that both subject and non-subject imports were underselling more than 60 per cent of the time, this change in the rate of increase of only 4.7 percentage points is small.

36. But once again, the ITC focus on this small change is oblivious to the much larger absolute volume (60% for non-subject in 2002, versus only 9% for subject) and increase in market share (a gain of 10.5 percentage points versus 2.2%) by non-subject imports.

37. The ITC’s superficial conclusions simply do not do justice to the underlying data. Rather than analyse the data carefully, the ITC drew conclusions designed to confirm an outcome. This approach is not sufficient to satisfy the obligations of Article 15.

\* \* \*

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<sup>8</sup> Note that these percentages come from the ITC data on pricing, they focus on the commodity products, not the speciality products.

<sup>9</sup> Market share multiplied by the frequency of underselling.

**15. Did the DOC conclude that the KEB was entrusted or directed to (a) participate in the Syndicated Loan and/or (b) seek a loan limit waiver?**

**Comment:**

38. The DOC did not make any distinction between these two different steps in its determination.<sup>10</sup> Indeed, it is not really clear that the DOC ever attempted to accomplish the first step. The DOC evidence related only to the loan limit waiver, not the decision to participate in the loan itself.<sup>11</sup>

\* \* \*

**16. To what extent was the USD 1.35 billion GDS offering taken into account by the DOC with respect to its finding of entrustment / direction of Hynix's creditors?**

**Comment:**

39. The DOC did not consider the \$ 1.25 billion GDS offering in the context of entrustment or direction. Rather, the DOC discussed this issue only in the context of "benefit", in determining whether the May 2001 GDS could serve as an equity benchmark for the October 2001 debt-equity swap.<sup>12</sup> Remarkably, the DOC did acknowledge that a successful GDS did represent a contingency upon which other actions under the May restructuring were dependent,<sup>13</sup> but the implication was simply ignored.

\* \* \*

**17. Was the participation by "small" creditors accounting for approximately 20% of the debt in the October Restructuring countervailed?**

**Comment:**

40. Yes. DOC countervailed the entire amount of the October restructuring not represented by Citibank, including all debt forgiveness, debt-for-equity swaps, and maturity extensions effected by all participants in the process.

\* \* \*

**B. QUESTIONS TO KOREA**

**18. Please comment on the following paragraphs of the Opening Statement of the US at the Second Substantive Meeting of the Panel:**

**§ 24 : Korea's concession that the transactions made under the KFB Fast Track Programme constitute financial contribution, but could still serve as benchmarks for determining benefit;**

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<sup>10</sup> DOC Decision Memorandum at 50.

<sup>11</sup> *Id.* at 51-52.

<sup>12</sup> *Id.* at 90-91.

<sup>13</sup> *Id.* at 20.



**Answer:**

41. The United States is mischaracterizing the Korean argument about the KDB Programme. The United States is blurring the distinction between the bonds held by the KDB itself, and the bonds that were held by the other Korean private banks. Under this programme, banks that already held the Hynix bonds had to buy back and refinance some portion of those bonds. Most of the bonds were then repackaged and sold to investors as “investments trusts” (like mutual funds). The KDB itself held only a portion of the bonds.

42. Our point at page 15 of the Korean answer to Panel Question #23 was simple: even if the KDB is deemed to be a public body and thus the bonds held by the KDB could constitute a financial contribution, there are other banks holding identical bonds on identical terms. We do not agree with the US premise that the other private Korean banks were entrusted or directed, an argument developed extensively in the Korean submissions in this proceeding. Thus if any of the private Korean banks are found not to have been entrusted or directed, those banks could and should serve as benchmarks for that small portion of the bonds held by the KDB.

43. Moreover, for both the bonds held by the KDB and the bonds held by private Korean banks, the comparison of interest rates to market interest rates confirms the lack of any benefit. If the market price for three-year debt in Korea is about 7 per cent in 2001, then it is hard to see how refinancing bonds at interest rates ranging from 10.99 to 12.56 per cent can constitute a benefit.

\* \* \*

**§ 45 : no requirement in the SCM Agreement that the period examined for the subsidies inquiry cover the entire period examined for the injury determination.**

**Answer:**

44. Although we agree there is no such specific requirement in the SCM Agreement, this US argument mischaracterizes the Korean argument. We never attack the DOC finding for investigating a period shorter than the ITC period, or attack the ITC for examining a period longer than the DOC period.

45. Our point is simply that proper causation analysis takes into account the existence or non-existence of temporal correlation. In this case, we do not believe any temporal correlation exists, and this absence of correlation calls into serious question any ITC conclusion about the existence of a causal link.

\* \* \*

**19. With reference to Figure US-1, does Korea contest the DOC's conclusion that each of the Group B creditors were controlled by GOK? Please explain.**

**Answer:**

46. Yes. We disagree with several aspects of this conclusion.

47. First, we disagree with the US premise that ownership alone constitutes control for purposes of any analysis under Article 1.1(a). As Korea has argued, the Public Fund Oversight Act and the Memoranda of Understanding ensured that those banks in which the GOK had to take ownership would continue to make day-to-day decisions independently.

48. Second, we further disagree with the assumption that the capacity to control implies the same meaning as entrustment or direction. In the case of a private body (such as a bank) in which the government has a shareholding (minority or majority) allowing it to exercise a decisive influence over the private body's operations, the mere fact that the private body is under government control is not sufficient to presume that a measure adopted by that body has been "directed" by the government. It must be established that the government has actually exercised its control to direct the bank to participate in the measure. The other interpretation would -- in plain contradiction with the text of Article 1.1(a)(1)(iv) of SCM Agreement -- replace a more explicit standard of "direction" with a looser "control" standard.

49. Third, the KEB was not controlled by the GOK. Two different GOK entities each held a portion smaller than the largest shareholder, Commerzbank. When Commerzbank made its substantial investment in KEB, it asserted significant managerial control, including assigning a Commerzbank official to chair the loan committee. Given the relative shareholding and the operational control by Commerzbank officials, it makes no sense to conclude the KEB was being controlled by the GOK.

50. Fourth, the KFB was not controlled by the GOK. Newbridge Capital, a US financial firm, held 51% of the shares. Like Commerzbank, once Newbridge made this investment it assumed significant managerial control over day-to-day operations. Indeed, the US argument itself demonstrates the degree of KFB independence, even in the face of alleged pressures from others to take certain actions.

51. Fifth, we note that the investment trusts and financing companies are not owned or controlled by the GOK. This is a new aspect of the US argument, not part of the original DOC rationale.

52. Finally, the US assertion of "control" is at odds with the actual experience of many of these banks to decide not to participate in various parts of the Hynix restructuring. With respect to the December 2000 syndicated loan, since Hynix was trying to obtain 1000 billion won, but could only arrange 800 billion in loans, why did not Seoul Bank, Peace Bank, Kwangju Bank, or Kyongnam Bank make up some or all of the shortfall, if they were being controlled by the GOK? These banks, like the others, were making their own decisions. Similarly, the United States characterized all banks as participating in the October 2001 restructuring, even those that refused to provide any new funds or even agree to debt-equity swaps (Kwangju Bank, Kyongnam Bank, and KFB). If these banks were "controlled", why did they not provide the new loans that Hynix needed?

\* \* \*

**20. With reference to Figure US-1, does Korea contest the DOC's conclusion that each of the Group B creditors were entrusted or directed by GOK ? Please explain.**

**Answer:**

53. Yes, we disagree with this conclusion as well. The discussion in answer to Question 19 above applies here as well. We would note the following additional points.

54. First, the conclusion of entrustment or direction makes absolutely no sense for the October 2001 restructuring. KFB and several others refused any new loans, and instead exercised Option No. 3 and then mediation to obtain the liquidation value of their outstanding debt, in accordance with the value set by the Arthur Anderson valuation report. That such banks would be deemed entrusted or directed is not supported by any plausible review of the facts.

55. Even for the other banks, the DOC drew conclusions based on extremely limited evidence. Notwithstanding its claim not to be relying upon general pronouncements, that is precisely what the United States uses as “evidence” for the October restructuring. Against this evidence, the DOC never analyzed or acknowledged the strong self-interest these banks had in trying to make restructuring work. Those banks with the largest stakes had the most to lose from bankruptcy and the most to gain from debt restructuring. This self-interest is a crucial part of the overall context and evidence that any reasonable authority would have considered. The problem in this case is that the DOC analysis put on blinders, and deemed any consideration of existing debt to be irrational and therefore irrelevant. This approach makes no sense as an effort to understand the decisions of Korean investors operating in a Korean market context.

56. Second, the conclusion of entrustment or direction also does not make any sense for the May 2001 restructuring. The May 2001 restructuring involved primarily rolling over existing debt at basically the same interest rates. By doing so, the banks allowed Hynix to obtain \$1.25 billion in new equity capital, which was conditioned on the banks agreeing to roll over existing debt rather than absorbing the new equity capital to pay off existing debt. The foreign investors wanted new money to be used for capital spending and R&D spending, not just allowing existing Korean creditors to cash out. Against this context, the US “evidence” of entrustment or direction simply does not allow a reasonable and objective authority to draw the conclusions that the DOC drew in this case.

57. We have addressed the failings in the US evidence of entrustment or direction at length, and we need not repeat those arguments here. Those arguments apply to the entities listed in Group B, as well as the others in Group C. The US approach pays too little attention to the legal standard of Article 1.1(a)(1)(iv), too little attention to the compelling reasons the banks had for participating in the Hynix restructuring, and too much attention to sensational remarks by Korean politicians.

## ANNEX E-6

### ANSWERS OF THE UNITED STATES TO THE PANEL'S QUESTIONS TO THE PARTIES FOLLOWING THE SECOND SUBSTANTIVE MEETING OF THE PANEL

6 August 2004

Table of Reports Cited in These Answers

<i>EC – Tube or Pipe Fittings</i>	<i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/R, Report of the Panel, as modified by the Appellate Body, adopted 18 August 2003</i>
<i>US – Wheat Gluten</i>	<i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R, Report of the Appellate Body adopted 19 January 2001</i>
<i>Brazil – Aircraft</i>	<i>Brazil – Export Financing Programme for Aircraft, Panel Report, WT/DS46/R, Report of the Panel, as modified by the Appellate Body Report on other grounds, adopted 20 August 1999</i>
<i>US – Softwood Lumber</i>	<i>United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada, WT/DS257/AB/R, Report of the Appellate Body adopted 14 February, 2004</i>
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	<i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina, WT/DS268/R, Report of the Panel circulated 16 July 2004 (unadopted)</i>
<i>Argentina – Hides and Leather</i>	<i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, WT/DS155/R, Report of the Panel adopted 16 February 2001</i>
<i>US – DRAMS</i>	<i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, WT/DS99/R, Report of the Panel adopted 19 March 1999</i>

## A. QUESTIONS TO THE UNITED STATES

### 1. Please comment on the following paragraphs of Korea's Opening Statement at the Second Substantive Meeting of the Panel:

**§ 20: the hypothetical of Hynix being the lowest price twice, but 98 other suppliers being each the lowest price once;**

1. Korea's hypothetical is not informative with respect to the issues raised in this dispute. To appreciate why this is so, it is first necessary to put the ITC's price undercutting analysis in context.

2. The ITC compared the weighted-average price of subsidized subject imports with the weighted-average price of the domestic industry's US shipments for eight specific standard DRAM products over a monthly time series spanning the period from January 2000 to March 2003. These comparisons comported with the relevant enquiry under Articles 15.1 and 15.2 of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) concerning the price effects of the subsidized subject imports on the domestic industry. Based on these comparisons, the ITC found increasing undercutting at high margins (often greater than 20 per cent) in the majority of instances by subsidized subject imports. It also found consistent and substantial undercutting for particular high-revenue products to particular channels of distribution at specific points during the period of investigation.<sup>1</sup>

3. Although there is no requirement in the SCM Agreement to do so given the facts of the DRAMs investigation, in response to Hynix's argument, the ITC also examined the pricing data on a disaggregated basis by both brand name and by source. The ITC determined that even a disaggregated analysis showed that subject DRAM products from Hynix's Korean facilities were the lowest-priced product "more often than DRAM products from any other source".<sup>2</sup> In other words, the disaggregated analysis of the pricing data confirmed the ITC's finding of significant price undercutting by subsidized subject imports.

4. Korea seeks to divert the Panel's attention from the significance of these findings by introducing hypotheticals concerning the ITC's disaggregated pricing analysis that have no bearing on the facts of the DRAMs investigation.<sup>3</sup> In its initial hypothetical, Korea assumed that there were 10 sales for which different suppliers were competing, that Hynix was the lowest priced source 2 times, and that eight other suppliers were the lowest priced source on at least one occasion.<sup>4</sup> Korea has now modified the hypothetical such that Hynix was the lowest priced source twice, but 98 other suppliers were each the lowest priced source once.<sup>5</sup>

5. These hypotheticals are meaningless for several reasons. First, Korea overlooks the fact that subsidized imports from Korea were the lowest-priced source in a disaggregated analysis of the

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<sup>1</sup> See, e.g., USITC Pub. 3616 at 23-24, V-3 to V-9 & Tables V-1 to V-18 (Exhibit GOK-10).

<sup>2</sup> See, e.g., USITC Pub. 3616 at 24 (Exhibit GOK-10).

<sup>3</sup> Korea also calls attention to the fact that the ITC did not reveal in the public version of its opinion the percentage of times that Hynix was the lowest-priced source under the disaggregated analysis of the pricing data. As we have pointed out in our previous submissions, however, Korea has not challenged the ITC's treatment of this information as confidential, nor has Korea challenged the ITC's summary of this confidential information as inadequate under Articles 12.4 or 22.5 of the SCM Agreement. This information is confidential because it identifies the percentage of times that a single subject foreign producer, Hynix of Korea, was the lowest-priced supplier in the US market based on a disaggregated analysis of the pricing data.

<sup>4</sup> *First Written Submission by the Republic of Korea*, 19 April 2004, para. 161 [hereinafter "Korea First Submission"].

<sup>5</sup> *Second Substantive Meeting; Oral Statement of the Government of Korea*, 21 July 2004, para. 20 [hereinafter "Korea Second Oral Statement"].

pricing data. This was so notwithstanding the fact that the DRAMs investigation involved an industry where there were *thousands* of transactions (and not only one hundred transactions, as Korea posits) over a 39-month investigation period and where the products for which the pricing data were gathered were highly substitutable for one another.

6. Second, the ITC's disaggregated pricing analysis was based on the data of only those few key suppliers to the US market. By contrast, Korea's second hypothetical is predicated on the existence of 99 suppliers, a scenario which even Korea admits is "extreme".<sup>6</sup> In the view of the United States, it is more than extreme; it is completely divorced from the factual record of the DRAMs investigation.

7. The ITC's disaggregated analysis of the pricing data was based on an examination of reported pricing information concerning *eight* sources of DRAM products from the four major players in the US market: (1) subsidized subject imports produced by Hynix in Korea; (2) Hynix-brand products produced in the United States; (3) Micron-brand products produced in non-subject countries; (4) Micron-brand products produced in the United States; (5) Infineon-brand products produced in non-subject countries; (6) Infineon-brand products produced in the United States; (7) non-subject Samsung-brand products produced in Korea; and (8) Samsung-brand products produced in the United States.<sup>7</sup> Subsidized subject imports were the lowest-priced product more often than any of these other sources, and at a magnitude that was greater than would be expected if each source were the lowest-priced product one-eighth of the time, as might be expected in an industry like this involving a fungible product and the rapid dissemination of pricing information.<sup>8</sup> The disaggregated analysis showed that subsidized subject imports were the lowest-priced DRAM products more often than any of the major US sources of DRAM products. Hynix's subsidized subject imports were the lowest priced more often than Micron's US DRAM products; Hynix's subsidized subject imports were the lowest priced more often than Infineon's US DRAM products; Hynix's subsidized subject imports were the lowest priced more often than Samsung's US DRAM products; and finally, Hynix's subsidized subject imports were the lowest priced more often than DRAM products from Hynix's own Eugene, Oregon facility.

8. Thus, based on both the weighted-average comparison of prices for subsidized subject imports and US shipments of DRAM products by the domestic industry and the disaggregated analysis of the pricing data, the ITC reasonably concluded that subsidized subject imports significantly undercut the domestic industry's DRAM prices.

9. To the extent that Korea is also arguing in the above-referenced paragraph 20 that the prices of non-subject imports are somehow relevant to the ITC's analysis of price undercutting by subsidized subject imports, Korea fails to identify any requirement in Article 15.2 of the SCM Agreement for an investigating authority to examine non-subject imports in that context. An investigating authority's analysis of price undercutting pursuant to the plain text of Article 15.2 is limited to a comparison of the subsidized subject imports and the like product produced by the domestic industry.

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<sup>6</sup> Korea Second Oral Statement, para. 20.

<sup>7</sup> See *First Written Submission of the United States of America*, May 21, 2004, para. 375 [hereinafter "US First Submission"]. Hynix conceded early in the DRAMs investigation that there were only four major players globally and in the US market (Samsung, Micron, Hynix, and Infineon, in decreasing order of magnitude). See, e.g., Conference Transcript at 117-118 (Exhibit US-95).

<sup>8</sup> Indeed, the ITC's disaggregated analysis was conservative. There were instances where certain products were the *only* source in the market (e.g., because other firms were not yet capable of selling those products) and yet they were considered the lowest-priced source. Had the ITC only considered instances where there were sales from more than one brand-name source in a particular month, the undercutting frequency for subsidized subject imports based on a disaggregated analysis by both brand name and by source would have been even higher.

10. Nevertheless, the ITC did examine the weighted average price of non-subject imports. It determined that the undercutting frequency by non-subject imports was lower than, and increased less than, the undercutting frequency of subsidized subject imports during the period of investigation.<sup>9</sup> The ITC found that “subject imports undersold non-subject imports in a majority of instances”.<sup>10</sup> Moreover, notwithstanding Korea’s focus throughout this dispute on Samsung’s non-subject imports, the ITC’s disaggregated analysis of the pricing data revealed that subsidized subject imports produced by Hynix in Korea were more often priced lower than Samsung’s non-subject imports. Similar statements can also be made with respect to the other two major non-subject import suppliers (Micron and Infineon). Hynix’s subsidized subject imports were the lowest priced more often than Micron’s non-subject DRAM products, and Hynix’s subsidized subject imports were the lowest priced more often than Infineon’s non-subject DRAM products.

**§ 22: the ITC’s focus on relatively small changes in the frequency of underselling, while ignoring dramatically different volumes of non-subject imports;**

11. There are a number of flaws with Korea’s arguments in the referenced paragraph 22. Once again, Korea attempts to challenge the adequacy of the ITC’s price undercutting analysis by shifting the discussion to non-subject imports. However, as noted above, the focus of Article 15.2 of the SCM Agreement is on the significance of the price undercutting by subsidized subject imports, not non-subject imports.

12. There is simply no way that a reasonable investigating authority could have dismissed the significance of the undercutting by subsidized subject imports in the DRAMs investigation, regardless of the price undercutting by non-subject imports. Subsidized subject imports undercut the domestic like product in the majority of comparisons examined at high margins (often over 20 per cent), and at increasing frequencies. Undercutting occurred with respect to each of the major channels of distribution (PC OEMs, non-PC OEMs, and non-OEMs). Undercutting was also consistent and substantial for particular high-revenue products to particular channels of distribution at specific points during the period of investigation. For example, by the end of the period examined, undercutting to PC OEMs – the most significant sales channel – reached *100 per cent* of all price comparisons.<sup>11</sup> As the ITC explained, such significant price disparities would not normally be expected in a commodity-type market, and these high margins could be expected to have “particularly deleterious effects on domestic prices”.<sup>12</sup>

13. Furthermore, this is one of many instances where Korea discusses the record evidence in a vacuum. Korea appears to argue in favour of the adoption of some abstract notion of what is “substantial” or “significant”, while eschewing the relationship of facts to the particular circumstances in which they arise. For example, Korea speaks of “relatively small changes in the frequency of underselling” and “dramatically different volumes of non-subject imports”. Nowhere, however, does the SCM Agreement identify any “change” in undercutting or in volume as by definition “small”, “dramatically different”, or any other such term. This is entirely logical, because in the abstract, no such change can automatically be regarded as “significant” or “insignificant”.

14. As we have emphasized in our submissions to the Panel, and as the ITC emphasized throughout its final determination, it is only when the factual data are examined in terms of the conditions of competition in the particular industry that an otherwise abstract figure or change has meaning. The ITC’s determination evinced how the agency put the facts of the DRAMs investigation

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<sup>9</sup> See, e.g., USITC Pub. 3616 at 25 & n.164 (Exhibit GOK-10).

<sup>10</sup> See, e.g., USITC Pub. 3616 at 25 n.164 (Exhibit GOK-10).

<sup>11</sup> See, e.g., USITC Pub. 3616 at 23-24 & nn.155, 165 (Exhibit GOK-10).

<sup>12</sup> See, e.g., USITC Pub. 3616 at 24 (Exhibit GOK-10).

in context.<sup>13</sup> By contrast, in its submissions to the Panel, Korea has opted to examine the evidence in a vacuum and to characterize trends concerning subsidized subject imports as “small” and trends concerning non-subject imports as “dramatic”.

15. Korea ignores the following key facts about the DRAMs industry: (1) subsidized subject imports were highly substitutable for domestically produced DRAMs products; (2) demand was inelastic so that lower prices were unlikely to generate additional purchases; and (3) information about the prices that a handful of suppliers were offering was transmitted extremely quickly to purchasers, including through mechanisms such as most favoured customer and best price clauses and other such mechanisms.<sup>14</sup> Thus, a given volume or a given volume increase of DRAM product imports – absolutely or relative to domestic production or consumption – has a greater effect on the domestic industry than it would for a highly differentiated product.

16. In the DRAMs investigation, the pricing data showed extreme price undercutting by subsidized subject imports. In addition, other record evidence reinforced these findings, showing that even purchasers that may have been reluctant to commit large portions of their purchases to the financially troubled Hynix freely used Hynix’s low-priced offers as a bargaining tool to ratchet down prices from other potential suppliers.<sup>15</sup> Articles 15.1 and 15.2 of the SCM Agreement, which employ disjunctive language, plainly contemplate that there may be cases where there are significant adverse price effects without any increase in subject import volume, such as where the domestic industry lowers its prices in order to retain market share.<sup>16</sup>

17. In the referenced paragraph, Korea also repeats its mistaken assertion that the ITC “ignored” non-subject import volume. The ITC’s determination demonstrates otherwise. The ITC explicitly recognized that non-subject imports “increased market share by a substantially larger amount than subject imports”. At the same time, however, the ITC found that “subject import volume and pricing were themselves sufficient to have a significant negative impact on the domestic industry”.<sup>17</sup>

18. The ITC considered the possible effects of the increasing volumes of non-subject imports on domestic prices. Whereas it is our understanding that most other Members do not even collect pricing information on non-subject imports, the ITC collected such data in the DRAMs investigation. The ITC examined the pricing data concerning non-subject imports by means of a weighted-comparison and by means of a disaggregated analysis by brand-name and by source. It recognized that there were instances where non-subject imports undersold the domestic industry.<sup>18</sup> The ITC also looked at the timing, magnitude, and frequency of the undercutting by non-subject imports. The undercutting frequency by non-subject imports was lower than, and increased less than, the undercutting frequency of subject imports during the period of investigation. In particular, while subject imports were increasing their undercutting frequency between 2000 and 2001 from 51 per cent of all observations to 56 per cent of all observations, the frequency of undercutting by non-subject imports was fairly steady at 46.6 per cent of instances in 2000, and 47.7 per cent in 2001. Undercutting by subsidized

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<sup>13</sup> See, e.g., *Answers of the United States of America to the Panel’s Questions to the Parties Following the First Substantive Meeting of the Panel*, 9 July 2004 (Answer to Question 20) [hereinafter “US Answers to Panel Questions”], regarding how the ITC examined the volume data in context; *Second Written Submission of the United States*, 9 July 2004, paras. 73 to 91 [hereinafter “US Second Submission”], regarding how the ITC examined the price effects of the subsidized subject imports in context.

<sup>14</sup> See, e.g., USITC Pub. 3616 at 22-23 (Exhibit GOK-10).

<sup>15</sup> See, e.g., Hearing Transcript at 23, 50, 72-75 (Exhibit US-94).

<sup>16</sup> Of course, the ITC found, based upon record evidence, that there were significant increases in the volume of subsidized subject imports during the time period covered by the DRAMs investigation.

<sup>17</sup> See, e.g., USITC Pub. 3616 at 21 (Exhibit GOK-10).

<sup>18</sup> See, e.g., USITC Pub. 3616 at 25 (Exhibit GOK-10).



subject imports increased to 69.8 per cent of all observations in 2002, about 10 percentage points higher than the percentage for non-subject imports in that year (60.7 per cent).<sup>19</sup>

19. In other words, between 2000 and 2001, when DRAMs prices experienced historically unprecedented severe declines<sup>20</sup>, it was subsidized subject imports whose undercutting frequency was increasing, not non-subject imports. Moreover, the frequency and magnitude of undercutting by subject imports continued to increase into 2002, as prices continued to decline.<sup>21</sup> The ITC determined that “[w]hile non-subject import market share grew, the primary negative impact on the domestic industry was due to lower prices, and on this point, subject imports, themselves, were large enough and priced low enough to have a significant impact. This is so regardless of the adverse effects caused by non-subject imports”.<sup>22</sup> The ITC evaluated the growing market share of non-subject imports and concluded that while non-subject imports were having “adverse effects” on the domestic industry, subsidized subject imports themselves were having a significant negative impact on the domestic industry.<sup>23</sup>

20. There is nothing in the SCM Agreement that prevents an investigating authority from determining that subsidized subject imports materially injure the domestic industry, even if non-subject imports are larger, or increase by a larger amount, than subject imports. Nor is there any language in the SCM Agreement that prevents an investigating authority from making an affirmative determination if the volume or price effects of non-subject imports are also having an adverse impact on the domestic industry.

21. Indeed, the plain text of Article 15.5 contemplates that a domestic industry may be being injured by one or more other known factors at the same time that subject imports are materially injuring the domestic industry. It specifies that “The authorities shall also examine any known factors other than the subsidized imports *which at the same time are injuring* the domestic industry ... .” (emphasis added). The key is simply that the investigating authority is to take care not to attribute injury caused by the other factors to the subsidized subject imports.<sup>24</sup>

22. Even though Korea purports to agree with the United States that the SCM Agreement does not require that subject imports be the “sole cause” of the material injury experienced by the domestic industry<sup>25</sup>, the reality is otherwise. Korea’s arguments related to the referenced paragraph 22 do amount to an assertion that subject imports must be the sole cause in order for an investigating authority to make an affirmative injury determination. In order to obscure the harm caused by subsidized subject imports, Korea insists on comparing the relative size of the volume of subject imports and non-subject imports and their relative volume increases, as well as the level of undercutting attributable to each.

23. The discussion above demonstrates how the ITC carefully examined non-subject imports to identify the nature and extent of any injurious effects that non-subject imports were having on the domestic industry in order to ensure that it did not attribute injury from other factors to the subsidized subject imports. Korea simply has failed to demonstrate that a reasonable investigating authority could not have come to the same conclusion based on the record evidence as did the ITC.

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<sup>19</sup> See, e.g., USITC Pub. 3616 at 25 & n.164 (Exhibit GOK-10).

<sup>20</sup> See, e.g., USITC Pub. 3616 at 24 (Exhibit GOK-10).

<sup>21</sup> See, e.g., USITC Pub. 3616 at 24, 25 & n.164 (Exhibit GOK-10).

<sup>22</sup> See, e.g., USITC Pub. 3616 at 27 (Exhibit GOK-10).

<sup>23</sup> See, e.g., USITC Pub. 3616 at 27 (Exhibit GOK-10).

<sup>24</sup> SCM Agreement, Article 15.5.

<sup>25</sup> See, e.g., Korea Second Oral Statement, para. 28.

**§ 26: the issue of correlation, in the context of causal nexus: what changed from 2000, when the domestic DRAMS industry had record performance, and 2001, when price fell and industry profits plunged;**

24. As we have explained in previous submissions, Korea's assertions concerning the lack of correlation between subsidized subject imports and the material injury suffered by the domestic industry are predicated largely on Korea's erroneous assumption that "volume" does not mean the volume of subsidized subject imports, but instead means the volume of all Hynix-brand products being sold in the US market, including those produced at Hynix's Eugene, Oregon plant. Korea does so because it is only by reference to brand-name volume that Korea is able to make the assertion that the volume of Hynix brand products was "declining" during the period of investigation. However, Hynix products produced in Oregon were not subsidized subject imports; instead, they were the production of the US domestic industry.

25. Korea has failed to demonstrate that a brand-name analysis was required under the SCM Agreement given the facts of the DRAMS investigation. Once the focus is shifted from Korea's faulty "brand" enquiry to the relevant enquiry under the SCM Agreement, the causal nexus between the subsidized subject imports and the material injury experienced by the domestic industry is readily apparent.

26. In the referenced paragraph 26, Korea focuses on changes between 2000 and 2001. However, as is evident from the final determination, the ITC examined all of the factors described in Articles 15.1, 15.2, and 15.4 of the SCM Agreement based on the thirty-nine months between January 2000 and March 2003. The ITC also discussed the intervening changes between 2000 and 2001 and between 2001 and 2002, and it also examined the data for the first quarter of ("interim") 2002 and interim 2003.<sup>26</sup>

27. Drawn from Figure US-5 is a summary of the data pertaining to the period between January 2000 and March 2003, as well as a summary of the data for the period between 2000 and 2001:

**During the Period of Investigation**<sup>27</sup>

***Subsidized subject imports***

- Volume significant in absolute terms, increased significantly absolutely and relative to both US. production and consumption (20-21, 24).
- Significant price undercutting at increasing frequencies and at increasingly higher margins, reaching 100 per cent for key products by 2002 (22-24 & n.164).
- Significant price depression, and other factors could not explain the price depression (24-25).
- Hynix is uncreditworthy (1/1/2000 to 6/30/2002); unequityworthy at 10/2001 debt-to-equity swap; DOC determined Hynix total net countervailable subsidy for 1/1/2001 to 6/30/2002 of approximately \$2 billion, or a subsidy rate of 44.71 per cent *ad valorem* (19).

***Domestic industry***

- Increasing US shipments in terms of bits, but declining unit values; declining market share.
- Small and relatively stable end-of-period inventories.
- Overall decline in average production capacity and wafer starts.
- Increase in capacity utilization, but capacity utilization is expected to be high in this industry.

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<sup>26</sup> See, e.g., USITC Pub. 3616 at 20 to 28, Table C-1 (Exhibit GOK-10).

<sup>27</sup> References in parentheses are to the corresponding pages of the report of the ITC's final determination, USITC Pub. 3616 (Exhibit GOK-10).

- Idling of certain production capacity and deferral of upgrades and expansions of production facilities and equipment.
- Four US producers ceased DRAM production in the United States.
- Increasing production quantities in terms of bits, but increases were smaller than increases in apparent US consumption.
- General declines in employment and wages over the period of investigation.
- Due to a large decline in unit sales value, operating income declined from a \$2.7 billion profit in 2000 to a loss in excess of \$2 billion in 2001, and losses continued into 2002.
- As a ratio to net sales, operating income was 32.2 per cent in 2000 then became a loss of 79.2 per cent in 2001 and a loss of 50.8 per cent in 2002; declines in capital expenditures (26-27, Tables III-1, III-5, IV-4, C-1).

### **Between 2000 and 2001**

#### ***Subsidized subject imports***

- Volume significant in absolute terms, significant increases (absolutely, relative to US production/consumption) (20-21).
- Significant undercutting, no matter how data viewed, frequency increasing from 51 to 56 % (22-24 & n.164).
- Precipitous price declines across all products, most severe price decline in DRAMs history (24).
- Anti-Dumping order on DRAM products from Hynix/predecessors revoked 10/5/2000 (19 & n.141).
- Hynix is uncreditworthy (1/1/2000 to 6/30/2002), unequityworthy at 10/2001 debt-to-equity swap (19).

#### ***Domestic industry***

- Increased US shipments.
- Declining unit values.
- Declining market shares.
- Small and relatively stable end-of-period inventories.
- Declining average production capacity.
- Declining wafer starts.
- Slight increase in capacity utilization, but capacity utilization is expected to be high in this industry.
- Certain production capacity idled.
- Upgrades and expansions of production facilities and equipment deferred.
- Declines in production quantities measured in bits.
- General declines in employment and wages.
- Due to a large decline in unit sales value, operating income declined from a \$2.7 billion profit in 2000 to a loss in excess of \$2 billion in 2001.
- As a ratio to net sales, operating income was 32.2 per cent in 2000 then became a loss of 79.2 per cent in 2001.
- Declines in capital expenditures (26-27, Table C-1).

28. As these summaries and the additional data summaries provided in Figure US-5 illustrate, there was a very strong correlation between the volume (and the increases both absolutely and relative to both domestic production and consumption) of the subsidized subject imports and the adverse impact on the domestic industry. There was a strong correlation between the significant price undercutting by the subsidized subject imports and the significant price declines experienced during the period of investigation. There was a strong correlation between these price declines and the

adverse impact on the domestic industry. There was also a strong correlation between the timing of the subsidies and the adverse impact on the domestic industry.

29. Indeed, to provide a further example of the changes occurring between 2000 and 2001 using even more detailed data, we refer the Panel to the pricing data summaries in the ITC's report. As the ITC recognized, PC manufacturers accounted for the vast majority of the revenues on sales of DRAM modules.<sup>28</sup> In 2000, Hynix's subsidized subject imports in this sales channel were priced *above* the domestic industry in fully 75 per cent of all observed price comparisons.<sup>29</sup> In 2001, this pattern reversed itself profoundly when Hynix *undercut* the domestic industry's module prices to this important segment in 68 per cent of all price comparisons.<sup>30</sup> Price undercutting for modules to PC OEMs remained at 68 per cent of observations in 2002.<sup>31</sup>

**§ 33: the selection of data on record about product substitutability;**

30. Contrary to Korea's suggestion, the ITC was not selective in its use of record data concerning product substitutability. The ITC found that within the DRAM product family, DRAM products of similar density, access speed, and variety (regular DRAM, VRAM, SGRAM, etc.) were generally interchangeable "regardless of the country of fabrication".<sup>32</sup> Thus, standard products of a similar density, access speed, and variety were substitutable with one another regardless of country source. However, as explained by the ITC, a more limited degree of interchangeability existed among different varieties of DRAMs, as well as among those with different addressing modes/access speeds.<sup>33</sup> Thus, substitutability was more limited and had to occur at the design phase for DRAM products of different varieties or different addressing modes.

31. Whereas the record indicated, and the ITC found, that nearly all of the subject imports and domestically produced DRAM products were standard DRAM products<sup>34</sup>, such was not the case with non-subject imports. The ITC collected data on the percentage of imported products and US shipments of DRAM products in 2001 and 2002 that were "standard" DRAM products, Rambus DRAM products, and other "specialty" DRAM products. Questionnaire respondents were asked to differentiate the reported information for Rambus DRAM products containing dice fabricated in Korea by "Samsung" and the portion containing dice fabricated in Korea by "others", and to differentiate the reported information for specialty DRAM products containing dice fabricated in Korea by "Samsung" and the portion containing dice fabricated in Korea by "Others".<sup>35</sup> As the United States previously explained<sup>36</sup>, Rambus or specialty DRAM products accounted for approximately one-fifth of all US shipments of non-subject imports in 2001. The corresponding percentage in 2002 was somewhat higher than in 2001.

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<sup>28</sup> See, e.g., USITC Pub. 3616 at 15, 23 n.152 (Exhibit GOK-10).

<sup>29</sup> See, e.g., USITC Pub. 3616 at Table V-18 (Exhibit GOK-10).

<sup>30</sup> See, e.g., USITC Pub. 3616 at Table V-18 (Exhibit GOK-10).

<sup>31</sup> See, e.g., USITC Pub. 3616 at Table V-18 (Exhibit GOK-10).

<sup>32</sup> See, e.g., USITC Pub. 3616 at 17 (Exhibit GOK-10). As an example, the ITC's report explained that a 64 Mb SDRAM manufactured by the subject Korean producer should be fully interchangeable with a similarly configured domestically produced device, as well as with a non-subject import. *Id.* at I-10.

<sup>33</sup> This substitution often must occur during the design phase of the electronic system. For example, according to numerous questionnaire responses, after an electronic system has been designed to operate using a specific type of DRAM, the system would likely not function optimally using a different type. Similarly, with regard to the different addressing modes, once a memory controller has been designed for an electronic system, a specific addressing mode such as EDO or SDRAM has also been designed in. See, e.g., USITC Pub. 3616 at 17, I-10 (Exhibit GOK-10).

<sup>34</sup> See, e.g., USITC Pub. 3616 at 22, 23 n.151, I-10, II-6, Table II-2 (Exhibit GOK-10).

<sup>35</sup> See, e.g., Importers' Questionnaire at question II-10(a) (Exhibit GOK-44(b)).

<sup>36</sup> US Answers to Panel Questions (Answer to Question 17).

32. Thus, some of the non-subject imports sold in the US market during the period of investigation consisted of standard DRAM products that were interchangeable with the corresponding standard DRAM products produced by Hynix in its subject Korean facilities and by the domestic industry. However, a significant portion of non-subject imports were non-standard products. The ITC appropriately took into account these factual differences.

33. In this regard, we reiterate that the eight products for which pricing data was collected in the DRAMs investigation were all “standard” DRAM products.<sup>37</sup> No pricing information was collected on RAMBUS or specialty DRAM products. Thus, when the ITC determined that subsidized subject imports were undercutting the domestic industry at greater frequencies and at larger margins than non-subject imports, this conclusion was based on the pricing behaviour for standard DRAM products.<sup>38</sup>

**§ 34: the portion of subject imports underselling in 2001 was 5% of the market, whereas the portion of non-subject imports underselling was 27% of the market;**

34. There are several flaws with the arguments set forth in paragraph 34. First, Korea insists that a comparison of the undercutting by subsidized subject imports with a comparison of the undercutting by non-subject imports is somehow required. However, such a comparison has no foundation in the text of the SCM Agreement or in reports reviewing countervailing or antidumping duty determinations.

35. The ITC separately examined the volume and price effects of subsidized subject imports and their impact on the domestic industry, and it separately examined the volume and price effects of non-subject imports on the domestic industry, but there was no requirement that it compare and contrast the two. So long as subsidized subject imports themselves materially injured the domestic industry, and so long as the ITC provided a satisfactory explanation of the nature and extent of the injurious effects non-subject imports were having on the domestic industry to show that it did not attribute the injury from other factors to the subsidized subject imports, then the ITC complied with the requirement to separate and distinguish other factors, as articulated by the Appellate Body. As explained above in the response to the question concerning paragraph 22, the ITC satisfied these requirements in the DRAMs investigation.

36. The second flaw in Korea’s arguments relates to the figures cited by Korea. As we have explained in prior submissions, Korea’s calculation of Hynix’s market share is skewed.<sup>39</sup> In paragraph 34, Korea compounds the problem by netting its flawed market share figure for Hynix and the market share for the domestic industry from 100 per cent and calling the remainder the market share for non-subject imports (even though it is at best the market share for non-subject imports *plus* the market share for importers of subsidized subject imports other than Hynix).

37. Korea then multiplies these suspect market share figures by the frequency with which those imports undersold the domestic industry’s DRAM products and pronounces that in 2001 the portion of undercutting by subject imports was about 5 per cent of the market, but the portion of undercutting by non-subject imports was about 27 per cent of the market. Leaving aside the problems with the underlying market share figures, Korea’s calculation attempts to use the undercutting data for a purpose for which it is not suited. The undercutting data shows the number of monthly comparisons in which the weighted average subject import price was below the weighted average price of the

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<sup>37</sup> See, e.g., USITC Pub. 3616 at 23 (Exhibit GOK-10).

<sup>38</sup> See, e.g., USITC Pub. 3616 at 25 n.164 (Exhibit GOK-10).

<sup>39</sup> See, e.g., US Second Submission, paras. 114 to 118; *Opening Statement of the United States of America at the Second Substantive Meeting of the Panel*, 21 July 2004, paras. 34-36 [hereinafter “US Second Oral Statement”].

domestic like product. The undercutting comparisons are for specific products and do not even cumulatively account for all of the sales of either subject imports or of the domestic like product during the period of investigation. Consequently, there is no basis whatsoever to take the percentage of months where there was undercutting by the subject imports and then to multiply that by the market share of subject imports to derive a figure that purports to reflect what percentage of shipments in the US market were undersold by subject imports. For exactly the same reason, the data collected by the ITC cannot be used to posit a percentage of the market which was undersold by non-subject imports, as Korea presents to the Panel, for a specific product type. Contrary to Korea's implication, the frequency of undercutting, while significant in and of itself, says nothing about the quantity of imports in the observed months that were undercutting the domestic like product. Instead, this figure reflects that the weighted-average price of the imports in question for each of those months was lower than the weighted-average price of the domestic industry's DRAM products.

38. Moreover, the proxies that Korea uses also do not take into consideration the magnitude of undercutting involved or the effects that a company engaging primarily in undercutting has on the market. A company that consistently undercuts prices as Hynix did has a disproportionate effect on prices in the market as opposed to a company that does not consistently undercut prices.

**§ 37: the ITC does not explain why the effect of supplier competition was attributed to the small change in subject import market share, rather than the much larger market share of non-subject imports and the rate at which non-subject imports were gaining market share;**

39. We addressed the major flaws in this argument in our responses above to paragraphs 20, 22, and 34 of Korea's Second Oral Statement. We refer the Panel to those responses, including the discussions of the problems with Korea's characterization of data in the abstract without any factual context and Korea's dependence on an assumption that subsidized subject imports must be the "sole cause" of material injury to the domestic industry. Simply because Korea does not like the explanation that the ITC provided does not detract from the fact that the ITC's explanation is at least as thorough and comprehensive as those explanations provided by other investigating authorities in cases where their analyses have been found to be WTO-consistent by WTO reviewing bodies.<sup>40</sup>

**§ 39: the key missing point – non-attribution required the ITC to separate and distinguish the role of subject import supply sources from domestic and non-subject import supply sources;**

40. The cited statement from paragraph 39 was made in connection with Korea's argument that the ITC "completely ignored" increases in supply/capacity by DRAMs producers that occurred during the period of investigation. As we pointed out in previous submissions, however, the ITC *agreed* with Hynix that there were capacity increases during the period of investigation, and it expressly relied on the same exhibits that Hynix did to support this finding.

41. Moreover, the ITC took account of these capacity increases (whether they are called capacity increases or supply increases)<sup>41</sup> as part of its consideration of the DRAMs business cycle and the manner in which the DRAMs business cycle and other factors (such as the product life cycle and a slowing in demand growth) affected DRAM prices during the period of investigation.

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<sup>40</sup> See US Second Submission, paras. 109-113.

<sup>41</sup> See, e.g., Hearing Transcript at 205 (Exhibit US-122) (in which Hynix's counsel concurs that in this industry where producers need to operate at high capacity utilization levels in light of the high fixed costs associated with DRAMs production, capacity equals supply).

42. Based on its analysis of the pricing data, the ITC ascertained that prices for nearly every pricing product and channel of distribution declined substantially over the period of investigation. It observed that prices for domestic products and subsidized subject imports followed the same general trends and were generally similar for sales to PC OEMs across all products. More particularly, the product-specific data showed price declines of 70 to 90 per cent from late 2000 through 2001, a modest rebound in early 2002, then a further decline over the course of 2002. The ITC identified record evidence indicating that the price decline in 2001 was the “most severe in history”.<sup>42</sup>

43. The ITC examined other possible reasons for these price declines. Regardless of the label attached to these factors – or whether a particular factor encompassed “sub-factors” – it is clear from the face of the ITC’s determination that the ITC examined the *product life cycle* and the DRAMs *business cycle* that is characterized by repeated “boom” and “bust” periods as other possible reasons for the price declines.<sup>43</sup>

44. Based on its evaluation of the record evidence in this investigation, the ITC determined that “[w]hile slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor”.<sup>44</sup> The ITC determined that these price declines were far greater than the 20 to 30 per cent that Micron – or even the 40 per cent that Hynix *itself* – reported would be expected on an annual basis.<sup>45</sup>

45. The ITC concluded that the increasing frequency of undercutting by subsidized subject imports from 2000 to 2002 corresponded with the substantial decline in US prices over those same years. The ITC further concluded that in the absence of significant quantities of subsidized subject imports competing in the same product types at relatively low prices, domestic prices would have been substantially higher.<sup>46</sup>

46. In the referenced paragraph 39, Korea asserts that a “lone footnote” is not enough, and that “to look at capacity in the aggregate simply does not allow the necessary analysis” because this “factor is not one that can be subsumed within another and required independent analysis to be analyzed at all.” (Citation omitted).

47. The ITC’s evaluation of supply/capacity, described above, can hardly be characterized as a “lone footnote”, nor does Korea provide any support for its assertion that an investigating authority’s examination must take place in the text. Nor is there any support for Korea’s assertion that analysis of supply/capacity is “not one that can be subsumed within another and required independent analysis to be analyzed at all”. Korea’s argument conflicts with the findings of panels in disputes reviewing antidumping determinations wherein investigating authorities’ analyses have been found to be WTO-consistent in situations where the authorities analyzed factors that were subsumed within other factors.<sup>47</sup>

48. The ITC clearly separated and distinguished the role of subject import supply sources from domestic and non-subject import supply sources. The ITC’s examination and explanation is more fully described above in response to questions concerning paragraphs 20, 22, 34, and 37. Moreover, it

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<sup>42</sup> See, e.g., USITC Pub. 3616 at 24 (Exhibit GOK-10).

<sup>43</sup> See US First Submission, paras. 454-457, which identify in more detail where in the ITC’s final determination the examination of these factors took place.

<sup>44</sup> See, e.g., USITC Pub. 3616 at 24-25 (Exhibit GOK-10).

<sup>45</sup> See, e.g., USITC Pub. 3616 at 24-25, I-11 (Exhibit GOK-10); Hearing Transcript at 157-161, 267-68 (Exhibit US-94).

<sup>46</sup> See, e.g., USITC Pub. 3616 at 24-25 (Exhibit GOK-10).

<sup>47</sup> See, e.g., US Second Submission, paras. 109 to 112 (citing, *inter alia*, EC – Tube (Panel)).

is important to bear in mind that the ITC's analysis of subject and non-subject imports was not based only on a macro-economic analysis of trends and projected causes. The ITC also contacted purchasers of DRAM products, and those purchasers identified Hynix as a source of low-priced DRAM products and confirmed that the domestic industry lost sales and/or revenues due to competition from Hynix.<sup>48</sup> This anecdotal evidence is a further indication that the ITC did "separate and distinguish" the subsidized subject imports from non-subject imports, and that it did find independent evidence that low prices of the subsidized subject imports were injuring the US industry.

**§ 49: appearance of control where none exists, nothing suggests that the GOK would intervene in day-to-day credit decisions of various banks;**

49. In the referenced paragraph 49, Korea asserts that there is "nothing" in the Prime Minister's Decree, the Public Fund Oversight Act, or any specific MOU, "to suggest that the GOK *would* intervene in the *day-to-day* credit decisions of the various banks". (Emphasis added.) There are several problems with this statement.

50. First, the DOC did not find that the cited measures suggested that the GOK necessarily *would* intervene in banks' credit decisions. Instead, the DOC reasonably found, based upon their plain text, that these measures gave the GOK the *ability* to intervene in banks' credit decisions should it choose to do so.

51. For example, Prime Minister Decree No. 408, on its face, gave the GOK legal authority to intervene in the lending decisions of a bank in the exercise of the GOK's shareholder rights.<sup>49</sup> The Decree also permitted supervisory agencies to request "cooperation" from financial institutions for the purpose of stabilizing financial markets or attaining the "goals of financial policy".<sup>50</sup> Another legislative action considered by the DOC was the Public Fund Oversight Act. This law required Korean private banks to sign contractual commitments with the government – MOUs – in exchange for the massive recapitalizations received from the GOK. The MOUs provided for GOK intervention in a bank's fiscal operations.<sup>51</sup>

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<sup>48</sup> See, e.g., USITC Pub. 3616 at 25 (Exhibit GOK-10).

<sup>49</sup> The decree was issued in November 2000, precisely when the GOK began pursuing its Hynix bailout policy.

<sup>50</sup> *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4); Prime Minister Decree No. 408, Articles 5 and 6 (Exhibit GOK-45). The investigation record reflects that on more than one occasion, the GOK did, in fact, request "cooperation" from various creditors to assist Hynix. For example, an FSS official stated: "It is unsound that both Hyundai Electronics and the creditor group, the banks which agreed to resolve the liquidity of Hyundai Electronics, are refusing to provide support even resorting to expedient measures. Now that we have *requested for cooperation* using multiple channels, we are expecting support to be provided sooner or later." *Financial Community's Support for Hyundai Electronics—A US Subsidiary Facing Insolvency Risk*, MAEL ECONOMIC DAILY, March 7, 2001 (emphasis added) (translated version) (Exhibit US-69). The FSS also invited officials from Shinhan Bank and Hanmi Bank to a meeting to "*request their cooperation*" when several banks retracted their earlier promises to increase purchase limits on Hynix's export bills of exchange ("D/A loans"). *Creditor Group Conflicts With Government Over Supporting Hyundai Group*, MAEL ECONOMIC DAILY, 2 February 2001 (emphasis added) (translated version) (Exhibit US-68). A 7 March 2001 Mael Economic Daily article further commented that, "[a]s things are going awry, the Financial Supervisory Service is desperately 'making every effort', as the highly-placed official of FSS calls the presidents of the banks concerned, urging that the limit be extended following the convening of people from the appropriate banks to make an earnest *request for cooperation*." *Financial Community's Support for Hyundai Electronics – A US Subsidiary Facing Insolvency Risk*, MAEL ECONOMIC DAILY, 7 March 2001 (emphasis added) (translated version) (Exhibit US-69).

<sup>51</sup> *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4); *Government of Korea Verification Report* at 4 (referencing Exhibits 1-2 through 1-6) (Exhibit US-12). During the investigation, the DOC requested the GOK to produce an MOU, but it declined to do so. See US Second Oral Statement, para. 8.



52. An additional legislative action considered by the DOC was the Corporate Restructuring Promotion Act (CRPA), which was enacted immediately prior to Hynix's October restructuring and refinancing. The DOC found that the CRPA permitted a handful of Hynix's creditors to dictate restructuring terms to other Hynix creditors,<sup>52</sup> and provided the Financial Supervisory Service (FSS), a government entity, with formal power to request creditors' assistance, and to instruct creditors not to press payment claims, with respect to Hynix's restructuring.<sup>53</sup> As discussed in response to Questions 2 and 6, below, the DOC did not rely upon the mandatory nature of the CRPA, in and of itself, or in the abstract, as evidence of entrustment or direction. Rather, the DOC found that the mandatory nature of the CRPA, *coupled with the specific factual circumstances present in this case*, provided an effective tool through which the GOK was able to effectuate its Hynix policy.

53. Another problem with the referenced paragraph 49 is that the DRAMs investigation simply was not about the "day-to-day" credit decisions of banks. Instead, it involved extraordinary government action aimed at ensuring that billions of dollars were funnelled to a company that the GOK regarded as so important that it would not be left to the mercies of the marketplace and allowed to fail.

54. Finally, the United States has never contended – nor did the DOC find – that the GOK *needed* to intervene on a daily basis with the banks in order to entrust or direct them to assist Hynix. The GOK only needed to intervene as necessary to ensure that the banks stayed in line. The DOC reasonably found that the aforementioned measures gave the GOK the ability to intervene as it considered necessary. Furthermore, the DOC found that record evidence made clear that the GOK *did* intervene in banks' credit decisions.

**§ 76: the argument regarding the size of Citibank's loan.**

55. As explained in prior US submissions, the DOC rejected loans from Hynix's private creditors for use as a benchmark because it found those loans to be government financial contributions (with the exception of loans from Citibank). After consideration of record evidence, the DOC also rejected loans from Citibank for use as a benchmark. The reasons why the DOC rejected Citibank as a suitable benchmark can be summarized as follows:<sup>54</sup>

- Citibank's involvement was small in absolute and percentage terms compared to the involvement of the government-owned and controlled banks.
- Citibank itself acknowledged that its participation was only a symbolic gesture.<sup>55</sup>
- There was substantial record evidence that Citibank's risk assessment of Hynix was influenced by the GOK's policy to support Hynix and prevent its failure. For example, a Citibank official stated that Citibank needed a clear signal from the Korean banks that they were willing to support Hynix before they would commit funds.
- Record evidence showed that Citibank was influenced by the significant and continuing involvement of the GOK in propping up Hynix, rather than by its belief that Hynix was a commercially worthy credit risk in its own right.<sup>56</sup>

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<sup>52</sup> *Issues and Decision Memorandum* at 54-55 (Exhibit GOK-5).

<sup>53</sup> *Government of Korea Verification Report* at 19 (Exhibit US-12).

<sup>54</sup> For a more extensive discussion of the DOC's rejection of Citibank as a benchmark, see US First Submission, paras. 197-204.

<sup>55</sup> See *Hynix Verification Report* at 19 (Exhibit US-43).

<sup>56</sup> US First Submission, paras. 200-201.

- Citibank and SSB were the exclusive financial advisors to Hynix, and reaped significant fees from this engagement – fees that would justify the token participation on the restructuring packages.
- Evidence showed that Citibank’s involvement with Hynix was viewed by Citibank as a stepping stone toward a larger and more lucrative role in helping the GOK to resolve other structural problems in the Korean financial market.

56. Other “unusual aspects” relevant to Citibank’s decision to participate in the syndicated loan include the fact that despite its long involvement in the Korean financial market dating back to the 1960s, Citibank was not a lender to Hyundai Electronics or Hynix prior to the December 2000 Syndicated Loan. Furthermore, Citibank did not extend any financing to Hynix other than in GOK entrusted and directed restructurings (and was not a participant in the KDB Fast Track Program). In addition, Citibank’s participation in those restructurings was on the same terms as were applicable to government entrusted and directed participants. Citibank also did not seek internal credit approval for its portion of the syndicated loan until after Korean banks had committed to the arrangement. Finally, Citibank did not base its lending decisions on independent credit analyses that a commercial bank normally would consider, but rather upon the assessment of Hynix that SSB prepared for purposes of advancing a plan to restructure Hynix’s debt.

57. Thus, contrary to Korea’s assertions in the referenced paragraph 76, the DOC did not reject Citibank’s lending to Hynix based solely on the relative size of that lending. Instead, the DOC properly rejected Citibank loans as a benchmark on *multiple grounds*, one of which was the size of such loans.

58. Under Article 14(b) of the SCM Agreement, a “benefit” is measured as the difference between “the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market”.<sup>57</sup> Thus, under Article 14(b), one must compare what Hynix actually paid on the government loans with what it *would have paid* had it been forced to obtain all of that financing on the market. For example, to measure the benefits of the KRW 700 billion portion of the syndicated loan directed to Hynix by the GOK, Article 14(b) requires an examination of what Hynix would have paid if it had been obligated to obtain the full KRW 700 billion on the market. The relevant question under Article 14(b), therefore, is whether Citibank (or another lender) would have extended to Hynix the full KRW 800 billion credit (without any participation from the GOK-directed banks, and without any governmental interference) on the same favourable terms as the KRW 100 billion loan. The answer is an unequivocal “no”.

59. The record demonstrated that Citibank’s decision to participate in the syndicated loan, even in its very limited capacity, was conditioned on the behaviour of the GOK-directed banks. As the DOC found in its investigation,

For example, in regard to the syndicated loan, Citibank officials stated that Citibank wanted to show its commitment, but did not want to be the “lender of last resort” and “needed a clear signal from the ROK banks” that they were willing to support Hynix

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<sup>57</sup> The Panel in *Brazil – Aircraft*, para. 7.24, found that a determination of the existence of benefit should be based upon “objective benchmarks ... reflecting the terms under which the beneficiary of the financial contribution would be operating in the absence of the government financial contribution.” In addition, in *US – Softwood Lumber*, para. 103, the Appellate Body found that, for purposes of establishing the existence of benefit, an investigating authority may reject proposed benchmarks shown to have been distorted by government involvement in the market.

as well, and that Citibank did not seek internal credit approval for its portion of the syndicated bank loan until after the ROK banks had committed to the arrangement ... . In a similar vein, Citibank officials indicated that Citibank had decided to “ride” with the ROK banks to see if Hynix could make it as an ongoing concern, and that Citibank made a bet that the ROK banks would protect their exposure.<sup>58</sup>

These statements by Citibank officials indicate that Citibank would not have extended credit on comparable terms (or perhaps not at all) absent the participation of the government entrusted and directed banks.

60. As noted, the loans provided by Citibank represented a small fraction of the full amount of the syndicated loan. If Citibank had provided the entire amount, the financial risk (and hence the interest rate) would have been greater. The increased risk stems from three factors:

- Citibank’s overall exposure (based simply on the size of the loan) would have been much higher;
- Citibank would have had no assurance that the GOK-directed banks would have been willing to support Hynix; and
- While the advisory fees earned by Citibank provided meaningful protection against potential losses on a small loan, they would have provided no meaningful protection were Citibank to have financed the full syndicated loan.

61. Given the record evidence, the DOC reasonably concluded that Citibank loans to Hynix, including its portion of the syndicated loan, were unsuitable as benchmarks.

**2. With regard to para. 32 of the Second Written Submission of the US, are the “actions that directly evinced entrustment and direction” those set forth in section 1(a) – (c) of that submission? Is the US arguing that there is both direct and indirect evidence of entrustment / direction?**<sup>59</sup>

62. Yes, it is the US position that there is both direct and indirect (also referred to as “circumstantial”) evidence of government entrustment or direction. Reliance on both types of evidence is entirely consistent with the SCM Agreement.<sup>60</sup> In fact, circumstantial evidence, secondary sources, and reasonable inferences are often essential analytical tools, as prior panels have acknowledged.<sup>61</sup>

63. As we have noted previously, recognition of the importance of both types of evidence and the reasonable inferences to be drawn from the evidence as a whole is particularly important in the case of indirect subsidies. This is because, given the very nature of such subsidies, there may often be little,

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<sup>58</sup> *Issues and Decision Memorandum* at 9-10 (Exhibit GOK-5), citing *Hynix Verification Report* at 19, 20 (Exhibit US-43).

<sup>59</sup> In order to better address the Panel’s questions, we have broken our answer to Question 2 into two parts.

<sup>60</sup> See, e.g., *US - OCTG Sunset*, para. 7.296, in which the panel noted that “there are no rules in the Anti-Dumping Agreement as to the type of evidence that can support an investigating authority’s findings”. The same holds for the SCM Agreement.

<sup>61</sup> See, e.g., *Argentina – Bovine Hides*, para. 11.28 (complainant clearly may establish the existence of an export restriction on the basis of circumstantial evidence); *US - Wheat Gluten*, para. 174 (a panel must draw inferences on the basis of all the facts of record relevant to the particular determination to be made); and *US - DRAMS*, para. 6.79 (panel found that investigating authority properly relied on secondary sources).

if any, direct evidence of the government's role. Thus, reliance on these analytical tools is essential if Article 1.1(a)(1)(iv) of the SCM Agreement is to have any meaning.

64. As noted above, there was both direct and indirect evidence of government entrustment and direction in the DRAMs investigation. For example, there was direct evidence that the GOK decreed publicly, on numerous occasions, that Hynix would not be allowed to fail and that the GOK gave explicit instructions aimed at fulfilling that goal. There is also direct evidence in the form of the Kookmin prospectus that the GOK directed the lending decisions of banks in which the GOK had a relatively small proportion of voting shares. Moreover, there is a host of secondary sources that document the GOK's adoption and implementation of its Hynix bailout policy.

65. With respect to the phrase "[i]n addition to taking actions that directly evince entrustment and direction", the United States was distinguishing between the government actions described in paragraphs 32-36 that enabled Hynix's creditors to fulfill their assigned task of resolving the Hynix financial crisis (*i.e.*, credit limit waivers and coercion of credit rating agencies) and evidence that more directly supported the conclusion that the GOK, in fact, entrusted or directed them to undertake that task. The United States did not mean to suggest that all of the evidence discussed in sections 1(a)-(c) was "direct" – as opposed to "indirect" – evidence of entrustment or direction. Moreover, regardless of whether a particular piece of evidence is labelled "direct", "indirect" or "circumstantial", it is all relevant. The real issue is whether, based upon all of that evidence, the DOC could reasonably conclude that the GOK entrusted or directed Hynix's creditors to resolve the company's financial crisis.

**Why is mandatory participation under the CRPA included as an "action [...] that directly evinced entrustment and direction", when at para. 33 of its replies to the Panel's questions, the US asserts that "[t]he DOC did not find that mandatory participation under the CRPA constituted, in and of itself, entrustment or direction"?**

66. As discussed above, the United States did not mean to suggest that all of the evidence discussed in section 1(a)-(c) was "direct" evidence of entrustment and direction. Moreover, with respect to the CRPA, classification is not straightforward, because the CRPA did not represent a single piece of evidence, but rather a host of facts specific to Hynix.

67. With respect to the CRPA itself, as a law viewed *in the abstract*, the DOC did not find that mandatory participation under the CRPA, in and of itself, constituted entrustment or direction. The CRPA did not, however, operate in a vacuum. As detailed in the previous US submissions, the structure of the CRPA enables a handful of the largest creditors to dominate the restructuring process and to dictate the results to every other creditor.

68. The CRPA mandated that all Hynix creditors participate in the Creditors Council. As previously noted, the GOK enacted the CRPA in August 2001, precisely at the time when Hynix and other Hyundai Group companies were on the brink of bankruptcy and required significant financial assistance to avoid financial failure.<sup>62</sup> As GOK officials noted at verification, "the National Assembly passed the Corporate Restructuring Promotion Act ('CRPA') to make sure that the banks could not avoid *participating in workouts*".<sup>63</sup> A Ministry of Finance official stated that: "[w]e've decided to force all creditor financial institutions to take part in the meetings in order to prevent some of them

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<sup>62</sup> US First Submission, para. 84.

<sup>63</sup> *Issues and Decision Memorandum* at 54 (Exhibit GOK-5), citing *Government of Korea Verification Report* at 8 (Exhibit US-12).

from refusing to attend and pursuing their own interests by taking advantage of bailout programmes”.<sup>64</sup>

69. Further, the CRPA provides the GOK with a very valuable tool to prevent creditors from seeking to liquidate a troubled company. Pursuant to Article 14, at the request of the lead creditor bank, the FSS can prevent creditors from placing a company in liquidation. This is precisely what the FSS did in the Hynix bailout.<sup>65</sup> While Korea has attempted to minimize the impact of this provision<sup>66</sup>, this provision effectively forecloses any and all creditors from seeking liquidation unless and until the GOK’s objectives are achieved through the CRPA procedures.

70. With respect to the DRAMs investigation, the Creditors’ Council was dominated by creditors that were owned and controlled by the GOK. In turn, the GOK had a stated, public policy that it would not allow Hynix to fail, and had taken, and continued to take, actions aimed at ensuring that Hynix did not fail. Under these *specific, factual circumstances*, the DOC reasonably concluded that the GOK was able to use the CRPA as a mechanism to ensure that all Hynix’s creditors participated in the restructuring and recapitalization measures benefiting Hynix. For example, by naming the KEB, the GOK’s lead bank for Hynix, as head of the Council, the GOK positioned itself to take full advantage of the KEB’s longtime role as agent and facilitator of the GOK’s credit and management decisions.<sup>67</sup> In short, the GOK knew that it could entrust or direct the banks to carry out the task of saving Hynix.

71. The following excerpt from a news report, entitled ‘*Gangster-Style’ Solution for Hynix*, underscores the significance of the CRPA when, as in the DRAMs investigation, the Creditors’ Council is dominated by government-owned and controlled banks:

Bank executives are about to have a meeting of the “Financial Institution Council” to pass a resolution of the support plan for Hynix Semiconductor. The executives of the main creditor banks, Korea Exchange Bank and other banks such as Hanvit, Korea Development Bank, and Chohung Bank, have smiles on their faces. In contrast, the executives of Shinhan, KorAm, Hana, Korea First, and Kookmin Bank stepped glumly into the meeting room. They were supposed to cast “aye” votes that would

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<sup>64</sup> *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4), citing *Foreign Banks Required to Attend Creditor Meetings for Ailing Firms*, KOREA TIMES, July 22, 2001; *Issues and Decision Memorandum* at 60 (Exhibit GOK-5).

<sup>65</sup> *Government of Korea Verification Report* at 19 (Exhibit US-12).

<sup>66</sup> Korea Second Oral Statement, para. 39.

<sup>67</sup> *Issues and Decision Memorandum* at 56-57 (Exhibit GOK-5); *Hynix Verification Report* at 13-14 (Exhibit US-43). At verification, KEB officials confirmed that GOK had traditionally followed the main bank principle, and that the KEB had a long history of being the main bank for the Hyundai Group. *Hynix Verification Report* at 12 (Exhibit US-43). Also, record evidence reflected the following: “Main banks were designated by the government on the basis of the bank’s exposure to chaebols; for each chaebol, the government designated a bank, who has the largest exposure to that chaebol, as the main bank of the chaebol. Once designated, however, the main bank was not changed even if the main bank lost its status as the principal source of credit to the chaebol.” *Corporate Governance in Korea*, Il Chong Nam *et al.*, KOREA DEVELOPMENT INSTITUTE (from Organisation for Economic Co-operation and Development conference on Corporate Governance in Asia: A Comparative Perspective) (Seoul, March 3-5, 1999) (“In short, main banks acted as *de facto* government agents in terms of regulation and monitoring.”) at 2 (copy attached as Exhibit US-131). In effect, “[T]he principal transaction banks have been largely the agent of the GOK in their supervisory role. As such, PTBs were more concerned about whether corporate clients’ behaviors were conforming to the government rules and regulations rather than trying to help them with their investment and financing plans.” *Korea’s Economic Crisis and Corporate Governance*, Sang-Woo Nam, SCHOOL OF PUBLIC POLICY AND MANAGEMENT, KOREA DEVELOPMENT INSTITUTE (undated) at 47 (copy attached as Exhibit US-132).

The United States notes here that all of the new exhibits attached to these answers were part of the administrative record before the DOC.

bring themselves losses on the order of several tens of billions of won, up to 100 billion won. It is no wonder they could not be light-hearted.

On that day, the “ayes” carried the day on the Hynix support proposal. However, practically no one thought that the proposal passed due to merit, or that the proposal was convincing and reasonable.

On 30 October, Korea Exchange Bank sent a unilateral notice to commercial banks, “As for the banks which do not agree to the support proposal, their debts will be paid off based on liquidation value.” In other words, those banks will have to give up some 85% of their receivables. This picture has another angle that is difficult to understand. They say they intend to keep Hynix alive. But then, why would they use the value of a liquidated concern as opposed to the value of a continuing concern?

Korea Exchange Bank went on to attach another condition: As for the remaining receivables of 15% or so after the payoff, they will not be paid in cash. Instead, they will be paid in 5-year term Hynix debentures.

The message was loud and clear: “Do not even think of opposing this plan.”

Banks initially went ballistic: “It doesn’t make any sense, its just plain ridiculous.” However, they ended up giving their consent, “swallowing the mustard while crying in tears,” as the old Korean saying goes. There simply wasn’t any room for any other choice. The result in support was all set in advance.... Another aspect was that the state-affiliated banks were coercing commercial banks in the private sector. The government and the creditor group may breathe a sigh of relief after keeping Hynix alive in this way.<sup>68</sup>

72. Thus, given the facts of the DRAMs investigation, it is easy to see why and how the GOK could entrust and direct Hynix’s creditors to save the company. The GOK was able to use the CRPA to determine the outcome of Council deliberations so as to assist Hynix.

**3. Please comment on Korea’s argument (para. 128 of Korea’s Second Written Submission) that “there is simply no evidence indicating that Shinhan, Hana, or KorAm bank were entrusted or directed by the GOK to extend their portion of the syndicated loan”. What evidence of entrustment / direction did the US rely on in respect of the participation of these banks in the syndicated loan? Even if one does not accept Korea’s argument on the need for specific banks to be directed to perform specific tasks, is it not necessary for an investigating authority to point to evidence showing that creditors included in the finding of entrustment/direction were actually entrusted / directed ?**

73. With respect to the second part of the question, the United States agrees that there must be evidentiary support warranting the inclusion of creditors in a finding of entrustment/direction. If, however, by use of the words “evidence showing that creditors ... *were actually* entrusted/directed” (emphasis added), the Panel is suggesting that it is necessary for authorities to have *direct* evidence for every bank and every event, the United States would not agree.

74. As the United States has noted previously, governments typically have a wide range of tools at their disposal to deliver a financial contribution indirectly, and these tools may vary greatly in terms of their transparency. Where governments have political reasons for wanting to obscure their role in

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<sup>68</sup> ‘Gangster-Style’ Solution for Hynix, DONG-A DAILY (1 November 2001) (copy attached as Exhibit US-133).

providing assistance to a particular company or industry, they may choose to employ less transparent methods of delivering assistance. Thus, cases involving indirect subsidies can present particular challenges for an investigating authority attempting to gather facts and figure out what really happened. As the European Communities noted, in practice, evidence of entrustment/direction is more likely to be circumstantial than direct.<sup>69</sup>

75. In light of these considerations, if Article 1.1(a)(1)(iv) of the SCM Agreement is to have any meaning, it is essential to recognize the importance of examining, on a case-by-case basis, all of the evidence, including direct and circumstantial evidence, surrounding possible government entrustment or direction. In other words, an investigating authority must be able to assess the evidence in light of the totality of circumstances. These circumstances would include not only the specific actions taken by a government, but also the greater context for those actions, including any governmental interest in, and control over, the private parties it is alleged to be entrusting or directing; any inducements of the private bodies allegedly taking action at the government's behest; any governmental policies concerning the company or industry that allegedly benefits from government entrustment or direction; and the views of objective third party observers and scholars who are knowledgeable about a government's policies and practices regarding intervention in the decision-making of firms.

76. Turning to the first part of the Panel's question concerning the three banks – Shinhan, KorAm and Hana – the DOC properly found that the Hynix bailout constituted one cohesive programme with several interrelated phases, one of which was the syndicated loan. The programme took place over a relatively short period of time, was undertaken by the same GOK officials at each stage, was coordinated by the same lead bank at each stage, and reflected the same types of tactics at each stage (the enactment of laws, waivers from those laws, threats and coercion). Figure US-3 illustrates how, at each stage, the bailout continuously rolled over debt from one stage to the next. Moreover, while they avoid use of the term “bailout”, the GOK and Hynix have conceded that there was a single programme.<sup>70</sup>

77. Second, there was evidence that these three particular banks – Shinhan, KorAm and Hana – were among the banks the GOK had successfully threatened into participation at other stages of this single program. For example, the FSC called Shinhan and KorAm to a meeting at FSC offices on 2 February 2001 to request their “cooperation” when they expressed reluctance to maintain the D/A financing.<sup>71</sup> In addition, the GOK threatened KorAm into participating in the May restructuring when the bank refused to take over its share of the May 2001 1.0 trillion won convertible bond package (34.7 billion won worth) due to Hynix's failure to deliver a written pledge to use its best effort to reduce its debt.<sup>72</sup> The FSS severely rebuked KorAm, with one FSS official stating: “If KorAm does not honor the agreement, we will not forgive the bank.”<sup>73</sup> The same FSS official further threatened

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<sup>69</sup> Third Party Submission by the European Communities, 26 May 2004, para. 8.

<sup>70</sup> For example, Hynix stated that, in September 2000, “Citibank and SSB, Hynix' financial advisors retained to devise a financial restructuring plan, presented a fully integrated proposal to completely realign the financial structure of Hynix ... . The important point, for purposes of this submission, is that many of the financial transactions that are separately identified in the [Department's] questionnaire (each with their own sub-heading) were, in fact, all part of Citibank and SSB's original integrated plan for a complete financial restructuring of Hynix.” *Hynix Questionnaire Response* (27 January 2003) at 14 and 15 (Exhibit US-119). In a later submission, the GOK stated that the December 2000 syndicated loan “was the first step in a several stage financial plan developed and implemented by SSB over the 2000-2001 period.” *GOK Questionnaire Response* (February 4, 2003) at A-1 (copy attached as Exhibit US-134).

<sup>71</sup> *Creditor Group Conflicts With Government Over Supporting Hyundai Group*, MAEIL ECONOMIC DAILY, 2 February 2001 (Exhibit US-68).

<sup>72</sup> *Issues and Decision Memorandum* at 60 (Exhibit GOK-5); *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).

<sup>73</sup> *KorAm Reluctantly Continues Financial Support for Hynix*, KOREA TIMES, 21 June 2001 (Exhibit US-64).

stern measures against the bank, such as disapproving new financial instruments and subjecting the bank to a tighter audit.<sup>74</sup> In addition, in April 2001, the FSS threatened to fine Hana Bank if it failed to provide emergency liquidity to Hyundai Petrochemical, which was a part of the Hyundai Group that was going through the corporate workout process.<sup>75</sup>

78. Third, there was the other evidence of entrustment/direction that was not specific to these three banks. This evidence is discussed elsewhere in these answers and in prior US submissions, and the United States will not repeat those discussions here.

79. Finally, all of this evidence had to be considered in the context of Hynix's dismal financial condition. This, too, has been discussed elsewhere, and the United States will not repeat the discussion here other than to note that none of the three banks in question produced any sort of legitimate credit analysis in connection with the syndicated loan, or, for that matter, any other phase of the bailout.

80. In sum, there was evidence that the GOK had a policy to bailout Hynix; there was evidence that this policy consisted of a single programme; there was evidence that at various points the GOK applied pressure on the three banks; and for every phase of the bailout programme there was evidence of GOK entrustment/direction, albeit not always specific to these three banks. In light of this evidence, it was reasonable for the DOC to infer that the GOK entrusted/directed Shinhan, KorAm and Hana to participate in the syndicated loan. Indeed, in light of the evidence, the inference that the GOK did not entrust/direct these banks to participate in the syndicated loan seems implausible.

**4. At para. 18 of its Answers to the Panel's questions, the US asserts that "The DOC did not find specifically that government-owned and controlled private entities 'were instruments through which the GOK entrusted/directed other entities'. Rather, the DOC found, for example, that the GOK exercised control over Hynix's creditors generally through government-owned and controlled banks, because those banks played a dominant role in the Creditors Councils." Does the US response mean that control over creditors through government-owned and controlled private entities is not relevant to the issue of entrustment / direction of those creditors? How does the concept of the exercise of control over creditors differ from the notion of entrustment / direction of those creditors?**

81. The Panel is correct that the DOC did not find that the government-owned and controlled banks were "instrumentalities" through which the GOK entrusted or directed other creditors. To the contrary, the DOC found that it was the GOK that entrusted or directed Hynix's creditors. However, the DOC also found that the GOK's task was facilitated by its ownership and control over banks that dominated the Hynix Creditors' Council.

82. The US response at paragraph 18 does not mean that control over creditors is irrelevant to the issue of entrustment/direction of those creditors. While government control over a private party may not be essential to a finding of entrustment/direction, the presence of control may provide direct or circumstantial evidence of entrustment/direction.

83. With respect to the Panel's question concerning the difference between the concept of "control" over creditors and the notion of "entrustment/direction" of those creditors, in the abstract, a government could have control over a private entity, but never entrust or direct the private entity to do

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<sup>74</sup> *KorAm Reluctantly Continues Financial Support for Hynix*, KOREA TIMES, 21 June 2001 (Exhibit US-64).

<sup>75</sup> *Corporate Restructuring and Reform: Lessons from Korea*, W. Mako, KOREAN CRISIS AND RECOVERY, David T. Coe & Se-jik Kim, eds., 2002, at 213-14 (Exhibit US-20).



anything. Conversely, a government could entrust or direct a private entity which it did not control, at least in the sense of ownership control.

84. In assessing the variety of ways a government wields power such that it may entrust or direct a private body, the political, cultural and socio-economic context for its actions is particularly germane. This is particularly true in the case of Korea, where the government's clout over the banks is widely acknowledged, and rooted in decades of close collaboration between the government and the financial sector and Korea's strategic industries.

85. In this regard, the example of Kookmin Bank – a Group C bank in Figure US-4 – is instructive. The GOK had a relatively low ownership interest in Kookmin as compared to the Group B banks – a mere 15.1%.<sup>76</sup> However, in a sworn statement to the US Securities and Exchange Commission, Kookmin admitted that the GOK could direct its credit practices.<sup>77</sup> In addition, the GOK hand-picked Kookmin's CEO, Kim Sang-Hoo, former Vice Chairman of the FSC, "to speak for the government in the second-stage restructuring plan with Kookmin and other banks."<sup>78</sup> As with the other creditors, the GOK also blocked Kookmin from finding Hynix in default.<sup>79</sup>

86. Thus, there was more than ample evidence on the DOC record that, even though the Group C banks were not controlled by the GOK purely on the basis of GOK ownership, the GOK nonetheless had the ability to direct their behaviour.

**5. At para. 20 of the US Answers to Panel questions, the US asserts that "the motives of private investors are not germane" to the issue of entrustment / direction. At para. 24, however, the US argument of entrustment / direction relies on private creditors knowing what was good for them. If entrustment / direction is based on creditors knowing what is good for them, doesn't that imply an analysis of their motives?**

87. By the statement at paragraph 24 of our written answers that "this was a situation where the GOK said to the banks: 'If you know what's good for you, you are going to help us bail out Hynix,'" the United States was not intending to suggest that the issue of entrustment or direction requires an analysis of the bank's motives. The United States did, however, wish to convey the GOK's ability to obtain the banks' cooperation through punitive measures and threats thereof.

**6. At para. 33 of its Answers to the Panel's questions, the US asserts that "[t]he DOC did not find that mandatory participation under the CRPA constituted, in and of itself, entrustment or direction. Rather, the DOC found that the GOK used the CRPA as a vehicle to effectuate the GOK's Hynix policy". Does this mean that the alleged mandatory nature of the CRPA is not relevant to the issue of entrustment / direction?**<sup>80</sup>

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<sup>76</sup> Bank for International Settlements, "The Banking Industry in the Emerging Market Economies: Competition, Consolidation and Systemic Stability," BIS Papers No. 4 at 95 (August 2001) (Exhibit US-13). The 15.1% figure included preferred stock.

<sup>77</sup> *Issues and Decision Memorandum* at 58-59 (Exhibit GOK-5); *Kookmin Bank Prospectus* (18 June 2002) at 22 (Exhibit US-46); *Kookmin Bank Prospectus* (September 10, 2001) (Exhibit US-45); see also *Government Control of Banks Diehard*, KOREA TIMES (13 March 2000) (Exhibit US-127); *Kookmin Urges Seoul to Sell off its Stake*, FINANCIAL TIMES (10 November 2001) (copy attached as Exhibit US-137).

<sup>78</sup> *Government Control of Banks Diehard*, KOREA TIMES (13 March 2000) (Exhibit US-127); *Highhanded Companies Sued for Unilateral Shareholders Meeting*, KOREA TIMES (April 5, 2000) (copy attached as Exhibit US-138); *Seoul Pushes for a New 'Big Bang' in Banking*, ASIA TIMES (18 March 2000) (copy attached as Exhibit US-139); *Soundness of Financial Sector Still Remains Remote*, KOREA TIMES (2 September 2002) (copy attached as Exhibit US-140).

<sup>79</sup> *GOK Verification Report* at 19 (Exhibit US-12).

<sup>80</sup> In order to better address the Panel's questions, we have broken up our answer to Question 6 into three parts.

88. As stated above in response to Question 2, the DOC's finding that the GOK used the CRPA as a "vehicle" to effectuate the GOK's Hynix policy does not mean that the mandatory nature of the CRPA was not relevant to the issue of entrustment or direction. Rather, it was the mandatory nature of CRPA, *coupled with the specific factual circumstances present in the DRAMs investigation and the application of the CRPA to the Hynix bailout*, that constituted evidence of GOK entrustment/direction.

**How does the notion of entrusting / directing someone to carry out an objective differ from using something as a vehicle to have someone effectuate that objective?**

89. If the United States understands the question correctly, the difference is perhaps best described as the difference between ends and means. In abstract, the "ends" is entrustment/direction and the "means" is the method used to entrust/direct. In the context of the DRAMs investigation, the ends was the entrustment/direction of Hynix's creditors to provide assistance to Hynix, and the CRPA was a means by which the GOK entrusted/directed those creditors to provide such assistance. As an evidentiary matter, the means used can be informative in ascertaining the ends.

**If the October 2001 restructuring had occurred in isolation, would the CRPA in and of itself have been sufficient evidence of entrustment /direction?**

90. The United States is not in a position to state definitively what the relevant DOC decisionmaker would find if faced with the situation hypothesized by the Panel. However, it seems quite unlikely that entrustment/direction would be found if the CRPA was the only piece of evidence.

91. Of course, in the DRAMs investigation, the CRPA was not the only evidence of entrustment or direction pertaining to the October bailout. There was other evidence, and the extent of the additional evidence of entrustment or direction in October must be put in its proper perspective.

92. With the enactment of the CRPA, Hynix's Creditors' Council was formalized. As previously discussed, Hynix's Creditors' Council was dominated by government-owned and controlled banks. Furthermore, even before the October restructuring, the KEB had been hand-picked by the GOK as the lead bank, and was in charge of the Creditor Group and acted as a liaison between the banks and the GOK. The implications of this structure in terms of the evidence necessary to support a finding of entrustment or direction should not be underestimated. That is, the advantage of the Council structure and having the KEB as lead bank was that the GOK could utilize one bank as point person and avoid having to dictate terms to each Council member individually.

93. In addition, by the time of the October bailout, the GOK was aware that its Hynix bailout policy was coming under increased international scrutiny. In particular, the United States had begun to raise its concerns regarding the subsidization of Hynix directly with Korea.<sup>81</sup> Press reports reflected that due to rising trade tensions, the GOK could no longer afford to openly discuss supporting Hynix. As one commentator stated, "Whenever the creditor group attempts to shy away from providing support, the government has talked to them, or even twisted their arms, to bring support for Hynix. The government has to avoid trade disputes while trying to keep Hynix alive. Hence the government is not in a position to openly talk about support."<sup>82</sup> Another commentator

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<sup>81</sup> See, e.g., *GDS Offering Memorandum* at 90 (copy attached as Exhibit US-151) (acknowledging that the "United States Trade Representative has challenged the KDB Fast Track Debenture Programme ... as constituting a preferential governmental subsidy in contravention of subsidy regulations of the World Trade Organization. A draft resolution disputing the programme was submitted to the United States Congress in February 2001 and remains under review.").

<sup>82</sup> *Hynix, Will it Really Survive?*, NEWSMAKER, NO. 439 (August 30, 2001) (copy attached as Exhibit US-141).

observed that with the increasing pressure from abroad, the GOK could soon be grappling with a full-fledged WTO dispute, stating: “Of course the government is very aware of this, and is likely to tread very carefully.”<sup>83</sup> Yet another commentator stated in August: “Our government is squirming and cringing over these viewpoints from overseas. If the government goes all out to keep Hynix alive, it will surely be on a collision course with trade friction overseas.”<sup>84</sup>

94. Under these circumstances, one would expect the GOK to be more circumspect in its implementation of its Hynix bailout policy. Nonetheless, there was evidence of the GOK’s entrustment/direction, albeit evidence of a more circumstantial nature.

95. In July 2001, DRAMs prices fell drastically and Hynix still faced a liquidity crisis. The GOK reiterated its commitment to keeping Hynix afloat, and, during the planning of the October restructuring, continued its practice of public commentary aimed at ensuring the banks’ cooperation.

96. For instance, on 3 August 2001, the GOK gave a clear indication to Hynix’s creditors that they had no choice but to capitulate to GOK demands when Deputy Prime Minister Jin Nyum reaffirmed the GOK’s strong and unwavering commitment to Hynix: “In the event that the creditor group is unable to resolve the Hynix Semiconductor issue, the government will come forward and make a quick decision ... . If Hynix says it needs an additional 1 trillion won, and if the creditor group cannot make a decision whether or not to provide additional support, the financial authorities should decide. We cannot simply leave it blindly to the creditor group.”<sup>85</sup> Apparently realizing his excessive candor, Jin quickly added: “This should not be viewed as if the government is running the financial sector. It is not.”<sup>86</sup>

97. There is no doubt that Minister Jin’s remarks impacted the actions of the banks. The article states: “Accordingly, Korea Exchange Bank, the main creditor bank, and Salomon Smith Barney (SSB), the financial manager, are talking about possible additional support from the creditor group, including debt restructuring.”<sup>87</sup> A separate report stated: “Jin also urged the creditor financial institutions of Hynix Semiconductors to speedily resolve the troubled firm’s liquidity crisis by forcing more drastic restructuring of the memory chip maker in return for financial support.”<sup>88</sup>

98. In connection with these statements, in August 2001, one report noted that “[w]henver the creditor group attempts to shy away from providing support, the government has talked to them, or even twisted their arms, to bring support for Hynix”.<sup>89</sup> It also observed: “For years Hynix has been

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<sup>83</sup> *An Expensive Decision*, ASIAMONEY (September 2001) (copy attached as Exhibit US-142).

<sup>84</sup> *Hynix Practically in Default, What’s the Problem?*, CHOSUN DAILY (29 August 2001) (translated version) (Exhibit US-25).

<sup>85</sup> *Deputy Prime Minister Chin, ‘Government will Take Actions to Turn Around Hynix’*, KOREA ECONOMIC DAILY (4 August 2001) (translated version) (copy attached as Exhibit US-143).

<sup>86</sup> *Deputy Prime Minister Chin, ‘Government will Take Actions to Turn Around Hynix’*, KOREA ECONOMIC DAILY (4 August 2001) (translated version) (Exhibit US-143); *see also Jin Vows to Eliminate Uncertainties Thru Furthering Restructuring Efforts*, KOREA TIMES (4 August 2001) (copy attached as Exhibit US-144). The New York Times, reporting on former Deputy Prime Minister and Minister of Finance Jin Nyum’s views in this regard, stated: “His preference for a hands-off stance by the government did not necessarily extend to some of the giant corporate invalids that the country is trying to deal with, like Daewoo Motor and Hynix Semiconductor.” *Korean Official Defends Seoul’s Efforts on Economy*, THE NEW YORK TIMES, (23 February 2002) (copy attached as Exhibit US-145).

<sup>87</sup> *Deputy Prime Minister Chin, ‘Government will Take Actions to Turn Around Hynix’*, KOREA ECONOMIC DAILY (4 August 2001) (translated version) (Exhibit US-143).

<sup>88</sup> *Jin Vows to Eliminate Uncertainties Thru Furthering Restructuring Efforts*, KOREA TIMES (4 August 2001) (Exhibit US-144).

<sup>89</sup> *Hynix, Will it Really Survive?*, NEWSMAKER, NO. 439 (30 August 2001) (copy attached as Exhibit US-141).

considered a “second Daewoo” by various market voices. The government and the creditor group are scrambling to turn it around and keep it alive, but the market is not convinced of the possibility of its success ... . The government and the creditor group have absolutely decided to keep it alive.”<sup>90</sup>

99. Another August report stated that “[A]s for the government, it is difficult for them to give up on Hynix because the ruin of Hynix would symbolize the demise of the DJ [Kim Dae Jung] Administration’s “Big Deal” policy (the artificial merger of Hyundai Electronics and LG Semiconductor.)”<sup>91</sup> A short time later, Deputy Prime Minister Jin publicly criticized delays by Hynix creditor banks in putting together the upcoming bailout as further jeopardizing Hynix’s financial situation.<sup>92</sup>

100. In September 2001, Keun-Yung Lee, Chairman of the Financial Supervisory Commission stated in a news conference: “Of three problematic companies, the government will determine how to handle Daewoo Motor and Hynix Semiconductor Inc. by the end of September.”<sup>93</sup> Several days before a meeting of Hynix’s creditors in mid-September 2001, he said that when they met, they would strike a compromise on the bailout plan for Hynix, and disclosed knowingly that: “All the related parties are committed to resolving the Hynix matter as soon as possible.”<sup>94</sup>

101. In addition, in connection with the October bailout, the GOK rewarded certain Hynix creditors by allowing them to utilize preferential tax provisions available only to lenders of companies involved in formal court reorganization. Under Korean law, banks could qualify for tax deductions for bad debt when the debtor was in a court-supervised reorganization, composition, or mandatory composition under Article 44 of the Special Law on Tax Reduction and Exemption. Although Hynix was not in bankruptcy status under Article 44, the Korean Office of Tax Administration issued a special exception authorizing loans of 1.5 to 1.6 trillion won held by five Hynix creditor banks to be considered as tax deductible expenses.<sup>95</sup> Absent this favour from the Office of Tax Administration, those creditors would not have qualified for this preferential and significant tax treatment.<sup>96</sup>

102. The DOC properly considered this evidence in the context of Hynix’s utterly dismal financial condition at the time of the October bailout. Over the course of the summer of 2001, Hynix’s financial situation had deteriorated to near insolvency. Standard and Poor’s had lowered Hynix’s credit rating to selective default<sup>97</sup>, and Hynix had overdue payments of US\$202.1 million owed to its US subsidiary.<sup>98</sup> As Standard and Poor’s noted in an 16 August 2001 revision to Hynix’s rating, “the outlook revision reflects the worsening prospects for Hynix’s profitability and cash flow protection measures amid a severe market downturn in the company’s mainstay dynamic random access memory (DRAM) business”. The notification went on to note that “in the second quarter of 2001, the

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<sup>90</sup> *Hynix, Will it Really Survive?*, NEWSMAKER, NO. 439 (30 August 2001) (Exhibit US-141).

<sup>91</sup> *Hynix Practically in Default, What’s the Problem?*, CHOSUN DAILY (29 August 2001) (translated version) (Exhibit US-25).

<sup>92</sup> *See Banks Open Talks on Hynix Lifeline*, BBC NEWS (September 3, 2001) (copy attached as Exhibit US-147).

<sup>93</sup> *FSC Chairman Promises Sale of Daewoo Motor This Month*, KOREA HERALD (10 September 2001) (copy attached as Exhibit US-148).

<sup>94</sup> *FSC Chairman Promises Sale of Daewoo Motor This Month*, KOREA HERALD (10 September 2001) (Exhibit US-148).

<sup>95</sup> *The Office of National Tax Administration’s Decree to Recognize the Creditors’ Write-Off of the Hynix Loan as a Tax Deductible Expense ¼ May Give Rise to an Issue of Preferential Treatment*, KOREA ECONOMIC DAILY (6 November 2001) (translated version) (copy attached as Exhibit US-149).

<sup>96</sup> *The Office of National Tax Administration’s Decree to Recognize the Creditors’ Write-Off of the Hynix Loan as a Tax Deductible Expense ¼ May Give Rise to an Issue of Preferential Treatment*, KOREA ECONOMIC DAILY (6 November 2001) (translated version) (Exhibit US-149).

<sup>97</sup> *See Standard and Poor’s Press Release* (5 October 2001) (copy attached as Exhibit US-150).

<sup>98</sup> *See GDS Offering Memorandum* at 57 (Exhibit US-151).

company posted an operating loss of Korean won (W) 266 billion, compared with an operating profit of W69 billion in the first quarter of the year. EBITDA net interest coverage for the second quarter of the year is estimated at 1.0-1.5 times, an extremely low level'. The notification also reflected the commonly held belief that Hynix would require another bailout, noting "current harsh market conditions are once again tightening Hynix's liquidity position, making it difficult for the company to undertake enough capital spending to improve, or even maintain, its technological and cost competitiveness. The company is likely to require additional financial support from its creditors to maintain its competitive position in the global DRAM market while meeting its debt obligations in 2001 and 2002".<sup>99</sup>

103. Clearly, the May bailout had simply not been enough to put Hynix back on its feet, and the GOK and the banks it owned and controlled would once again have to step in to provide another, even larger, bailout in October. Yet, notwithstanding this, none of Hynix's creditors produced a legitimate commercial risk analysis. Hynix's dismal financial condition and the absence of such analyses served to reinforce the DOC's conclusion that Hynix was being kept alive by virtue of GOK entrustment/direction of Hynix's creditors.

104. Finally, the United States believes that it is not possible to view the October bailout in isolation. In this regard, Korea has attempted to characterize the October bailout as disconnected from the events of November 2000, when the Economic Ministers first met to launch the Hynix bailout. This is simply untrue. A brief chronology of events should suffice to demonstrate the link between the GOK's actions in November 2000 and the October 2001 bailout:

- November 2000 – The GOK's top Ministry officials meet and order the KEB and the KEIC to execute their plan for Hynix "perfectly," and the FSC meets to grant the credit limit waiver.
- December 2000 – The GOK Ministers plan the KDB Programme and decide to designate the lions share of it for Hynix and other Hyundai companies; Ministers meet with Citibank officials to plan the 800 billion won syndicated loan; and the KEIC guarantees the loans made in connection with the syndicated loan.
- January 2001 – Economic Ministers meet again to hammer out the D/A financing plan for Hynix, forcing cooperation from the KEB and KEIC.
- February 2001 – Economic Ministers meet again to follow up on the D/A financing, and the FSC calls Shinhan and KorAm to a mandatory meeting to request their "cooperation".
- March 2001 – The FSC orders all Hynix creditors to a meeting at FSC offices to secure their commitments on the D/A financing "in the form of a covenant" and requires the formation of the Hynix Creditor Council.
- April 2001 – The Economic Ministers meet yet again to follow up on the D/A financing, and the GOK meets again with Citibank.
- May 2001 – The May restructuring occurs and a KEB official echoes the GOK's continuing support for Hynix on the basis of the economic and strategic consequences of its survival, stating "[i]f Hynix is placed under receivership, [the ROK's] exports will be severely battered

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<sup>99</sup> See *Standard and Poor's Press Release* (5 October 2001) (Exhibit US-150).

[because] Hynix accounts for 4 per cent of exports. As far as I know, the government is now working out a series of powerful measures to ensure the survival of [Hynix].”<sup>100</sup>

- June 2001 – The GOK threatens to sanction KorAm Bank – a bank without substantial GOK ownership – and KorAm then reverses its decision not to participate in the Hynix June 2001 convertible bond offering (part of the May restructuring programme).
- August 2001 – Deputy Prime Minister Jin Nyum announces in a breakfast meeting with businessmen at the Korea Press Center that, “[i]n the event that the [Hynix] creditor group is unable to resolve the Hynix Semiconductor issue, the government will come forward to make a quick decision.” He then stated, “[i]f Hynix says it needs an additional 1 trillion won, and if the creditor group cannot make a decision whether or not to provide additional support, the financial authorities [i.e. the FSS, FSC and MOFE] should decide. We cannot simply leave it blindly to the creditor group.” He added: “This should not be viewed as if the government is running the financial sector. It is not.”<sup>101</sup>
- September 2001 – The Chairman of the FSC states in a news conference: “Of three problematic companies, the government will determine how to handle Daewoo Motor and Hynix Semiconductor Inc. by the end of September.”<sup>102</sup> In that same month, in a prospectus filed with the US Securities and Exchange Commission, Kookmin admits that the GOK can direct its lending decisions.
- October 2001 – The GOK leads the October 2001 bailout, engineering the restructuring under the CRPA.

105. As this brief chronology shows, from the period November 2000 to October 2001, the record before the DOC contained evidence of GOK activity in virtually every month. Thus, the notion that the October bailout was somehow disconnected from the other major events that made up the overall Hynix bailout simply cannot be supported on the basis of the evidence before the DOC. To the contrary, the GOK never wavered in its Hynix policy. The October bailout was merely the last in a series of interrelated, overlapping actions undertaken by the GOK to assist Hynix during the DOC’s period of investigation.

## 7. What was the evidence of entrustment / direction in respect of Pusan?

106. Regarding evidence pertaining specifically to Pusan, Pusan, along with other Hynix creditors, reportedly met on multiple occasions directly with GOK officials to discuss assisting Hynix.<sup>103</sup> Pusan

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<sup>100</sup> *Creditors Deny Hynix Receivership Rumors*, KOREA TIMES (4 May 2001) (Exhibit US-26).

<sup>101</sup> *Deputy Prime Minister Chin, “Government will Take Actions to Turn Around Hynix,”* KOREA ECONOMIC DAILY (4 August 2001) (translated version) (Exhibit US-118).

<sup>102</sup> *FSC Chairman Promises Sale of Daewoo Motor This Month*, KOREA HERALD (10 September 2001) (Exhibit US-148).

<sup>103</sup> *Meetings on 12/20/00: Self-Rescue Before Asking for Help*, THE KOREA ECONOMIC DAILY (11 January 2001) (translated version) (Exhibit US-81); *1/9/01: Government and Creditor Group ‘Bewildered’ by Hyundai Electronics ‘Dogged Clamoring’*, KOOKMIN DAILY (January 11, 2001) (translated version) (Exhibit US-82); *Self-Rescue Before Asking for Help*, THE KOREA ECONOMIC DAILY (11 January 2001) (translated

was subject to the KEB's authority as Hynix's lead bank, and regularly attended KEB-convened Hynix creditor meetings.<sup>104</sup> In addition, the GOK waived the statutory credit limits so that Pusan could participate in the KDB bond programme<sup>105</sup>, and the GOK compelled its participation in Hynix's bailout through the CRPA.<sup>106</sup> Furthermore, like the other creditors, the GOK forced it to participate in the 10 March 2001 meeting between Hynix's creditors and the FSC.<sup>107</sup> Like the other creditors, the GOK also blocked it from finding Hynix in default.<sup>108</sup>

107. Other relevant evidence is the fact that the GOK's Hynix bailout policy consisted of a single programme, and the evidence of entrustment/direction that does not pertain specifically to Pusan. Finally, there is the context in which the DOC had to consider this evidence, which included the facts relating to Hynix's dismal financial situation and the fact that Pusan offered no legitimate credit risk analysis for assisting Hynix. These factors are discussed in more detail in the response to Question 3, above.

**8. Regarding Figure US-4, the different proportions of council vote held by group A, B and C creditors in respect of the October 2001 restructuring do not add up to 100%. Please explain.**

108. The percentages set forth in Figure US-4 are approximate, because the precise percentages are business proprietary. Thus, the exact percentages have been ranged, and the discrepancy noted by the Panel reflects this ranging.

109. According to Figure US-4, Group A creditors accounted for over 15% of the Council vote, Group B creditors accounted for over 50% of the Council vote, and Group C creditors accounted for over 18% of the Council vote for the October 2001 restructuring. The remaining portion of the Council vote for the October 2001 restructuring – approximately 17% – was held by over 90 separate entities, such as investment trust companies, leasing, financing companies, and other financial institutions. Many of these other financial entities were wholly owned subsidiaries of, or majority owned by, one of Hynix's Group A or Group B creditors.

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version) (Exhibit US-81); *3/10/01: The Grace Period Decision for Three Affiliates of Hyundai Group – Stories of Inside and Outside*, KOREAN SEOUL ECONOMIC DAILY (11 March 2001) (translated version) (Exhibit US-79); *Grace Period Discussion on Hyundai Electronics*, MAEIL ECONOMIC DAILY (March 10, 2001) (translated version) (copy attached as Exhibit US-136); *The Creditor Group Finalizes Financing Package for 3 Hyundai Affiliates*, NAEOE ECONOMIC DAILY (10 March 2001) (translated version) (Exhibit US-78); *GOK Verification Report* at 18-19 (Exhibit US-12).

<sup>104</sup> *Hynix Verification Report* at 13, 14, 16 (Exhibit US-43).

<sup>105</sup> *Issues and Decision Memorandum* at 51-52 (Exhibit GOK-5); *GOK Verification Report* at 16-17 (KDB Fast Track Programme blanket waiver) (Exhibit US-12).

<sup>106</sup> CRPA, Art. 2 (Exhibit US-51).

<sup>107</sup> *3/10/01 Meeting with FSC: Bank Should be Allowed to Make Decision on the Matter of Support for Specific Companies*, MAEIL ECONOMIC DAILY (March 11, 2001) (copy attached as Exhibit US-146); *Grace Period Discussion on Hyundai Electronics*, MAEIL ECONOMIC DAILY (10 March 2001) (translated version) (Exhibit US-136); *Hynix, Will it Really Survive?*, NEWSMAKER, No. 439 (August 30, 2001) (Exhibit US-141); *Never-ending Aid for Hyundai*, KOREA TIMES (12 March 2001) (Exhibit US-80); *Seoul's Continuing Support Spawns Fresh Debate Over HEI's Viability*, KOREA HERALD (14 March 2001) (copy attached as Exhibit US-157); *The Creditor Group Finalizes Financing Package for 3 Hyundai Affiliates*, NAEOE ECONOMIC DAILY (10 March 2001) (translated version) (Exhibit US-78); *The Grace Period Decision for Three Affiliates of Hyundai Group – Stories of Inside and Outside*, KOREAN SEOUL ECONOMIC DAILY (11 March 2001) (translated version) (Exhibit US-79); *GOK Verification Report* at 18-19 (Exhibit US-12).

<sup>108</sup> *GOK Verification Report* at 19 (Exhibit US-12).

**9. What was the basis for the DOC's finding that Citibank was not entrusted/directed?**

110. During the investigation, Micron argued in its petition that DOC should treat lending from Citibank as having been "entrusted and directed" by the GOK.<sup>109</sup> Micron argued that, in light of the long-standing relationship between Citibank and the Government of Korea reaching back to the 1960s, the evidence suggested that "Citibank was asked, if not directed, by the GOK to provide the loan to Hynix on concessionary terms. Such GOK encouragement is tantamount to government directed credit of a debt-restructuring package that was achieved on non-commercial terms."<sup>110</sup>

111. The DOC, however, determined that there was no government direction or entrustment of Citibank. The DOC's determination was based principally on its findings that Korean branches of foreign banks were not subject to GOK direction, and that loans by Citibank in particular were not directed by GOK. As stated in the DOC's *Final Determination*:

[W]e note that, in past cases, we have found that loans from ROK branches of foreign banks are not subject to the direction of the GOK.... As part of this finding, we found in past cases that loans from Citibank were not directed by the GOK.... Based on these past findings, we have determined that the lending and credit practices of Citibank are not directed by the GOK. However, as discussed in Comments 1 and 5, below, while we find that Citibank's loans from prior periods are acceptable for use as a benchmark, we find that Citibank's loans relating to the Hynix restructuring are not appropriate for use as benchmarks.<sup>111</sup>

112. One of the past cases cited by the DOC, in which it addressed whether foreign banks were subject to government direction is *Stainless Steel Plate in Coils From the Republic of Korea*. In that case, the DOC explained the basis for its finding of no government control or direction over foreign banks (and Korean branches of foreign banks) as follows:

Petitioners' contention that record evidence establishes that the Korean branches of foreign banks were subject to the same GOK controls and direction that applied to domestic commercial banks is not supported by the record. The record evidence cited by petitioners does not amount to GOK control and direction of these institutions' operations and lending practices.

First, the 1996 and 1998 OECD reports do not support petitioners' arguments. While the 1996 OECD report discusses funding levels by foreign banks in Korea, nowhere does that report state that these banks were subject to the GOK's control or direction. Moreover, the 1998 OECD Report, in discussing the weakness of the Korean banking system, and in attributing responsibility for that weakness partly to the government's direct and indirect intervention in the operations of commercial banks, mentions only domestic commercial banks, not foreign banks....

Petitioner's reliance on the reports issued by the Presidential Commission for Financial Reform, quoted by the Department in the Credit Memo, is equally

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<sup>109</sup> *Countervailing Duty Petition* (1 November 2002) at 57 (copy attached as Exhibit US-135)

<sup>110</sup> *Micron's 14 March 2003 Comments to the US Department of Commerce* at 77 (copy attached as Exhibit US-152); see also *Micron Case Brief* (22 May 2003), at 73 n.213 ("Citibank's close and long-standing relationship with the GOK suggests that Hynix's Citibank loans were either directed by the GOK or made by Citibank to curry favour with the GOK) (copy attached as Exhibit US-153); and *Financial Experts Report* at 8 ("As for the participation of foreign banks, such as Citibank, the expert stated that these banks understand the political system in Korea and work it in their favour.") (Exhibit GOK-30).

<sup>111</sup> *Issues and Decision Memorandum* at 17 (Exhibit GOK-5).



misplaced. The section of the Presidential Report titled “Deregulation of Access to Foreign Capital Markets,” cited by petitioners refers to regulations governing access to foreign capital markets, not regulations governing foreign currency-denominated loans from domestic branches of foreign banks in Korea.[] Regulations governing access to foreign capital markets are quite separate from those governing domestic branches of foreign banks in Korea.... This has nothing to do with any GOK controls over the operations of domestic branches of foreign banks....

... Their [foreign banks’] source of funds was from their head offices and, as respondents correctly illustrate, the appointment of their senior officials was not subject to influence by the GOK. Petitioners proffer no evidence that foreign banks in Korea were “inescapably influenced by the controls on every other sector of the banking industry.” Rather, they speculate that these banks would be no less influenced than their Korean counterparts by the lead of the Korean Development Bank and the Bank of Korea to extend credit to certain government-favoured projects. This is not a conclusion reached by any of the commercial bankers at verification, and petitioners do not point to any evidence that would support this contention.<sup>112</sup>

113. The DOC’s conclusions regarding the lack of entrustment and direction of Korean branches of foreign banks applied only to that category of banks, and *not* to Korean banks that may have had some level of foreign ownership. Such banks were Korean commercial banks, subject to all Korean banking laws, regulations and oversight. Moreover, most of these Korean commercial banks, including Shinhan, KorAm, Kookmin, Hana, and H&CB, had some level of government ownership, even when there was also some foreign ownership. Moreover, for each of these banks, the GOK was the single largest shareholder based on both common and preferred shares. These banks were thus a distinct category from wholly foreign banks that operated branches within Korea.

**10. In its Second Written Submission to the Panel, the US refers to the Kookmin Prospectus in a section entitled “GOK Ownership and Control of Hynix’s creditors”. Does the US argue that GOK’s 15.1% shareholding resulted in GOK control over Kookmin?**

114. Although government ownership is a relevant factor to be considered in an analysis of entrustment or direction, the United States is *not* arguing that the GOK’s ownership interest in Kookmin *per se* allowed it to control the bank. In the section of our submission referred to in the Panel’s question, the United States was refuting Korea’s claim that the GOK was legally precluded from intervening in the banking sector.<sup>113</sup> In doing so, we did not limit our analysis to government control by virtue of ownership. Rather, we discussed the issue of the GOK’s legal rights as a shareholder, *plus* the evidence related to Kookmin. We specifically cited Kookmin’s SEC prospectus as evidence of government control or influence over banking decisions, even in a situation where the GOK had only a 10 per cent voting interest. The key point made by the Kookmin prospectus is that it represents a formal acknowledgment by the bank that, at the behest of the GOK, it made loans to troubled high-technology borrowers that it would not otherwise make. Moreover, Kookmin’s annual report expressly listed Hynix, a high-technology company, as its top troubled borrower. In addition, Kookmin’s rationale for assisting Hynix echoed the government’s objectives referenced in Kookmin’s

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<sup>112</sup> *Stainless Steel Plate in Coils From the Republic of Korea, Final Negative Countervailing Duty Determination*, 64 Fed. Reg. 15530, 15542 (31 March 1999) (copy attached as Exhibit US-154). The DOC’s analysis of direction of credit in the *Stainless Steel Plate in Coils From the Republic of Korea* investigation forms part of the record in the instant investigation. See *Direction of Credit Memorandum*, Attachment 4 at 17 (Exhibit US-8).

<sup>113</sup> The United States recognizes that this may not have been clear from the heading of the section.

SEC prospectus.<sup>114</sup> The DOC reasonably found this to be compelling evidence of government entrustment or direction of Hynix's creditors, which, when considered in light of all the other evidence, provided a sound basis for its determination that the Hynix bailout was a government financial contribution.

**11. In reply to question 1 from the Panel, the US stated that “the constituent parts of the subsidy programme ... included the 800 billion won syndicated loan, the KDB Fast Track bond programme, the May 2001 restructuring package, the October 2001 restructuring package, and the benefits conferred by these and other financial contributions, such as D/A loans, made as part of the Hynix bailout.” Please specify an exhaustive list of the constituent parts of the alleged subsidy programme.**

115. The constituent parts of the subsidy programme were the 800 billion won syndicated loan, the KDB Fast Track bond programme, the May 2001 restructuring package, and the October 2001 restructuring package. Benefits conferred under the subsidy programme during the period of investigation were attributable to all types of new and restructured loans (including bonds), as well as debt forgiveness, debt-to-equity swap, and retroactive interest rate reduction prior to the swap. The following is a list of the specific types of financial instruments that the DOC countervailed: syndicated loan; KDB bonds; convertible bonds; new loan (in lieu of convertible bonds) from the Industrial Bank of Korea, a government entity; foreign currency loans (new and/or restructured); KDB Industry Facility loans (new and/or restructured); short-term loans (new and/or restructured); usance loans (new and/or restructured); overdraft loans (new and/or restructured); general loans (new and/or restructured); D/A loans (new and/or restructured); five-year, zero-interest debentures; retroactive interest rate reduction prior to debt-to-equity swap; debt held by investment trust companies; operating and capital leases; various other loans (new and/or restructured).<sup>115</sup>

**12. Please comment on para. 182 of Korea's Second Written Submission. In particular, does the US accept that the Hynix-only import figures are a reasonable proxy for the total import figures?**

116. No, the United States does not accept that the Hynix-only import figures are a reasonable proxy for the total import figures. The United States has discussed in detail subject import volume and the increasing trends in subject import volume both absolutely and relative to domestic production and consumption during the period of investigation.<sup>116</sup> Notwithstanding the constraints imposed on the United States by virtue of the confidentiality of the underlying data, the United States provided as much information as possible within the confines of its obligations to protect the confidentiality of the underlying information. We refer the Panel to prior US submissions for an explanation of why the Hynix-only import figures are an unacceptable proxy, an explanation of why Korea's compilation of Hynix's data is flawed compared to the US compilation in Confidential US Figure 1, and some observations based on the Hynix-only data.<sup>117</sup>

117. Indeed, given Korea's failure to challenge the ITC's treatment of this data as confidential and its failure to challenge as inadequate the ITC's summary of the confidential information in the public version of its report, Korea's continuing attempt to assign values to the confidential data is unwarranted. Under the terms of Article 12 of the SCM Agreement, the United States is obligated to protect the confidentiality of data submitted during the ITC's investigations. However, *all*

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<sup>114</sup> See US Second Submission, para. 18, and the materials cited therein; *see also Issues and Decision Memorandum* at 59 (Exhibit GOK-5).

<sup>115</sup> See *Hynix 2001 Audited Financial Statements* at 38-41 (Exhibit US-125), and *October Restructuring Package* (Exhibit GOK-23(e)).

<sup>116</sup> See US Answers to Panel Questions (Answers to Questions 15 and 18).

<sup>117</sup> US Second Submission, paras. 114 to 118; and US Second Oral Statement, paras. 34-36.

confidential information collected by, submitted to, and relied upon by the ITC was made available to counsel for interested parties, including Hynix's counsel, under the terms of an administrative protective order.

**13. Please comment on Korea's argument regarding the difference between the US submission and the ITC report regarding the extent of the "portion" speciality products (para. 211 of Korea's Second Written Submission). Please comment on Korea's argument regarding the ITC's use of "value estimates" in respect of those speciality products (para. 212 of Korea's Second Written Submission).**

118. In its written submissions, the United States has characterized the amount of non-subject imports consisting of Rambus and specialty DRAM products as "significant". This was the same term that Hynix used during the ITC's investigation.

119. In a postconference brief that Hynix and Samsung submitted jointly during the preliminary phase of the ITC's investigation, they emphasized that Samsung, whose US shipments of DRAM products were an important portion of US shipments of non-subject imports during the period of investigation, offered products that "differ[ed] *substantially* from and were not interchangeable with products made by US producers."<sup>118</sup> Thus, by Hynix's own admission, Samsung's imports were less likely to compete with US-produced products than Hynix's imports.

120. Hynix and Samsung further asserted that "[n]o domestic producer makes Rambus chips, to the best of our knowledge, and Micron's witness Mr. Sadler acknowledged ... that, 'there's only one significant supplier of RAM Bus {sic} DRAM; that would be Samsung from Korea.'"<sup>119</sup> They noted "the incontrovertible fact is that Rambus now accounts for a *significant* percentage of Samsung's US sales, \*\*\*, as shown in SSI's questionnaire response".<sup>120</sup> Hynix and Samsung also emphasized that "irrefutable evidence exists that a *very significant* proportion of Samsung's US sales had no competition from" Micron, Infineon, and Hynix.<sup>121</sup>

121. As another example, they noted that another "significant market segment" where Samsung had not materially injured the domestic industry was in double data rate ("DDR") DRAM products, which are technically not specialized products, but leading edge SDRAM products. They pointed to evidence that Samsung was clearly out in front of other suppliers in terms of DDR penetration.<sup>122</sup> For all of these reasons, they argued, imports of Samsung's Rambus, specialty, and leading edge DRAM products could not have materially injured the domestic industry.<sup>123</sup>

122. There was also extensive testimony by witnesses at the Commission's hearing about the extent to which non-subject imports consisted of Rambus and specialty DRAM products.<sup>124</sup>

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<sup>118</sup> See, e.g., 27 November 2002 Postconference Brief of Hynix and Samsung at 52 (Exhibit US-100) (emphasis added).

<sup>119</sup> See, e.g., 27 November 2002 Postconference Brief of Hynix and Samsung at 50-56 (Exhibit US-100).

<sup>120</sup> See, e.g., 27 November 2002 Postconference Brief of Hynix and Samsung at 50 n.69 (Exhibit US-100) (emphasis added).

<sup>121</sup> See, e.g., 27 November 2002 Postconference Brief of Hynix and Samsung at 53 (Exhibit US-100) (emphasis added).

<sup>122</sup> See, e.g., 27 November 2002 Postconference Brief of Hynix and Samsung at 55-56 (Exhibit US-100).

<sup>123</sup> See, e.g., 27 November 2002 Postconference Brief of Hynix and Samsung at 50-56 (Exhibit US-100).

<sup>124</sup> See, e.g., Hearing Transcript at 168-175, 258-260 (Exhibit US-94).

123. The ITC confirmed the validity of these arguments through its data collection efforts. The ITC collected information from importers on the percentage of imported products and US shipments of DRAM products in 2001 and 2002 that were “standard” DRAM products, Rambus DRAM products, and other “specialty” DRAM products. Importers were asked to differentiate the reported information for Rambus DRAM products containing dice fabricated in Korea by “Samsung” and the portion containing dice fabricated in Korea by “Others” and to differentiate the reported information for specialty DRAM products containing dice fabricated in Korea by “Samsung” and the portion containing dice fabricated in Korea by “Others”.<sup>125</sup> The responses indicated that a significant percentage of non-subject DRAM products were non-standard DRAM products, such as Rambus or specialty DRAM products.<sup>126</sup> Korea does not challenge the ITC’s treatment of this information as confidential under either Article 12.4 or Article 22.5 of the SCM Agreement. Because the Panel requested a non-confidential summary of the underlying confidential percentage, we confirmed in response to question 17 of the Panel’s Questions Following the First Substantive Panel Meeting that of all US shipments of non-subject imports in 2001, approximately one-fifth were Rambus or specialty DRAM products. The corresponding percentage in 2002 was somewhat higher than in 2001.

124. The information collected by the ITC concerning the share of imports that were “standard”, “specialty”, “Rambus”, and “other” DRAM products was based on the value share of the questionnaire respondents’ total US shipments. The ITC provided draft questionnaires to the parties during the final phase of its investigation in which it proposed collecting this data on a value-basis. In Hynix’s comments on the questionnaire responses, Hynix never asked the ITC to collect the data on a quantity basis as well.

125. In its answer to question 16 of the Panel’s Questions Following the First Substantive Panel meeting, Korea asserts based on “public evidence” that Rambus DRAM products accounted for less than 10 per cent of total DRAM sales by Samsung, which Korea characterizes as the major supplier of Rambus DRAMs. There are a number of problems with this assertion. First, Korea’s estimate is based solely on Rambus DRAMs and does not even purport to consider specialty DRAM products. Second, the information cited by Korea is based on data for the global market gathered by Gartner/Dataquest, not the US market, whereas the data collected by the ITC was tailored to the US market. Finally, the percentage submitted by Korea conflicts with the percentage that Korea offered to the Panel during the First Substantive Panel Meeting. It is the recollection of the United States that in response to a question from the Panel, Korea’s counsel estimated that Rambus and specialty DRAM products accounted for approximately 20 per cent of all non-subject import shipments to the US market. When the United States enquired as to the source of this estimate in the ITC record, Korea’s counsel responded that he had asked Hynix the previous night and that 20 per cent was Hynix’s estimate based on its knowledge of the market.

**14. In response to Question 23 from the Panel, the US asserts that although the ITC determined that non-subject imports were responsible for “the bulk of the market share lost by domestic producers during the period of investigation,” it identified two reasons why it did not find the volume of non-subject imports as significant as otherwise would be suggested. First, the ITC referred to the composition of non-subject imports. Second, the ITC referred to the price effects of non-subject imports. How do these two factors qualify the loss of market share? Wouldn’t any impact resulting from the composition and price effects of non-subject imports already be reflected in the market share data? For example, wouldn’t the fact that non-subject imports include speciality products mean that they would have taken less market share from domestic producers, and that this consideration is therefore already reflected in the market share data?**

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<sup>125</sup> See, e.g., Importer’s Questionnaire at question II-10(a) (Exhibit GOK-44(b)).

<sup>126</sup> The exact percentage is confidential.

126. The scope of the DRAMs investigation included standard DRAM products as well as specialty and Rambus DRAM products.<sup>127</sup> As we confirmed during the Second Substantive Panel meeting, no party ever argued that Rambus or specialty DRAM products should have been excluded from the scope of the investigation, and no party ever argued that Rambus or specialty DRAM products were a separate domestic like product(s). Hynix affirmatively argued that there was a single domestic like product consisting of DRAM products that corresponded to the scope of the investigation.<sup>128</sup>

(1) As a result, the figures for apparent domestic consumption and the market share data discussed in the ITC's final determination and, for example, in Table C-1 of the accompanying data tabulations includes Rambus and specialty DRAM products as well as standard DRAM products.

(2) Because domestic producers' and Hynix's subject DRAM production facilities in Korea did not produce Rambus or specialty DRAM products, their market shares reflected exclusively shipments of their standard products. The market share for non-subject imports, however, includes US shipments of standard, Rambus, and specialty DRAM products from non-subject sources.

(3) Thus, the relative losses in market share of the domestic industry vis à vis subsidized subject imports from Korea (as manifested for example in an increasing ratio of subsidized subject imports to domestic industry production) cannot be due to specialty products.

(4) Korea has provided data to this Panel indicating that demand for Rambus DRAMs in particular peaked during the period of investigation.<sup>129</sup> This period also corresponded with an increase in the volume and market share of non-subject imports.

(5) In addition, we wish to reiterate that the pricing data collected by the ITC pertained solely to "standard" DRAM products. No pricing data was collected on Rambus or specialty DRAM products. With respect to the standard DRAM products, non-subject imports were underselling the domestic industry at lower margins and at lower frequencies than subsidized subject imports. Even a disaggregated analysis of the pricing data by brand name and by source revealed that subsidized subject imports produced by Hynix in Korea were the lowest priced source more often than any other source, including more often than any of the suppliers of non-subject imports to the US market.

(6) With respect to price effects, the ITC did not state that the market share gains of non-subject imports were qualified by the prices of non-subject imports, but that the "impact" of non-subject imports on the domestic industry was qualified by their lesser price effects. As the ITC explained, non-subject imports undercut the domestic industry at a lower frequency than subject imports did, providing some support for finding that non-subject imports had "less impact" than their absolute and relative volumes might otherwise indicate.<sup>130</sup> The ITC further emphasized that the "primary negative impact" on the domestic industry was due to lower prices and, on this point, subject imports were large enough and priced low enough to have a significant impact "regardless of the adverse effects caused by non-subject imports".<sup>131</sup> Thus, the ITC qualified the "impact" of non-subject imports which, despite their larger volume, had less of a price effect on the industry and caused less of the injury suffered by the industry (lost profits in particular) due to import undercutting and price depression.

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<sup>127</sup> See, e.g., USITC Pub. 3616 at 4 (Exhibit GOK-10).

<sup>128</sup> See, e.g., USITC Pub. 3616 at 5 (Exhibit GOK-10).

<sup>129</sup> See, e.g., Korea's Second Written Submission para. 213; Korea's First Written Submission paras. 253 to 254; Exhibit GOK 19(c).

<sup>130</sup> See, e.g., USITC Pub. 3616 at 27 (Exhibit GOK-10).

<sup>131</sup> See, e.g., USITC Pub. 3616 at 27 (Exhibit GOK-10).

(7) Finally, we would like to reiterate that price undercutting does not necessarily lead to market share changes. It can cause a loss of profits or revenues to the domestic industry when it drives prices down, even when purchasers are not willing to commit a large, or any, portion of their purchases to subsidized imports.

**15. Did the DOC conclude that the KEB was entrusted or directed to (a) participate in the Syndicated Loan and/or (b) seek a loan limit waiver?**

127. The DOC found that the GOK entrusted and directed all Hynix creditors (except Citibank) to participate in all phases of the Hynix bailout during the period of investigation. This finding, based on the evidence as described in the previous US submissions, included the KEB's participation in the syndicated loan.

128. With respect to the loan limit waiver, the GOK's entrustment/direction of KEB to participate in the syndicated loan required the KEB to take whatever actions were necessary to render it eligible to participate. As previously noted, the November 2000 letter from the Economic Ministers to the Presidents of the KEIC and the KEB, included an instruction to seek a waiver of the ceiling on loans.<sup>132</sup>

129. With respect to loan limit waivers, the DOC did find that the GOK's actions enabled Hynix's creditors, including the KEB, to participate in the restructuring and recapitalization of Hynix in situations where they would have been prohibited by law because they were already above legal lending limits.<sup>133</sup> Specifically, in a November 2000 meeting, the Economic Ministers concurred on a "resolution of special approval" by the FSC to increase certain banks' ceiling limits for single borrowers, as requested by the KEB on behalf of Hynix's creditors.<sup>134</sup> The FSC subsequently approved credit limit increases for Hynix' creditors "in order to allow them to participate in the Hynix restructuring process".<sup>135</sup> Without the GOK's special intervention, there would not have been enough participants to raise the 800 billion won December 2000 syndicated loan.<sup>136</sup> The DOC found that the GOK waivers "ensured the successful kickoff of Hynix' restructuring".<sup>137</sup>

**16. To what extent was the USD 1.35 billion GDS offering taken into account by the DOC with respect to its finding of entrustment / direction of Hynix's creditors ?**

130. Contrary to Korea's assertions,<sup>138</sup> the DOC did, in fact, consider Korea's contention that the creditor banks' participation in the May restructuring was contingent upon the success of the June 2001 GDS offering.<sup>139</sup> However, the DOC did not find Korea's contention persuasive.

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<sup>132</sup> See US First Submission, para. 48, and materials cited therein.

<sup>133</sup> *Government of Korea Questionnaire Response* (3 February 2003), Exhibit 8 (Banking Act, Article 35) (Exhibit US-53).

<sup>134</sup> *Results of Discussions at the Economic Ministers' Meeting*, letter from Ministry of Finance and Economy (28 November 2000) (translated version) (Exhibit US-28).

<sup>135</sup> *Issues and Decision Memorandum* at 50-51 (Exhibit GOK-5); *Government of Korea Verification Report* at 16 (Exhibit US-12).

<sup>136</sup> See, e.g., *Hyundai Electronics May Seek Loans Beyond Borrowing Limit*, AFX NEWS LIMITED, AFX-ASIA (1 December 2000) (Exhibit US-54); *Panel to Approve Excess Credit Provision to Hyundai Electronics*, KOREA HERALD (2 December 2000) (translated version) (Exhibit US-55); see also *Government of Korea Verification Report* at 16 (Exhibit US-12).

<sup>137</sup> *Issues and Decision Memorandum* at 52 (Exhibit GOK-5).

<sup>138</sup> Korea Second Submission, paras. 68-69

<sup>139</sup> *Issues and Decision Memorandum* at 39 (Exhibit GOK-5).

131. As a practical matter, the massive May 2001 restructuring package came *before* the June GDS offering. Hynix creditors met and voted to provide such a package on 7 May 2001. The new loans and debt restructuring included in the May package were a focal point of the GDS Offering Memorandum, which was provided to potential share purchasers.<sup>140</sup> In the Offering Memorandum, the May restructuring was labelled “Concurrent Financing Transactions”, and was characterized as a central portion of the overall recapitalization plan for Hynix. Along with the KDB Fast Track Program, it was presented as the cornerstone for restoring Hynix’s liquidity.<sup>141</sup> The Offering Memorandum also noted that the May restructuring would close “substantially concurrently”, with the closing of the GDS<sup>142</sup>, thus highlighting the automaticity of the assistance agreed to in May. Finally, the “Risk Factors” section of the Offering Memorandum did not even mention the “contingency” related to the May bailout – something that surely would have, and should have, been featured prominently, if in fact, such a risk existed.<sup>143</sup> Overall, the characterization of the May restructuring in the Offering Memorandum clearly gave the impression that the funds and restructuring would be forthcoming, and immediate.

132. In addition, Korea’s assertion also was contradicted by the Offering Memorandum’s discussion of the GOK’s direct support of Hynix through the KDB fast track program. The KDB fast track programme was in operation before the May restructuring package and was never conditioned upon the result of the GDS offering. In fact, the Offering Memorandum expressly specified in numerous places how the GOK stood behind Hynix. In order to demonstrate GOK’s continuing support to Hynix, the Offering Memorandum specifically stated that, “as a supplement to the May restructuring package, approximately 2.0 trillion won in additional financing was expected to continue to be available to Hynix from 31 May 2001 through the remainder of 2001 under the debenture rollover programme sponsored by KDB”.<sup>144</sup> Thus, Hynix was clearly relying on the support of the GOK in selling its GDS shares and the alleged contingency – assuming *arguendo* that it actually existed – was largely inconsequential.

133. It also was noteworthy that the GOK pushed Korea’s investment trust companies to purchase Hynix corporate debentures in May as a way to support the GDS offering.<sup>145</sup> According to press reports, the FSS called on the investment trust companies to buy Hynix convertible bonds as part of the May restructuring, saying that attracting foreign capital for Hynix could not be done without cooperation of the investment trust companies.<sup>146</sup>

134. Finally, even after the May announcement was made, but before the GDS offering closed, Hynix creditor banks entered into an agreement on 12 June 2001, setting the terms of the underwriting agreement for the issuance of the KRW 1,000 billion of convertible bonds.<sup>147</sup> If it was truly the case that the banks were waiting until the successful conclusion of the GDS to decide whether to proceed with the May bailout, why would they meet again before the GDS even closed to work out the details and then sign an agreement with respect to the terms of the underwriting?

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<sup>140</sup> *Hynix GDS Offering Memorandum* at 4-5 (Exhibit US-151).

<sup>141</sup> *Hynix GDS Offering Memorandum* at 4 (Exhibit US-151).

<sup>142</sup> *Hynix GDS Offering Memorandum* at 4 (Exhibit US-151).

<sup>143</sup> *Hynix GDS Offering Memorandum* at 18-32 (Exhibit US-151).

<sup>144</sup> *Hynix GDS Offering Memorandum* at 4 (Exhibit US-151).

<sup>145</sup> *Hynix GDS Offering Memorandum* at 6 (Exhibit US-151). The Offering Memorandum described under the title of “Proposed Investment Trust Refinancing Transaction,” that certain Korean investment trust companies were contemplating a potential investment of approximately 680 billion won in aggregate principal amount of Hynix debentures.

<sup>146</sup> *Creditor Group ... Asks Investment Trust Companies to Take Over 750 Billion Won of Hynix Corporate Debentures*, THE KOREA ECONOMIC DAILY (May 30, 2001) (translated version) (copy attached as Exhibit US-155); see also *Finance/Conflict Between Banks and Investment Trust {Companies} Over Support for Hynix*, DONG-A DAILY (May 4, 2001) (translated version) (copy attached as Exhibit US-156).

<sup>147</sup> *Hynix GDS Offering Memorandum* at 5 (Exhibit US-151).

135. Thus, the DOC reasonably declined to accept the argument that the May restructuring package was conditioned upon the GDS offering. If anything, the “condition” to the May restructuring was nothing more than a “symbolic gesture” designed to disguise the true nature of the May restructuring.

**17. Was the participation by “small” creditors accounting for approximately 20% of the debt in the October Restructuring countervailed?**

136. We understand the Panel’s use of the term “small creditors” as referring to those members of the Hynix Creditor’s Council other than those listed by name in Figure US-4 (*i.e.*, those grouped under “investment trust companies and other financing companies”). These creditors accounted for approximately 17 per cent of the council vote at the time of the October 2001 restructuring. The DOC countervailed all of the debt held by the “small creditors” that was affected by the October restructuring.

137. As discussed in response to Question 8, above, many of these financial entities were subsidiaries of, or majority owned by, one of Hynix’s Group A or Group B creditors. Further, we note that Hynix itself attributed 100% of the debt affected by the October restructuring to the 18 creditors included in Figure US-4, plus HSBC.<sup>148</sup>

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<sup>148</sup> See Exhibit GOK-23(e). HSBC was a bank that was not included in Figure US-4 because it was not part of the Creditors’ Council and, thus, did not vote on the October restructuring package.



**TABLE OF EXHIBITS**

<b>Exhibit US-</b>	<b>Title of Exhibit</b>
131	<i>Corporate Governance in Korea</i> , Il Chong Nam <i>et al.</i> , KOREA DEVELOPMENT INSTITUTE (from Organization for Economic Co-operation and Development conference on Corporate Governance in Asia: A Comparative Perspective) (Seoul, 3-5 March 1999)
132	<i>Korea's Economic Crisis and Corporate Governance</i> , Sang-Woo Nam, SCHOOL OF PUBLIC POLICY AND MANAGEMENT, KOREA DEVELOPMENT INSTITUTE (undated)
133	'Gangster-Style' Solution for Hynix, DONG-A DAILY (1 November 2001)
134	<i>GOK Questionnaire Response</i> (4 February 2003)
135	<i>Countervailing Duty Petition</i> (1 November 2002)
136	<i>Grace Period Discussion on Hyundai Electronics</i> , MAEIL ECONOMIC DAILY (10 March 2001) (translated version)
137	<i>Kookmin Urges Seoul to Sell off its Stake</i> , FINANCIAL TIMES (10 November 2001)
138	<i>Highhanded Companies Sued for Unilateral Shareholders Meeting</i> , KOREA TIMES (5 April 2000)
139	<i>Seoul Pushes for a New 'Big Bang' in Banking</i> , ASIA TIMES (18 March 2000)
140	<i>Soundness of Financial Sector Still Remains Remote</i> , KOREA TIMES (2 September 2002)
141	<i>Hynix, Will it Really Survive?</i> , NEWSMAKER, NO. 439 (30 August 2001)
142	<i>An Expensive Decision</i> , ASIAMONEY (September 2001)
143	<i>Deputy Prime Minister Chin, 'Government will Take Actions to Turn Around Hynix'</i> , KOREA ECONOMIC DAILY (4 August 2001) (translated version)
144	<i>Jin Vows to Eliminate Uncertainties Thru Furthering Restructuring Efforts</i> , KOREA TIMES (4 August 2001)
145	<i>Korean Official Defends Seoul's Efforts on Economy</i> , THE NEW YORK TIMES, (23 February 2002)
146	<i>Bank Should be Allowed to Make Decision on the Matter of Support for Specific Companies</i> , MAEIL ECONOMIC DAILY (11 March 2001)
147	<i>Banks Open Talks on Hynix Lifeline</i> , BBC NEWS (3 September 2001)

148	<i>FSC Chairman Promises Sale of Daewoo Motor This Month</i> , KOREA HERALD (10 September 2001)
149	<i>The Office of National Tax Administration's Decree to Recognize the Creditors' Write-Off of the Hynix Loan as a Tax Deductible Expense ¼ May Give Rise to an Issue of Preferential Treatment</i> , KOREA ECONOMIC DAILY (5 November 2001) (translated version)
150	Standard and Poor's Press Release (5 October 2001)
151	<i>Hynix GDS Offering Memorandum</i>
152	<i>Micron's 14 March 2003 Comments to the US Department of Commerce</i>
153	<i>Micron Case Brief</i> (22 May 2003)
154	<i>Stainless Steel Plate in Coils From the Republic of Korea, Final Negative Countervailing Duty Determination</i> , 64 Fed. Reg. 15530 (31 March 1999)
155	<i>Creditor Group ... Asks Investment Trust Companies to Take Over 750 Billion Won of Hynix Corporate Debentures</i> , THE KOREA ECONOMIC DAILY (3 May 2001) (translated version)
156	<i>Finance/Conflict Between Banks and Investment Trust {Companies} Over Support for Hynix</i> , DONG-A DAILY (4 May 2001) (translated version)
157	<i>Seoul's Continuing Support Spawns Fresh Debate Over HEI's Viability</i> , KOREA HERALD (14 March 2001)

## ANNEX E-7

### COMMENTS OF THE REPUBLIC OF KOREA ON ANSWERS OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE SECOND SUBSTANTIVE MEETING

13 August 2004

1. The Government of Korea ("GOK") appreciates this opportunity to comment upon several items of new evidence introduced by the United States in its response to the questions posed by the Panel after the second substantive meeting. Below, we cite the relevant paragraph and/or note to which the comments refer, and then follow with the specific comments.

#### **Para. 70, fn. 67**

2. At para 70, the United States introduces two studies undertaken by the Korea Development Institute (Exhibits US-131 and US-132), not cited in the DOC Decision Memorandum and not previously provided to the panel, to support the argument that the KEB acted as a vehicle of the GOK's financial policy decisions. The problem with these studies is that they primarily pertain to the pre-1997 period. As the GOK extensively noted in its first submission, Korea's financial crisis in 1997 spawned several reform initiatives. These reforms render the KDI studies dated. Moreover, as the GOK has discussed elsewhere, it was foreign-based Commerzbank, not the GOK, that controlled the day-to-day management of KEB.

#### **Para. 76, fn. 70**

3. The United States has introduced new evidence to bolster an old point: it has now cited excerpts from a GOK questionnaire response to the DOC as further evidence that the Korean side somehow conceded that all Hynix restructuring was part of a single, overarching "programme" to bailout Hynix.<sup>1</sup>

4. The Korean side never made any such concession. Although the early stages of the Hynix restructuring may have been interrelated as parts of a Citibank and SSB led restructuring effort, Korea has consistently argued that the October 2001 restructuring was fundamentally different. Although Korea has already addressed this point with respect to the statements of Hynix, the United States now cites a statement made by the Government of Korea in its 13 February 2003 questionnaire response in an effort to buttress its argument. We request that the panel review the cited page from the GOK's response. That review will definitively resolve the issue – the GOK made no such assertion and none can be reasonably implied from the statements it did make.

5. The United States argues for a "single programme" because it realizes that its case otherwise has major factual gaps that cannot be filled with the evidence. Paragraph 76 argues for a single program, because the remainder of this answer provides no evidence directly responding to the specific question: what evidence did the United States rely upon to conclude that the GOK entrusted

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<sup>1</sup> See Exhibit US-134.

or directed Shinhan, Koram, or Hana to participate in the syndicated loan? The United States cites to no evidence on this point, and can only cite to evidence related to other transactions and other banks. The GOK believes such efforts to extrapolate from other evidence does not meet the legal standard of Article 1.1(a)(1)(iv).

**Para. 79**

6. The United States asserts that neither Shinhan, Koram, nor Hana produced any “sort of legitimate credit analysis” to support their decision to extend the syndicated loan.<sup>2</sup> This new factual assertion has several problems.

7. First, the United States cites to no evidence for this factual assertion. As the DOC verification reports indicate, the DOC spent most of its time at verification meeting with KEB, Kookmin, and Citibank. The DOC had a very brief meeting with Shinhan, and no meeting at all with Koram and Hana.<sup>3</sup>

8. Second, this assertion is at odds with the evidence on the record. Citibank made a loan of 100 billion won as part of the syndicated loan. Regardless of when the loan approval was obtained, Citibank did obtain approval to make this large loan. It is simply not credible for the DOC to assert that Citibank made a loan of about US\$ 80 million without going through appropriate credit approval. Since Citibank was leading the syndicated loan effort, and was committing to provide 100 billion won itself, it is quite reasonable for other banks to commit to much less than the 100 billion. Shinhan committed to only 50 billion won; Koram committed to 20 billion won; and Hana committed to 30 billion won. Regardless of what other internal loan approval that each bank undertook, this fact alone provides very strong evidence that these Korean banks had a reasonable basis to make this particular loan.

9. The United States tries to impugn the Citibank loan assessment process.<sup>4</sup> But this argument is also inconsistent with the evidence. Specifically, this undocumented factual assertion is at odds with *two* Affidavits submitted by Tom Fallows, the senior Citibank official that had day-to-day responsibility for Citibank’s participation in the Hynix restructuring. In a March 2003 Affidavit,<sup>5</sup> Mr. Fallows affirmed the following facts:

- “After extensive analysis of Hynix’s financial situation, and Hynix’s competitive position in the DRAM market, SSB and Citibank designed a comprehensive restructuring and recapitalization plan for Hynix.”<sup>6</sup>
- “Our decision to become a new Hynix lender [in December 2000] was made on the basis of Citibank’s standard credit policies and procedures. Given the size of the transaction and the non-investment grade standing of Hynix, the credit process required much more senior approval than would be the normal case for ordinary Korean deals. The Citibank credit process functions separately and apart from SSB, which provided the financial advisor services to Hynix described above.”<sup>7</sup>

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<sup>2</sup> US Answers to Questions, para. 79.

<sup>3</sup> See Exhibit GOK-31, pp. 11-24.

<sup>4</sup> See US Answers to Questions, para. 56.

<sup>5</sup> Exhibit GOK-26.

<sup>6</sup> *Id.*, para. 6.

<sup>7</sup> *Id.* at para. 12.

10. Thus, a senior Citibank official specifically told the DOC that it had used a heightened credit evaluation process, and that process was separate from any SSB evaluations. In a May 2003 Affidavit, Mr. Fallows affirmed the following facts:

- “We also explained to the Commerce Department [during the Commerce Department’s visit] that Citibank’s decision to participate in the Hynix restructuring was based on thorough and detailed assessment of Hynix’s long-term viability at that time from one of the best analysts in the industry, Jonathan Joseph. At the time, Mr. Joseph was the premier analyst covering Micron and the industry. We explained to the Commerce Department that Mr. Joseph’s report in reply to our request was that (1) Hynix had very good technology, (2) was a lower cost producer compared to competitors, and (3) because of its sheer size (following the merger of LG) would be able to handle the costs associated with ever changing technology. Mr. Joseph’s basic conclusion was that Hynix should be seen as a “long-term survivor”.<sup>8</sup>

11. We, again, respectfully urge the Panel to review the two Citibank affidavits for the most accurate description of how and why Citibank participated in the Hynix restructuring.

12. In this connection, we note that the new Exhibit US-154, quoted by the United States in paragraph 112, reinforces this point. In this prior case, the DOC specifically relied upon the testimony of commercial bankers that foreign banks would make their own decisions. Yet in this case, the DOC decided that Citibank was somehow being influenced by the very same vague “pressures” that the DOC had specifically rejected in prior cases as being insufficient. This conclusion to reject Citibank is not supported by the evidence in this case.

13. The syndicated loan in fact made perfect commercial sense, as the first step in an effort to restructure the outstanding Hynix debt, and made it possible for the company to refinance and service that debt. The ultimate success at raising \$1.25 billion of new equity capital from foreign investors confirmed the validity of this initial restructuring effort. That the DRAM market continued to deteriorate in the summer of 2001 does not undermine the reasonableness of the restructuring efforts earlier in the year.

#### **Para. 85**

14. The United States seeks to buttress its argument that the GOK could direct the actions of Kookmin Bank. Yet, in so doing, the United States provides more articles as exhibits that were never addressed in the DOC Decision Memorandum. Exhibit US-137 is offered to illustrate GOK influence over Kookmin, when all the article identifies is Kookmin’s concern over “reputation” related to the minority GOK stake in the bank. The same article goes on to note that Kookmin refused to issue fresh loans to Hynix, while others extended new financing, and that the Deputy Prime Minister Jin Nyum denied putting pressure on domestic banks.

15. Other new articles offered but never cited in the DOC Decision Memorandum are used by the United States to support the assertion that the GOK “handpicked” Kookmin’s CEO. This includes Exhibits US-138 through US-140. While the United States offers this statement as fact, its own Exhibits do no such thing. Exhibit US-138 plainly identifies the statement as an allegation. Exhibit US-139 addresses the accusations of bank unionists, not any affirmation that the GOK directed the placement of Kookmin’s CEO. Finally, it is unclear how Exhibit US-140 in any way supports the US assertion.

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<sup>8</sup> Exhibit GOK-29, para. 17.

16. As a general matter, what these and other articles illustrate is that you have to read the US factual assertions very carefully, line-by-line with the articles used to support them. The disconnects are frequent.

**Para. 96**

17. The US offers a new article at Exhibit US-144, not previously provided the panel, to support its assertion that the Deputy Prime Minister forced banks to finance Hynix. Yet, all the article states is that the Deputy Prime Minister “urged the creditor financial institutions of Hynix Semiconductors to speedily resolve the troubled firm’s liquidity crisis by forcing more drastic restructuring of the memory chip maker in return for financial support”.

**Para. 100, fn. 93**

18. The United States has found and cited another general pronouncement by a government official.<sup>9</sup> The United States uses this alleged comment to bolster its argument that the GOK was somehow behind the October 2001 restructuring.

19. There are several points worth noting about this particular piece of “evidence”. First, this article is nowhere cited in the DOC Decision Memorandum. This article was one of the hundreds of articles mentioning Hynix that Micron placed on the record before the DOC.

20. Second, this article relates primarily to Daewoo, not to Hynix. The FSC Chairman was quoted as saying “Of three problematic companies, the government will determine how to handle Daewoo Motor and Hynix Semiconductor Inc. by the end of September.” The only other statement related to Hynix included the Chairman’s explanation that:

[O]nce creditors of Hynix Semiconductor meet this week, they would strike a compromise on the bailout plan for the troubled memory chipmaker. “All the related parties are committed to resolving the Hynix matter as soon as possible”, he said.

In addition, the top financial supervisor said that despite some confusion, the sell-off of the three Hyundai financial units to American International Group (AIG) is making progress and that tangible results are expected before the end of October.

21. The general comment about “how to handle” the Hynix restructuring must be read in the context of this more detailed statement later in the story. The FSC official was acknowledging the divergent views among the creditors, and the need to work out some compromise in accordance with the CRPA framework. This is hardly compelling or even persuasive evidence of GOK interference in the October restructuring. Indeed, that is probably why the DOC did not even bother to cite the article in the first instance.

22. But at this stage, the United States appears to be searching for any additional evidence to somehow bolster its claim that the GOK was entrusting or directing the October 2001 restructuring. This new piece of “evidence” adds very little to what the United States has already argued.

**Para. 101, fn. 95-96**

23. The United States presents two new articles, not previously provided to the panel, to argue that Hynix creditors received preferential tax treatment related to the October restructuring package. Yet the articles cited in support of the US claim are factually incorrect. First, the tax deduction for

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<sup>9</sup> See Exhibit US-148.

bad debt in connection with the October restructuring was not made pursuant to Article 44, as suggested by the United States, but rather pursuant to the Enforcement Decree of the Corporate Tax Act. Article 62 1.2 of that Act provides for tax deductions for bad debt if they meet the standards of bad debt specified in the Bank Control Regulations of the FSS. The Hynix debt met the standard set forth in the FSS regulations. Since these regulations apply to all corporate debt, Hynix's creditor banks did not obtain any preferential treatment. They met the same standard that applies to bad debt for any other creditor.

**Para. 113**

24. At para 113, the United States seems to be drawing a dichotomy between Korean branches of foreign banks and Korean banks with foreign ownership in that only the latter are subject to Korean banking laws and regulations. This is an assertion never advanced in the DOC's determination. Moreover, this new US implication is wrong. Pursuant to Article 59 of the Banking Act, all Korean branches of foreign banks, including Citibank, are subject to all applicable Korean laws and regulations.

**Paras. 137-142**

25. The United States has now offered excerpts from the GDS Offering Memorandum to support its argument that the May 2001 restructuring was not conditioned on the success of the GDS offering.<sup>10</sup> But these excerpts prove just the opposite.

26. The United States simply misstates the conditions that applied to the GDS in an attempt at *post hoc* rationalization. Although the US focuses on the term "concurrent financing" within the GDS Offering Memorandum, a simple review of that Offering Memorandum reveals that the "concurrent financing" obligations made by the banks were subject to a "principal condition", and namely "completion of sales of equity and/or debt securities generating aggregate gross proceeds of W1,300 billion".<sup>11</sup> The "concurrent financing" obligations linked to that "principal condition" were listed just after this statement and included all the elements of the May 2001 package.<sup>12</sup> Indeed, this "principal condition" was spelled out in the very same pages cited by the United States in its answer.

27. The United States also asserts that the "Risk Factors" section of the Offering Memorandum did not even mention the contingency related to the May package.<sup>13</sup> Once again, the United States is incorrect. Under the sub-heading "If we are unable to carry out our recapitalization plans, our financial condition may be adversely affected" in the "Risk Factors" section, the Offering Memorandum plainly states that:

The success of our recapitalization initiatives, as summarized in "Offering Memorandum Summary – Recapitalization Initiatives and Business Restructuring" is *critical for our business*.<sup>14</sup>

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<sup>10</sup> Exhibit US-151.

<sup>11</sup> Exhibit US-151 at 4.

<sup>12</sup> *Id.* at 4-5.

<sup>13</sup> US Answers to Questions, para. 131.

<sup>14</sup> Exhibit US-151 at 19 (emphasis added).

28. The summary to which the statement refers is the same summary that sets forth the “principal condition” attached to the financing. This is the same summary that the United States has cited as not discussing the condition, but which plainly states the condition.



## ANNEX E-8

### COMMENTS OF THE UNITED STATES ON NEW FACTUAL INFORMATION PROVIDED IN THE REPUBLIC OF KOREA'S ANSWERS TO THE PANEL QUESTIONS FOLLOWING THE SECOND SUBSTANTIVE MEETING

13 August 2004

#### *Question 14*

1. In its August 6 answers, Korea provides for the first time its estimates of the relative volumes of subject imports and non-subject imports that were undercutting domestic prices in 2000 and 2002.<sup>1</sup> These figures were computed in the same manner as the estimates of the relative volumes of subject imports and non-subject imports that were undercutting prices in 2001 that Korea previously submitted to the Panel<sup>2</sup>, and suffer from the same defects.<sup>3</sup> Additionally, the new data are based upon selective portions of confidential import data that the United States has previously shown are not an appropriate proxy for the actual subject import data.<sup>4</sup>

2. The United States wishes to reiterate that there is no basis for substituting Korea's own, less accurate data – including the new data provided in the Korea Second Answers – for that used by the ITC. Korea has not challenged the ITC's treatment of the data in question as confidential. Indeed, at the second meeting with the Panel, Korea highlighted the sensitivity surrounding the treatment of confidential information when it justified its own failure to provide certain information to the DOC – even on a confidential basis under the terms of a protective order – by invoking Korean bank secrecy laws. Moreover, Korea has not challenged as inadequate the ITC's summary of the confidential information in the public version of its report. Under the terms of Article 12 of the SCM Agreement, the United States is obligated to protect the confidentiality of data submitted during the ITC's investigation. The United States has provided as much information as possible within the confines of its obligations. Moreover, all confidential information collected by, submitted to, and relied upon by the ITC was made available to counsel for interested parties, including Hynix's counsel, under the terms of an administrative protective order.

#### *Question 16*

3. In paragraph 39 of the Korea Second Answers, Korea makes the factual assertion that the DOC did not consider the GDS offering in the context of entrustment/direction. As indicated in paragraph 137 of the US Second Answers, however, the DOC did consider Hynix's GDS arguments in the context of entrustment/direction.<sup>5</sup> What Korea fails to explain is that Hynix's sole reference to

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<sup>1</sup> *The Republic of Korea's Answers to the Panel Questions Following the Second Substantive Meeting*, 6 August 2004, para. 33 [hereinafter "Korea Second Answers"].

<sup>2</sup> *Second Substantive Meeting – Oral Statement of the Government of Korea*, 21 July 2004, para. 34.

<sup>3</sup> *Answers of the United States of America to the Panel's Questions to the Parties Following the Second Substantive Meeting of the Panel*, August 6, 2004, paras. 34-38 [hereinafter "US Second Answers"].

<sup>4</sup> US Second Answers, para. 116.

<sup>5</sup> In its response to Question 16, the United States mistakenly ascribed the argument to Korea, rather than Hynix.

the GDS in the context of entrustment/direction was to cite it as evidence in support of its argument that the banks were acting based on the company's financial condition.<sup>6</sup> The DOC did not consider this GDS argument to be relevant to the issue of entrustment/direction. As the DOC stated, "[w]hether the terms are sufficiently affected by government action so as to make the provision actionable is a factual element that is relevant to the measurement of 'benefit,' not 'financial contribution.'" <sup>7</sup> Accordingly, the DOC properly addressed the facts surrounding the GDS in the context of "benefit", as Korea acknowledges.<sup>8</sup> Neither Hynix, nor any other party, ever argued in the underlying investigation that the very existence of any contingency related to the May restructuring evinced a lack of government entrustment/direction.

4. Korea's new argument that the very existence of any contingency in connection with the May restructuring evinces a lack of entrustment/direction is fundamentally flawed and, as discussed in our response to Question 16, is not supported by the record evidence.<sup>9</sup> As the United States discussed with the Panel, it is entirely consistent with the concept of entrustment/direction – *i.e.*, giving someone responsibility for a task – to leave the details to the discretion of the entity entrusted/directed. The concern of the government is that the task be performed, not necessarily *how* it is performed. Those entrusted/directed to perform the task may have various options for fulfilling that objective, some of which may be contingent on other events or factors. The fact that the precise method the private entities ultimately used to perform the task may have been contingent on certain events does not in any way suggest that the government did not entrust/direct the entity to carry out the task in the first instance. Thus, the GDS contingency does not obviate the evidence that the GOK entrusted/directed Hynix's creditors to solve the company's financial crisis – one way or another. In this particular case, the irrelevance of the alleged "contingency" is underscored by the timing of, and the facts surrounding, the GDS offering relative to the May restructuring, as evidenced by the Offering Memorandum itself, as discussed in our response to the Panel's question.

#### ***Question 17***

5. In paragraph 49 of the Korea Second Answers, Korea makes the factual assertion – without citation to record evidence – that Commerzbank was "the largest shareholder" and had "operational control" of the KEB. In fact, the GOK was the largest single shareholder of the KEB. The fact that the GOK's 43.17% interest was held by two GOK entities is immaterial – KEB's own ownership structure chart lists *total GOK ownership* (43.17%) as compared to Commerzbank (32.55%) and public shares (24.28%).<sup>10</sup> KEB was properly included in Group B (private entities owned/controlled by the GOK) of Figure US-4.

6. In paragraph 51 of the Korea Second Answers, Korea makes the factual assertion – again without citation to record evidence – that the investment trusts and financing companies referenced in Figure US-4 "are not owned or controlled by the GOK". In fact, record evidence substantiated that many of these financial entities were wholly owned subsidiaries of, or majority owned by, public entities and private entities owned/controlled by the GOK.<sup>11</sup>

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<sup>6</sup> *Issues and Decision Memorandum* at 39 (Comment 1) (Exhibit GOK-5) (summary of Hynix's arguments).

<sup>7</sup> *Issues and Decision Memorandum* at 47 (Exhibit GOK-5).

<sup>8</sup> *See, e.g., Preliminary Determination*, 68 Fed. Reg. at 16777 (Exhibit GOK-4); *Issues and Decision Memorandum* at 87 and 90-91 (Comment 7) (Exhibit GOK-5).

<sup>9</sup> US Second Answers, paras. 137-142.

<sup>10</sup> *See KEB Ownership Structure Chart* (2001) (copy attached as Exhibit US-158). The KEB ownership figures represent voting shares as of March 2001, as all preferred shares were accorded voting rights at that time. *See* Figure US-4 ("\*\*" notation and source document *GOK Supplemental Questionnaire Response* (March 11, 2003)) at 29 (Exhibit US-36).

<sup>11</sup> *See Chart of Hynix Creditors* (June 16, 2003) (Exhibit US-37).