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

WT/DS296

ANSWERS OF THE

UNITED STATES OF AMERICA

TO THE PANEL'S QUESTIONS TO THE PARTIES FOLLOWING

THE FIRST SUBSTANTIVE MEETING OF THE PANEL

July 9, 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 U.S. 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.

In this public version of the U.S. answers, the BPI has been deleted and replaced with "* * *".

Table of Reports Cited in These Answers

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

QUESTIONS TO THE UNITED STATES

Alleged Subsidization

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

1. The U.S. 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} program," the objective of which was "the complete financial restructuring of Hynix in order to maintain the company as an ongoing concern."[1] As such, the DOC's reference to the "single {subsidy} program" encompassed the GOK's policy and the resulting series of actions taken to support Hynix and prevent its failure from 1999 through the end of the DOC's period of investigation.[2] Specifically, the constituent parts of the subsidy program identified by the DOC included the 800 billion won syndicated loan, the KDB Fast Track bond program, the May 2001 restructuring package, the October 2001 restructuring package, and the benefits conferred by these and other financial contributions, such as D/A loans, made as part of the Hynix bailout.[3]

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

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

3. With respect to the evidence relied on in respect of each of the "private entities," the DOC did not engage in the type of bank- and transaction-specific analysis advocated by Korea. As previously explained, there is no basis in subparagraph (iv) of Article 1.1(a)(1) of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) for such an analysis.[4] Approximately 10-18 banks participated in each of the four bailout measures,[5] and there were hundreds of individual financial contributions (*e.g.*, loans) made by each of these banks under the

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

[2] *Issues and Decision Memorandum* at 19-24 (Exhibit GOK-5).

[3] *See* US First Submission, paras. 127-151.

[4] *See* US First Submission, paras. 164-170.

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

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

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

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

7. The evidence before the DOC included official GOK documentation of high-level meetings and directives; GOK laws; the investigative report of Korea's Grand National Party investigation of the GOK's preferential policies for Hynix and other Hyundai Group *chaebol*; reports of direct meetings between GOK officials and Hynix/Hyundai creditors, confirmed by supporting documentation; sworn submissions to U.S. and Korean regulatory agencies, and reports and website materials of Korean banks; numerous direct quotes from GOK officials in

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

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

interviews and press conferences; public statements of Hynix's creditors; U.S. 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 percent ownership or was the single largest shareholder, and KFB (the GOK was not the largest single shareholder in KFB, but did own 49 percent). Figure US-4, provided in response to Question 2, above, describes the basis for such classification (*i.e.*, the percentage of GOK ownership).

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

11. The designation "majority owned by the government" refers to those financial institutions in which the GOK was the majority shareholder at the time of the Hynix bailout, that is those banks in which the GOK had greater than 50 percent 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

[8] *See* US First Submission, para. 55, note 75; *Issues and Decision Memorandum* at 16 (Exhibit GOK-5).
[9] For purposes of domestic law, the DOC uses the term "government authority" instead of "public body."

B except the KEB and the KFB). Under its general practice, the DOC does not automatically treat an entity as a "government authority" merely because the government has an ownership stake in the entity (even a significant ownership stake).[10] In this case, the DOC found that the GOK majority-owned financial institutions did not meet the criteria for a "government authority." Therefore, the DOC had to determine whether the GOK entrusted or directed these entities to make financial contributions to Hynix.

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

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

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

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

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 percent 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

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

the KDB – were direct.[11] In other words, the DOC did not find, nor did it need to find, government entrustment or direction of the entities it found to be "public." However, the DOC did find that "public" Hynix creditors – the KDB in particular – played a significant role in the GOK's direction of the "private" Hynix creditors.[12]

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

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

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

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

[11] US First Submission, para. 55; *Issues and Decision Memorandum* at 15-16 (Exhibit GOK-5).
[12] *See* US First Submission, paras. 55-78.
[13] *Issues and Decision Memorandum* at 53 and notes 18-20 (Exhibit GOK-5).
[14] *Hynix Verification Report* at 16 (Exhibit US-43).

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?

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 U.S. Securities and Exchange Commission; memoranda of understanding (MOUs) between the government and the government-invested banks that permitted the GOK to fire bank officials; other statements or documents by Hynix creditors corroborating GOK entrustment or direction;

multiple examples of GOK threats and coercive tactics; many observations by third party observers; the GOK's pervasive ownership and control of the banks; direct lending by the GOK through the KDB; and the coordination of the bailout by the KEB, the GOK's officially designated lead bank.

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

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

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

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

27. The three options available to Hynix creditors were:

(1) extend new loans to Hynix, convert a portion of their unsecured Hynix debt to equity, and extend maturities on the remainder;

(2) withhold new loans, convert 100 percent of secured loans and 28.46 percent 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 percent interest. The portion converted into debentures was calculated based on

[15] *See* US First Submission, paras. 88-93.

100 percent of the secured loans and 25.46 percent of the unsecured loans, based on the liquidation value of the company.

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

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

30. The ongoing relationship between the Option 3 banks and Hynix was not a matter of liquidating and walking away. Nor did creditors obtain "what they could have obtained in liquidation."[20] Instead, the relationship between the Option 3 banks and Hynix consisted of five elements that distinguished this situation from a typical liquidation process:

- First, as part of the CRPA processes described above, these banks had no independent rights to seek or establish the value of their outstanding credit to Hynix. Rather, their rights were dictated to them by the government-owned banks and the rest of the blocking majority on the Creditor Council.[21]

- Second, the banks were foreclosed from even seeking liquidation. Under the terms of the CRPA, at the request of the lead creditor bank, the Financial

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

[17] Corporate Restructuring Promotion Act, Article 2.1 (Exhibit US-51).

[18] US First Submission, para. 88.

[19] Korea First Submission, para. 353.

[20] Korea Oral Statement, para. 51.

[21] US First Submission, para. 88.

Supervisory Service (FSS), a government agency, could stop creditors that wanted to seek liquidation from exercising their rights to call loans and to move companies into receivership. In the case of Hynix, the FSS did request that banks refrain from exercising their creditor rights.[22]

- Third, two of the Option 3 banks, Kyongnam and Kwangju, were 100 percent government-owned banks and were merged with another 100 percent government-owned bank, Hanvit, in April 2001, to form Woori Financial Holdings.[23] As a result, there was no need for the GOK to funnel new money through these two banks (which had ceased to have separate legal identities, in any event), because Woori had already committed to assist Hynix by selecting Option 1.

- Fourth, as part of the recapitalization process, banks were subject to intense pressure from the GOK. Among other things, MOUs associated with the recapitalization of banks permitted GOK control over the hiring and firing of bank officials.

- Fifth, and most important, Korea implies that the banks were paid the liquidation value of their loans and that was the end of their relationship with Hynix. *Not true.* These banks were forced to accept an IOU in the form of an interest-free Hynix debenture that would not mature for another five years; *i.e.*, in 2006. In other words, the four banks selecting Option 3 (which, in any event, represented only a small fraction of total Hynix loans) *are still waiting to be paid.*

In sum, the choices available to the creditors at the October 2001 restructuring were clearly designed to ensure the continued survival of Hynix, at the expense of Hynix's creditors.[24]

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

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

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[22] *GOK Verification Report* at 19 (Exhibit US-12).

[23] *GOK Verification Report* at 6 (Exhibit US-12).

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

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

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

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

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

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

35. During the investigation, the GOK conceded that the CRPA was introduced by the National Assembly "to make sure that the banks could not avoid participating in workouts."[27]

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

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

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

Under the CRPA, all creditor banks were obligated to participate in the workout system.[28] The DOC found that this "provided the dominant GOK-owned and controlled [banks] with the ability to establish the financial restructuring terms over many more creditors."[29]

36. Thus, the evidence before the DOC showed that enactment of the CRPA considerably leveraged the GOK's already considerable power over Hynix's creditor banks. First, by naming Hynix's principal transactions bank as head of the council, the GOK positioned itself to take full advantage of the KEB's longtime role as agent and facilitator of government credit and management decisions.[30] Second, the law made all creditors of an ailing firm subject to the Council's authority.[31] This requirement left KFB and other banks with non-GOK ownership little option but to participate in any restructuring and recapitalization measures.

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

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

38. With respect to the October bailout, the four banks that selected Option 3 converted a portion of their loan balances into five-year debentures at zero percent interest. The portion converted into debentures was calculated based on 100 percent of the secured loans and 25.46 percent 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

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[28] *Issues and Decision Memorandum* at 53, n.19 (Exhibit GOK-5).

[29] *Issues and Decision Memorandum* at 53, n.19 (Exhibit GOK-5).

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

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

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

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

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

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

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

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

Alleged Injury

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

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

(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?

[32] *See* US First Submission, paras. 55-56 and note 77.

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

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

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

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[33] *See, e.g.*, USITC Pub. 3616 at 20 (Exhibit GOK-10).

[34] *See, e.g.*, USITC Pub. 3616 at 20 (Exhibit GOK-10).

[35] *See, e.g.*, USITC Pub. 3616 at 15 & n.92, 20 (Exhibit GOK-10).

[36] *See, e.g.*, USITC Pub. 3616 at 20 (Exhibit GOK-10).

[37] *See, e.g.*, USITC Pub. 3616 at 20 (Exhibit GOK-10).

[38] *See, e.g.*, USITC Pub. 3616 at 20 (Exhibit GOK-10).

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

[40] *See, e.g.*, USITC Pub. 3616 at 20 (Exhibit GOK-10).

[41] *See, e.g.*, USITC Pub. 3616 at 20, Tables IV-4, C-1 (Exhibit GOK-10).

[42] *See, e.g.*, USITC Pub. 3616 at 21, IV-3 (Exhibit GOK-10).

2002, it was still higher than the ratio in 2000.[43] The ratio of subsidized subject imports to U.S. shipments of DRAM products increased between 2000 and 2001, and also increased between 2001 and 2002.[44]

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

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

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

50. 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

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[43] *See, e.g.*, USITC Pub. 3616 at 21, IV-3 (Exhibit GOK-10).
[44] *See, e.g.*, USITC Pub. 3616 at 21 n.138, Table IV-5 (Exhibit GOK-10).
[45] *See, e.g.*, USITC Pub. 3616 at 20, 26, Table C-1 (Exhibit GOK-10).
[46] *See, e.g.*, USITC Pub. 3616 at 20, 26, Table C-1 (Exhibit GOK-10).
[47] *See, e.g.*, USITC Pub. 3616 at 20, Table C-1 (Exhibit GOK-10).
[48] *See, e.g.*, USITC Pub. 3616 at 20, 21, 24, 26 & n.174, Tables IV-4, IV-5, C-1 (Exhibit GOK-10).
[49] *See, e.g.*, USITC Pub. 3616 at 21 & nn.140-41, Table IV-3 (Exhibit GOK-10).
[50] *Thailand – H-Beams*, para. 7.170.

absolute volume or any increase in volume absolutely or relative to domestic production or consumption that by definition is "significant."[51]

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

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

53. 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

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

Negligibility was never an issue raised by any of the parties in the underlying agency proceeding. As the ITC determined, "[n]egligibility is not an issue in this investigation because subject imports from Korea constituted *** percent 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.

[52] *See, e.g.*, USITC Pub. 3616 at 21 (Exhibit GOK-10).

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

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

volume absolutely or relative to domestic production or consumption. In the instant investigation, involving a completely fungible commodity, a given volume or a given increase of import volume absolutely or relative to domestic production or consumption is more harmful than in other cases involving highly differentiated products, because it is more likely to have a direct impact on the market particularly in terms of purchasers' willingness to switch to or increase their purchasing of subsidized subject imports, and/or use the low price of subsidized subject imports as leverage to extract lower prices.[55] This is a factual determination properly made by the investigating authorities. As the ITC determined, "[t]he commodity-like nature of domestic and subject imported DRAM products magnifies the ability of a given volume of imports to impact the domestic market and industry."[56]

54. 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.

(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"?

55. In its volume analysis, the ITC found a "significant" absolute volume of subsidized subject imports as well as "significant" increases in that volume both absolutely and relative to both domestic production and consumption, as noted above.[57] In other words, it found that the volume of subsidized subject imports was "significant" based on each of the possible bases identified in Article 15.2 of the SCM Agreement. In its analysis of the price effects of subsidized subject imports, the ITC found significant undercutting and significant price depression by the subsidized subject imports.[58] Under Articles 15.1 and 15.2 of the SCM Agreement, no one or several of these factors can necessarily give decisive guidance. Given its findings concerning the volume and price effects of subsidized subject imports and declines in nearly all of the domestic

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

[56] *See, e.g.*, USITC Pub. 3616 at 21 (Exhibit GOK-10).

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

[58] *See, e.g.*, USITC Pub. 3616 at 22-25 (Exhibit GOK-10).

industry's performance indicators, the ITC concluded that subject imports were having a significant adverse impact on the domestic industry producing DRAM products.[59] The ITC also examined other known factors to ensure that it did not attribute injury from those factors to the subsidized subject imports, and concluded that the domestic industry producing DRAM products was materially injured by reason of subject imports from Korea that Commerce found to be subsidized.[60]

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

57. 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 U.S. 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 injured "by reason of" subject imports as a unified question and then issued a single determination that subsumed the causation question, as evidenced by the ITC's explicit findings: "Based on the record in this investigation, we determine that an industry in the United States is materially injured by reason of imports of {subsidized DRAMs from Korea}."[62]

58. 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

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[59] *See, e.g.*, USITC Pub. 3616 at 25-27 (Exhibit GOK-10).

[60] *See, e.g.*, USITC Pub. 3616 at 20-27 (Exhibit GOK-10).

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

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

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.

59. First, Korea is incorrect that there was a mere "swapping" of customers between Hynix's Korean and Eugene facilities while Hynix upgraded the Eugene facility between July 2001 and January 2002. As we explained in Confidential US-Figure 1,[63] there is a missing factual predicate to Korea's argument – that **[[* * *]]**.

60. 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 U.S. market, its actions displaced U.S. production, U.S. productive capacity, and U.S. workers. During the proceedings before the ITC, the agency included Hynix Semiconductor Manufacturing America in the domestic industry consistent with the position advocated by Hynix.[64] Thus, even if subsidized subject imports were replacing sales of the Eugene facility, that meant that they were replacing sales of a domestic producer and, *inter alia*, displacing U.S. production facilities and employees.[65]

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

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

[64] *See, e.g.*, USITC Pub. 3616 at 12-14 (Exhibit GOK-10).

[65] The factual data on the public record of this investigation indicate declines in employment and employment-related indicia. Over the period 2000 to 2002, the number of hours worked in DRAM fab operations, hourly wages, and aggregate wages all fell. After two years of extraordinary losses (a 79.2 percent operating loss in 2001, followed by a 50.8 percent operating loss in 2002), the domestic industry was forced to lay off workers. U.S. 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 percent from 2002, 18 percent from 2001, 17 percent from 2000, and 6 percent 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.

61. In a postconference brief that Hynix and Samsung submitted jointly during the preliminary phase of the ITC's investigation, they emphasized that Samsung, whose U.S. shipments of DRAM products were an important portion of U.S. 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 U.S. producers."[66] Thus, by Hynix's own admission, Samsung's imports were less likely to compete with U.S.-produced products than Hynix's imports.

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

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

64. There was also extensive testimony by witnesses at the Commission's hearing about the extent to which non-subject imports consisted of Rambus and specialty DRAM products.[72]

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[66] *See, e.g.*, November 27, 2002 Postconference Brief of Hynix and Samsung at 52 (Exhibit US-100) (emphasis added).

[67] *See, e.g.*, November 27, 2002 Postconference Brief of Hynix and Samsung at 50-56 (Exhibit US-100).

[68] *See, e.g.*, November 27, 2002 Postconference Brief of Hynix and Samsung at 50 n.69 (Exhibit US-100) (emphasis added).

[69] *See, e.g.*, November 27, 2002 Postconference Brief of Hynix and Samsung at 53 (Exhibit US-100) (emphasis added).

[70] *See, e.g.*, November 27, 2002 Postconference Brief of Hynix and Samsung at 55-56 (Exhibit US-100).

[71] *See, e.g.*, November 27, 2002 Postconference Brief of Hynix and Samsung at 50-56 (Exhibit US-100).

[72] *See, e.g.*, Hearing Transcript at 168-175, 258-260 (Exhibit US-94).

65. The ITC confirmed the validity of these arguments through its data collection efforts.[73] The responses indicated that a significant percentage of non-subject DRAM products were non-standard DRAM products, such as Rambus or specialty DRAM products. The exact percentage is confidential. Korea does not challenge the ITC's treatment of this information as confidential under either Article 12.4 or 22.5 of the SCM Agreement. Because the Panel requested a non-confidential summary of the underlying confidential percentage, we can confirm that of all U.S. 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.

66. 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."

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".

67. 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 U.S. law (which correspond to factors under the SCM Agreement).[74] For that reason, the ITC relied on data from questionnaire responses consistent with its regular practice.[75] Because there are so few players in the market, there were several instances where even aggregated information from three or more companies was treated as confidential, consistent with the ITC's practice, because one or two of the companies represented such a large share of the aggregated information that revealing the aggregated data would reveal confidential information about individual concerns.[76]

68. 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 U.S. consumption of DRAM products is not confidential.[77]

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[73] In the questionnaires issued in this investigation, the ITC collected information from importers on the percentage of imported products and U.S. 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)).

[74] *See, e.g.*, USITC Pub. 3616 at 20 n.134 (Exhibit GOK-10).

[75] *See, e.g.*, USITC Pub. 3616 at 20 n.134 (Exhibit GOK-10).

[76] *See, e.g.*, US First Submission, paras. 297-298.

[77] *See, e.g.*, USITC Pub. 3616 at Table C-1 (Exhibit GOK-10).

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

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

71. 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.

72. 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 U.S. 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

[78] *See, e.g.*, USITC Pub. 3616 at ii, 20-21, Table C-1 (Exhibit GOK-10).
[79] *See, e.g.*, USITC Pub. 3616 at 20-21 (Exhibit GOK-10).
[80] *See, e.g.*, USITC Pub. 3616 at 20-21 (Exhibit GOK-10).

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?

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

74. 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:

> It must be demonstrated that the subsidized imports are, through the effects[47] of the subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant

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

> 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).

75. 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.

76. 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).

77. 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.

78. 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."

79. 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.

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

81. 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."

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

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

[83] Safeguards Agreement, Article 2.1 (emphasis added).

83. As defined by Article 4.1(a) of the Safeguards Agreement, "serious injury" means a significant overall impairment in the position of a domestic industry. As the Appellate Body emphasized in *US – Lamb Meat*, "serious injury" is a much higher standard than "material injury."[84] It stated:

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

84. 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.

85. 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.

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

[85] *US – Lamb Meat*, para. 124.

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

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

87. 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.

88. 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 U.S. 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 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]

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[86] *See also,* US First Submission, para. 424.

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

not sever *the causal link* between subsidized subject imports and material injury to the domestic industry."[88]

89. 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.

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

91. 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?

92. 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).

[88] *See, e.g.*, USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10) (emphasis added).

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

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

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

96. In this regard, there is no requirement to evaluate each or any of the factors referenced in the last sentence of SCM Agreement Article 15.5 in every countervailing duty investigation. As the panel found in *Thailand – H-Beams* regarding the parallel provision of the AD Agreement, "[t]he text of Article 3.5 indicates that the list of other possible causal factors enumerated in that provision is illustrative." In order for the "known factors" obligation to be triggered, the Appellate Body has explained that the factor at issue must: "(a) be 'known' to the investigating authority; (b) be a factor 'other than [subsidized] imports'; and (c) be injuring the domestic industry at the same time as the dumped imports."[92] Regarding whether a factor is "known" to the investigating authority, the panel in *Thailand – H-Beams* found that other "known factors" would include factors "clearly raised before the investigating authorities by interested parties in

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[89] *EC – Tube (AB)*, para. 188 quoting *US – Hot-Rolled Steel (AB)*, para. 226.
[90] *US – Hot-Rolled Steel (AB)*, para. 226.
[91] *EC – Tube (AB)*, para. 189, relying on *US – Hot-Rolled Steel (AB)*.
[92] *EC – Tube (AB)*, para. 175.

the course of an AD investigation."[93] It explained that investigating authorities are not required to seek out such factors on their own initiative.[94]

97. 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.

98. *Non-subject imports*: The ITC determined that non-subject imports were in the U.S. market throughout the period of investigation and at absolute volumes that were higher than subsidized subject imports.[95] The ITC also recognized that some domestic producers were responsible for some of the non-subject imports.[96] Non-subject imports increased market share between 2000 and 2001 and between 2001 and 2002, an increase the ITC evaluated as a "substantially larger amount than subject imports."[97] Although the ITC determined that non-subject imports were responsible for "the bulk of the market share lost by domestic producers during the period of investigation," it identified two reasons why it did not find the volume of non-subject imports as significant as otherwise would be suggested.[98]

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

100. 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-

[93] *Thailand – H-Beams (Panel)*, para. 7.273.
[94] *Id*.
[95] *See, e.g.*, USITC Pub. 3616 at 21, 25, 27, Tables IV-4, IV-5, C-1 (Exhibit GOK-10).
[96] *See, e.g.*, USITC Pub. 3616 at 6, 10-11, 17, 18 (Exhibit GOK-10).
[97] *See, e.g.*, USITC Pub. 3616 at 21, Tables IV-4, IV-5, C-1 (Exhibit GOK-10).
[98] *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10).
[99] *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10).
[100] *See, e.g.*, Korea First Submission, para. 166.

subject imports was lower than, and increased less than, the underselling frequency of subsidized subject imports between 2000 and 2002.[101] Thus, the ITC reasonably found that because non-subject imports were less substitutable for domestic DRAM products than were subsidized subject imports, and because non-subject imports undersold domestic DRAM products less frequently than subsidized subject imports did, non-subject imports had less of an impact than their absolute and relative volumes might otherwise have indicated.

101. Moreover, the ITC also found that, while non-subject imports' market share grew, the "primary negative impact" on the domestic industry was due to lower prices.[102] On this point, the ITC found that subsidized subject imports, themselves, were large enough and priced low enough to have a significant impact, regardless of the adverse effects caused by non-subject imports.[103]

102. 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.

103. *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 to PC OEMs across all products. More particularly, the product-specific data showed price declines of 70 to 90 percent from late 2000 through 2001, a modest rebound in early 2002, then a further decline over the course of 2002. The ITC identified record evidence indicating that the price decline in 2001 was the "most severe in history."[104]

104. 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

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

[102] *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10).

[103] *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10).

[104] *See, e.g.*, USITC Pub. 3616 at 24 (Exhibit GOK-10).

growth slowed at the end of the period of investigation) as other possible reasons for the price declines.[105]

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

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

107. 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 percent. Positive evidence from the ITC's record, however, supports the ITC's finding that the price declines experienced between 2000 and 2001 were far greater than even Hynix asserted would be the norm. In addition to the testimony of Hynix's witness (Mr. Tabrizi) at the ITC's hearing that has been previously cited,[109] in its brief filed after the ITC's hearing, Hynix took another opportunity to respond to the same question that was posed by the ITC during the hearing. Hynix argued that the average annual price decline had increased in recent years, and once again estimated that the average annual decline was approximately 43 percent. 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 percent, as was the case between 2000 and 2001 according to the ITC's pricing data.[110] In other words, it was reasonable for the ITC to have drawn the conclusions it did based on the evidence before it, such evidence including testimony and responses made by Hynix itself.

108. 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

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[105] *See* US First Submission, paras. 454-457, which identify in more detail where in the ITC's final determination the examination of these factors took place.

[106] *See, e.g.*, USITC Pub. 3616 at 24-25 (Exhibit GOK-10).

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

[108] *See, e.g.*, USITC Pub. 3616 at 24-25 (Exhibit GOK-10).

[109] *See, e.g.*, Hearing Transcript at 267-68 (Exhibit US-94).

[110] *See, e.g.*, Hynix's July 2, 2003, Posthearing Brief at Exhibit 1 at 39-41 & Exhibit 19 (Exhibit US-121).

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 effects of other factors affecting prices (which could not explain the unprecedented price declines that took place in the U.S. 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.

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

110. Second, even though Hynix never even argued that exports might be another causal factor, the ITC nonetheless evaluated the domestic industry's exporting activities.[115] The ITC identified the "increasingly global nature of the DRAMs market, both in terms of producers as well as purchasers."[116] Analyzing the data, the ITC determined that the domestic industry exported "a large and growing share of its DRAM products production, although it [sold] a substantial portion (the majority in each of the full years 2000 through 2002) in the U.S. market."[117] The ITC determined that "[i]ncreasing export shipments offset to some degree the slower growth of the industry's domestic sales and thereby allowed the industry to utilize more capacity than it would otherwise have done. However, falling unit sales values on export sales had a negative impact on the domestic industry's profitability. The unit value of the industry's export shipments fell substantially, although somewhat less than the unit value of the industry's domestic sales."[118] Based on this evaluation of the data, the ITC concluded that "while the

[111] *See, e.g.*, USITC Pub. 3616 at V-3, Table V-10 (pricing product 5) (Exhibit GOK-10).

[112] *See, e.g.*, Micron's Posthearing Brief at Exhibit 3 at 19-21 (Exhibit US-96).

[113] *See, e.g.*, USITC Pub. 3616 at 26 n.177 (Exhibit GOK-10).

[114] *See, e.g.*, USITC Pub. 3616 at 26 n.177 (Exhibit GOK-10).

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

[116] *See, e.g.*, USITC Pub. 3616 at 18 (Exhibit GOK-10).

[117] *See, e.g.*, USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10).

[118] *See, e.g.*, USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10).

industry's export performance played a role in the injury it experienced, it [did] not sever the causal link between subsidized subject imports and material injury to the domestic industry."[119]

111. 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 U.S. obligations under Articles 15.1 and 15.5.

112. 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*, 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 Eurostat that was not susceptible to verification because it was not available at such a level of detail. The panel reiterated that Poland "was not under investigation for selling the product at dumped prices in the EC market." The panel found that although the investigating authority was required during the course of the investigation to satisfy itself as to the accuracy of the information supplied by interested parties upon which its findings were based, the EC's consideration of Brazil's argument was enough, and there was no inconsistency with Articles 3.1, 3.5 or 6.6 of the AD Agreement.[120] The fact that the ITC's collection and evaluation of data concerning other known factors in this investigation exceeded the level considered adequate by the panel reviewing the EC's determination in *EC – Tube* 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?

113. 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.

114. 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.

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[119] *See, e.g.*, USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10).
[120] *EC – Tube (Panel)*, para. 7.389.

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.

115. 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.

116. 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 U.S. obligations under the SCM Agreement.

117. 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 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.

118. 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-favored-customer, best-price clauses, and other informal arrangements.

119. 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 U.S. 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.

120. 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 U.S. safeguard measures concerning steel products, notwithstanding that for some of these measures, as the panel in that case noted, the United States "did not perform a coincidence analysis."[121]

121. The panel in *US – Steel Safeguards* recognized that previous reports reviewing safeguards determinations had found that a coincidence finding was "central" to a causation analysis under the Safeguards Agreement.[122] At the same time, that panel recognized that Safeguards Agreement Article 4.2(b) does not prescribe the use of any particular methods or analytical tools for demonstrating causation, leaving it up to the competent authority to decide the method it considers most appropriate to determine causation.[123] In that report, the panel recognized that "there may be cases, for instance, where a competent authority does not undertake a coincidence analysis or does so, but the facts do not support a finding of causal link on the basis of such an analysis."[124] The panel found that in such situations, "reference could be made to the conditions of competition as between imports and domestic products with a view to providing a compelling explanation, in the absence of coincidence, as to why a causal link nevertheless exists."[125] Notably the panel continued that in its view, "consideration of the conditions of competition of the market in which the relevant imported and domestic products are being sold may generally prove insightful in respect of the issue of the causal relationship between increased imports and serious injury."[126] As the panel further explained, "the more complicated the factual situation, the more important it is for a number of factors to be taken into consideration."[127] The panel then upheld, subject to its review of the ITC's non-attribution analysis, the ITC's causation analysis concerning hot-rolled bar and rebar that the panel ascertained was not based on a coincidence analysis but on a conditions of competition analysis.[128]

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[121] *US – Steel Safeguards (Panel)*, para. 10.295.

[122] *US – Steel Safeguards (Panel)*, para. 10.296.

[123] *US – Steel Safeguards (Panel)*, para. 10.294.

[124] *US – Steel Safeguards (Panel)*, para. 10.314.

[125] *US – Steel Safeguards (Panel)*, para. 10.314.

[126] *US – Steel Safeguards (Panel)*, para. 10.314.

[127] *US – Steel Safeguards (Panel)*, para. 10.323.

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

122. 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.