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

WT/DS296

FIRST WRITTEN SUBMISSION

OF THE

UNITED STATES OF AMERICA

May 21, 2004

TREATMENT OF BUSINESS PROPRIETARY INFORMATION

The United States notes that, with one exception, the entire text of the attached written submission and the accompanying exhibits is public information. The one exception is **Figure US-1**, which contains business proprietary information ("BPI") derived from the BPI exhibits attached to Korea's first written submission. The BPI information in **Figure US-1** is noted with brackets.

Consistent with the request made by Korea in its first written submission, the Secretariat and the Panel should treat the bracketed information in **Figure US-1** as confidential.

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I. INTRODUCTION

1. Did you know that the Government of Korea forced LG Semicon and Hyundai Electronics to merge? Did you know that in an attempt to get out of the financial hole in which it found itself, it was *Hynix* that approached Micron about purchasing Hynix?

2. If your knowledge of Hynix and its problems is limited to the first submission of Korea in this dispute, then ignorance of these facts is understandable. This is because Korea's submission presents an extremely distorted and sanitized version of events that leaves out a host of unpleasant facts regarding the seemingly unending perils of this much-troubled company. For example, with respect to the LG Semicon-Hyundai Electronics merger, Korea uses the passive voice in its submission whenever it refers to the merger in order to conceal the undisputed fact that the Korean Government ordered and forced through the merger. Obviously, it does not help Korea's story if the opening chapter begins with the Korean Government ordering around private firms.

3. Thus, while Korea tells a nice-sounding story in its first submission, it is just that: a story. As the United States will demonstrate, the U.S. authorities looked at all of the evidence and reasonably determined that Hynix was subsidized and that imports of subsidized merchandise caused injury to a U.S. industry. These determinations were based upon positive evidence, an objective examination of *all* of the evidence, and were otherwise consistent with the provisions of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Summary of the Hynix Bailout

4. It is useful at the outset to provide a brief summary of the events concerning the Hynix bailout. Korean Government ("GOK") support for Hynix, and indeed for the entire Korean semiconductor industry, predates the Hynix bailout by three decades. In its investigation, the U.S. Department of Commerce ("DOC") found evidence of a host of assistance programs to this industry dating back to 1975.

5. After the Korean financial crisis of 1997, the GOK became even more directly involved in shaping and nurturing the Korean semiconductor industry. Following the crisis, two Korean DRAM manufacturers, Hyundai Electronics and LG Semicon, had become financially unsound due to heavy borrowing in the 1990s to finance capacity expansions. The resulting capacity glut and ensuing price collapse of DRAMs strained the companies' ability to remain solvent.

6. By 1999, the GOK concluded that the Korean economy would suffer significantly if Hyundai Electronics and LG Semicon were to go into bankruptcy. To prevent this, the GOK developed a well-publicized plan to merge the two companies. Through this plan, dubbed "The Big Deal," the GOK sought to create the world's largest DRAM producer. Despite some opposition from the companies, by late 1999, the GOK had forced the merger through, and Hyundai Electronics took over the semiconductor operations of LG Semicon.

7. However, the merger did not result in a return to solvency. There was no meaningful restructuring of the two companies, no closure of capacity, and no reduction in employment as a result of the merger. By 2000, Hyundai Electronics' debt was staggering – 8 trillion won (US$ 7.1 billion) – and it soon became clear that servicing this debt would become more and more difficult. By 1999-2000, the firm's cash crunch reached a new crisis point.[1]

8. In 2000, the GOK intensified its policy to ensure the survival of Hyundai Electronics, now called Hynix. Through one bailout after another, the GOK ensured that Hynix would be spared from the bankruptcy courts and that its creditors would go along with the GOK's plans to save Hynix. The GOK funneled financial assistance through the banks under the GOK's direct ownership control and also through banks and other financial institutions over which it successfully exercised its influence and suasion. The record developed during the course of the DOC's investigation demonstrates that the GOK considered Hynix to be of strategic importance; Hynix accounted for 4 percent of Korean exports, employed approximately 22,000 people directly, and accounted for another 100,000 jobs in industries that supported Hynix.

9. Thus, contrary to what Korea would have the Panel believe, the underlying dispute here does not involve a fair contest between two companies, Hynix and Micron.[2] Instead, to the extent that this dispute involves a "contest," it is an unfair contest between the private companies that make up the U.S. DRAMs industry and a government – the GOK.

B. The DOC Subsidy Investigation

10. On November 22, 2002, the DOC initiated a countervailing duty investigation in response to a petition filed by Micron.[3] The investigation covered the period January 1, 2001 through June 30, 2002, and both Korean DRAMs producers, Hynix and Samsung Electronics Co., Ltd. ("Samsung" or "SEC").[4]

11. On April 7, 2003, the DOC published its *Preliminary Determination*, which contained a preliminary affirmative countervailing duty determination for Hynix and a preliminary negative

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[1] Indeed, as early as 1997, the financial situation of Hynix (then Hyundai Electronics) had deteriorated to a point where it was unable to meet its fixed financial obligations from cash flow; *i.e.*, it was insolvent. In 2000, Hynix suffered a net loss of KRW 2 trillion. In 2001, it suffered an even larger loss of KRW 5 trillion.

[2] First Written Submission by the Republic of Korea (28 April 2004), para. 2 [hereinafter "Korea First Submission"].

[3] *Notice of Initiation of Countervailing Duty Investigation: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 67 Fed. Reg. 70927 (November 27, 2002) ("*Notice of Initiation*") (Exhibit GOK-2). The United States has a so-called "bifurcated" system under which one agency – the DOC – conducts the subsidy investigation, while a different agency – the U.S. International Trade Commission ("ITC") – conducts the injury investigation.

[4] *Id.*, at 70930.

countervailing duty determination for Samsung.[5] With respect to Hynix, the DOC found a preliminary countervailable subsidy rate of 57.37 percent *ad valorem*. The DOC invited interested parties to comment on the *Preliminary Determination*, and held a public hearing on June 6, 2003.[6]

12. On June 23,2003, the DOC published its *Final Determination*. Notwithstanding Korea's unfounded accusations that the DOC was hell-bent on protecting Micron from import competition, the DOC issued a negative determination with respect to Samsung, finding only *de minimis* subsidies.[7] In the case of Hynix, the DOC found that during the period of investigation, the GOK had entrusted or directed Hynix's creditors to provide financial contributions in the form of loans, equity infusions, and debt forgiveness.[8] The DOC further found that these financial contributions provided a benefit to Hynix and that they were specific.[9] The DOC found a countervailable subsidy rate of 44.71 percent *ad valorem*, but later reduced the rate to 44.29 percent *ad valorem*.[10]

C. The ITC Injury Investigation

13. On November 1, 2002, the ITC initiated its preliminary injury investigation in response to Micron's petition.[11] On December 27, 2002, the ITC published its preliminary determination in which the Commissioners unanimously found that there was a reasonable indication that the domestic industry producing DRAM products was materially injured by reason of subsidized imports from Korea.[12]

14. On July 23, 2003, at the conclusion of a detailed investigation and based upon its consideration and evaluation of the record evidence, the ITC announced at a public vote its unanimous final determination that the domestic industry producing DRAM products was materially injured by reason of subsidized imports from Korea. Notice of the ITC's final

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[5] *Preliminary Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors From the Republic of Korea*, 68 Fed. Reg. 16766 (April 7, 2003) ("*Preliminary Determination*") (Exhibit GOK-4). Korea does not challenge the DOC *Preliminary Determination*.

[6] *Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 37122 (June 23, 2003) ("*Final Determination*") (Exhibit GOK-5).

[7] *Id*.

[8] *See Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Dynamic Random Access Memory Semiconductors from the Republic of Korea* ("*Issues and Decision Memorandum*") (Exhibit GOK-5).

[9] *Id*.

[10] *See Notice of Amended Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 44290 (July 28, 2003) ("*Amended Final Determination*") (Exhibit GOK-6).

[11] *DRAMs and DRAM Modules from Korea*, 67 Fed. Reg. 68176 (Nov. 8, 2002) (Exhibit GOK-1).

[12] *DRAMs and DRAM Modules from Korea*, 67 Fed. Reg. 79148 (Dec. 27, 2002) (Exhibit GOK-3); *DRAMs and DRAM Modules from Korea*, Inv. No. 701-TA-431 (Prelim.), USITC Pub. 3569 (Dec. 2002) (Exhibit GOK-9). Korea is not challenging the ITC preliminary determination.

determination was published in the Federal Register.[13] The public version of the ITC's narrative opinion, along with the public version of the related data tabulations, was published in *DRAMs and DRAM Modules from Korea*.[14]

15. On August 11, 2003, the DOC published notice of the countervailing duty order.[15]

D. The WTO Proceedings

16. On June 30, 2003, Korea requested consultations with respect to the preliminary and final determinations of the DOC and the preliminary determination of the ITC.[16] Notwithstanding the requirement in Article 4.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") that a consultation request identify the legal basis for the complaint, Korea did not identify any provisions of any WTO agreement with which the ITC preliminary determination was inconsistent. In addition, and notwithstanding the injunction in the first sentence of Article 3.7 of the DSU, Korea requested consultations with regard to "any subsequent determinations that may be made during the [ITC's] injury investigation ... ."[17]

17. By letter of July 10, 2003, the United States accepted Korea's request to enter into consultations. However, the United States noted Korea's failure to comply with Article 4.4 of the DSU, and also stated its position that the right to request consultations – and the corresponding obligation to consult – under Article 4 of the DSU did not extend to determinations that may or may not be made in the future.[18] Consultations took place in Geneva on August 20, 2003, and were limited to the preliminary and final determinations of the DOC.

18. On August 18, 2003, Korea made a new request for consultations with respect to the final determination of the ITC and the countervailing duty order published by the DOC.[19] Notwithstanding the requirements of Article 4.4 of the DSU, Korea did not identify any provision of any WTO agreement with which the DOC countervailing duty order was inconsistent.

19. By letter of August 28, 2003, the United States accepted Korea's new request to enter into consultations, but noted the failure of Korea to comply with Article 4.4.[20] In a letter dated September 8, 2003, Korea purported to explain how it had identified the legal basis for

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[13] *DRAMs and DRAM Modules from Korea*, 68 Fed. Reg. 47607 (Aug. 11, 2003) (Exhibit GOK-7).

[14] *DRAMs and DRAM Modules from Korea*, Inv. No. 701-TA-431 (Final), USITC Pub. 3616 (Aug. 2003) (Exhibit GOK-10) ("USITC Pub. 3616").

[15] *DRAMs and DRAM Modules from Korea*, 68 Fed. Reg. 47546 (Aug. 11, 2003) (Exhibit GOK-8).

[16] WT/DS296/1 (8 July 2003).

[17] *Id*.

[18] Letter from Amb. Linnet F. Deily to Amb. Chung Eui-yong Chung (July 10, 2003) (copy attached as Exhibit US-1).

[19] WT/DS296/1Add. 1 (21 August 2003).

[20] Letter from Amb. Linnet F. Deily to Amb. Chung Eui-yong (August 28, 2003) (copy attached as Exhibit US-2).

challenging the ITC preliminary determination and the DOC countervailing duty order, but it continued to refuse to identify the provision(s) with which the preliminary determination and the countervailing duty order were inconsistent.[21] By letter of September 10, 2003, the United States informed Korea of its view that Korea continued to be out of compliance with the obligations of Article 4.4.[22]

20. On October 1, 2003, consultations took place via video conference. With respect to the DOC countervailing duty order, the parties agreed to disagree concerning the conformity of Korea's consultation request with Article 4.4 of the DSU. Because Korea continued to refuse to identify any provision with which the countervailing duty order was inconsistent, the United States declined to engage in any discussions regarding the order. The preliminary determination of the ITC was not discussed.

21. On November 19, 2003, Korea requested the establishment of a panel. At the meeting of the Dispute Settlement Body ("DSB") at which Korea's request was first considered, the United States objected to the establishment of a panel on the grounds that Korea's panel request sought to cover matters on which the parties had not consulted. The United States described Korea's failure to comply with Article 4.4 of the DSU and the resulting absence of consultations with respect to the ITC preliminary determination and the DOC countervailing duty order.[23] Notwithstanding these deficiencies, the DSB established a panel at its meeting on January 23, 2004.

III. GENERAL ISSUES

22. Certain issues are relevant to the Panel's review of the determinations of both the DOC and the ITC. In the interests of efficiency, the United States addresses them here. These issues concern the standard of review, burden of proof and positive evidence.

A. Standard of Review

23. The parties agree that Article 11 of the DSU sets forth the standard of review for this Panel. Article 11 calls for panels to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ... ."

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[21] Letter from Amb. Chung Eui-yong to Amb. Linnet F. Deily (September 8, 2003) (copy attached as Exhibit US-3).

[22] Letter from Amb. Linnet F. Deily to Amb. Chung Eui-yon (September 10, 2003) (copy attached as Exhibit US-4).

[23] WT/DSB/M/159, paras. 32-38 (15 January 2004) (Exhibit US-5).

24. With respect to disputes involving a determination made by a domestic authority based upon an administrative record, the Appellate Body, in *Cotton Yarn*, summarized the role of a panel under Article 11 as follows:

> [P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assess whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.[24]

25. Thus, it is clear that the Panel's task is not to determine whether there was material injury or subsidization, but rather whether the DOC and the ITC properly established the facts and evaluated them in an unbiased and objective way. Put differently, the Panel's task is to determine whether a reasonable, unbiased person, looking at the same evidentiary record as the DOC and the ITC, could have – not would have – reached the same conclusions as did those agencies.

26. Korea professes not to disagree with this approach, but it actually does. A careful reading of Korea's first submission shows that Korea does not really challenge the evidence on which the DOC and the ITC relied. Instead, Korea directs the Panel to look at other evidence and/or asserts that the DOC and the ITC should have used different methodologies to compile or analyze the evidence.

27. In other words, even though Korea spends a good deal of time talking about "positive evidence," at its core, Korea's argument is not really about the nature of the evidence on which the DOC and ITC determinations were based. Instead, Korea implores the Panel to reweigh the evidence in the hope of obtaining a different outcome. Indeed, early in its first submission, Korea highlights its vulnerability on this point by insisting that this "dispute does not involve any impermissible 'second guessing' of decisions by the competent authorities."[25] Korea protests too much, and we trust that the Panel will see Korea's arguments for what they are: nothing more than an impermissible request for this Panel to conduct a *de novo* review.

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[24] *United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, Report of the Appellate Body adopted 5 November 2001, para. 74 [hereinafter "*Cotton Yarn*"].

[25] Korea First Submission, para. 13.

B. Burden of Proof

28. At the end of its discussion of standard of review, Korea asserts that the investigating authority bears the burden of proof.[26] This is a remarkable assertion for which Korea offers no citation to authority, and for which there is none.

29. The SCM Agreement imposes obligations on the authorities that they must satisfy, but the burden of proving that those obligations have not been satisfied is on the complaining party. This is the essential teaching of the Appellate Body in *Wool Shirts*. In that dispute, which involved a transitional safeguard under Article 6 of the *Agreement on Textiles and Clothing*, the complaining party – India – argued that because the transitional safeguard was an exception to basic WTO principles, the burden of proof was on the party imposing the safeguard to justify its action. The Appellate Body rejected this argument, finding that it was "up to India to put forward evidence and legal argument sufficient to demonstrate that the transitional safeguard action by the United States was inconsistent with the obligations assumed by the United States under Articles 2 and 6 of the *ATC*."[27]

30. Accordingly, the burden is on Korea to prove that the United States acted in a WTO-inconsistent manner. The burden is not on the United States to prove that it acted in a WTO-consistent manner.

C. Positive Evidence

31. Another recurrent theme in Korea's first submission is the allegation that the DOC and ITC determinations were not based upon "positive evidence." Korea not only makes this accusation with respect to the provisions of the SCM Agreement that require determinations based upon positive evidence – Articles 2.4 (specificity) and 15.1 (injury) – but also with respect to provisions that do not so require – Articles 1 (financial contribution) and 14 (benefit).[28]

32. The Appellate Body has interpreted "positive evidence" as follows:[29]

> The term 'positive evidence' relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination. The word 'positive'

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[26] Korea First Submission, paras. 25-26.

[27] *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body adopted 23 May 1997, page 16.

[28] *See, e.g.,* Korea First Submission, para. 25 ("To find a countervailable subsidy, the investigating authority must affirmatively prove the existence of each element of a subsidy based on positive evidence ... .").

[29] *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, para. 192 [hereinafter "*US – Hot-Rolled Steel*"].

means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.

33. As will be discussed in more detail below, the determinations of the DOC and the ITC – including those determinations that are not subject to a requirement of positive evidence – were based upon evidence that was "affirmative," "objective," "verifiable" and "credible."[30] What the Panel will see is that Korea's argument is not really about whether the evidence relied upon was "positive evidence." Instead, Korea wants the Panel to reweigh the positive evidence relied upon by the DOC and the ITC.

IV. THE DOC SUBSIDY DETERMINATION IS CONSISTENT WITH U.S. WTO OBLIGATIONS

A. The DOC's Finding that the GOK Entrusted or Directed Hynix's Creditors to Provide Financial Contributions Is Supported by the Evidence, Is Based on an Objective Examination, and Is Otherwise Consistent with U.S. Obligations Under the SCM Agreement

34. With respect to the DOC's subsidy determination, the key issue concerns the WTO-consistency of the DOC's finding that the GOK entrusted or directed creditors to provide financial contributions to Hynix. In the sections that follow, the United States will first demonstrate that, as a factual matter, the DOC's finding is fully supported by the record evidence. The United States next will demonstrate that, as a legal matter, the DOC's finding is consistent with a proper interpretation of the relevant provisions of the SCM Agreement.

[30] Indeed, the DOC's finding concerning specificity was based upon information provided by the GOK. Is Korea asserting that its own information is not credible?

1. The DOC's Determination of Entrustment or Direction Was Supported by Ample Record Evidence

35. The DOC determined that the GOK entrusted and directed Hynix's creditors to provide financial contributions to Hynix during the period of investigation.[31] The DOC made this determination based upon an objective examination of *all* of the record evidence.

36. The factual record before the DOC was, in Korea's words, "complex and extensive."[32] In reaching its determination, the DOC reviewed and evaluated more than 31,000 pages of documentation and argument provided by the GOK, Hynix, Samsung, and domestic interested parties, Micron and Infineon.[33] The DOC conducted verification in Korea of the various questionnaire responses from the GOK and Hynix.[34] While in Korea, the DOC also interviewed eight independent experts, covering Korea's financial sector, bank ownership, corporate restructuring, and Hynix's restructuring. In addition, all parties participated and presented oral testimony at the DOC's hearing.

37. The totality of this evidence amply supports the DOC's determination that the GOK entrusted and directed Hynix's creditors to provide financial contributions to Hynix during the period of investigation (the "Hynix bailout"). As demonstrated in the following sections, the evidence before the DOC demonstrated the following: (1) that the GOK pursued a policy to support Hynix and prevent its failure; (2) that the GOK exercised the control over Hynix's

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[31] *Issues and Decision Memorandum* at 17 (Exhibit GOK-5). Korea incorrectly states that the DOC found "a single ... financial contribution." Korea First Submission, para. 387 (emphasis in original). As is evident from the paragraph quoted by Korea, the DOC found that there was a "single program", the objective of which was "the complete financial restructuring of Hynix in order to maintain the company as an ongoing concern." *Issues and Decision Memorandum* at 48 (Exhibit GOK-5). The "single program" refers to the GOK's policy and resulting actions to support Hynix and prevent its failure; it is not a reference to a "single financial contribution". On the contrary, the DOC explicitly and separately examined each of the specific financial contributions received by Hynix. *See Issues and Decision Memorandum* at 19-24 (Exhibit GOK-5) ("Having determined that the GOK entrusted and directed credit to ... Hynix from 1999 through the end of the [period of investigation], we now examine the financial contributions made by the directed financial institutions and the benefits conferred by those financial contributions.").

[32] Korea First Submission, para. 327.

[33] This documentation included, for example, direct quotes from GOK officials in interviews and press conferences, as reported in independent Korean and U.S. press; IMF and OECD reports; official government documentation of high-level meetings and directives; the investigative report of Korea's Grand National Party into the GOK's preferential policies for Hynix and other Hyundai Group *chaebol*; reports and website materials of Korean banks; sworn submissions to U.S. and Korean regulatory agencies; Republic of Korea laws; reports of direct meetings between government officials and Hynix/Hyundai creditors, confirmed by supporting documentation; public statements of Hynix's creditors, as reported in Korean and U.S. press; materials of miscellaneous Korean entities; U.S. Government reports; public statements of Hynix; book excerpts; and reports of scholars, analysts and experts on the GOK's control of the banks, direction of credit practices and Hynix's financial condition.

[34] At the GOK verification, five DOC staff interviewed over fifty persons and wrote a thirty-four page report with thirty-five exhibits. At the Hynix verification, five DOC staff interviewed over thirty persons and wrote a forty-five page report with forty-five exhibits.

creditors necessary to implement its policy; and (3) that, where necessary, the GOK used its power and influence to coerce Hynix's creditors to adhere to the GOK's policy. The United States also will demonstrate that the evidence supports the DOC's determinations that the following financial contributions to Hynix were made as a result of the GOK's entrustment or direction: (1) the 800 billion won syndicated loan; (2) the KDB Fast Track Bond program; (3) the May 2001 restructuring package; and (4) the October 2001 restructuring package.

a. The GOK Pursued a Policy To Support Hynix and Prevent Its Failure

38. The DOC concluded that the GOK pursued a policy to support Hynix and prevent its collapse.[35] Korea argues that the investigation record merely "show[s] some GOK interest in Hynix's financial situation" or "relates more generally to the desire of the GOK ... to avoid bankruptcy and liquidation of a large firm".[36] The record in this case demonstrates, however, that the GOK's policy with respect to Hynix was more than just some general interest in Hynix's prospects. Rather, the GOK's policy was specific: do whatever necessary to prevent the failure of a particular company – Hynix. This policy, in turn, was the impetus for the various government-directed financial restructuring and recapitalization measures that made up the Hynix bailout.

i) The GOK's Support of the Semiconductor Industry and the 1997 Financial Crisis

39. As context for its policy, the GOK's support of Hynix as a member of a designated "strategic" industry predates the DOC's period of investigation.[37] As the DOC noted, "as far back as 1976, it was clear that the semiconductor industry was one of the GOK's 'strategic' industries and was designated to receive special treatment from the GOK, including loans."[38]

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[35] *Issues and Decision Memorandum* at 49-50 (Exhibit GOK-5).

[36] Korea First Submission, paras. 388, 407.

[37] *Issues and Decision Memorandum* at 13 (Exhibit GOK-5); *Preliminary Determination*, 68 Fed. Reg. at 16771 (Exhibit GOK-4); *see also*, *The Political Economy of the Financial Liberalization and Crisis in Korea*, WORKING PAPER NO. 99-06, Yoon Je Cho (October 1999) at 3 ("Banks have been tamed by the government to blindly expand credit to large chaebols believing the government would not be able to afford them going under.") (Exhibit US-6); *Creating Advantage; Semiconductors and Government Industrial Policy in the 1990s*, T. Howell, et al, U.S. Semiconductor Industry Association (1992) at 358 ("The [Korean] government funnels capital into semiconductor research, development and production by inducing the quasi-private banks to channel loan funds to favored semiconductor activities.") (Exhibit US-7).

[38] *Issues and Decision Memorandum* at 13-14 (Exhibit GOK-5); *see also Direction of Credit Memorandum*, Attachment 5 at 2, 7 ("[B]ankers in Korea have stated that the KDB is still known for preferring the semiconductor, shipbuilding and steel industries.") (Exhibit US-8).

The GOK treated the semiconductor industry as a strategic industry because of its great export potential.[39]

40. In late 1997, the financial crisis that had been plaguing many countries in Asia came to a head in Korea. As the DOC observed, "[m]any companies experienced serious financial difficulties, and many banks were weakened by the rapid increase in non-performing loans, a situation that threatened the stability of the financial system itself."[40]

41. As a result of this crisis, the GOK instituted a number of market-oriented changes in the financial sector.[41] The DOC considered these reforms during the course of its investigation, but concluded that "despite the changes . . ., events in the [Korean] financial system have led the GOK to continue its involvement there."[42] As an example, the DOC noted that the GOK had to inject trillions of won in Korean banks to keep them solvent following the financial crisis.[43] This type of support was "inevitable and necessary in order to ensure the soundness of the financial system and to prevent systemic risk in the process of financial sector restructuring."[44] Not only did the GOK assist Korean banks themselves, it also used the banks to assist corporations suffering from liquidity problems brought on by the financial crisis. As the OECD observed, in the years immediately following the financial crisis, the GOK "exerted immense pressure and

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[39] *Issues and Decision Memorandum* at 13-14 (Exhibit GOK-5), *citing* a sample of GOK programs that targeted this strategic industry, including the 1975 "Six-Year Electronics Industry Promotion Plan," the 1990 "Seven- Year High Technology Development Plan," and the 1996-2001 "Highly Advanced National Program; *id*., *quoting* the Director General of the Electronics, Textile, and Chemical Industry Bureau of MOTIE in a 1997 interview: "[T]he government's long-term strategy calls for the [ROK] becoming the world's largest producer of semiconductor chips in the year 2010"; C. Soh, *The State, Technology, and Industrial Competitiveness: Steel and Semiconductor Industries in Korea*, Fletcher School of Law and Diplomacy (Graduate Thesis) (1991) at 267 (Exhibit US-9); *see also* Sung Gul Hong, *The Politics of Industrial Leapfrogging: The Semiconductor Industry in Taiwan and South Korea*, Northwestern University Ph.D. Dissertation (December 1992) at 171 ("The selection of the electronics industry ... was based upon its export potential.") (Exhibit US-10); Sung Gul Hong, *The State and Sectoral Development: The Semiconductor Industries of Taiwan and South Korea*, Northwestern University Department of Political Science (1992) at 15 ("[U]nlike other sectors, the electronics industry (semiconductors as a part of it) was designated as a strategic sector, not because of its "strategic" nature but because of its export potential.") (Exhibit US-11).

[40] *Preliminary Determination*, 68 Fed. Reg. at 16772 (Exhibit GOK-4); *see also* Korea First Submission, para. 332.

[41] *Preliminary Determination*, 68 Fed. Reg. at 16772-73 (Exhibit GOK-4).

[42] *Preliminary Determination*, 68 Fed. Reg. at 16773 (Exhibit GOK-4); *see also Government of Korea Verification Report* at 2-9 (discussing changes in the Korean financial system and restructuring process after the 1997 financial crisis) (Exhibit US-12); and *Issues and Decision Memorandum* at 12-13, 15 (Exhibit GOK-5).

[43] *Preliminary Determination*, 68 Fed. Reg. at 16773 (Exhibit GOK-4).

[44] Bank for International Settlements, "Banking Industry in the Emerging Market Economies: Competition, Consolidation and Systemic Stability," BIS Papers No. 4 at 95 (August 2001) (Exhibit US-13).

directed much of the country's lending activities, often on the basis of political whim rather than a proper evaluation of risk."[45]

42. Korea maintains that the post-1997 reforms of the financial sectors and regulatory oversight created independence for banks to make their own decisions and eliminated government interference in individual lending decisions.[46] Evidence on the record indicates otherwise. For example, *three years after* the GOK implemented these reform measures, the Executive Board of the IMF was urging Korean authorities to "refrain from pushing creditors into bailing out troubled companies ... ."[47] A January 2001 *Wall Street Journal* article states that Korean banks have "been more accustomed to following government orders than making sound credit decisions."[48] In a March 2002 *New York Times* article, an IMF analyst states that, "There's a suspicion that the government mucks around with banks ... . With one-quarter of [ROK] companies losing money . . . banks often face political pressure to keep them on life support."[49] In July 2002, a Credit Suisse First Boston senior economist in Hong Kong stated that "[t]he government has changed its policies quite a bit, but it still may assert influence ... . Nobody can rule out intervention."[50]

43. This evidence and other evidence discussed by the DOC in its preliminary and final determinations indicate that the post-1997 reform measures did not, in fact, guarantee complete bank independence or eliminate government interference in lending decisions.[51] Moreover, the issue before the DOC was not really whether GOK interference in lending decisions, as a general matter, was greater or lesser than, or the same as, it was before 1997. The real issue was whether the GOK interfered with Hynix's creditor banks to effectuate a bailout of Hynix. The record evidence demonstrated that it did.

ii) The Establishment of the Policy to Save Hynix

44. Following the 1997 financial crisis, the GOK engineered a merger between Hynix (then Hyundai Electronics) and LG Semicon, another Korean DRAM producer. Although LG

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[45] *Direction of Credit Memorandum*, Attachment 5 at 3, *quoting* OECD 1999 study investigating the GOK's role in credit allocation entitled: "*Asia and the Global Crisis; The Industrial Dimension*," ch. 6, Corporate Factors in the Crisis: The Korean Situation (Exhibit US-8).

[46] Korea First Submission, paras. 333-34.

[47] *Direction of Credit Memorandum*, Attachment 1 (IMF 2001 assessment of Korea's economic development and policies) at 3 (Exhibit US-8).

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

[49] *With Growth in Site, Korea Plans Privatization for Banks*, NEW YORK TIMES (March 7, 2002) (Exhibit US-15).

[50] *No Pause for Woori: Seoul's Major Bank Privatization Vehicle Has Gotten Off to a Promising Start*, EUROMONEY INSTITUTIONAL INVESTOR at 4 (July 1, 2002) (Exhibit US-16).

[51] *See, e.g.*, *Issues and Decision Memorandum* at 15-18, 47-50, 53-54 n.20 (Exhibit GOK-5); *Preliminary Determination*, 63 Fed. Reg. at 16773-75 (Exhibit GOK-4).

Semicon tried to resist the forced merger, the government coerced its submission by threatening to recall existing government loans and to block future loans.[52] The forced merger – commonly referred to in Korea as "the Big Deal" – only exacerbated Hynix's financial problems, however. By the end of 2000, Hynix's debt amounted to eight trillion won. At a time when DRAM prices were plummeting, Hynix had massive debt repayments coming due in 2001 and 2002.[53] As the DOC noted, by the fall of 2000, Hynix had "serious looming financial troubles, with several trillion won in short-term debt that was coming due in 2001."[54]

45. As discussed above, the GOK considered the semiconductor industry a strategic industry. As of September 2001, Hynix alone accounted for roughly 4 percent ($6 billion in 2000) of Korea's exports and nearly 17 percent of the global production of memory chips.[55] As the DOC concluded, the collapse of Hynix would have serious implications for Korea's export performance and for the country's international competitiveness.[56]

46. In 2001, the GOK had reached the same conclusion. For example, in January 2001, a Blue House official stated that, "[Hyundai's semiconductors and constructions are Korea's backbone industries, and these businesses are deeply-linked with other domestic companies. Thus, these firms should not be sold off just to follow market principles."[57] In May 2001, a senior KEB official stated that, "[i]f Hynix is placed under receivership, Korea's exports will be severely battered [because] Hynix accounts for 4 percent of exports. As far as I know, the government is now working out a series of powerful measures to ensure the survival of Hynix

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[52] *The State Activism toward the Big Business in Korea, 1998-2000: Path Dependence and Institutional Embeddedness*, Jiho Jang, University of Missouri-Columbia (April 2001), at 13-14 (Korean Minister of Finance, Lee Gyu Seong, threatened to include the semiconductor industry in certain "workout programs" and institute suspension and withdrawal of credit or impose limits on corporate bills) (Exhibit US-17); *see also With Bank Merger, S. Korea Takes Steps to Revamp Economic System*, LOS ANGELES TIMES (January 2, 1999) (Exhibit US-18); *Banks Halt Loans to LG Semicon*, CNET NEWS.COM (December 28, 1998) ("LG Semicon's 13 creditor banks, most of them state-controlled, today held LG responsible for foiling the merger and stopped providing new funds to the heavily indebted company, according to the wire service.") (Exhibit US-19); *So Much for Reform*, BUSINESS WEEK INTERNATIONAL (July 26, 1999) (After significant government pressure on LG, LG and Hynix executives agreed to sell and consummate the deal by the end of the month) (Exhibit US-20); *The Great Universe is Torn Asunder*, EUROMONEY (September 1999) (The head of the FSC, Lee Hun-jai, threatened to cut off credit to whichever party was found to be responsible for delaying the merger.) (Exhibit US-21); and *Kim's Big Deals with the Chaebol Sound Better than they Really Are*, ASIAWEEK (February 26, 1999) (LG Semicon confirmed that the government had a hand in its fate.) (Exhibit US-22).

[53] *Creditworthiness Memorandum* at 3-4 (Exhibit US-23).

[54] *Issues and Decision Memorandum* at 19 (Exhibit GOK-5); *Preliminary Determination*, 68 Fed. Reg. at 16776 (Exhibit GOK-4); Korea First Submission, para. 342 ("Hynix had a substantial amount of short-term debt ... .").

[55] *Issues and Decision Memorandum* at 51 (Exhibit GOK-5); see also *Hynix Back From Jaws of Defeat*, THE ASSET (September 5, 2001) (Exhibit US-20); and *Hynix Practically in Default, What's the Problem?*, CHOSUN DAILY (August 29, 2001) (English Translation) (Exhibit US-25).

[56] *Issues and Decision Memorandum* at 49-52 (Exhibit GOK-5).

[57] *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).

Semiconductor."[58] A Chong Wa Dae official stated that, "[w]e are doing what is deemed necessary to save companies leading the countries [sic] strategic industries."[59] In sum, the perception in the Korean banking community was that Hynix was "too big to fail".[60]

47. The DOC considered this and other evidence of the GOK's policy to prevent the failure of Hynix. For example, the DOC noted that Economic Ministers held several meetings in late 2000 and early 2001 where senior government officials determined what measures could be taken by the government to assist Hynix. Based on documentation of these meetings, the DOC concluded that the GOK "took early and affirmative steps to secure Hynix' survival."[61]

48. In a November 2000 letter to the Presidents of the Korea Export Insurance Corporation (KEIC) and the Korea Exchange Bank (KEB), the Minister of Finance relayed the "results on alleviating the cash crunch of Hyundai Electronics" reached at a November 28, 2000 meeting of the Economic Ministers.[62] The measures, which were "initiated by" the Financial Supervisory Service (the enforcement body of the Financial Supervisory Commission, a government organization that monitors and supervises financial institutions[63]), included an instruction to seek a waiver of the ceiling on loans extended to a single borrower (which otherwise would prevent certain lenders from providing new loans to Hynix) and a command to the KEIC to resume the insurance for the balance of the non-negotiated D/A transactions,[64] valued at $550 million. The letter instructs the Presidents of the KEIC and KEB to make sure these results "are carried out perfectly."[65]

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

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

[60] *Financial Experts Report*, Meeting 2, at 7 ("Because the chaebol are so large, their failure had a large impact on the market. The Korean economy continued to be vulnerable to other shocks in 2000, and the government judged that it was necessary to become indirectly involved to help the Hyundai Group.") (Exhibit GOK-30).

[61] *Issues and Decision Memorandum* at 50 (Exhibit GOK-5).

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

[63] *See Preliminary Determination*, 68 Fed. Reg. at 16772 (Exhibit GOK-4); Korea First Submission, para. 333.

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

[65] *Results of Discussions at the Economic Ministers' Meeting*, letter from Ministry of Finance and Economy (November 28, 2000) (translated version) (Exhibit US-28). In a subsequent letter from the Ministry of Commerce, Industry, and Energy ("MOCIE") to the KEIC, MOCIE informed the KEIC that Economic Ministers had decided to

(continued...)

49. Shortly thereafter, the Ministers of Finance and Economy, Commerce Industry and Energy, and Planning and Budget explicitly instructed the KEIC to "insure the Hyundai Electronics D/A acquired by creditor banks by June 30, 2001, up to a total of 600 million dollars. As for the shortage of reserve payment capacity of the Korea Export Insurance Fund that might occur in relation to this matter, support will be provided from a separate source of funding."[66] In April 2001, the Minister of Finance and Economy advised the Minister of Commerce, Industry and Energy that the Economic Ministers had determined that "the D/A backed support [loans] insured by KEIC are be to maintained at 600 million dollars until the end of the year."[67]

50. The Korean press became aware of these and other documents and meetings in 2001 after they were brought to light in the Korean National Assembly. The *Korea Economic Daily* summarized these meetings as follows:

> Direct Intervention by the Government in Supporting Hynix
> It has been discovered that the government, after coming up with a decision to provide financial support to Hynix Semiconductors (formerly Hyundai Electronics) forced the decision upon the Export Insurance Corporation.
>
> Such facts were revealed when, on the 27th [of August], National Assembly Members Seung-min Hwang and Young-keun Ahn of the Grand National Party disclosed official correspondence from the Ministry of Finance and Economy and the Ministry of Industry and Resources to the Export Insurance Corporation (EIC) advising it to support Hynix Semiconductors and the board meeting minutes of the Export Insurance Corporation summarizing its position that "Hynix is in a state of technical insolvency."
>
> This official correspondence included the results from discussions at the Economy Ministers Meeting on November 28th of last year, during which the decision to provide financial support to Hynix Semiconductors was made, and the Economy

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[65] (...continued)
provide temporary support of export insurance for the D/A transactions between the main office and branch offices of Hyundai Electronics and requested that the KEIC "take actions accordingly." *Regarding the provision of Export Insurance for the Hyundai Electronics' D/A transaction*, letter from Ministry of Commerce, Industry and Energy (November 30, 2000) (translated version) (Exhibit US-30).

[66] *Results of Discussions at the Economic Ministers' Meeting*, letter from Ministry of Finance and Economy (January 10, 2001) with enclosure (translated version) (Exhibit US-31); *see also Regarding the provision of Export Insurance for the Hyundai Electronics' D/A transaction*, letter from Ministry of Commerce, Industry and Energy (January 12, 2001) (translated version) (Exhibit US-32).

[67] *Advising the Results of Discussions at the Economic Ministers' Meeting*, letter from Ministry of Finance and Economy (April 10, 2001) (translated version) (Exhibit US-33). In other words, the Economic Ministers instructions to the KEIC to guarantee an increase in the lending ceiling for Hynix export credits enabled Hynix to have access to an additional US$600 million in export financing.

> Vice Ministers Meeting on January 9, and was signed by Minister Nyum Chin of the Ministry of Finance and Economy, Former Minister Kook-hwan Shin of the ministry of Industry and Resources, and minister Yoon-chul Chun of the Ministry of Planning and Budget.
>
> The official correspondence from the Ministry of Finance and Economy to the Ministry of Industry and Resources contained a request for "cooperation in ensuring that the results of the meeting be smoothly carried out," while the official correspondence from the Ministry of Industry and Resources to the Export Insurance Corporation contained a request to "take appropriate actions in accordance with the results of discussions as informed in this letter."
>
> In addition, the correspondence revealed that the government, at the Economy Ministers Meeting in November of last year, came up with a position "to pursue plans to temporarily renew the Export Insurance Corporation's insurance on the export bills of exchange of Hyundai Electronics," worth $550 million, and relayed it to the Export Insurance Corporation.
>
> In response, as recorded in the minutes, a high-level executive with the Export Insurance Corporation stated at the December 1 board meeting that "we came to support this transaction at the direction of the Minister of Industry and Resources."[68]

51. Thus, the evidence before the DOC indicated that as early as November 2000, the GOK began pursuing a policy (and taking specific actions) to prevent the failure of Hynix. Korea argues that the DOC read "too much" into the Ministers' meetings and that the documents do not discuss any "direct cash infusions" into Hynix.[69] Korea misapprehends, perhaps, the bases for the DOC's finding of government entrustment and direction. The DOC never concluded that there is a single document that contains all of the sub-elements of an indirect financial contribution under Article 1.1(a)(1)(iv). Rather the DOC found government entrustment and direction after consideration of all the evidence on the record and the totality of the government's actions during the period of investigation. Based on its review of the instant documents, the DOC concluded that "[t]hese meetings signaled the GOK's determination that Hynix would not be allowed to fail."[70]

52. As further evidence of its policy to support Hynix, the GOK ensured that Hynix and its banking creditors would be exempt from the GOK's much-publicized economic reform program to accelerate the adoption of free market principles. These reforms were aimed at weeding out

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[68] *Direct Intervention by the Government in Supporting Hynix*, THE KOREA ECONOMIC DAILY (August 28, 2001) (Exhibit US-29).

[69] Korea First Submission, paras. 409-414.

[70] *Issues and Decision Memorandum* at 50 (Exhibit GOK-5).

financially insolvent companies. Despite Hynix's enormous debt burden, when Finance Minister Jin and FSC Chairman Lee Keun Young began pressuring creditors to decide the fate of nearly 300 troubled companies in November 2000, Hynix was conspicuously absent from the GOK's list.[71] This was precisely when the Economic Ministers were meeting to establish assistance measures for Hynix, as discussed above. Moreover, although creditors purportedly used the same insolvency criteria for all companies and opted to liquidate 52 troubled businesses, the GOK refused to allow favored companies such as Hynix, Hyundai Engineering and Construction, and Daewoo, to be liquidated, even though their debts were far larger than those of companies actually dissolved.[72]

53. In sum, the record evidence before the DOC showed that the financial crisis of 1997 and its aftermath threatened to topple the financially weak Hynix. When faced with the potential collapse of a company vital to Korea's export performance, domestic employment, and international competitiveness, the GOK adopted a policy to keep Hynix from failing. Indeed, Hynix officials were quite candid in acknowledging the government's pivotal role in ensuring the company's survival. Notably, in the midst of the planning for Hynix's October 2001 restructuring and recapitalization, one of its executives stated: "We won't be going bankrupt. The Korean government won't let us fail."[73] As demonstrated in the next section, the GOK's control over Hynix' creditors gave it the ability to implement its policy.

b. The GOK Exercised Control Over Hynix's creditors

54. As demonstrated above, the GOK had a policy to not allow Hynix to fail. Korea argues that the GOK did not take specific steps to implement this policy by forcing Hynix's creditors to lend or invest in Hynix.[74] While the exercise of "force" does not appear to be a prerequisite for entrustment or direction within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement, the evidence on the record nonetheless indicates that the GOK took affirmative actions to entrust and direct Hynix's creditors to provide financial contributions to Hynix during the period of investigation. As demonstrated below, the GOK did so through exercising control over Hynix's creditors in its multiple roles as lender, owner, legislator and regulator.

i) The GOK's Role as Lender

55. Hynix had two types of creditors – banks considered to be "public bodies" and banks considered to be "private bodies". In its *Final Determination*, the DOC found that the Korea Development Bank ("KDB"), the Industrial Bank of Korea ("IBK"), and other specialized banks

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[71] *See No End in Sight*, ASIAWEEK.COM (November 24, 2000) (Exhibit US-34).

[72] *See No End in Sight*, ASIAWEEK.COM (November 24, 2000) (Exhibit US-34).

[73] *Hynix Says Deal Close to Stave Off Debt Woes*, Electronic Engineering Times (September 17, 2001) (Exhibit US-35).

[74] Korea First Submission, para. 408.

were public bodies ("government authorities").[75] As such, the DOC found that financial contributions provided by these entities to Hynix were direct.[76] These findings are important for two reasons. First, Korea has not challenged the DOC's determination that certain Hynix creditors were public bodies and that those public bodies provided direct financial contributions to Hynix.[77] Second, as discussed below, these "public" Hynix creditors, KDB in particular, played a significant role in the GOK's direction of the "private" Hynix creditors.

56. The KDB – 100 percent owned by the GOK and backed by the Korean treasury – was the single largest holder of Hynix's long-term loans during the period of investigation, holding 44 percent of such loans.[78] The KDB's role as Hynix's primary lender significantly underscored the GOK's support for the company. In particular, the DOC considered that the KDB served a key role in implementing the GOK's policy objectives.[79] As such, the KDB's presence as a lender was a signal to Korean "private" banks that a particular investment decision had the GOK's blessing, and that a company was backed by the GOK.

57. The KDB also played a critical role in managing a critical phase of the bailout. One of several initial steps[80] taken by the GOK to effectuate its policy to support Hynix was the creation of the KDB Fast Track Program. The GOK enacted the Fast Track Program in early 2001 because existing programs designed to support the refinancing of corporate bonds issued in the aftermath of the 1997 financial crisis were not sufficient to handle the volume of bonds maturing at the end of 2000 and 2001, particularly in the case of those companies experiencing severe

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[75] *Issues and Decision Memorandum* at 15-16 (Exhibit GOK-5). In analyzing whether an entity is a public body, the DOC considers the following factors: (1) government ownership; (2) the government's presence on the entity's board of directors; (3) the government's 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.

[76] *Issues and Decision Memorandum* at 15-16 (Exhibit GOK-5).

[77] Korea states that it "does not concede" that the KDB is a public body. Korea First Submission, para. 427, n. 252. Nevertheless, Korea's Request for Establishment of a Panel does not contain a claim of WTO-inconsistency with respect to the DOC's final determination that certain Hynix creditors (KDB, IBK, and other specialized banks) were public bodies and that those public bodies provided financial contributions to Hynix, *i.e.*, *direct* financial contributions under subparagraph (i) of Article 1.1(a)(1) of the SCM Agreement. *See* WT/DS296/2 (21 November 2003). In addition to KDB and IBK, two other specialized banks provided financial contributions to Hynix during the period of investigation: the National Agricultural Cooperative Federation ("NAFC"), and the National Federation of Fisheries Cooperatives ("NFFC"). *See Government of Korea Supplemental Questionnaire Response* (March 11, 2003), at 1-3 (identifying Korea's five specialized banks) (Exhibit US-36). Although the fifth specialized bank, the Export-Import Bank of Korea ("KEXIM"), did not itself provide financial contributions to Hynix during the period of investigation, KEXIM was a major shareholder of the Korea Exchange Bank ("KEB"), which did provide such financial contributions. *See Chart of Hynix Creditors* (June 16, 2003) (Exhibit US-37).

[78] *Chart of Outstanding Long-Term Balance at End of 2001* (Exhibit US-38).

[79] *Issues and Decision Memorandum* at 52 (Exhibit GOK-5).

[80] One step, discussed above, was the GOK's initiation of an increase in the lending ceiling for Hynix's export credits to give Hynix access to an additional US$6 million in export financing. Another step, an 800 billion won syndicated loan for Hynix orchestrated by the GOK, is discussed below.

financial strains, such as the Hyundai Group and Hynix.[81] To be eligible to participate, companies had to be experiencing temporary liquidity problems due to large-scale maturation of corporate bonds, and be nominated by their Creditor's Council.[82]

58. Although participation terms in the government-legislated program were general, the facts indicate that the GOK created the program specifically to aid Hynix. Korea implies that the KDB Fast Track Program helped "many companies".[83] The facts indicate otherwise.

59. As the DOC noted in its *Final Determination*, only six companies participated in the KDB Fast Track Program, four of which were current or former Hyundai affiliates.[84] Korea did not dispute this finding. Furthermore, the fact that the KDB actually announced in a press release that it would buy Hynix's maturing corporate bonds (January 3, 2001) before Hynix's creditors had even formally recommended Hynix for the program (January 4, 2001), also indicates that Hynix was the intended beneficiary of the Fast Track Program.[85] It is also worth noting that the GOK announced the creation of the Fast Track Program in December 2000 – only a few days after Korean Economic Ministers met to formulate a financial rescue plan for Hynix.

60. In its investigation, the DOC concluded that the Fast Track Program was a critical component of Hynix's financial restructuring and recapitalization. Specifically, "the KDB's involvement sent a clear signal that the government stood behind the program and would take dramatic steps to ensure the restructuring effort moved forward."[86]

61. The government's clear favoritism towards Hynix in its creation of the Fast Track Program led to a wave of public criticism.[87] Considering the record evidence regarding the KDB

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[81] *Issues and Decision Memorandum* at 22-23 (Exhibit GOK-5); *Preliminary Determination*, 68 Fed. Reg. at 16778-79 (Exhibit GOK-4); and *Government of Korea Supplemental Questionnaire Response* (March 10, 2003) at 41 (referencing Art. 18(4) of Korea Development Bank Act and Art. 46 of the KDB's Creditor Financial Institutions and Corporate Credit Guarantee Fund Council Agreement to Facilitate the Bond Offerings) (Exhibit US-36).

[82] *Issues and Decision Memorandum* at 22-23 (Exhibit GOK-5).

[83] Korea First Submission, para. 426.

[84] *Issues and Decision Memorandum* at 23 (Exhibit GOK-5).

[85] *See KDB to Acquire Hyundai Electronics Bonds*, KDB PRESS RELEASE (January 3, 2001) (Exhibit US-39); and *Hynix Supplemental Questionnaire Response* (March 5, 2003), at 19-20 (Exhibit US-40).

[86] *Issues and Decision Memorandum* at 52 (Exhibit GOK-5). Korea argues that "signaling" does not amount to entrustment or direction. Korea First Submission, para. 427. The DOC never found that signaling in and of itself amounted to entrustment or direction. Rather, the DOC considered the government's creation of the KDB Fast Track Program – which benefitted a limited pool of users – as a relevant piece of evidence.

[87] *See, e.g.*, *Hyundai's Brinkmanship vs. Timid Government*, KOREA TIMES (January 10, 2001) at 2 (cash-starved Korean companies claimed that the government's measures were only aimed at certain larger companies such as HEI) (Exhibit US-41); and *Rescue of Three Hyundai Companies Deepens Doubts Over Reform Drive*, Korea Herald (March 12, 2001) ("[O]nce again, the government appears to have backtracked on reform pledges, as it allegedly forced creditors to extend trillions of won in fresh financial aid to three Hyundai Group firms - [HEI, HEC, and HPC].") (Exhibit US-42).

Fast Track Program, the DOC concluded that "[w]ithout the Fast Track Program, it is arguable that [the Hyundai] companies maturing bonds could not have been restructured, which would have prevented the placement of new debt and thus called into question their entire restructuring program."[88] The Fast Track program lasted from January to August 2001, overlapping with the May 2001 restructuring program and feeding into the October 2001 restructuring.[89]

ii) The GOK's Role as Owner

62. In addition to control derived from its role as lender, the GOK's role as owner was crucial in its exercise of control over Hynix's creditors. In particular, private Hynix creditors that were majority-owned by the GOK played a significant role in effectuating the GOK's policy to prevent the failure of Hynix.[90] In its investigation, the DOC found that in each of the major Hynix restructuring and recapitalization transactions, these government-owned and -controlled banks accounted for a major portion of either new loans or debt that was swapped for equity.[91] These banks, therefore, played a "dominant role" in Hynix's restructuring and recapitalization.[92]

63. Korea attempts to minimize the magnitude of the role played by the government-owned banks (the government owned "some" of Hynix's creditors),[93] and then implies that the DOC "presumed" government direction solely based on government ownership.[94] On the contrary, the DOC explicitly stated that it "[did] not contend that the GOK's ownership of ROK banks is by itself dispositive of the GOK's involvement in the banks' lending decisions ... ."[95] Rather, the DOC concluded that the GOK's ownership position in these banks indicated that the government was in a position to – and, based on the evidence, did – "entrust" aspects of Hynix's restructuring and recapitalization to these banks.[96] As discussed more fully below, the DOC also found that

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[88] *Issues and Decision Memorandum* at 52 (Exhibit GOK-5).

[89] *Issues and Decision Memorandum* at 52 (Exhibit GOK-5).

[90] The following private Hynix creditors were majority-owned by the government during the period of investigation: Woori Bank (formerly Hanvit Bank) (100%), Cho Hung Bank (80.1%), Seoul Bank (100%), and the banks under the Woori Financial Holding Company umbrella (including Peace Bank of Korea, Kwangju Bank, and Kyongnam Bank) (87-100%). *See Chart of Hynix Creditors* (June 16, 2003) (listing government ownership of Hynix's creditors) (Exhibit US-37); *Hynix Verification Report* at 11 (discussing KEB) (Exhibit US-43); and *Government of Korea Verification Report* at 6-7 (discussing Woori/Hanvit, Seoul Bank, and Woori Financial Holding Company) (Exhibit US-12); *see also Issues and Decision Memorandum* at 54-55 (Exhibit GOK-5), and *Preliminary Determination*, 68 Fed. Reg. at 16773 (Exhibit GOK-4).

[91] *Issues and Decision Memorandum* at 53 (Exhibit GOK-5).

[92] *Issues and Decision Memorandum* at 53 (Exhibit GOK-5).

[93] Korea First Submission, para. 455.

[94] Korea First Submission, paras. 455-56.

[95] *Preliminary Determination*, 68 Fed. Reg. at 16773 (Exhibit GOK-4).

[96] *Preliminary Determination*, 68 Fed. Reg. at 16773 (Exhibit GOK-4); *Issues and Decision Memorandum* at 53-54 (Exhibit GOK-5).

the GOK used the government-owned and -controlled banks to set the terms for all Hynix creditors and to ensure compliance with the GOK's policy to ensure the survival of Hynix.[97]

64. As discussed above, in the aftermath of the 1997 financial crisis many banks suffered liquidity crises in light of their debt holdings in troubled companies. The GOK had to inject trillions of won into Korean banks to keep them solvent.[98] As a result of these recapitalizations, many commercial banks were nationalized by the government, *i.e.*, the government became the majority owner. With the GOK's increase in ownership came its increase in control. According to an IMF report on the Korean financial system, prior to the 1997 crisis, the government held equity in only three banks, amounting for less than 18 percent of total assets. After restructuring, eight out of 15 commercial banks were either majority government owned or co-owned by the government and private owners.[99]

65. In its investigation, the DOC found that specialized banks and government-owned Hynix creditors themselves accounted for a major portion of either new loans or debt that was swapped for equity in each major restructuring step.[100] For example, with respect to the October restructuring and recapitalization, government-owned banks provided over 90 percent of new financing, and accounted for over 80 percent of the debt that was exchanged for equity.[101]

66. The DOC considered the role of government-owned banks throughout the various phases of Hynix's financial restructuring and recapitalization and concluded that the GOK was able to exercise control over these Hynix creditors via its ownership stakes.[102] For example, the government's common shares carry voting rights and its ownership stake allows it to determine bank management through the nominating committee process.[103] The DOC's conclusions were consistent with the views of private financial experts in Korea. One expert stated that "the

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[97] *Issues and Decision Memorandum* at 54-55 (Exhibit GOK-5).

[98] *Preliminary Determination*, 68 Fed. Reg. at 16773 (Exhibit GOK-4).

[99] When combined with government ownership in specialized and development banks, in mid-2002 nearly 60 percent of the assets of the Korean banking sector was government-controlled. *See Republic of Korea: Financial System Stability Assessment*, International Monetary Fund, IMF Country Report No. 03/81(March 2003), at 9 (Exhibit US-44).

[100] *Issues and Decision Memorandum* at 53-54 (Exhibit GOK-5).

[101] *Issues and Decision Memorandum* at 53 (Exhibit GOK-5).

[102] *Preliminary Determination*, 68 Fed. Reg. at 16773 (Exhibit GOK-4); *Issues and Decision Memorandum* at 53-55 (Exhibit GOK-5).

[103] See *Financial Experts Report*, Meeting 2, at 5-6; Meeting 5, at 12; and Meeting 5, at 11 ("In those cases [of public fund injections and greater government ownership], the government has interfered in the governance of the banks. (Exhibit GOK-30) For example, there have been instances where the government has tried to appoint outside directors or influence the decisions of the committee that selects the CEO.") (Exhibit GOK-30); *see also Government of Korea Verification Report*, at 4 ("According to the officials, bank nominating committees consist of outside directors, independent professionals, and where the government is majority or largest shareholder, a public interest or shareholder representative who is selected by the government.") (Exhibit US-12).

government can influence those banks in which it has significant ownership."[104] Another noted that as a shareholder, "the GOK has the right to be involved" in the banks.[105] Another observed that, "[i]n a nationalized banking system, it is difficult to expect banks to make independent decisions."[106] Yet another commented that "many [banks] thought that there was some government pressure regarding the lending decisions ... . [A]s long as the government has some ownership in the banks the perception will be that they are being influenced by the government."[107] Finally, another mentioned the increased bank dependence on the government stemming from capital injections.[108] The DOC reasonably concluded, therefore, that the GOK's control over government-owned banks did impact the lending decisions of those banks.[109]

67. The DOC found that the GOK also exercised control over Hynix's creditors generally, through these government-owned and -controlled banks. Specifically, the DOC found that the GOK "intervened in Hynix' financial restructuring through the dominant role played by government-controlled and owned banks in Hynix' Creditors Councils ... ."[110] With respect to the May restructuring and recapitalization, specialized banks and government-owned banks accounted for over 70 percent of the voting rights of the Creditors' Council.[111] With respect to the October restructuring and recapitalization, these banks also accounted for more than 50 percent of the voting rights in the October Creditors' Council.[112] The DOC concluded that, as such, these banks were in a position to set the terms of the financial restructuring via their control of votes in the Hynix Creditors' Council.[113]

68. Specifically, the DOC found that through its influence over government-owned banks and its direct control over specialized banks (*e.g.*, KDB and IBK), the government was able to establish its dominant position over Hynix' Creditors' Councils, influence the outcome of the council meetings, and entrust the continuation of its policies to the council.[114] In particular, government-owned banks "had a blocking majority in all of the Creditors' Council meetings that were held for the May and October restructurings, which meant that these banks had significant control over the plans that were approved by the councils, and could derail any plans with which

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[104] *Financial Experts Report*, Meeting 1, at 2 (Exhibit GOK-30).
[105] *Financial Experts Report*, Meeting 2, at 5 (Exhibit GOK-30).
[106] *Financial Experts Report*, Meeting 3, at 7 (Exhibit GOK-30).
[107] *Financial Experts Report*, Meeting 4, at 10 (Exhibit GOK-30).
[108] *Financial Experts Report*, Meeting 6, at 13 (Exhibit GOK-30).
[109] *Issues and Decision Memorandum* at 53-54 n.20 (Exhibit GOK-5).
[110] *Issues and Decision Memorandum* at 53 (Exhibit GOK-5).
[111] *Issues and Decision Memorandum* at 53 (Exhibit GOK-5).
[112] *Issues and Decision Memorandum* at 53 (Exhibit GOK-5).
[113] *Issues and Decision Memorandum* at 53-54 (Exhibit GOK-5); *see also Hynix Verification Report* at 15, noting that as of November 2000, the KDB, Woori Bank, KEB, Chohung Bank, Kookmin Bank, Shinhan Bank and Seoul Bank together made up the necessary 75 percent voting bloc to authorize assistance to Hynix (Exhibit US-43). As noted above, most of these entities had significant levels of GOK ownership.
[114] *Issues and Decision Memorandum* at 54-55 (Exhibit GOK-5).

they did not approve."[115] KEB officials corroborated the DOC's analysis, stating that "if 75 percent of the creditors in terms of outstanding debt approve a resolution, the dissenting creditor banks had no choice but to follow the decision of the meeting."[116]

69. Apart from its exercise of control through majority ownership rights, the GOK also demonstrated control over banks with relatively small government ownership shares. Korea asserts that the government "could not and did not influence" privately held banks.[117] Evidence on the record refutes Korea's assertions. For example, Kookmin Bank, which had less than 10 percent government ownership, admitted in sworn submissions to the U.S. Securities and Exchange Commission ("SEC") that it had been, and still was, subject to government influence in its lending decisions.

70. Specifically, in September 2001, Kookmin Bank and Housing and Commercial Bank (two Hynix creditors that were merging to form the "New Kookmin" during the period of investigation) filed a prospectus with the SEC. Kookmin acknowledged in the "Risks Relating to Government Regulation and Policy" Section of this prospectus:

> *The Korean government promotes lending to certain types of borrowers as a matter of policy, which New Kookmin may feel compelled to follow ... .* In addition, the Korean Government has, and will continue to, as a matter of policy, attempt to promote lending to certain types of borrowers. It generally has done this by identifying qualifying borrowers and making low interest loans available to banks and financial institutions who lend to those qualifying borrowers. The government has in this manner promoted low-income mortgage lending and lending to technology companies. We expect that all loans made pursuant to government policies will be reviewed in accordance with New Kookmin's credit review policies. *However, we cannot assure you that government policy will not influence New Kookmin to lend to certain sectors or in a manner in which New Kookmin otherwise would not in the absence of the government policy.*[118]

71. In June 2002, Kookmin made another submission to the SEC in anticipation of the issuance of American depository shares (ADS's) coordinated by Goldman Sachs. This submission contained language virtually identical to the first prospectus:

> *The Korean government promotes lending to certain types of borrowers as a matter of policy, which we may feel compelled to follow.* The Korean Government has promoted, and, as a matter of policy, may continue to attempt to promote lending to certain types of borrowers. *It generally has done this by*

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[115] *Issues and Decision Memorandum* at 54 (Exhibit GOK-5).
[116] *Hynix Verification Report* at 15 (Exhibit US-43).
[117] Korea First Submission, paras. 454, 463.
[118] *Kookmin Bank Prospectus* (September 10, 2001) at 24 (emphasis added) (Exhibit US-45).

> *requesting banks to participate in remedial programs for troubled corporate borrowers and by identifying sectors of the economy it wishes to promote and making low interest loans available to banks and financial institutions who lend to borrowers in these sectors.* The government has in this manner promoted low-income mortgage lending and lending to *high technology companies*. We expect that all loans made pursuant to government policies will be reviewed in accordance with our credit review policies. *However, government policy may influence us to lend to certain sectors or in a manner in which we would not in the absence of the government policy*."[119]

72. The filing of these prospectuses in September 2001 and June 2002 link the statements therein, concerning government influence over bank lending decisions, to the DOC's period of investigation. The DOC found that they were "very telling with regards to GOK influence over bank lending decisions."[120] In its *Final Determination*, the DOC concluded that Kookmin's SEC prospectuses provided explicit evidence that government direction had occurred and provided crucial evidence of the GOK's role in directing lending decisions.[121] The DOC also noted that no other Korean bank was subject to these same stringent transparency rules because no other Korean bank was listed on a U.S. stock exchange during the DOC's period of investigation.[122]

73. Korea argues that the Kookmin prospectuses do not "establish" government direction because they do not mention Hynix by name.[123] This ignores the fact that the DOC's finding that the GOK entrusted or directed Hynix's creditors to provide financial contributions to Hynix during the period of investigation was based upon the totality of the evidence on the record of the investigation. The prospectuses constitute direct evidence from one of the Hynix creditors that, notwithstanding the protestations of the GOK and Hynix to the contrary, the GOK was still in the business of directing the lending decisions of banks. In addition, the prospectuses refute

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[119] *Kookmin Bank Prospectus* (June 18, 2002) at 22 (emphasis added) (Exhibit US-46).

[120] *Issues and Decision Memorandum* at 58 (Exhibit GOK-5).

[121] *Issues and Decision Memorandum* at 58-59 (Exhibit GOK-5). As the DOC explained in its *Final Determination*,

> In order to be listed on a US stock exchange, companies must comply with stringent transparency rules. These rules are designed to protect investors, and companies cannot afford to hide certain risks from their investors. To do so would create a serious potential for litigation and liability risk for the company. In this instance, Kookmin was signaling to its investors that it must assume risks in making lending decisions not based on commercial consideration, but on direction by the GOK and reflective of the GOK's economic and social policy objectives. Kookmin had no choice but to reveal these risks to its investors.

Issues and Decision Memorandum at 58 (Exhibit GOK-5).

[122] *Issues and Decision Memorandum* at 58 (Exhibit GOK-5).

[123] Korea First Submission, paras. 435-439.

arguments made by the GOK and Hynix during the investigation that the banks with lower levels of government ownership, such as Kookmin, were not subject to government direction.[124]

74. The Kookmin prospectuses acknowledge the government's continued power and its use of that power to direct the lending decisions of banks, even ones like Kookmin that had a relatively low level of government ownership. The prospectuses identify both "troubled corporate borrowers" and "high technology companies" – both of which describe Hynix – as entities to whom the GOK was directing the banks to lend. Moreover, the timing of the issuance of the first Kookmin prospectus, September 2001, occurring as it did in the midst of several Hynix financial restructuring and recapitalization measures, reinforces the impression that Kookmin was referring specifically to the situation of Hynix.

75. Korea argues that, according to the lawyers that drafted the Kookmin prospectus, the "Risk Factors" language "was in no way meant to imply government control over Kookmin lending decisions."[125] Korea also claims that the DOC "did not even attempt to address this evidence".[126] Korea is wrong on both accounts.

76. The DOC explicitly addressed Hynix's and the GOK's arguments that the language in Kookmin's U.S. SEC prospectus was not meant to imply government control over Kookmin's lending decisions:

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

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[124] As the DOC stated in its *Final Determination*:

> The GOK and Hynix have attempted to demonstrate that the participation of creditors in the Hynix restructuring was without government direction and commercially based in part because highly credible and independent banks such as Kookmin participated. That Kookmin, a bank held up as an example of independence, was subject to direction is confirmed by its own US SEC filing. Moreover, the nexus described above regarding Kookmin's lending to Hynix and the government's policies to ensure that banks "participate in remedial programs for troubled corporate borrowers" is also evident from the loan approval documents the Department examined for Kookmin's internal approval of the December 2000 syndicated loan. This document, which cannot be quoted here because of the request that it be treated as business proprietary, echoes the government's objectives cited in the US SEC prospectus.

Issues and Decision Memorandum at 59 (Exhibit GOK-5).

[125] Korea First Submission, para. 438.

[126] Korea First Submission, para. 438.

> verification, connect the government's influence over Kookmin and the government objective to rescue Hynix from financial collapse. Kookmin's reference to "troubled corporate borrowers" and "technology companies" alone establish such a link.[127]

Thus, although the DOC considered the *post hoc* interpretations of Kookmin's lawyers, it found such explanations unpersuasive for a number of reasons.

77. One reason for the DOC's rejection of the *post hoc* interpretation was its "plain reading" of the risk factors language. When companies, whether foreign or domestic, issue securities on U.S. securities markets, they are subject to the strict laws that govern the securities industry. Penalties for violations of disclosure standards are severe, including fines and imprisonment.[128] In the "risk factors" section of a prospectus, a company is required to warn prospective investors of all material risks associated with the proposed investment. The SEC mandates the use of "plain English" in that section and requires that risk factors be "clear, concise and understandable."[129]

78. Kookmin warned prospective investors that it may "lend to certain sectors or in a manner which we would not in the absence of the government policy." Kookmin also cited "low-income mortgage" and "high technology companies" as sectors where the GOK had previously promoted lending. The DOC concluded that Kookmin's "Risk Factors" indicated that the GOK had and would continue to direct Kookmin to lend to high technology companies such as Hynix. The DOC's "plain reading" was reasonable.

iii) The GOK's Role as Legislator

79. The GOK also took legislative action that enhanced its ability and the ability of Hynix's creditors to effectuate the GOK's policy to save Hynix. For example, in November 2000 (precisely when the GOK began pursuing its Hynix policy), the Prime Minister issued a directive facilitating the GOK's exercise of its shareholder powers via the election of directors and the appointment of management. As discussed above, concurrent with the GOK's November 2000 decision to support Hynix in its restructuring, the Prime Minister issued a directive, Prime Minister Decree No. 408. During the investigation, Korea suggested that this measure would ensure that GOK officials at financial supervisory organizations not interfere in the operations of commercial and specialized banks.[130] The DOC concluded otherwise. Specifically, the DOC

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[127] *Issues and Decision Memorandum* at 58 (Exhibit GOK-5).

[128] *Issues and Decision Memorandum* at 58 (Exhibit GOK-5).

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

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

found that the Decree contained "sufficient ambiguities which would allow the GOK to become involved in the banking system."[131]

80. Article 5 of Prime Minister Decree No. 408 permits supervisory agencies to request "cooperation" from financial institutions for the purpose of the stability of the financial market, or to attain the "goals of financial policy." Article 6 provides the government with the flexibility to intervene on a company's behalf, stating that: "The Minister of MFE and KDIC shall, *unless they exercise their rights as shareholders of any of the Financial Institutions*, procure that the Financial Institution which was invested by the Government or KDIC, can be operated independently under the direction of the Board of Directors thereof" (emphasis added). In other words, the GOK can intervene in the lending decisions of a bank in the exercising of its shareholder rights.[132] As discussed previously, the GOK's shareholding rights in Hynix's creditors were very significant.

81. Thus, rather than diminishing the GOK's authority to intervene in the decisions of Korean banks, the Decree actually legalized the GOK's rights to intervene under the guise of stabilizing financial markets or exercising its shareholder rights (discussed above) to elect and appoint the banks' decision makers and to make credit policy decisions.[133]

82. The DOC also found that the GOK was able to leverage its control of the financial sector to assist Hynix through enactment of the Public Fund Oversight Act. This law required Korean private banks to sign contractual commitments with the government ("Memoranda of Understanding" or "MOUs") in exchange for the massive recapitalizations they received from the government.[134] These MOUs provided the government with a contractual right to intervene in the day-to-day business and credit decisions of Korean banks.[135] The MOUs specify financial soundness, profitability, and asset quality targets, and include a detailed plan for implementation.[136] The DOC concluded that by entering into MOUs, "[t]he GOK in this manner can be directly involved in the fiscal operations of the bank."[137]

83. In particular, MOUs allowed the GOK to "require that the bank management be changed or the bank be restructured" such that "employees can be fired, the bank can be restructured, or the KDIC can order that the bank be merged with another healthier bank."[138] Many of Hynix's creditors, suffering from capital shortages and seriously over-exposed with respect to Hynix, had

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[131] *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).
[132] *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).
[133] *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).
[134] *Government of Korea Verification Report* at 4 (referencing Exhibits 1-2 through 1-6) (Exhibit US-12).
[135] *See Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).
[136] *Preliminary Determination*, 68 Fed. Reg. at 16774 ((Exhibit GOK-4).
[137] *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).
[138] *Government of Korea Verification Report*, at 4 (Exhibit US-12).

no choice but to accept the strict requirements of the MOUs.[139] These legislatively-mandated contractual agreements provided the GOK with substantial control in directing credit to Hynix. Moreover, as discussed in more detail below, the GOK exercised its prerogatives provided for in the MOUs, hiring and firing bank management at Hynix's creditor banks, such as Kookmin Bank.

84. Another important step in furtherance of the GOK's policy towards Hynix was the enactment of the Corporate Restructuring Promotion Act ("CRPA"). The GOK enacted the CRPA just prior to the October restructuring and recapitalization measures, with Hynix and other Hyundai Group companies as the most visible pending bankruptcies. The DOC concluded that this law essentially permitted a handful of Hynix's creditors, most of whom were majority owned by the GOK, to dictate restructuring terms to other Hynix creditors.[140]

85. Prior to enactment of the CRPA, a group of Hynix's major creditors informally agreed to form a Creditor's Council (officially called the "Hynix Creditors' Financial Institution") to consider a corporate workout for Hynix.[141] This Creditor's Council was modeled after the corporate workout framework established by the GOK in June 1998 pursuant to the Corporate Restructuring Agreement ("CRA"). Under the CRA, the lead creditor, which would be responsible for negotiating any corporate work-out terms, headed the Creditors' Council, a council made up of the troubled corporation's creditor banks.[142] In September 2001, the CRA was replaced by the CRPA, a more formal mechanism under Korean law that codified the corporate workout methods that were being utilized under the CRA.

86. Under the CRPA, the creditors of a distressed Korean company are permitted to form a council and jointly manage the company through its restructuring. The "principal transactions bank" (the KEB in the case of the Hyundai companies) is nominally head of the council, which makes decisions "with a concurrent vote of the creditor financial institutions retaining ¾ or more of the gross amount of credit extension by the creditor financial institutions (including the loans converted into investments pursuant to the plans for management normalization)."[143]

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[139] Significant government capital was provided to a number of banks that were major participants in the Hynix restructuring and recapitalization measures, including KEB, Korea First Bank, Cho Hung, Seoul Bank, Kwangju, and Peace Bank. *See, e.g., Four Commercial Banks Get W775 bil. in Public Funds*, THE KOREA HERALD (January 1, 2001) (Exhibit US-47); *Six Banks to Receive W3 tril. in Addition to Public Funds*, KOREA TIMES (September 27, 2001) (Exhibit US-48); *KEB to Receive 336 Bil. Won in Public Funds*, KOREA TIMES (January 28, 1999) (Exhibit US-49); and *KFB Gets W18 Tril. in Public Fund*, Korea Times (January 20, 2003) (Exhibit US-50).

[140] *Issues and Decision Memorandum* at 54-55 (Exhibit GOK-5).

[141] *See Issues and Decision Memorandum* at 19-20 (Exhibit GOK-5).

[142] *Issues and Decision Memorandum* at 19-20 (Exhibit GOK-5).

[143] Corporate Restructuring Promotion Act, Article 27(1) (Exhibit US-51).

87. According to Korea, under the CRPA, Hynix's creditors could "choose" their own path and "walk away" from Hynix restructuring and recapitalization measures.[144] Korea implies that Hynix's creditors had real choices (in the October 2001 restructuring under the CRPA) that "made . . . sense." Korea maintains that the banks that participated were acting on their own free will based on purely commercial considerations.[145]

88. Korea has mischaracterized the CRPA. 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. Hynix's Creditors' Council, dominated by specialized banks and government-owned and -controlled banks, determined that: (1) no creditor would have the option to call in its debt, (2) no creditor would have the option to walk away without penalty, and (3) no creditor would have the option to remain an interest-earning creditor without the extension of new loans or forgiving significant debt on terms 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.[146]

89. The three options presented to Hynix's creditors as part of the October restructuring and recapitalization measures were: (1) extend new loans, convert a majority of their debt to equity, and extend maturities and lower interest rates on the remainder of outstanding loans; (2) decline to extend new loans, convert a still significant portion of their debt to equity, and forgive the remainder; or (3) decline to extend new loans or convert debt to equity, and exercise their appraisal rights on small part of their debt.[147] These three options, however, do not offer much of a real choice. Each of the three was structured to maximize benefits to Hynix and to minimize the creditors' abilities to exercise basic creditor rights. Even the third option, which Korea characterizes as an option to "walk away" from, or "sever ties" with Hynix, was highly favorable to Hynix because it required creditors to forgive their debt on very unfavorable terms. Specifically, creditors that exercised the third option could only exercise their appraisal rights for 25 percent of the unsecured debt; they had to forgive the rest, *i.e.*, they had to forgive 75 percent of that debt.[148]

90. In addition, the few banks that selected the third option not only had to write-off 75 percent of Hynix's debt, they did not even actually receive the proceeds from having exercised their appraisal rights on the remaining 25 percent. This is because they were forced under the terms of the Creditors' Council agreement to convert this portion into zero coupon (i.e., interest

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[144] Korea First Submission, at paras. 353, 457.

[145] Korea First Submission, at para. 353.

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

[147] *See Preliminary Determination*, 68 Fed. Reg. at 16776 (Exhibit GOK-4); and Korea First Submission, para. 353.

[148] *Preliminary Determination*, 68 Fed. Reg. at 16776 (Exhibit GOK-4).

free) debentures with a five-year maturity. Ths 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.[149]

91. 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."[150] Under the CRPA, all creditor banks were obligated to participate in the workout system.[151] 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."[152]

92. 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.[153] Second, the law made all creditors of an ailing firm subject to the Council's authority.[154] This requirement forced KFB and other banks with foreign ownership to attend the Hynix creditor meetings, leaving them little room but to participate in any restructuring and recapitalization measures.

93. The financial experts interviewed by the DOC confirmed that the GOK utilized the CRPA as a critical tool in delivering survival aid to Hynix. One expert explained that the CRPA permitted the government to use KEB as Hynix's lead bank and, thus, as a mouthpiece for the GOK at CRPA-mandated creditor meetings in order to impose its plan for Hynix on other creditors.[155] The DOC also found that the CRPA provided the FSS with formal power to request

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[149] *Issues and Decision Memorandum* at 93-94 (Exhibit GOK-5).

[150] *Issues and Decision Memorandum*, at 54, n.19 (Exhibit GOK-5); *Government of Korea Verification Report* at 8 (Exhibit US-12).

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

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

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

[154] *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.

[155] *Financial Experts Report*, Meeting 1, at 5 ("The government made its view clear to the creditors that it preferred the workout process"); Meeting 1, at 4-5 ("He further noted that management level officers at the KEB, Hynix's lead bank, talk with government officials, so there is an indirect channel through which the government can influence these creditors."). One expert noted that there is a perception that the KEB's credit risk committee is subject to government influence and that the KEB is considered a public bank because the government owns most of its shares. Meeting 5, at 12. (Exhibit GOK-30).

creditors' assistance in the restructuring process, and to instruct creditors not to press their payment claims against a company – as it did with respect to Hynix.[156]

iv) The GOK's Role as Regulator

94. The GOK's role as regulator also played a part in its exercise of control over Hynix's creditors. As part of its post-1997 reforms, the GOK created a government organization called the Financial Supervisory Commission ("FSC"). The FSC was established for the purpose of consolidating and improving the GOK's monitoring and supervision of financial institutions.[157] The FSC's authority was subsequently expanded to cover specialized banks.[158]

95. As discussed above, the November 2000 meeting of the Economic Ministers resulted in a "resolution of special approval" by the FSC to increase certain banks' ceiling limits for single borrowers, as requested by the KEB on behalf of Hynix' creditors.[159] Because Article 35 of the Banking Act prohibits a financial institution from loaning more than 25 percent of its capital to any one *chaebol*, or more than 20 percent to any one company,[160] a number of Hynix's creditors were already above their legal limit and would otherwise not have been able to participate in the restructuring and recapitalization of Hynix without the government's intervention.

96. The FSC, however, approved three credit limit increases for Hynix' creditors "in order to allow them to participate in the Hynix restructuring process."[161] The first waiver was for the KDB, KEB and KFB to participate in the December 2000 syndicated loan, thereby ensuring the existence of enough participants to raise the 800 billion won December 2000 syndicated loan.[162] The second was a blanket waiver provided for any bank that participated in the KDB Fast Track Program.[163] The FSC granted this blanket waiver without any regard to the commercial considerations pertaining to the individual banks. The third waiver was a March 2001 waiver for Woori Bank relating to its D/A financing to Hynix.[164]

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

[157] *Preliminary Determination*, 68 Fed. Reg. at 16772 (citing explanation of the GOK) (Exhibit GOK-4); Korea First Submission at 333.

[158] *Preliminary Determination*, 68 Fed. Reg. at 16772 (Exhibit GOK-4).

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

[160] *Government of Korea Questionnaire Response* (February 3, 2003), Exhibit 8 (Banking Act, Article 35) (Exhibit US-53).

[161] *Issues and Decision Memorandum* at 51-52 (Exhibit GOK-5); *Government of Korea Verification Report* at 16 (Exhibit US-12).

[162] *See, e.g., Hyundai Electronics May Seek Loans Beyond Borrowing Limit*, AFX NEWS LIMITED, AFX-ASIA (December 1, 2000) (Exhibit US-54); *Panel to Approve Excess Credit Provision to Hyundai Electronics*, KOREA HERALD (December 2, 2000) (translated version) (Exhibit US-55).

[163] *Government of Korea Verification Report* at 17 (Exhibit US-12).

[164] *Government of Korea Verification Report* at 17 (Exhibit US-12).

97. In total, the FSC had approved five cases where an applicant bank applied to exceed its credit ceiling, four of which related to Hynix and other Hyundai Group companies.[165] As discussed in above, the GOK identified these companies as being part of its "backbone industries" that should not be liquidated simply to follow "market principles." The record evidence shows that, far from applying "market principles," the FSC waived the credit ceiling for three of Hynix' creditors participating in the December 2000 syndicated loan for economic, social and political reasons. As part of its justification for those waivers, the FSC Commissioners noted the following factors:

> [T]he semiconductor industry is a strategic industry; after Hynix' merger with [LG Semicon] in 1999, the company accounted for 20 percent of the world semiconductor market and four percent of the ROK's exports; Hynix employs 24,000 employees in the industry, and other involved companies exceed 2,500 with over 150,000 employees; to support the syndicated loan and D/A financing would improve the ROK's international competitiveness; therefore, for the promotion of the electronics industry policy, the FSC finds it is in the best interest to increase the ceiling.[166]

98. In its *Final Determination*, the DOC correctly observed that these factors "[a]re a reflection of the government's economic and social policy concerns regarding a company that accounted for a significant portion of the ROK's exports and whose existence was important for the country's international competitiveness. These are not normal commercial considerations."[167]

99. Thus, the DOC found that when the GOK raised the credit ceiling for certain key creditors, it took the first significant step to help alleviate Hynix' cash crunch, as described by the Ministry documents.[168] This affirmative action by the GOK ensured the participation of certain key creditors in the syndicated loan, which was the first major part of the Hynix financial restructuring measures. For example, the KEB admitted at verification that, absent this waiver by the FSC, the bank would not have been able to provide the loan.[169] The DOC concluded that this waiver by the FSC "ensured the successful 'kickoff' of Hynix' financial restructuring."[170]

100. Korea argues that such waivers or "lifting regulatory hurdles" does not constitute a financial contribution.[171] The DOC never determined that the waivers themselves were financial

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[165] *Issues and Decision Memorandum* at 51 (Exhibit GOK-5).

[166] *Government of Korea Verification Report* at 16-17 (Exhibit US-12).

[167] *Issues and Decision Memorandum* at 51 (Exhibit GOK-5).

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

[169] *Issues and Decision Memorandum* at 51 (Exhibit GOK-5); *Hynix Verification Report* at 13-14 (Exhibit US-43).

[170] *Issues and Decision Memorandum* at 51 (Exhibit GOK-5).

[171] Korea First Submission, paras. 418-424.

contributions. Rather the DOC found that the waivers were one of many government actions taken to effectuate its Hynix policy.[172] As such, these actions were part of the totality of circumstances evincing government entrustment or direction.

101. Another government organization, the Financial Supervisory Service ("FSS"), the FSC's enforcement body, also played a role and took actions to ensure the ability of Hynix's creditors to effectuate the GOK's Hynix policy.[173] In order to forestall Hynix's creditors from finding Hynix in default, the GOK selectively enforced bankruptcy principles under the CRPA to prevent Hynix's creditors from exercising their rights against Hynix. The FSS exercised this authority on Hynix's behalf, requesting all creditor banks "to refrain from exercising [liquidation] rights until September 4, 2001." Without this intervention, according to FSS/FSC officials, Hynix's creditors could have sought to liquidate the company, thereby ending its prospects for restructuring.[174] This incident is another example of the GOK exercising control over Hynix's creditors. The FSS's actions successfully prevented Hynix's creditors from taking any action that would harm Hynix until the GOK, through the CRPA Creditor's Council, could organize the October restructuring and recapitalization measures.

102. As discussed previously, Hynix was in terrible financial condition even before October 2001. For example, in 2000 Hynix had suffered a net loss of over two trillion won.[175] Hynix's net profit margins and return ratios were also negative, and its cash flow ratios were very weak.[176] The DOC observed that, in spite of Hynix's serious financial woes, the FSS nevertheless had instructed Hynix's creditors to classify Hynix loans as "normal."[177] The FSS's intervention allowed Hynix to maintain the appearance of financial soundness and to avoid a downgrade of its debt.[178]

103. The FSS's instruction to Hynix's creditors reflects the GOK's willingness to intervene in the market on Hynix's behalf and was another affirmative step taken by the GOK to effectuate its Hynix policy.

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[172] *Issues and Decision Memorandum* at 52 (Exhibit GOK-5).

[173] Korea claims that the FSS "is not a government organization". Korea First Submission, note 258. In its *Preliminary Determination*, the DOC stated that the FSS is the enforcement arm of the FSC and that, based on the GOK's own description, the FSC was a "government organization". *Preliminary Determination*, 68 Fed. Reg. at 16772-73 (Exhibit GOK-4). Neither the GOK nor Hynix argued during the investigation that the FSS or the FSC were anything but government entities. Furthermore, Korea concedes that the FSS is a "public corporation" (without defining that term), which seems to be a distinction without a difference. Korea First Submission, note 258.

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

[175] *Hynix Creditworthiness Memorandum* at 4 (Exhibit US-23).

[176] *Hynix Creditworthiness Memorandum* at 3 (Exhibit US-23).

[177] *Preliminary Determination*, 68 Fed. Reg. at 16773 (Exhibit GOK-4).

[178] *See, e.g., Financial Experts Report*, Meeting 3 at 8; Meeting 4 at 10. (Exhibit GOK-30).

c. The GOK Engaged in Coercion

104. As demonstrated above, the GOK took affirmative actions to entrust and direct Hynix's creditors to provide financial contributions to Hynix during the period of investigation through its exercise of control over those creditors. The evidence before the DOC also showed that the GOK engaged in coercion as a means of effectuating its Hynix policy.

i) Threats Against Hynix's Creditors

105. In its investigation, the DOC assessed several instances in which the GOK employed threats against Hynix's creditors to coerce compliance with its policy to prevent the failure of Hynix. For example, the DOC considered "numerous statements on the record relating to the GOK's pressure on KFB (which was, at that time, 51 percent owned by Newbridge Capital, a US company) to participate in the Fast Track Program."[179] On January 4, 2001, KFB had rejected a government call for participation in the Hynix bailout, reflecting its assessment that increased credit to Hynix was not commercially warranted. Wilfred Horie, Chief Executive Officer of KFB, observed at the time that KFB's "opposition is the result of sticking to strict principles for profit making. All told, [the KFB directors] said the purchase of the bonds of insolvent firms would push the bank into further managerial hardship."[180]

106. Horie viewed the GOK's request for participation in the Hynix restructuring and recapitalization measures as coercive. Horie complained: "It is nonsense for the government to force the banks to undertake the corporate bond. Such issue should be left to the banks' discretion."[181] The FSS bluntly responded that, "[a]t the moment, we will ask [KFB] to undertake Hyundai's bond one more time. But if the bank rejects again, leading to the collapse of related companies, we will hold the bank responsible."[182] Yong-hwa Chong, Information Director at the FSS, openly threatened that "[s]evere sanctions will be imposed by adding the banks' willingness to support public policy as a category to the evaluation of bank management".[183]

107. A *Business Week* article indicated that "[t]he next day [after KFB rejected the government demand], a government agency pulled, then redeposited, $77 million from a Korea First

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[179] *Issues and Decision Memorandum* at 59-60 (Exhibit GOK-5).

[180] *KFB Changing Fast Under Profit-First Management*, KOREA TIMES (January 29, 2001) (Exhibit US-56).

[181] *Government's Compulsory Allotment of Corporate Bond Causes a Stir*, KOREA ECONOMIC DAILY (January 6, 2001) (Exhibit US-57).

[182] *Id*.

[183] *FSS-Korea First Bank Collide Head-on Over Corporate Debentures*, THE KOREA DAILY NEWS (January 6, 2001) (Exhibit US-58).

account.[184] This followed at least ten angry phone calls between the FSS and the KFB.[185] *Business Week* reported that: "Word spread that all government agencies would cut ties with Korea First."[186] According to Bloomberg, the government even threatened to demand that one of KFB's main corporate customers (the SK Group) cease doing business with the bank.[187]

108. The press reported that Wilfred Horie later confirmed that "[t]here was someone [at the FSS] who was very angry with the bank's decision. And it's true that someone within the government was talking to our clients."[188] Horie further elaborated, explaining that "[a]t some point he [the FSS official] can make our life very miserable. Their comment directly to me was: 'We have no desire nor do we have the right to insist that you do things against your will, but this is Korea and you should cooperate as much as you can'."[189]

109. In its *Final Determination*, the DOC noted there were multiple press reports on the record indicating that the KFB had resisted the purchase of the Hynix bonds because it considered Hynix to be a high credit risk. For example, the DOC cited to a January 29, 2001 *Wall Street Journal* article, stating that Korean banks have "been more accustomed to following government orders than making sound credit decisions."[190]

110. The DOC also observed that the article explained that when KFB refused to participate in the government program at the request of the FSS, the FSS applied pressure to KFB and "strongly urged" KFB to participate in the plan lest it risk losing some of its clients.[191] The article was quite specific, identifying the FSS official as Lee Sung No, a director at the FSS Credit-Supervision Department, and the KFB official as Lee Soo Ho. The DOC also noted that the article quoted an executive at a government-owned bank as stating that the nationalized banks were "green with envy," as "nobody wants to increase their exposure to these corporations that still have a long way to get their acts together." The article stated that the FSS asked creditor banks to participate in this program, and only KFB refused.[192]

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

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

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

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

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

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

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

[191] *Id.*

[192] *Id.*

111. The DOC noted that GOK pressure on KFB, a majority-foreign owned bank, attracted considerable attention in the press and was widely reported. The DOC quoted reported comments from a securities analyst that: "KFB's rebellious move was possible as the bank is now controlled by the foreign management." Most of the local banks, according to the analyst, "are under the government's influence [for whom] such a move by the KFB is unimaginable."[193]

112. Notwithstanding the KFB's initial resistance, it ultimately surrendered to the GOK's pressure by agreeing to participate in the bailout as it related to documents against acceptance ("D/A"), a form of accounts receivable/export financing.[194] Horie committed to share about $38 million among $1.5 billion funding for Hynix's D/As after a personal meeting with a high-level FSS official.[195] In fact, KFB ultimately participated in a number of the Hynix restructuring and recapitalization measures. Such capitulation by a foreign majority-owned bank simply underscores the even more precarious position of Korean-owned banks when it came to GOK pressure.

113. Not only did the GOK threaten to impose sanctions on KFB, it also, through the FSC and FSS, threatened to terminate banks' relationships with either the government or their existing customers. For instance, the GOK threatened KFB with the loss of its customers, interceding directly with them,[196] and raised the possibility of losing tens of millions of dollars in government business unless the bank complied with government demands.[197] The DOC specifically noted a January 29, 2001 *Wall Street Journal* article stating that when KFB refused to participate in the GOK program at the request of the FSS, the FSS applied pressure to KFB and "strongly urged" KFB to participate in the plan lest it risk losing some of its clients.[198] Other Hynix creditors facing similar pressure from the GOK are likely to have capitulated, as did KFB.

114. The DOC also found that the GOK made threats against KorAm Bank when the bank refused to participate in the May 2001 1.0 trillion won convertible bond package. The bank had refused, contending that Hynix had failed to deliver a written pledge to use its best effort to

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[193] *Foreign Bank in ROK Rebels Against Govt Bond Purchase Order*, THE DAILY STAR (January 6, 2001) (Exhibit US-62).

[194] *Korea First Bows to Gov't Pressure*, THE DIGITAL CHOSUN, (March 27, 2001) (Exhibit US-63). Others have recognized that KFB and other privately owned banks felt compelled to purchase Hynix bonds at various times "to stay on good terms with the South Korean Government." *See, e.g., Hynix Back From Jaws of Defeat: Did the Government Lend a Hand to Nudge the Deal Forward*, THE ASSET (September 5, 2001) (Exhibit US-24).

[195] *Korea First Bows to Gov't Pressure*, THE DIGITAL CHOSUN, (March 27, 2001) (Exhibit US-63).

[196] *Cooperate or be Damned*, EUROMONEY (February 2001) (Exhibit US-61); *see also Korea First Bank Shuts Government 'Wallet' Under New Management*, BLOOMBERG (January 31, 2001), at 2 (Exhibit US-60).

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

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

reduce its debt.[199] The FSS severely rebuked KorAm, with one FSS official stating: "If KorAm does not honor the agreement, we will not forgive the bank."[200] The same FSS official further threatened stern measures against the bank, such as disapproving new financial instruments and subjecting the bank to a tighter audit.[201] Another FSS official predicted that the bank would extend credit to Hynix even without the Hynix memorandum pledging to reduce its debt: "We don't think KorAm will break the agreement. In particular, the bank yesterday expressed its intention to extend financial support to the semiconductor maker even if Hynix fails to submit the memorandum."[202] As a result of the threats, KorAm Bank capitulated and reversed its decision in a single day.[203] In addition, the investigation record shows that, in connection with the D/A extensions in February and March 2001, the GOK engaged in similar pressure tactics against Shinhan Bank,[204] Hanmi Bank,[205] Chohung,[206] and Hanvit Bank.[207]

115. Finally, the DOC also noted an April 2001 *Korea Herald* report that the FSS threatened to fine Hana Bank if it failed to provide emergency liquidity to Hyundai Petrochemical, which was a part of the Hyundai Group that was going through the corporate workout process.[208] Hana Bank was also an important Hynix creditor. While this report discussed Hyundai Petrochemical, the GOK's policies during this investigation period were aimed at the corporate and financial restructuring of the entire Hyundai Group, including Hynix's predecessor, HEI, which was part of that group.

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[199] *Issues and Decision Memorandum* at 59 (Exhibit GOK-5); *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).

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

[201] *Id.*

[202] *Id.*

[203] *See Hynix Questionnaire Response* (January 27, 2003), Exhibit 19 (Exhibit US-65) (confirming that KorAm purchased the bonds); *see also Korean Banks Complete Purchase of KRW1T Hynix Conv. Bond*, DOW JONES INTERNATIONAL NEWS (June 20, 2001) ("KorAm Bank's reversal of its board's decision comes after the Financial Supervisory Service warned of a possible sanction for KorAm for threatening to break the earlier rescue pact for Hynix.") (Exhibit US-66); *KorAm Reluctantly Continues Financial Support for Hynix*, KOREA TIMES (June 21, 2001) (Exhibit US-64).

[204] *Banks Under Fire for Reducing Export Credit Ceilings for HEI*, KOREA HERALD (January 27, 2001) (Exhibit US-67); *Creditor Group Conflicts With Government Over Supporting Hyundai Group*, MAEIL ECONOMIC DAILY (February 2, 2001) (translated version) (Exhibit US-68); *Financial Community's Support for Hyundai Electronics - A U.S. Subsidiary Facing Insolvency Risk*, MAEIL ECONOMIC DAILY (March 7, 2001) (translated version) (Exhibit US-69).

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

[206] *Financial Community's Support for Hyundai Electronics - A U.S. Subsidiary Facing Insolvency Risk*, MAEIL ECONOMIC DAILY (March 7, 2001) (translated version) (Exhibit US-69).

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

[208] W. Mako, *Corporate Restructuring and Reform: Lessons from Korea,* in KOREAN CRISIS AND RECOVERY, David T. Coe & Se-jik Kim, eds. (2002), at 213-14 (Exhibit US-70).

ii) Disciplining Credit Rating Agencies

116. In addition to threatening banks who tried to resist participating in Hynix's restructuring and recapitalization, the GOK also disciplined credit rating agencies for giving Hynix a low credit rating. For example, on January 22, 2001, the Korea Investors Service, one of three local rating firms, downgraded Hyundai Electronics' corporate bonds to a speculation-grade credit rating.[209] The FSC, concerned that this lower rating might endanger Hynix's eligibility for the KDB Fast-Track program, reacted swiftly. That very day, at approximately 4:00 p.m., an FSS official called one of the credit rating agency officials responsible for Hyundai Electronics (now Hynix) and was told to attend a meeting of the three credit rating agencies and the FSS on January 26, 2001. The agency official commented that "it was his first time to receive such a call in his more than 10 years of employment at a credit agency."[210]

117. On January 26, 2001, FSS officials met with eight representatives from the three local credit rating agencies: Korea Investors Service, Korea Ratings, and National Information and Credit Evaluation.[211] The meeting was held at FSS offices and was presided over by the FSS bond market leader.[212] The participants at the meeting who were later interviewed reported that the FSS had stated that: "[I]t was caught off guard by the downgrading of Hyundai Electronics' credit without prior consultation when the company's financial situation is improving. [Credit agencies] should look at the market as a whole rather than insisting upon the earlier positions."[213]

118. One report stated that the FSS had used the meeting to express its strong dissatisfaction.[214] Another report stated that the agency officials received a "reprimand" and "lecture."[215] An exasperated agency official remarked: "Where in the world does the government call in credit agency's employees and apply pressure?"[216]

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[209] *Not an Outright Order of Do-this-Do-that, but a Subtle Pressure*, DONG-A ILBO (March 6, 2001) (translated version) (Exhibit US-71); *FSS Asked for Reflection of Hyundai Affiliates' Improved Business Performance on Credit Rating*, KOREA ECONOMIC DAILY (January 27, 2001) (translated version) (Exhibit US-72); *Interest Rate on Hyundai Electronics Corporate Debentures Likely to Go Up by 1.8% Points ... Result of Downgraded Credit Rating*, KOREA ECONOMIC DAILY (January 30, 2001) (translated version) (Exhibit US-73).

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

[211] *Id.*; *FSS Asked for Reflection of Hyundai Affiliates' Improved Business Performance on Credit Rating*, KOREA ECONOMIC DAILY (January 27, 2001) (translated version) (Exhibit US-72).

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

[213] *Id.*

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

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

[216] *Id.*

119. A credit rating agency official who attended the January 26, 2001 meeting observed: "The fact that the FSS, which has the authority to decide their life and death, held the uncustomary meeting itself, was enough to feel the pressure."[217] As a result of the meeting, one agency reportedly cancelled its plans to follow the lead of Korea Investor Service and downgrade the credit rating of Hyundai Electronics.[218]

120. In a similar incident, on January 7, 2001, the National Information and Credit Evaluation agency, "buckling under government pressure," upgraded the credit rating for Hyundai Engineering and Construction.[219] It seems apparent that the upgrade was due to GOK pressure. An official at National Information and Credit Evaluation lamented that the government "put the brakes on his credit rating, determined after sleepless nights of going through huge volume of papers to evaluate Hyundai Engineering and Construction's credit."[220]

121. In a public speech the next day, FSC Chairman Keun-Yung Lee was quoted as stating: "It is wrong for credit evaluation agencies to downgrade the credit rating of temporarily cash-strapped businesses, whose future profitability has improved with the implementation of restructuring."[221] Chairman Lee stressed that the FSC would demand that the credit rating agencies "correct" their credit rating evaluations.[222]

122. Following on this threat, on February 13, 2001, a senior FSC official announced that the FSC was considering allowing several additional companies to perform credit rating in Korea, and eliminating the system whereby multiple agencies rated one company, in favor of a system where only one agency was assigned to a particular company. This announcement was widely perceived as a threat to the independence and competitive position of existing credit rating firms.[223]

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

[218] *Id*.

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

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

[221] *FSC Chairman Lee, '...Will Demand Corrections on Incorrect Credit Ratings*,' SEOUL ECONOMIC DAILY, (February 8, 2001) (translated version) (Exhibit US-76); *see also Does the FSS Peddle Influence even on Credit Ratings?* HANKYOREH SHINMUN (February 14, 2001) (translated version) (Exhibit US-77); and *'Corporate Credit Rating' 'Wobbles' Under the Sway of Government Influence*, DONG-A ILBO (March 1, 2001) (translated version) (Exhibit US-75).

[222] *FSC Chairman Lee, '...Will Demand Corrections on Incorrect Credit Ratings*,' SEOUL ECONOMIC DAILY, (February 8, 2001) (translated version) (Exhibit US-76).

[223] *Does the FSS Peddle Influence even on Credit Ratings?* HANKYOREH SHINMUN (February 14, 2001) (translated version) (Exhibit US-77).

123. Again, the GOK interventions forced at least one agency to upgrade the credit rating for Hyundai Engineering and Construction,[224] and another to cancel its plans to downgrade the rating for Hyundai Electronics.[225] One credit agency official who was later interviewed found a press release by the FSS defending its actions as laughable, and all the officials who were interviewed about the GOK interventions "unanimously requested reporters not to reveal their names because they could get into big trouble if found guilty of offending [the FSS]."[226]

iii) Mandating Attendance at Creditor Meetings

124. Another method used by the GOK to coerce Hynix's creditors was requiring attendance at meetings with government officials. In early 2001, Hynix's increasingly poor financial condition prompted several banks to retract their earlier promises to increase purchase limits on Hynix's export bills of exchange ("D/A loans"). On February 2, 2001, the FSS responded by inviting officials from two of these banks (Shinhan Bank and Hanmi Bank) to a meeting with FSS officials to "request their cooperation."[227] When the banks continued to resist, the FSS called a general meeting of the Hynix creditor bank presidents on March 10, 2001. High-level officials of the FSC, including Vice Commissioner Ki-Hong Chung and Associate Vice Commissioner Kin Won-kang, reportedly attended the meeting.[228] At the meeting, Hynix's creditors were pressured to assist Hynix. Specifically, they were pressured to:

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

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

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

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

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

[226] *Id.*

[227] *Creditor Group Conflicts With Government Over Supporting Hyundai Group*, MAEIL ECONOMIC DAILY (February 2, 2001) (Exhibit US-68). A subsequent Maeil Economic Daily article further commented that, "[a]s things are going awry, the Financial Supervisory Service is desperately 'making every effort,' as the highly-placed official of FSS calls the presidents of the banks concerned, urging that the limit be extended following the convening of people from the appropriate banks to make an earnest request for cooperation." *Financial Community's Support for Hyundai Electronics – A US Subsidiary Facing Insolvency Risk*, MAEIL ECONOMIC DAILY (March 7, 2001) (Exhibit US-69).

[228] *The Creditor Group Finalizes Financing Package for 3 Hyundai Affiliates*, NAEOE ECONOMIC DAILY (March 10, 2001) (translated version) (Exhibit US-78).

- Sign a written "covenant" that they would assist Hynix;[229] and

- Confirm their intention to aid the Hyundai firms.[230]

125. During verification, the DOC confirmed that at least one FSC official was present at the March 2001 meeting, and that the official was invited by the KEB "to urge creditor banks to execute the resolutions made by creditors."[231] The verification report further explains that the FSC attended the meeting to exert pressure on the banks. It states:

> The creditors felt that, if an FSS person was there, it might facilitate a resolution .... According to the FSC/FSS, the creditors thought that, if there was a regulator there, the other creditors who no longer wanted to participate in the restructuring plan might change their minds and go along with the wishes of the rest of the creditors.[232]

126. The GOK itself stated that the FSC official attended the meeting to "act as a witness" so that "creditors could no longer back out" of any prior commitments they had made.[233] Thus, the evidence before the DOC indicates that GOK officials from the FSC were present at this meeting for the express purpose of pressuring Hynix's creditors to comply with the GOK's policy of assisting Hynix. Record evidence suggests that there were at least three additional meetings where GOK officials met directly with one or more of Hynix's creditors to obtain their agreement on assisting Hynix.[234] Neither the GOK nor Hynix produced any documentation pertaining to these meetings.

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

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

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

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

[233] *Issues and Decision Memorandum* at 41 (Exhibit GOK-5).

[234] *See Self-Rescue Before Asking for Help*, THE KOREA ECONOMIC DAILY (January 11, 2001) (translated version) (Exhibit US-81); *Government and Creditor Group 'Bewildered' by Hyundai Electronics 'Dogged Clamoring',* KOOKMIN DAILY (January 11, 2001) (translated version) (Exhibit US-82); *Creditor Group Conflicts With Government Over Supporting Hyundai Group*, MAEIL ECONOMIC DAILY (February 2, 2001) (translated version) (Exhibit US-68).

2. The DOC Had Ample Evidence that the Specific Financial Contributions to Hynix Were the Result of Government Entrustment or Direction

127. The totality of the evidence supports the DOC's findings that the GOK entrusted and directed Hynix's creditors to provide financial contributions to Hynix. The GOK's policy to prevent the failure of Hynix and its actions to effectuate that policy were in evidence throughout the entire period of investigation. Although the DOC was not required to do so, much of this evidence can be tied to the various specific phases of the Hynix bailout, as discussed below.

128. The specific financial contributions – *i.e.*, the "functions" under Article 1.1(a)(1)(iv) of the SCM Agreement – carried out by Hynix's creditors, are set forth below. All of the financial contributions at issue are of a "type illustrated" in subparagraph (i) of Article 1.1(a)(1) – *i.e.*, they involve "a direct transfer of funds". They all fall into the categories of loans, debt forgiveness, and equity infusions.

a. 800 Billion Won Syndicated Loan

129. By the fall of 2000, Hynix had serious looming financial troubles, with several trillion won in short-term debt coming due in 2001.[235] Hynix's financial advisors worked with Hynix's creditors to borrow funds to meet immediate liquidity needs. Specifically, they arranged an 800 billion won syndicated bank loan as a stop-gap measure to cover Hynix's immediate financial needs.[236] The loan was agreed to in December 2000 and extended in January 2001.

130. The GOK's involvement in the 800 billion won syndicated loan to Hynix in December 2000 is well documented. As discussed above, at a formal meeting on November 28, 2000, high-ranking Economic Ministers officially decided to provide Hynix with financial assistance, devised a detailed plan to provide the required assistance, and then ordered the FSC, KEB, and KEIC to carry through "perfectly" on those plans. As of December 2000, before the syndicated loan, at least three banks (KEB, KFB, and KDB) were restricted under the Banking Act from extending any additional credit to Hynix. These limits were in effect under Article 35 of the Banking Act, which prohibited a financial institution from loaning more than 25 percent of its capital to any one *chaebol*, or more than 20 percent to any one company.[237]

131. As discussed above, the government, acting through the FSC, waived the statutory single borrower lending limit for several Hynix creditor banks. An FSS official reportedly announced on December 11, 2000: "We will approve the excess credit provision to HEI by its creditors

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[235] *Preliminary Determination*, 68 Fed. Reg. at 16776 (Exhibit GOK-4).
[236] *Issues and Decision Memorandum* at 19 (Exhibit GOK-5).
[237] Banking Act, Article 35 (Exhibit US-53).

resulting from the syndicated loan."[238] The DOC found the FSC's action in waiving the credit ceilings significant, stating:

> In raising the credit ceiling for certain key creditors, the GOK took the first significant step to help alleviate Hynix' cash crunch. This affirmative action ensured the participation of certain key creditors in the syndicated loan, which was the first major part of the financial restructuring package. As explained by KEB at verification, absent this waiver by the FSC, the bank would not have been able to provide the loan. In a sense, therefore, this action ensured the successful "kickoff' of Hynix' financial restructuring.[239]

In other words, without this waiver, the banks would have been precluded from participating in the syndicated loan.

132. The investigation record also reflects that in 2000, the GOK recapitalized a number of banks, including several of those that participated in the syndicated loan.[240] For example, the KEB received 400 billion won in capital injections, and Hanvit Bank received 2.76 trillion won.[241] This fact is particularly significant with respect to the KEB, the lead bank for the Hyundai Group, because the GOK was thereby increasing its ownership and clout over the very bank that was to supervise the Hynix bailout and help coordinate the participation of the other council members.

133. In addition, as discussed above, at precisely the time it decided to assist Hynix, the GOK strengthened its control over those banks in which it had ownership rights by enactment of Prime Minister Decree No. 408, which allowed the GOK to intervene in bank affairs via its shareholder rights.

b. KDB Fast Track Bond Program

134. In January 2001, the GOK created the KDB Fast Track Program to provide for refinancing of maturing bonds. Existing programs designed to support the refinancing of corporate bonds issued in the aftermath of the 1997 financial crisis were not sufficient to handle the volume of bonds maturing at the end of 2000 and 2001.[242] The Fast Track Program enabled

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[238] *Panel to Approve Excess Credit Provision to Hyundai Electronics*, THE KOREA HERALD (December 2, 2000) (translated version) (Exhibit US-55).

[239] *Issues and Decision Memorandum* at 51 (Exhibit GOK-5).

[240] *Preliminary Determination*, 68 Fed. Reg. at 16773 (Exhibit GOK-4).

[241] *Seoul, Commerzbank Expected to Inject W600 Billion Into KEB*, KOREA HERALD (September 26, 2000) (Exhibit US-83).

[242] *Issues and Decision Memorandum* at 21-22 (Exhibit GOK-5); *Preliminary Determination*, 68 Fed. Reg. at 16778 (Exhibit GOK-4).

Hynix to avoid default on its maturing bonds. Hynix refinanced 1.208 trillion of its bonds through this program.[243]

135. The investigation record contains ample evidence regarding the extent of the GOK's involvement in the KDB Fast Track Program. One fundamental fact is that the program was administered by a public body, the KDB.[244] The DOC found that the KDB's involvement in the Fast Track Program sent a clear signal that the GOK stood behind the program and would take whatever steps were necessary to ensure that the Hynix restructuring effort moved forward.[245]

136. The FSC also played a critical role at this point in time by granting a waiver to the credit limits for any bank participating in the Fast Track Program.[246] As discussed above, this waiver was one of five waivers from credit limits issued by the FSC, four of which were for the particular benefit of Hynix or Hyundai affiliates. At verification, the FSC acknowledged that this particular waiver for participation in the KDB Fast Track Program was different from other waivers in that the FSC gave pre-approval for all banks based on a blanket application filed by the KDB, a government entity.[247] The blanket waiver approval necessarily precluded the FSC from analyzing each individual application and the effect it would have on each bank's prudentiality.[248]

137. The DOC also concluded that the GOK enacted the KDB Fast Track Program with the specific intent of assisting Hynix and other members of the Hyundai Group. As discussed above, the GOK announced the Fast Track Program within days after Korean Economic Ministers met to formulate a financial rescue plan for Hynix. In addition, as the DOC noted in its *Final Determination*, only six companies participated in the KDB Fast Track Program, four of which were current or former Hyundai affiliates.[249]

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[243] *Issues and Decision Memorandum* at 23-24 (Exhibit GOK-5). The DOC countervailed only those bonds purchased by KDB (10 percent) and other Hynix creditors (20 percent) – total 362 billion won – because the remaining bonds were placed in certain other funds that were available to anyone with maturing bonds that wanted to participate and there was evidence that a wide range of companies and industries had participated. *Id*.

[244] *See Issues and Decision Memorandum* at 15-16 (Exhibit GOK-5).

[245] *Issues and Decision Memorandum* at 52 (Exhibit GOK-5).

[246] *See Government of Korea Verification Report* at 16-17 (Exhibit US-12).

[247] *Government of Korea Verification Report* at 17 (Exhibit US-12) (Jong-koo Lee, Director of Financial Policy, Ministry of Finance and Economy, commented that: "Because the measures are government sponsored, employees of KDB, participating creditor banks and the Korea Credit Guarantee Fund would not be held accountable if things turn askew, unless there is evidence of gross deliberate negligence or tort on their part."); see also *State-Run Bank Will Buy W20 Trillion Worth of Corporate Bonds*, KOREA HERALD (December 27, 2000) (Exhibit US-84).

[248] *Government of Korea Verification Report* at 17 (Exhibit US-12).

[249] *Issues and Decision Memorandum* at 23 (Exhibit GOK-5).

c. May 2001 Restructuring Package

138. As discussed above, the Economic Ministers met on November 21, 2000, to arrange the initial restructuring and recapitalization measures necessary to prevent Hynix's failure. At that meeting, the Ministers determined not only to waive the loan ceilings for Hynix's creditors, but also to direct KEIC to insure Hynix's D/A loans. The Economic Ministers subsequently determined to extend the KEIC's insurance of banks' D/A balances through the end of 2001.[250] Without the extension of D/A financing, Hynix would not have been able to finance its export transactions, *i.e.*, it would not have been able to continue to do business. In May 2001, Hynix's financial advisors presented Hynix's Creditor's Council with a restructuring package. Subsequently, Hynix's creditors purchased 994 billion won of convertible bonds, provided 5.9 billion won in new loans, and refinanced (at lower rates) and/or extended maturities on over 930 billion won and $765 million in existing loans.[251]

139. As previously discussed, the DOC found that the GOK also exercised control over Hynix's creditors generally through government-owned and controlled banks. For example, the DOC found that the GOK "intervened in Hynix' financial restructuring through the dominant role played by government-controlled and owned banks in Hynix' Creditors Councils ... ."[252] With respect to the May restructuring and recapitalization, government-owned banks accounted for over 70 percent of the voting rights of the Creditors' Council.[253] As such, these banks were in a position to set the terms of the financial restructuring via their control of votes in the Hynix Creditors' Council.[254]

140. The DOC also found that through its influence over government-owned banks and its direct control over specialized banks, such as the KDB, the GOK was able to establish its dominant position over Hynix' Creditors' Councils, influence the outcome of the council meetings, and entrust the continuation of its policies to the council.[255] In particular, government-owned banks "had a blocking majority in all of the Creditors' Council meetings that were held for the May and October restructurings, which meant that these banks had significant control over the plans that were approved by the councils, and could derail any plans with which they did not approve."[256] KEB officials corroborated the DOC's analysis, stating that "if 75 percent of the creditors in terms of outstanding debt approve a resolution, the dissenting creditor

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

[251] *Hynix Audited Financial Report (2001)* at 38-39 (Exhibit GOK-21(d)).

[252] *Issues and Decision Memorandum* at 53 (Exhibit GOK-5).

[253] *Issues and Decision Memorandum* at 53 (Exhibit GOK-5).

[254] *Issues and Decision Memorandum* at 53 (Exhibit GOK-5); *see also Hynix Verification Report* at 15, noting that as of November 2000, the KDB, Woori Bank, KEB, Chohung Bank, Kookmin Bank, Shinhan Bank and Seoul Bank together made up the necessary 75 percent voting bloc to authorize assistance to Hynix (Exhibit US-43). Most of these entities had significant levels of GOK ownership.

[255] *Issues and Decision Memorandum* at 54 (Exhibit GOK-5).

[256] *Issues and Decision Memorandum* at 54 (Exhibit GOK-5).

banks had no choice but to follow the decision of the meeting."[257] Moreover, the evidence before the DOC demonstrated GOK control over banks with relatively small government ownership shares.

141. The DOC also considered that the GOK took legislative action that enhanced its ability and the ability of Hynix's creditors to effectuate its policy to prevent the failure of Hynix. For example, Prime Minister Decree No. 408 facilitated the GOK's exercise of its shareholder powers via the election of directors and the appointment of management. The DOC found that the Decree contained "sufficient ambiguities which would allow the GOK to become involved in the banking system."[258]

142. The DOC also found that the GOK was able to leverage its control of the financial sector to assist Hynix through enactment of the Public Fund Oversight Act. This law required Korean private banks to sign contractual commitments with the GOK ("Memoranda of Understanding" or "MOUs") in exchange for the massive recapitalizations they received from the government.[259] These MOUs provided the GOK with a contractual right to intervene in the day-to-day business and credit decisions of Korean banks.[260] The DOC concluded that by entering into MOUs, "[t]he GOK in this manner can be directly involved in the fiscal operations of the bank."[261]

143. Finally, when KorAm Bank refused to take over its share of the May 2001 convertible bond purchase, the GOK made threats against KorAm Bank. The bank had refused, contending that Hynix had failed to deliver a written pledge to use its best effort to reduce its debt.[262] The FSS severely rebuked KorAm, with one FSS official stating: "If KorAm does not honor the agreement, we will not forgive the bank."[263] The same FSS official further threatened stern measures against the bank, such as disapproving new financial instruments and subjecting the bank to a tighter audit.[264] As a result of the threats, KorAm Bank capitulated and reversed its decision in a single day.[265]

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[257] *Hynix Verification Report* at 15 (Exhibit US-43).

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

[259] *Government of Korea Verification Report* at 4 (referencing Exhibits 1-2 through 1-6) (Exhibit US-12).

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

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

[262] *Issues and Decision Memorandum* at 60 (Exhibit GOK-5); *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).

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

[264] *Id.*

[265] *Korean Banks Complete Purchase of KRW1T Hynix Conv. Bond*, DOW JONES INTERNATIONAL NEWS (June 20, 2001) ("KorAm Bank's reversal of its board's decision comes after the Financial Supervisory Service warned of a possible sanction for KorAm for threatening to break the earlier rescue pact for Hynix.") (Exhibit US-66); *KorAm Reluctantly Continues Financial Support for Hynix*, KOREA TIMES (June 21, 2001) (Exhibit US-64). Hynix confirmed KorAm's decision to purchase the bonds. *See Hynix Questionnaire Response* (January 27, 2003), Exhibit 19 (Exhibit US-65).

d. October 2001 Restructuring Package

144. Hynix's financial situation continued to deteriorate throughout the summer of 2001 and, by early fall, another restructuring package was necessary. In October 2001, therefore, Hynix's creditors converted 2.99 trillion won in debt to equity, forgave 1.45 trillion in debt, provided 658 billion won in new loans, and refinanced and/or extended maturities on over 4 trillion won in existing loans.[266] In the October restructuring, *almost all* of the January 2001 syndicated loan was converted to equity or forgiven.[267] Furthermore, *almost all* of the convertible bonds from the May 2001 restructuring were converted to equity as well.[268]

145. Korea argues that there is no evidence of government entrustment or direction at the time of the October restructuring.[269] Korea also suggests that the length of time – 10 or 11 months removed from the government's initial steps to prevent the failure of Hynix – "confirms the absence of GOK direction".[270] The facts, as discussed herein, indicate otherwise.

146. Pursuant to the Corporate Restructuring Promotion Act ("CRPA"), Hynix's creditors had formed a Creditors' Council to negotiate the workout terms for Hynix's restructuring. As previously discussed, the GOK enacted the CRPA just prior to the October restructuring. This law permitted a handful of Hynix's creditors, most of whom were majority-owned by the government, to dictate restructuring terms to other Hynix creditors.[271]

147. The DOC found that, as with the May restructuring, government-owned and controlled banks had "a blocking majority" in all of the Creditors' Council meetings that were held for the October restructuring.[272] As such, these banks had significant control over the plans that were approved by the councils, and could derail any plans with which they disagreed.

148. With respect to Hynix's October restructuring, government-owned and -controlled banks accounted for more than 50 percent of the voting rights in the October Creditors' Council.[273] The DOC concluded that, as such, these banks were in a position to set the terms of the financial restructuring via their control of votes in the Hynix Creditors' Council.[274] As previously

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[266] *Hynix Audited Financial Report (2001)* at 39-41 (Exhibit GOK-21(d)).
[267] The exact figures are proprietary.
[268] The exact figures are proprietary.
[269] Korea First Submission, paras. 461-471.
[270] Korea First Submission, paras. 388, 464.
[271] *Issues and Decision Memorandum* at 54 (Exhibit GOK-5).
[272] *Issues and Decision Memorandum* at 54 (Exhibit GOK-5).
[273] *Issues and Decision Memorandum* at 53 (Exhibit GOK-5).
[274] *Issues and Decision Memorandum* at 53 (Exhibit GOK-5); *see also Hynix Verification Report* at 15, noting that as of November 2000, the KDB, Woori Bank, KEB, Chohung Bank, Kookmin Bank, Shinhan Bank and Seoul Bank together made up the necessary 75 percent voting bloc to authorize assistance to Hynix (Exhibit US-43). Most of these entities had significant levels of GOK ownership.

discussed, these terms provided maximum benefits to Hynix while minimizing creditors' abilities to exercise basic creditor rights.[275]

149. Tellingly, while lending to Hynix, Hynix's creditors internally prepared for Hynix's expected default. Hynix's creditors, especially those with decreasing amounts of government ownership, increased significantly their loan loss provisions for Hynix, at the same time they were extending new credit to the company during the restructurings.[276]

150. Furthermore, the government-owned Hynix creditors themselves accounted for a major portion of either new loans or debt that was swapped for equity in each major restructuring step, including the October restructuring.[277] In the October restructuring, government-owned Hynix creditors provided over 90 percent of new financing, and accounted for over 80 percent of the debt that was exchanged for equity.[278]

151. The FSC also interacted with Hynix's lead bank, KEB, in managing the October restructuring. The DOC confirmed at verification that the FSC monitored the CRPA proceedings, made calls to creditors, and even attended meetings when necessary to make creditors fall in line with the GOK's wishes.[279] As discussed above, the GOK also used the FSC to facilitate the October restructuring by selectively enforce the CRPA bankruptcy principles to prevent Hynix's creditors from exercising their rights against Hynix.

3. The DOC's Determination That GOK-Directed Financial Restructuring and Recapitalization Measures Constituted Financial Contributions Is Consistent With a Proper Interpretation of Article 1.1 of the SCM Agreement

152. As demonstrated in the preceding section, the DOC's finding that the GOK entrusted or directed Hynix's creditors to provide financial contributions is supported by ample record evidence. In this section, the United States will demonstrate that the DOC's finding also is based on a proper interpretation of Article 1.1 of the SCM Agreement.

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

[276] Various brokerage reports document the banks' increases in the loan loss provisions with respect to Hynix debt. *See, e.g.*, Shinhan Bank, ING BARINGS (April 24, 2001), p. 558 at *2 (Exhibit US-85); KorAm Bank, ING BARINGS (September 26, 2001), pp. 4-5 at *2 (Exhibit US-86; Hana Bank, MORGAN STANLEY, DEAN WITTER (October 20, 2001), p. 470 at *2 (Exhibit US-87); Kookmin Bank, MORGAN STANLEY, DEAN WITTER (October 24, 2001) p. 7 at *3 (Exhibit US-88).

[277] *Issues and Decision Memorandum* at 53 (Exhibit GOK-5).

[278] *Issues and Decision Memorandum* at 53 (Exhibit GOK-5).

[279] *See, e.g., Government of Korea Verification Report*, at 17-18 (Exhibit US-12); *Financial Experts Report*, at 3 (Exhibit GOK-30).

153. Article 1.1(a)(1) provides that a "financial contribution" exists where:

> (i) a government practice involves a direct transfer of funds (*e.g.*, grants, loans and equity infusion) or potential direct transfers of funds or liabilities (*e.g.*, loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone (*e.g.*, tax credits)[];
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments ... .

154. It is evident from the text of Article 1.1 that Members recognized that governments have a wide variety of mechanisms at their disposal to confer an advantage on specific domestic enterprises or industries, and that they intended to bring those mechanisms within the disciplines of the SCM Agreement. While the SCM Agreement is not intended to bring all government actions within its disciplines, it is obvious from the text of Article 1.1(a)(1)(iv) that the Agreement recognizes that subsidies may be conferred not only directly by the government, but also indirectly by private actors at the direction of the government. In other words, subparagraph (iv) exists in order to prevent governments from avoiding subsidies disciplines by using private actors as the vehicle for transmitting a subsidy.

155. As a general matter, Article 1.1 is concerned with whether the government made a "financial contribution", as that term is defined in Article 1.1(a)(1). The focus of the first element, therefore, is on "the action of the government" in making the "financial contribution".[280] On this point, the United States and Korea seem to agree. As Korea states succinctly, "Consideration of government action is paramount ... ."[281] Where the United States and Korea diverge, however, is on whether the GOK's actions concerning Hynix *amounted to* entrustment or direction.

156. The SCM Agreement does not define the terms "entrusts" and "directs." Therefore, one must look to the ordinary meaning of these terms.

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[280] *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Report of the Appellate Body adopted 20 August 1999, para. 156 [hereinafter "*Canada Aircraft (AB)*"].

[281] Korea First Submission, para. 382.

157. "Entrust" is defined in relevant part as "Invest with a trust; give (a person, etc.) responsibility for a task .... Commit the execution of (a task) to a person ... ."[282] Thus, if a government gives a "private body" responsibility to carry out what might otherwise be a governmental subsidy function of the type listed in subparagraphs (i)-(iii) of Article 1.1(a)(1), there would be a financial contribution within the meaning of Article 1.1(a)(1).

158. Definitions of the word "direct" include "Cause to move in or take a specified direction; turn towards a specified destination or target"; "Give authoritative instructions to; to ordain, order (a person) *to do* (a thing) *to be done*; order the performance of" or "Regulate the course of; guide with advice".[283] Additional definitions of "direct" include "Inform or guide (a person) as to the way; show or tell (a person) the way (to)"; and "govern the actions ... of."[284]

159. Thus, when a government "gives responsibility to", "orders", or "regulates the activities of" a private body such that one or more of the type of functions referred to in subparagraph (iv) is carried out, there is entrustment or direction by the government.

160. Although Korea cites essentially the same dictionary definitions, it does not proffer an interpretation of *the meaning of* "entrusts or directs" based on those definitions. Instead, Korea advocates an *evidentiary standard* for "entrustment or direction."[285] Specifically, Korea argues that government action amounts to entrustment or direction only where it is "clear and unambiguous"[286] or "specific and compelling."[287] Furthermore, discerning whether government action amounts to entrustment or direction demands "increased scrutiny."[288]

161. In a sense, Korea is correct. Whether a particular government action amounts to entrustment or direction always will present an evidentiary question. Korea is wrong, however, to suggest that there is a special evidentiary standard for entrustment or direction distinct from the general evidentiary standard that applies in any dispute governed by Article 11 of the DSU, which is whether there is a "reasoned and adequate" explanation of how the facts support the investigating authority's determination.[289]

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[282] *The New Shorter Oxford English Dictionary* (1993) (Exhibit US-89). Korea cites the same definition. Korea First Submission para. 373.

[283] *The New Shorter Oxford English Dictionary* (1993) (Exhibit US-89). Korea mentions only some of these definitions. Korea First Submission para. 373.

[284] *The New Shorter Oxford English Dictionary* (1993) (Exhibit US-89).

[285] Korea First Submission, para. 381 ("the 'entrusts or directs' standard").

[286] Korea First Submission, para. 374.

[287] Korea First Submission, para. 375.

[288] Korea First Submission, para. 380.

[289] *See United States - Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, Report of the Appellate Body adopted 10 December 2003, paras. 276-78 [hereinafter "*US - Steel Safeguard*"].

162. As part of its proposed evidentiary standard for entrustment or direction, Korea argues that the evidence of entrustment or direction must be in a particular form; *i.e.*, an "explicit" government command.[290] Korea's use of the term "explicit" suggests that government entrustment or direction may only be evidenced by a formal or official command. Subparagraph (iv), however, cannot be limited in the manner Korea suggests.

163. The plain meaning of entrustment or direction encompasses, but is not limited to, an order or command. Furthermore, governments have many tools at their disposal to effectuate a policy of subsidization. An interpretation of subparagraph (iv) that would rule out automatically, and in all cases, any government direction not expressed in writing would render Article 1.1(a)(1)(iv) virtually meaningless. The Panel must conclude that Members did not intend that governments be able to evade the subsidy disciplines by using less formal – but no less effective – forms of entrustment or direction over private parties to grant subsidies.[291]

164. As discussed above, the record in this case demonstrates both the formal and the less formal ways in which the GOK directed and entrusted Hynix's creditors with carrying out subsidy functions. Korea argues that the evidentiary standard of entrustment or direction requires *a* government command to *an* explicitly named private body to take *an* explicitly identified action at *an* explicit point in time.[292] Korea then expends considerable efforts throughout the course of its first submission to discuss how individual pieces of evidence cited by the DOC fail to show government entrustment or direction,[293] and that the DOC failed to link individual government actions to each and every Hynix creditor bank that provided a financial contribution.[294] Korea again misconstrues the applicable evidentiary standard.

165. There is no obligation that the DOC have express proof of bank-by-bank, transaction-by-transaction government direction. As an evidentiary matter, any piece of evidence or fact can be relevant, provided it demonstrates, either individually or in conjunction with other evidence, whether or not a government entrusted or directed private bodies to provide financial

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[290] Korea First Submission, paras.366.

[291] Indeed the Appellate Body has cautioned against interpretations that "elevate form over substance and that permit Members to circumvent ... subsidy disciplines ...." *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, Report of the Appellate Body adopted 27 October 1999, para. 110. Although the Appellate Body was addressing export subsidy disciplines under the Agreement on Agriculture, its reasoning applies with equal force to the SCM Agreement.

[292] Korea First Submission, paras. 38, 366-367, 379, 400, 402, 404, and 458-59.

[293] Korea First Submission, *e.g.*, paras. 494; 409 and 412 (results of Economic Ministers' meetings); 415 (communication to KEB); 420-423 (FSC lending limit waivers); 426-27 and 481 (KDB Fast Track Program); 430 (press reports); 432-34 (FSC attendance at Hynix creditor meetings); 436-37 (Kookmin prospectus); 443 (financial experts' statements); 455 (bank ownership); 457 and 469 (Hynix Creditors' Council); 480 (extension of D/A financing); 485 (syndicated loan); and 483-44 (KEIC insurance).

[294] Korea First Submission, *e.g.*, paras., 463 (October 2001 restructuring package), 472, 474 and 479 (May restructuring package), 487 (January 2001 syndicated loan), 499-500.

contributions. The relative importance of each piece of evidence or fact can only be determined in the context of a particular case, and not on the basis of generalities.

166. The evidentiary question in this dispute, therefore, is whether a reasonable, objective decision-maker, looking at *all* the evidence on the investigation record, could have concluded that the GOK's actions *in toto* evince entrustment or direction. As demonstrated in the preceding section, it was imminently reasonable for the DOC, based on the evidence before it, to conclude that the GOK's actions did evince entrustment and direction of private bodies to provide financial contributions to Hynix during the period of investigation.

167. Korea also attempts to find textual support for its bank-by-bank, transaction-by-transaction standard by citing the use of the singular "a" financial contribution in the text of Article 1.1(a)(1). Following this logic through the text with respect to each of the elements of a countervailable subsidy reveals the fatal flaw in this approach. Korea is correct that the text says "a" financial contribution. The text of Articles 1 and 2 of the SCM Agreement also use the singular "a" where it refers to benefit, subsidy and specificity. If "a" financial contribution were interpreted to mean government direction to "a" particular bank, then specificity would be considered always in the context of, for example, an individual bank's loan to "a" beneficiary. The subsidy, therefore, would always be specific. The Panel should reject Korea's "a"/singular argument because it would render Article 2 of the SCM Agreement a nullity.[295]

168. Even more significant, though, is the fact that Korea's "a"/singular argument overlooks the fact that use of the singular does not rule out a meaning that encompasses the plural of that term. In particular, the definition of the term "body", as used in "a private body" in subparagraph (iv), provides that the term "body" may refer to a singular entity or more than one entity.[296] The plain meaning of the text of Article 1.1(a)(1)(iv), therefore, does not rule out government entrustment or direction of a particular "group" of private bodies. In this case, for example, the GOK did entrust and direct a "group" of private bodies – Hynix's private creditors. Moreover, the GOK entrusted and directed that group to perform a particular task – to bail out Hynix by restructuring and recapitalizing its debts. To suggest, as Korea does, that entrustment or direction can *only* be found on a bank-specific basis, truly elevates form over substance.

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[295] *See United States - Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, Report of the Panel adopted 27 January 2003, para. 7.114.

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

169. Korea's reliance on *Export Restraints* for its bank-by-bank, transaction-by-transaction evidentiary standard also is misplaced.[297] *Export Restraints* addressed a very different issue; *i.e.*, whether a hypothetical restriction on exports could constitute entrustment or direction under Article 1.1(a)(1)(iv).[298] Specifically, the Panel opined as to whether a government's prohibition on exports of a particular input constituted entrustment or direction to owners of those goods to sell to domestic purchasers, thereby increasing domestic supply of the input to the benefit (in the form of lower prices) of domestic producers of downstream products.

170. Thus, the cited portion of the *Export Restraints* report is of limited (if any) relevance to the instant dispute, in which there is a voluminous body of evidence that the GOK affirmatively caused, and gave responsibility, to private entities to provide loans, equity infusions, and debt forgiveness to save Hynix from bankruptcy.[299] Furthermore, even if this Panel should accept the premise that "the act of entrusting and that of directing 'necessarily carry with them the element of an explicit and affirmative action, be it delegation or command'",[300] there is no basis in the SCM Agreement to transform the general concept of an "element of an explicit and affirmative action" into a "strict" evidentiary requirement for express proof of formal government action on a bank-by-bank, transaction-by-transaction basis. The only purpose such a standard could have would be to remove government-directed corporate bailouts from the disciplines of the SCM Agreement.

171. Korea also argues that the behavior of private parties is relevant to whether there is government entrustment or direction. According to Korea, the phrase in subparagraph (iv) – "in no real sense, differs from practices normally followed by governments" – means that the private body must, in effect, become "the instrumentality of the government" and that "any discretion" left to the private body would mean that "the action can no longer be imputed to the government."[301] In other words, one must gauge the behavior of private bodies to know whether there was government entrustment or direction. Korea's argument is that because Hynix's creditors "had choices,"[302] there can be no government entrustment or direction.

172. Korea's focus on the motives of Hynix's creditors is incongruous with its recognition that the "perceived" or "confirmed" reaction by private entities "cannot be the basis on which the

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[297] Korea First Submission, paras. 378-379, discussing *United States - Measures Treating Export Restraints as Subsidies*, WT/DS194/R, Report of the Panel adopted 23 August 2001 [hereinafter "*Export Restraints*"].

[298] In that dispute, there was no agency determination at issue. The panel addressed entrustment or direction under subparagraph (iv) entirely in the abstract.

[299] *See Issues and Decision Memorandum* at 47 (discussing the DOC's interpretation of "entrusts or directs") (Exhibit GOK-5).

[300] *Export Restraints*, para. 8.29.

[301] Korea First Submission, para. 375.

[302] Korea First Submission, paras. 353 (October 2001 restructuring package), 420-21 (FSC lending limit waivers), 424 (lifting regulatory hurdles), 426 (KDB Fast Track Program), 455(government ownership), 463 and 465-66 (October 2001 restructuring package), 488 (bank participation).

Member's compliance with its treaty obligations under the WTO is established."[303] Rather the existence of a government financial contribution – whether direct or indirect – is determined in reference to the actions of the government. Furthermore, the text of subparagraph (iv) does not support Korea's position.

173. Subparagraph (iv) requires that the financial contribution at issue "would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments." The text does not elaborate on what constitutes a function "which would normally be vested in the government" and that "in no real sense, differs from practices normally followed by governments." Significantly, however, this textual phrase modifies "functions illustrated in subparagraphs (i) to (iii) above", *i.e.*, transferring funds, foregoing revenue, and providing or procuring goods. The issue, then, is whether the financial contribution functions at issue in a particular case are ordinarily performed by governments. Whether a practice differs, in any real sense, from practices normally followed by governments depends on the circumstances relating to the government and the financial contribution in question.

174. The functions at issue in this dispute are financial restructuring and recapitalization measures (all falling withing subparagraph (i), transfer of funds) to bail out a major company that is failing. While not all governments intervene in the market to provide subsidies to bail out failing companies, there are many instances in which governments do. Korea itself offers two examples of such government intervention and orchestration of multibillion dollar bailout packages.[304]

175. As Korea acknowledges, governments "generally try to avoid the collapse of major companies in their countries."[305] That is exactly what this case is about – a government's orchestrated and directed multibillion dollar bailout of one of its largest and most important manufacturers, *i.e.*, the GOK's actions to effectuate the bailout of Hynix. In this case, the private banks are acting in the place of the government in funding the government-directed bailout. As such, they are performing functions "which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments." There is no support for the notion that any discretion left to private bodies vitiates the governmental action. The focus in determining entrustment or direction is on the government's actions, not the effects of that action on, or the reaction to it by, those affected, even if those effects or reactions are expected.[306]

176. In sum, there is no distinct evidentiary standard for government entrustment or direction found in Article 1.1(a)(1)(iv) or elsewhere in the SCM Agreement. There is no requirement that

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[303] Korea First Submission, para. 383 (emphasis in original).

[304] Korea First Submission, para. 408, n.240 and n.241.

[305] Korea First Submission, para. 408.

[306] *See, e.g.*, Korea First Submission, paras. 376, 382, 383; *see also Export Restraints* para. 8.42 (emphasis in original).

evidence of government entrustment or direction take the form of a formal command, whether in writing or otherwise. There is no requirement that each individual piece of evidence on its face demonstrate government entrustment or direction. And, there is no requirement for express proof of bank-by-bank, transaction-by-transaction government entrustment or direction.

177. Rather, the evidentiary standard in this dispute, as in any similar dispute where Article 11 of the DSU furnishes the standard, is whether there is a "reasoned and adequate" explanation of how the facts support the investigating authority's determination. The determination at issue in this dispute – whether there is government entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement – 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 (*e.g.*, grants, loans, and equity infusions). The issue before the Panel is 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. As demonstrated in the preceding section, it was.

B. The DOC's Determination That Financial Restructuring and Recapitalization Measures Conferred Benefits on Hynix Is Consistent with Articles 1.1 and 14 of the SCM Agreement

178. As discussed above, the DOC determined that during the period of investigation three types of financial contributions were provided to Hynix: (1) loans; (2) equity infusions; and (3) debt forgiveness. Utilizing certain benchmarks, the DOC calculated the benefit conferred by each of these financial contributions. Korea claims that the DOC's findings and measurement of benefits conferred on Hynix are inconsistent with Articles 1.1 and 14 of the SCM Agreement.[307] Korea's interpretation of Articles 1.1 and 14 is seriously flawed. Furthermore, Korea's factual arguments simply present another view of evidence before the DOC, rather than a showing that the findings made by the DOC were unsupported by the record evidence. Such argument improperly seeks to have the Panel make its own *de novo* interpretation of the record.

179. All financial contributions (including loans, equity infusions, and debt forgiveness) received by Hynix during the period of investigation were provided either directly by the GOK through "public" Hynix creditors, such as KDB and IBK, or indirectly by "private" Hynix creditors that were entrusted and directed by the GOK[308] to provide funding to Hynix. The DOC rejected loans from Hynix's private creditors for use as a benchmark, therefore, because it found those loans to be government financial contributions. Furthermore, the DOC concluded that it

[307] Korea First Submission, paras. 501-556. Korea is not challenging, as such, the U.S. statute or regulations regarding measurement of benefits. *See* Korea First Submission, para. 328.

[308] As discussed previously and herein, the DOC concluded that Citibank, the only Hynix creditor that was wholly foreign-owned, was not entrusted or directed by the Government of Korea. *See also Issues and Decision Memorandum* at 17 (Exhibit GOK-5).

was not appropriate to use loans by Citibank during the period of investigation as a benchmark due to certain unusual aspects concerning the extension of those loans.

180. Based on a review of Hynix's financial indicators, the lack of commercially-provided loans, and its poor financial prospects, the DOC also determined that Hynix was an uncreditworthy company during the period of investigation. Therefore, the DOC calculated an uncreditworthy benchmark, utilizing cumulative default rates reported by Moody's Investor Service, to measure the benefit.[309]

181. The DOC also concluded that Hynix was unequityworthy for part of the period of investigation (October 2001). The DOC, therefore, treated the converted equity as a grant and calculated the benefit based upon the amount of equity purchased by Hynix's creditors.

182. As demonstrated below, these determinations are supported by record evidence and consistent with Articles 1.1 and 14 of the SCM Agreement.

1. Determination and Measurement of Benefit Under Articles 1.1 and 14 of the SCM Agreement

183. Article 1.1 of the SCM Agreement defines a subsidy as a government financial contribution that confers a "benefit". The SCM Agreement does not define the term "benefit." However, panel and Appellate Body reports suggest the use of commercial benchmarks, reflecting free market principles, when measuring the amount of the benefit to the recipient. In *Canada – Aircraft*, the panel stated:

> [I]n our opinion the ordinary meaning of "benefit" clearly encompasses some form of advantage. . . . [The authority must] determine whether the financial contribution places the recipient in a *more advantageous position than would have been the case but for the financial contribution*. In our view, the only logical basis for determining the position the recipient would have been in absent the financial contribution is the market.[310]

In reviewing the panel report, the Appellate Body agreed:

> We . . . believe that the word "benefit", as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient *"better off" than it would otherwise have been, absent that contribution*. In our view, the marketplace

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[309] *Issues and Decision Memorandum* at 5 (Exhibit GOK-5).

[310] *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, Report of the Panel, as modified by the Appellate Body, adopted August 20, 1999, para. 9.112 [hereinafter *"Canada – Aircraft"*] (emphasis added).

> provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.[311]

184. Consequently, as explained below, any measurement of the benefit necessarily encompasses a comparison of the financial contribution to a commercial or market standard. At least one panel has addressed the concept of "the market". Following the reasoning of the Appellate Body in *Canada – Aircraft*, the *Brazil – Aircraft 21.5 II* panel concluded that the concept of a comparison market means a "*commercial* market, i.e., a market undistorted by the government's financial contribution."[312] Although it was not interpreting Article 14 of the SCM Agreement, it is clear that the panel was discussing the concept of benefit generally. The panel's reasoning, which follows logically from the findings of the Appellate Body, is compelling. Only by comparison to an instrument – or "benchmark" – reflective of free market principles is it possible to determine whether the financial contribution made the recipient better off than it otherwise would have been in the absence of that financial contribution. That is true regardless of the form of the financial contribution.

185. Article 14 of the SCM Agreement sets forth guidelines relating to the assessment of benefit for four general types of government financial contributions: provision of equity capital, loans, loan guarantees, and provision of goods and services.[313] However, Article 14 does not prescribe a specific methodology for calculating the benefit to the recipient.

186. In fact, by its very terms, Article 14 leaves the methodology for determining the existence and amount of benefit to the Members. Article 14 states that "any method used by the investigating authority" must be provided for in the national law or implementing regulations. The use of the term "any" confirms that there is not a *single* calculation method dictated by the SCM Agreement. As further confirmation that Article 14 does not prescribe a single or precise methodology, the chapeau continues, "Furthermore, *any such method* shall be consistent with the following guidelines." (Emphasis added). As the Appellate Body confirmed in *Softwood Lumber*: "The reference to "*any*" method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of

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[311] *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Report of the Appellate Body adopted August 20, 1999, para. 157 [hereinafter "*Canada Aircraft (AB)*"] (emphasis added).

[312] *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU)*, WT/DS46/RW/2, Report of the Panel adopted August 23, 2001, para. 5.29 [hereinafter, *Brazil – Aircraft 21.5 II*"] (emphasis in original).

[313] The four general types of financial contributions identified in Article 14 do not, either by the terms of the Article or by any reasonable implication, exhaust the possible types of financial contributions that may constitute subsidies.

calculating the benefit to the recipient."[314] Thus, the only substantive limitations imposed on the calculation methodology can be found in subparagraphs (a)-(d) of Article 14.

187. Specifically, subparagraphs (a)-(d) of Article 14 contain guidelines on calculation methodologies and explicitly identify the relevant market from which to source the benchmark:

> (a) Government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;
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> (b) A loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;
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> (c) A loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay for a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;
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> (d) The provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

188. Korea argues that for *every* type of financial contribution, the relevant market from which to source the benchmark is a "primary market benchmark"; *i.e.*, the market of the particular Member at issue.[315] Korea's interpretation ignores the plain language of Article 14. Furthermore, Korea's reliance on *Softwood Lumber* in support of its argument is misplaced.

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[314] *United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, Report of the Appellate Body adopted 17 February 2004, para. 91 (emphasis in original) [hereinafter "*Softwood Lumber*"].

[315] Korea First Submission, paras. 507-511 and heading "D.1(b)" (referring to "primary market benchmark").

189. Subparagraphs (a) and (d) of Article 14 contain language that explicitly identifies the relevant market from which to source the benchmark. Concerning equity capital, Article 14(a) focuses on "the usual investment practice ... of private investors *in the territory of that Member*" (emphasis added). Concerning goods or services, Article 14(d) focuses on the "prevailing market conditions for the good or service in question *in the country of provision or purchase* ...." (emphasis added).

190. In contrast, subparagraphs (b) and (c) of Article 14 do not contain similarly limiting language. Concerning loans, Article 14(b) focuses on "the amount the firm would pay on a comparable commercial loan which the firm could actually obtain *on the market*" (emphasis added). Concerning loan guarantees, Article 14(c) focuses on "the amount that the firm would pay on a comparable commercial loan absent the government guarantee."

191. Nevertheless, Korea argues that it is "implicit" in the use of the term "comparable" in subparagraphs (b) and (c) that "comparisons be made using the experience of private actors *in the market of the Member*, since that experience is necessarily the most comparable" (emphasis added).[316] However, there is nothing in the text of Article 14 to support Korea's argument. Subparagraphs (a) and (d) contain territorial limitations on the relevant benchmark; subparagraphs (b) and (c) do not. Korea's interpretation, therefore, runs afoul of a basic principle of treaty interpretation. As previously explained by the Appellate Body, "the principles of treaty interpretation set out in Article 31 of the Vienna Convention ... neither require nor condone the imputation into a treaty of words that are not there ... ."[317] The Panel should reject Korea's attempt to do just that.

192. Korea also argues that a preference for the use of benchmarks from the market of the Member under investigation is reflected in the Appellate Body's recent report in *Softwood Lumber*.[318] Korea's reliance on *Softwood Lumber* is misplaced. The Appellate Body's findings in that dispute were limited to subparagraph (d) of Article 14, which contains the phrase "in the country of provision or purchase."[319] There is no such territorial limitation language in subparagraphs (b) and (c). The use of different words is typically intended to convey different meanings. Korea's interpretation would vitiate this basic premise of treaty interpretation.[320] The

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[316] Korea First Submission, para. 507.

[317] *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, Report of the Appellate Body adopted 16 January 1998, para. 45 [hereinafter "*India Patent Protection*"].

[318] Korea First Submission, paras. 509-511.

[319] *See Softwood Lumber*, para. 82. Even with the explicit territorial limitations language contained in Article 14(d), the Appellate Body concluded that there may be case-specific circumstances which would necessitate use of a benchmark other than private prices in the country of provision. *See Softwood Lumber*, paras. 98-103.

[320] *See European Communities - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body adopted 13 February 1998, para. 164 [hereinafter "*EC – Hormones*"].

Panel, therefore, should reject Korea's "primary benchmark" test[321] and rely, instead, on the language contained in the benefit calculation guidelines relevant to this dispute in subparagraphs (a) and (b) of Article 14.

2. Loans from Hynix's Creditors Were Unsuitable Benchmarks

193. Subparagraph (b) of Article 14 provides that the benefit from a government loan should be determined by comparison to a "comparable commercial" loan that "the firm could actually obtain on the market". In other words, the SCM Agreement, in general terms, defines the benefit arising from a loan as the difference between the cost of the loan that the company received and a commercial benchmark. The amount of the benefit is the difference between the cost of the loan received and the cost of the benchmark.

194. Korea does not take issue with the specific benchmarks used by the DOC in its benefit calculation.[322] Rather, Korea is challenging the DOC's findings that none of the loans from Hynix's private creditors,[323] during the period of investigation, were suitable for use as benchmarks. As discussed below, the record evidence support the DOC's findings.

a. Loans By Hynix's Private Creditors

195. The DOC rejected loans from Hynix's private creditors for use as a benchmark because it found those loans to be government financial contributions.[324] Korea essentially restates its claim that the DOC's financial contribution findings are "flawed" and argues that the DOC should have been able to use at least some of Hynix's private creditors loans as valid benchmarks.[325] The premise of Korea's argument is faulty. It is axiomatic that loans determined to be government financial contributions cannot themselves serve as benchmarks for determining the benefit from such financial contributions.

196. A "comparable commercial loan" under Article 14(b) of the SCM Agreement must be a loan other than a loan determined to be a government financial contribution. In *Brazil – Aircraft 21.5 II*, the panel stated that the "market" for the comparable loan to which Article 14(b) refers

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[321] Korea First Submission, para. 511.

[322] We note that Korea does not challenge the concept of including a risk premium in a benchmark used with respect to an uncreditworthy company. Rather, Korea challenges only the DOC's calculation of the amount of that premium in the DRAMs investigation.

[323] As discussed above in connection with the issue of "financial contribution," Korea has not challenged the DOC's determination that certain Hynix creditors were "public" bodies and that those public bodies provided direct financial contributions to Hynix. Therefore, only benefits from indirect financial contributions – *i.e.*, those provided by Hynix's private creditors – are discussed herein.

[324] *Issues and Decision Memorandum* at 4-5 (Exhibit GOK-5); *Preliminary Determination*, 68 Fed. Reg. at 16769-70 (Exhibit GOK-4). The DOC rejection of loans from Citibank, the only wholly foreign-owned Hynix creditor, is discussed below.

[325] Korea First Submission, paras. 514-15.

must be a "*commercial* market, *i.e.*, a market undistorted by government intervention."[326] The *Softwood Lumber* panel subsequently found that "it would not be appropriate to determine whether a particular financial contribution confer[s] a benefit by comparing the terms of that financial contribution with those of other government financial contributions."[327] The Appellate Body agreed with the panel in this regard and went even further, finding that even the financial contributions of private parties acting independently may be inappropriate as benchmarks if the government's involvement in the market is sufficient to distort the market and, thereby, indirectly affect the terms of the private parties' contributions.[328] Thus, the Panel should find that there is a reasoned and adequate explanation for why the DOC rejected loans from Hynix's private creditors for use as a benchmark and that such rejection was consistent with Articles 1.1 and 14 of the SCM Agreement.

b. Loans By Citibank

197. After consideration of the record evidence, the DOC also rejected loans from Citibank, the only wholly foreign-owned Hynix creditor, due to certain "unusual aspects" attendant with the extension of those loans. Korea presents another view of the facts and improperly seeks to have the Panel make its own *de novo* evaluation of the evidence. The Panel should decline to do so.

198. In analyzing whether Citibank loans were appropriate for use as benchmarks, the DOC looked at the circumstances surrounding Citibank's extension of financing to Hynix during the period of investigation. The DOC considered, for example, the size of Citibanks loans independently, as well as relative to those of other Hynix's other creditors during the same period of time. The DOC found that Citibank's involvement was "small in absolute and percentage terms" compared to the involvement of government-owned and -controlled banks.[329] Citibank itself acknowledged that its participation was only a "symbolic gesture."[330] In making this finding, the DOC examined the exact amount and percentage of Citibank financing in the 800 billion won syndicated loan, the May 2001 restructuring package, and the October 2001 restructuring package, as well as the total amount and percentage for the entire period of investigation.[331]

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[326] *Brazil – Aircraft 21.5 II*, para. 5.29 (emphasis in original).

[327] *United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*, WT/DS257/R, Report of the Panel, as modified by the Appellate Body, adopted 17 February 2004, para. 7.55.

[328] *Softwood Lumber*, paras. 100, 103.

[329] *Issues and Decision Memorandum* at 9 (Exhibit GOK-5).

[330] *See Hynix Verification Report* at 19 (Exhibit US-43).

[331] The exact amount and percentage of Citibank financing in each of the four financial contribution packages (January 2001 syndicated loan, the KDB Fast Track Program; the May 2001 restructuring package; and the October 2001 restructuring package), as well as the total amount and percentage for the entire period of investigation, are set forth in proprietary version of the DOC's June 16, 2003 memorandum entitled, "Business

(continued...)

199. The specific figures that form the basis for the DOC's finding that Citibank's involvement was "small in absolute and percentage terms" are proprietary. Korea challenges the DOC's factual findings concerning the size of Citibank's loans, yet only reveals selective figures from the DOC's calculations,[332] presumably because revealing all the figures would undermine its arguments. Korea does mention that Citibank's share of the January 2001 syndicated loan was 12.5 percent,[333] yet fails to mention Citibank's share of the May 2001 restructuring package.[334] Korea also mentions that Citibank's share of the October 2001 restructuring was 3.0 percent,[335] yet fails to mention Citibank's share of all restructuring during the period of investigation. Furthermore, Korea's argument also fails to account for the fact that Citibank had zero share of the KDB Fast Track Program because it was not a participant. In contrast, the DOC took into account *all* the figures in reaching its determination. Korea would have the Panel re-weigh the evidence and make its own *de novo* interpretation of the record, and it would have the Panel do so on the basis of only a selected portion of the evidence considered by the DOC. The Panel should decline to do so.

200. In analyzing whether Citibank loans were appropriate for use as benchmarks, the DOC also considered whether Citibank's risk assessment of Hynix was influenced by the GOK's policy to support Hynix and prevent its failure.[336] The DOC found that Citibank took into consideration the behavior of Hynix's other creditors (*i.e.*, those owned or controlled by the GOK) in making its decision to participate. For example, with respect to the January 2001 syndicated loan, Citibank officials stated that Citibank wanted to show its commitment, but did not want to be the "lender of last resort". Citibank officials also stated that Citibank "needed a clear signal" from Korean banks that they were willing to support Hynix as well.[337] The DOC also considered the fact that Citibank did not seek internal credit approval for its portion of the syndicated loan until after the Korean banks had committed to the arrangement.[338]

201. The DOC concluded that Citibank's risk assessment, like that of other Hynix creditors, was influenced by the continuing and significant involvement of the GOK in propping up Hynix. Korea takes issue with the DOC's finding that Citibank's decision to participate in Hynix financing was not based on *bona fide* commercial considerations, providing its own quotes from Citibank officials.[339] The problem with Korea's argument is that it is based on a mischaracterization of the DOC's analysis of Citibank's risk assessment. The DOC never found

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[331] (...continued)
Proprietary Information for the Final Determination".

[332] Korea also uses rounding to its advantage.

[333] Korea First Submission, para. 526.

[334] *See* Korea First Submission, paras. 527-529.

[335] Korea First Submission, para. 531.

[336] *Issues and Decision Memorandum* at 9-10 (Exhibit GOK-5).

[337] *Hynix Verification Report* at 20 (Exhibit US-43).

[338] *Hynix Verification Report* at 19 (Exhibit US-43).

[339] Korea First Submission, paras. 532-34.

that the GOK took affirmative action to influence Citibank's decision to lend to Hynix. Rather, its finding is much more circumspect – that the GOK's policy to support Hynix was an influential factor in Citibank's decision to participate in Hynix financing. The DOC's findings in this regard are supported by record evidence.

202. Finally, the DOC also considered Citibank's dual role as lender and financial advisor in analyzing whether Citibank loans were appropriate for use as benchmarks.[340] Hynix retained Citibank and its sister company, Salomon Smith Barney ("SSB"), to act as exclusive financial advisors to Hynix.[341] Citibank and SSB stood to make substantial profits with little risk if Hynix kept them as its exclusive investment advisors. These profits justified token participation in the restructuring packages that they would arrange, particularly in view of the fact that the GOK implicitly guaranteed the survival of Hynix, as described above. The DOC noted that Citibank and SSB expected to earn more profit in their capacity as financial advisors than as a lender, and the fees for the advisory services were ultimately equal to a significant portion of the principal of the loans provided to Hynix.[342]

203. The DOC found that Citibank's lending decisions were based more upon its investment advisory role than the independent commercial reasonableness of the loans, in part because rather than basing the lending decisions upon independent credit analyses that banks would typically conduct before lending to a company, Citibank relied upon assessments of Hynix that SSB prepared for purposes of advancing a plan to restructure Hynix's debt.[343] The DOC concluded that Citibank was not only motivated by the fees that it stood to earn as Hynix's exclusive investment advisor, but also by its desire to serve a broader advisory role. Involvement with Hynix was viewed by Citibank as a stepping stone towards a larger and more lucrative role in addressing more general structural problems Citibank saw in the Korean financial market.[344]

204. Korea's only argument with regard to Citibank's dual role is that given that the DOC found that Citibank was not entrusted or directed by the government, Citibank's reasons for lending money were "by definition purely commercial."[345] The issue, however, is not whether Citibank as a business enterprise is profit-driven generally; the issue is whether Citibank's loans during the period of investigation were suitable for use as a benchmark for other loans provided to Hynix during that period. Given the record evidence, the DOC reasonably concluded that neither the incentive provided by potential fees as investment advisor to Hynix, nor the interest in being positioned to provide advisory services more broadly in the Korean economy, was

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[340] *Issues and Decision Memorandum* at 10-11 (Exhibit GOK-5).

[341] *See Issues and Decision Memorandum* at 10 (Exhibit GOK-5).

[342] *See Issues and Decision Memorandum* at 10 (Exhibit GOK-5).

[343] *See Issues and Decision Memorandum* at 10 (Exhibit GOK-5).

[344] *See Issues and Decision Memorandum* at 10 (Exhibit GOK-5); *Hynix Verification Report* at 18-19 (Exhibit US-43) (noting that Citibank officials thought that Hynix would be a good test-case to try out different restructuring packages and that Citibank and SSB looked at the big picture in Korea and saw a structural problem in the financial market).

[345] Korea First Submission, para. 537.

demonstrative of commercial considerations typical of a *lending institution* independent of government involvement. Furthermore, both factors significantly affect assessment of the risk attendant to participation as a lender in the restructuring measures and made the loans "problematic for purposes of comparability."[346] In sum, the record evidence supports the DOC's conclusion that Citibank loans to Hynix were unsuitable as benchmarks.

3. Use of an Uncreditworthy Benchmark

205. The DOC found that Hynix was not creditworthy during the period of investigation. The DOC, therefore, determined the existence and amount of the benefit from loans received by Hynix during that period by reference to an "uncreditworthy benchmark." Specifically, the DOC calculated the amount of the benefit based on a formula that factors in a "risk premium" to account for the higher probability that the borrower will default on repayment of the loan. The methodology is based on the notion that a lender who makes a loan to an uncreditworthy company faces a higher probability of default, and therefore will charge a higher interest rate.

206. Korea is not challenging, per se, the DOC's finding that Hynix was uncreditworthy at the time it received the government-directed loans.[347] Rather, Korea argues that the DOC improperly ignored available market benchmarks as part of its creditworthy analysis.[348] As demonstrated below, the record evidence supports the DOC's determination.

207. As an initial matter, the Appellate Body has recognized that the creditworthiness of the borrower is a relevant consideration.[349] A GATT panel also found that it was appropriate to consider a recipient's "creditworthiness" in assessing whether a government-provided loan confers a benefit.[350] This is because the financial condition of the borrower is a significant determinant of the loan's interest rate. Logically, a commercial lender will charge a higher interest rate to account for the fact that it faces a higher risk that the borrower may default on the loan. In other words, a loan to a creditworthy company and a loan to an uncreditworthy company that are otherwise structurally similar to each other would not be "comparable" loans within the

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[346] *Issues and Decision Memorandum* at 10 (Exhibit GOK-5).

[347] In this regard, Korea states only that it was inappropriate for DOC to find Hynix uncreditworthy for purposes of its benefit analysis because the result of this finding was, according to Korea, the application of "unreasonably high interest rates to serve as a surrogate benchmarks for all of Hynix' lending ... ." Korea First Submission, para. 539.

[348] Korea First Submission, paras. 514-538.

[349] *See Brazil - Export Financing Programme for Aircraft*, WT/DS46/AB/R, Report of the Appellate Body adopted 20 August 1999, para. 182.

[350] *See United States - Imposition of Countervailing Duties on Certain Hot Rolled Lead and Bismuth Carbon Steel Products from France, Germany, and the United Kingdom*, GATT Panel Report, SCM/ 185, issued November 15, 1994, paras. 522-586 (unadopted) [hereinafter "*US – Lead Bar*"], in which the panel found that an investigating authority may base its determination on an "uncreditworthy" analysis if the recipient is uncreditworthy at the time it received the government-backed loan or loan guarantee. Any such analysis of creditworthiness must be based on the "totality of the evidence" before the decision maker, including relevant facts regarding the past financial performance and "future prospects" of the firm being investigated. *See id*. paras. 548-550.

meaning of Article 14(b) of the SCM Agreement. Thus, under Article 14(b), consideration of a recipient's "creditworthiness" for purposes of assessing the amount of any market-based benefits conferred by a government loan is relevant.[351]

208. After finding Hynix uncreditworthy, the DOC determined the existence and amount of Hynix' benefit for long term loans by reference to an "uncreditworthy benchmark."[352] This benchmark was based on a formula that reflects the increased probability of default by uncreditworthy companies, which reflects a "risk premium" to account for the higher probability that uncreditworthy borrowers will default on repayment of the loan. The DOC calculated the uncreditworthy benchmark rate based on four different variables, including: 1) the probability of default by an uncreditworthy company; 2) the probability of default by a creditworthy company; 3) the long-term interest rate for creditworthy borrowers, and 4) the term of the debt.[353]

209. For purposes of determining the probability of default, the DOC relied on the average cumulative default rates reported in Moody's Investors Service study of historical default rates for corporate bond issuers, including international issuers. The Moody's data relied upon by the DOC is comprehensive, reflecting the experience of 14,400 issuers of long-term debt over the cumulated period, with non-U.S. issuers accounting for up to 38 percent of the companies included in the statistics. Thus, the data provides default rates for corporate debtors around the world.[354] In light of the fact that Hynix is an internationally rated company and is not legally restricted from obtaining financing from foreign sources, it was reasonable for the DOC to use such data.

210. Korea claims that the DOC improperly calculated the premium to be applied by relying on the average U.S. cumulative default rates reported in Moody's Investors Service study of historical default rates, rather than using Korean default rates (specifically, data on default rates from corporate bonds in Korea as published by Korean bond rating agencies and compiled by the KCGF).[355] According to Korea, Korean data is more accurate than the Moody's data relied on by the DOC. Although, the DOC's creditworthy regulations authorize consideration of default information from the country in question, there is no obligation in the SCM Agreement to consider such data.

211. In particular, nothing in the plain language of Article 14 of the SCM Agreement requires that the DOC base any such calculation on Korean default rates. The guidelines in

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[351] *See also*, *Brazil – Aircraft 21.5 II*, para. 182 (the commercial interest rate attributable to a loan "*varies according to* the length of maturity as well as *the creditworthiness of the borrower*"); and *US – Lead Bar*, para. 584.

[352] *Preliminary Determination*, 68 Fed. Reg. at 16769 (Exhibit GOK-4). *See also Issues and Decision Memorandum* at 105-112 (comment 18) (Exhibit GOK-5).

[353] *Preliminary Determination*, 68 Fed. Reg. at 16769 (Exhibit GOK-4). Korea is not challenging this formula, per se. Rather, Korea is challenging the use of Moody's data for purposes of items one and two.

[354] *See* Moody's Investors Service, *Historical Default Rates of Corporate Bond Issuers (1920-1997)*, at 11 (February 1998) (Exhibit US-90).

[355] Korea First Submission, paras. 553-556.

subparagraph (b) of Article 14 require only that a benefit calculation be based on comparable commercial loans that the Hynix could actually obtain "on the market." As discussed above, nothing in this provision indicates that the definition of the term "market" should be limited to the "Korean" market, or the market "in the country of provision."

212. Furthermore, the DOC found that Hynix failed to provide all necessary information during the investigation regarding Korean default rates.[356] The regulations contemplate that the DOC will consider using other rates if "detailed and comprehensive" information is available. The minimal data that was offered by Hynix provided no detail or discussion of how the rates were calculated, thereby preventing the DOC from comparing the quality of that data to that reported in Moody's. In particular, there was no evidence on the record that indicated whether the Korean default rates provided by Hynix were cumulative average rates, like the Moody's rates, or were averages of annual rates. Only cumulative rates provide the probability of default over the full term of the loan, as opposed to a single year. Therefore, the DOC reasonably determined to rely on the comprehensive Moody's data.

213. Even if the information submitted by Hynix consisted of cumulative average rates, the data were unreliable on their face, as the data suggested that the default rate for lowest rated debt was lower than the default rate of the highest rated debt. Specifically, data from the Korea Corporation Evaluation Company indicated that the default probability was 3.27% for AA rated bonds and was 5.73% for BB rated bonds, but that the default rate for CCC rated bonds was 2.47%. Similarly, the data from Korea Credit Information Ltd. showed that the default rate for CCC and below bonds was 1.82%, much better than the 12% rate for B rated bonds and approximately the same as for AA rated bonds (1.02%). By contrast, in the Moody's data, lower rated bonds had higher default rates in every instance.

214. In sum, the DOC's determination to reject the Korean default data, because they lacked sufficient explanation and were unreliable on their face, was reasonable. Given that there is no obligation under the SCM Agreement to consider Korean default data, the Panel should reject Korea's challenge to the DOC's use of the Moody's rates.

4. Hynix Was Unequityworthy In October 2001

215. Where a firm has not received any commercial equity infusions contemporary to the equity infusions under investigation, and if the financial conditions of the firm establishes that it would be inconsistent with usual investment practice to make equity infusions in that company, the DOC considers that firm to be "unequityworthy." The DOC found that Hynix was not equityworthy in October 2001. The DOC, therefore, treated the entire amount of the equity infusions received by Hynix in October 2001 as a grant.

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[356] *Issues and Decision Memorandum* at 105 (Exhibit GOK-5).

216. Korea does not challenge the DOC's equityworthiness methodology. Rather, Korea claims that, as a factual matter, the DOC ignored contemporaneous equity purchases that allegedly showed that that Hynix was equityworthy. Korea also argues that the DOC ignored "third party enthusiasm" for Hynix equity investments and improperly rejected the notion that existing creditors have different motivations from new lenders and investors. As demonstrated below, the DOC considered each of these arguments during the course of its investigation, but ultimately concluded that record evidence did not support these assertions. Korea is, once again, asking the Panel to reweigh the evidence.

217. With respect to the provision of equity capital, Article 14(a) of the SCM Agreement provides that a benefit may exist where the investment decision is "inconsistent with the usual investment practice ... of private investors in the territory of [the Member concerned]." Subparagraph (a) does not provide any guidance on how to determine whether a practice is "inconsistent" with usual investment practice or how to determine what constitutes the "usual" investment practice of private investors in that country.

218. The DOC's equityworthiness analysis is based upon the general presumption that private investors usually will make an equity investment only if they can expect a reasonable rate of return within a reasonable period of time. If such an expectation does not exist, the firm would usually not be considered for equity investments and, as a result, investment in that firm would not be consistent with the usual practice of private investors. Nothing in Article 14(a) precludes such an analysis. Indeed, one panel has found that "[i]n the case of equity infusions ... the existence of 'benefit' is normally determined by reference to the equityworthiness of the firm into which the capital is injected. A 'benefit' will be conferred if that firm is not equityworthy."[357]

219. Under the DOC's equityworthiness methodology, the DOC will first determine whether private investors purchased a significant amount of newly issued shares reasonably concurrent with the government purchase of newly issued shares. If such private investment does exist, a benefit will exist if and to the extent that the price paid by the government is greater than the price paid by the private investors. If no such private investment exists, the DOC will assess whether the firm funded by the government-provided equity was equityworthy at the time of the equity infusion. If the firm was equityworthy, the DOC will determine the extent of any inconsistency with usual private investment practice on a case-by-case basis. If the firm was unequityworthy, the DOC views the government investment as inconsistent with usual private investment practice and will treat the amount of the equity infusion as the benefit.

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[357] *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R, Report of the Panel, as modified by the Appellate Body, adopted June 7, 2000, para. 6.78 n.90.

220. Here, the DOC determined that no significant, reasonably concurrent purchases of newly issued Hynix shares by private investors existed.[358] As discussed below, the DOC determined that Hynix's June 2001 GDS offering provided no indication as to whether Hynix was equityworthy almost five months later.

221. The DOC also examined Hynix's financial indicators and performance as part of its equityworthiness analysis. The DOC found that Hynix had been in poor condition throughout the late 1990s and through 2001.[359] Hynix reported losses in every year from 1997 through 2001, except 1999. Its net income dropped from an already poor negative 28 percent in 2000 to negative 127 percent in 2001. Hynix's return on equity was at negative six percent in 1998, increased to a modest three percent in 1999, but then dropped to negative 40 percent in 2000 and negative 97 percent in 2001 and, even after the debt restructuring in 2001, was expected to be negative 76 percent in 2002. Finally, Hynix's debt to equity ratios ranged from 688 percent in 1997 to 129 percent in 2001.

222. Despite these extremely poor financial indicators, Korea contends that Hynix should not be considered unequityworthy, because its creditors relied upon reports prepared by Salomon Smith Barney, the Monitor Group, and Arthur Anderson.[360] As explained in its *Final Determination*, however, the DOC found that these studies, prepared at the request of Hynix or its creditors, were not a reasonable basis for determining that Hynix was equityworthy.[361] Based upon extensive review, the DOC determined that the SSB and Monitor Group studies were not prepared to answer the question of whether Hynix was equityworthy. The studies did not consider the factors that would usually be considered in determining whether a firm is equityworthy. Instead, the studies were focused on presenting options for ensuring Hynix's survival, which is different than assessing whether Hynix would provide its investors with a reasonable rate of return within a reasonable period of time.

223. Furthermore, the DOC found that the SSB study was based upon assumptions regarding the DRAM market that were inconsistent with the consensus view held by neutral industry analysts, which viewed the DRAM industry as being in a significant slump, with no recovery imminent.[362] Analysts, such as Morgan Stanley Dean Witter, also found that the difficulties in the DRAM industry combined with Hynix's ineffective investment and massive debt left "no reason to be positive on the stock."[363]

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[358] *Issues and Decision Memorandum* at 90 (Exhibit GOK-5).
[359] *Issues and Decision Memorandum* at 92 (Exhibit GOK-5).
[360] Korea First Submission, paras. 543-546.
[361] *Issues and Decision Memorandum* at 92 (Exhibit GOK-5).
[362] *Issues and Decision Memorandum* at 91 (Exhibit GOK-5).
[363] *Issues and Decision Memorandum* at 91 (quoting Morgan Stanley Dean Witter July 2001 report) (Exhibit GOK-5).

224. The DOC also found that the Monitor Group report focused narrowly on Hynix's operating capabilities and efficiencies and did not address Hynix's future prospects, expected return on equity, or any other factor that private investors would usually consider prior to an equity infusion.[364] Accordingly, the report could not reasonably be used as evidence of whether investment in Hynix was consistent with the usual practice of private investors and could not have been reasonably relied upon by the government and government-directed banks in deciding whether to convert debt into equity.

225. Finally, Korea cannot reasonably argue that Hynix's creditors relied upon the Arthur Anderson report. As the DOC noted, the report was not finished until two months *after* the creditors agreed to the October 2001 restructuring package.[365] Furthermore, the Arthur Anderson report does not establish that the investment by Hynix's creditors was consistent with the usual practice of private investors, as the report was drafted from the perspective of a creditor rather than an equity investor. The report consequently did not address all of the factors relevant to a decision of whether to invest.

226. Given the opinion of independent analysts that Hynix was in poor condition, the extremely negative picture portrayed by Hynix's financial indicators, and Hynix's persistent and deep failure to earn any return on equity, the DOC reasonably concluded that Hynix was not equityworthy.

227. Korea also argues that the DOC ignored Hynix's successful GDS offering from earlier in 2001 in assessing whether the debt-for-equity swaps carried out in October 2001 were relevant to its analysis of the usual investment practices of private investors.[366]

228. As an initial matter, Korea's assertion that the DOC simply "ignored" the GDS equity offering as a potential benchmark in this case is incorrect. As reflected in its *Final Determination*, the DOC expressly considered and rejected the June 2001 GDS equity offering as establishing Hynix's equityworthiness in October 2001.[367] In rejecting the relevance of this potential benchmark, the DOC explained that "the GDS issuance in June 2001 does not support a conclusion that the October 2001 equity purchase (i.e., debt to equity conversion) was consistent with the usual investment practices of private investors" due to the "extreme differences in the condition of the global DRAMS market ... and Hynix' financial state" at the time of the two equity infusions.[368] As explained in detail in the *Preliminary Determination*, the earlier GDS offering was clearly based on "rosy expectations for a rebound in DRAM demand and prices, which were necessary for Hynix to improve its position," but that those expectations "were not

[364] *Issues and Decision Memorandum* at 91 (Exhibit GOK-5).
[365] *Issues and Decision Memorandum* at 91 (Exhibit GOK-5).
[366] Korea First Submission, paras. 541-542.
[367] *Issues and Decision Memorandum* at 90 (Exhibit GOK-5).
[368] *Issues and Decision Memorandum* at 90-91 (Exhibit GOK-5).

bourne out."[369] Therefore, it was reasonable for the DOC to conclude, as it did, that the earlier offering was not relevant to the later equity offering. In other words, the DOC determined that the earlier GDS offering was, in a sense, not "usual" when compared to the later offering.

229. Korea also contends that the DOC erred in adopting a methodology in which it determines whether an investment decision is consistent with the usual investment practice by evaluating whether a *rational* private investor would have made the same investment.[370] Korea offers an alternative theory, known in sociological circles as the Prospect Theory. This theory is sometimes used to describe why an individual may continue to increase loss exposure, even if he has failed to earn a return on his past investment.[371]

230. The Expected Utility Model of explaining commercial behavior, which is the basis for the DOC's rational investor standard, holds that a private investor will look upon any past investments, including its own, as sunk costs that are not relevant to its analysis of whether to make additional investments.[372] In other words, a private investor will evaluate whether to make additional investments based upon the expected rate of return on the additional investment, regardless of the value of past investments. Prospect Theory, on the other hand, posits that investors will continue to make investments in a particular project or entity in hopes of minimizing past losses, even if the investment would not be justified based only the potential for future return.

231. The DOC has considered and rejected on many occasions the argument that inside investors should be held to a different investment standard than outside investors. As explained in previous determinations, the prevailing economic theory for explaining normal commercial behavior holds that an investor makes its decision on the margin, seeking to maximize the return on incremental outlays. This is because the investor will only decide to make additional investments in a company, whether in the form of "new" investments or exchange of debt for equity, if the potential for return on the investment is equal to or greater than the potential return from alternative investments. If the potential for return from the existing investment is sufficient to justify additional investments by an inside investor, it would also be sufficient to justify new investments by an outside investor.

232. As observed by the GATT panel in *US – Lead Bar*, where the panel evaluated similar objections to the DOC's use of an objective, rational investor standard, it cannot be said that economic theory or rational analysis preclude the approach adopted by the DOC.[373] As the panel noted there, the arguments against the DOC's standard "at best" indicate that an alternative

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[369] *Preliminary Determination*, 68 Fed. Reg. at 16777 (Exhibit GOK-4).
[370] Korea First Submission, paras. 547-552.
[371] Korea First Submission, paras. 547-552.
[372] *Issues and Decision Memorandum* at 88 (Exhibit GOK-5).
[373] *US – Lead Bar*, paras. 505, 508.

approach is possible.[374] In the DRAMs investigation, Hynix and the GOK offered little support for their argument that the DOC should change its considered methodology. Hynix sought to support its argument with a paper prepared by Bennet Zelner during the course of the investigation. Despite being Hynix's retained expert, Zelner does not specifically suggest that the Prospect Theory has any explanatory power in the context of the investment decisions of commercial banks.[375] Furthermore, in his paper, Zelner expressly acknowledges that the Expected Utility Model remains the predominant model.

233. Besides the general fact that the Prospect Theory remains a marginal economic theory, its application in this case shows the limits of its usefulness and why it would be inappropriate here. According to the arguments of Korea, the additional investments by Hynix's creditors are justified by their past investments in Hynix. Carried to its logical conclusion, however, this would support the untenable notion that the more the banks invest in Hynix, the more the additional investments are justified. In such a situation, a company could never be unequityworthy from the perspective of an inside investor.

234. In sum, the DOC's approach of assessing the consistency of investments with the usual practice of private investors is reasonable. Korea has at most offered a minority, alternative theory that does not vitiate the evidentiary basis for, and explanation of, the DOC's findings. The Panel should find that the DOC's equityworthiness determination is supported by record evidence and not inconsistent with the requirements of Article 14.

C. The DOC's Finding of Specificity Is Consistent with Article 2 of the SCM Agreement

235. As demonstrated above, the DOC properly found that the GOK directed and entrusted a group of Hynix's creditors to prevent the failure of the company, and that this subsidy program – the Hynix bailout – conferred substantial benefits on Hynix. As a final step in the analysis, consistent with Article 1.2 of the SCM Agreement, the DOC determined that the subsidy is "specific" within the meaning of Article 2 and, therefore, countervailable.

236. As discussed further below, because the subsidy program is directed at a particular company – Hynix – it is specific within the meaning of Article 2 of the SCM Agreement. Moreover, the DOC confirmed the specificity of the Hynix bailout through an analysis of corporate usage of the CRA/CRPA. Both analyses demonstrate that the subsidy is specific to certain enterprises within the meaning of Article 2 of the SCM Agreement.

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[374] *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom*, GATT Panel Report, SCM/185, report issued Nov. 15, 1994, para. 508.

[375] *See* Korea First Submission, para. 550 and n.379 referencing GOK Exhibit 28-(b).

237. In the face of the compelling evidence on the record, Korea attempts to redefine the specificity test in a manner more to its liking. In making its arguments, Korea not only reads non-existent obligations into Article 2.1 of the SCM Agreement, but also reinterprets the DOC's specificity determination. As we demonstrate below, however, Korea's claims are without foundation in the SCM Agreement and are contradicted by the record evidence.

1. Article 2 of the SCM Agreement

238. Pursuant to Article 1.2 of the SCM Agreement, a program that otherwise meets the definition of a subsidy (financial contribution and benefit) shall be subject to countervailing measures only if it is "specific" within the meaning of Article 2 of the SCM Agreement. Article 2.1 of the SCM Agreement provides three principles that must be applied to determine whether a subsidy is specific to "an enterprise or industry or group of enterprises or industries" – referred to collectively by the SCM Agreement as "certain enterprises" – within the jurisdiction of the granting authority.

239. First, a subsidy is specific as a matter of law if the granting authority *explicitly* limits access to a subsidy to certain enterprises. Second, a subsidy is *not* specific as a matter of law where the granting authority establishes objective criteria or conditions governing eligibility for, and the amount of, a subsidy, provided that eligibility is automatic and the criteria or conditions are strictly adhered to.

240. Third, even where the law under which the granting authority operates does not appear to create a *de jure* specific subsidy under the first two principles, Article 2.1(c) of the SCM Agreement provides that other factors may be considered to determine if the subsidy is, *in fact*, specific. Such factors are:

> use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

Thus, Article 2.1(c) establishes that, even if a subsidy has the "appearance" of being widely available throughout an economy, it may nevertheless be specific if, as a matter of fact, the subsidy is used by certain enterprises, or is predominantly used by or granted in disproportionately large amounts to certain enterprises.[376] The criteria set forth in Article 2.1(c)

[376] The United States has never argued that a finding of specificity under Article 2.1 may be based on factors other than those set forth in that provision, Korea's suggestion to the contrary notwithstanding. In any event,
(continued...)

are objective criteria relating to the number of users or actual use of a subsidy program, rather than the structure or legal eligibility of a subsidy program.

241. Although existence of a financial contribution and the existence of specificity are two separate determinations that must be made, the nature of the financial contribution can impact the specificity analysis under Article 2. Consider, for example, the situation in which the government provides a grant to a single, financially distressed manufacturer. There is no law or regulation providing for such grants; this is *sui generis* government assistance to a particular company. The subsidy is specific because there is a limited number of users – one. In fact, the nature of the subsidy is inherently specific. Thus, beyond the fact that the grant was company-specific (*i.e.*, there is no grant "program"), no further specificity analysis is required. In contrast, a tax benefit that, on its face, may be used by many enterprises or industries is not inherently specific. To determine if the subsidy is specific it would be necessary to examine the facts further to determine if there was, in fact, a limited number of users, predominant use or a disproportionate grant of the benefit, or if the granting authority exercised its discretion in a manner that rendered the subsidy specific to certain industries.

2. The DOC's Determination That the Hynix Bailout Is a Specific Subsidy Is Based on Positive Evidence

242. In the present case, as in the case of company-specific grants, the nature of the subsidy – a government-directed bailout – impacts the specificity analysis. As a result, much of the evidence establishing that the GOK directed and entrusted the banks to provide the bailout, is also relevant to the specificity analysis, as Korea concedes. The DOC's reliance on that evidence in its specificity analysis, therefore, is not an effort to "collapse" the distinct requirements to find a financial contribution and specificity, as Korea claims.[377] Rather, it is a natural consequence of the nature of the subsidy at issue.

243. Korea also argues that a finding of specificity must be based on positive evidence. The United States agrees.[378] The specificity finding was not "predisposed" as Korea claims.[379] To

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[376] (...continued)
the issue does not arise in this dispute because the DOC specificity determination is based solely on factors explicitly listed in Article 2.1.

[377] Korea First Submission, para. 560.

[378] The scope of the positive evidence requirement is not at issue here, because there is no dispute that the requirement applies to a specificity finding. Nevertheless, Korea argues that the "positive evidence" standard is "overarching" and applies to all three elements of a subsidy - financial contribution, benefit, and specificity. It is beyond question that there must be adequate evidentiary support for an investigating authority's findings concerning the three elements of a countervailable subsidy. As noted at the outset, however, the term "positive evidence" is used only with respect to specificity in Article 2 of the SCM Agreement. That term is not found in Article 1 or in Article 14, which collectively address the elements of financial contribution and benefit. As stated by the Appellate Body in *India Patent Protection*, "the principles of treaty interpretation set out in Article 31 of the *Vienna*

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the contrary, as discussed in the final determination and in this submission,[380] the record of the investigation is replete with positive evidence of a government-directed bailout of Hynix. The evidence demonstrates the GOK's commitment and actions taken specifically to prevent the collapse of Hynix.[381]

3. The DOC's Analysis of the CRA/CRPA Confirms the Specificity Determination

244. As noted above, the DOC also examined corporate usage of the CRA/CRPA to confirm its specificity determination. The data on corporate usage is confidential and, therefore, cannot be discussed in detail. We can state, however, that the data, which was provided by the GOK, demonstrates that the Hyundai Group companies received an extraordinarily large percentage of financial restructuring and recapitalization aid[382] and that Hynix alone received a very high percentage of such aid.[383] Ironically, having stressed the requirement for positive evidence, Korea then asserts that its own objective, credible data on use of the CRA/CRPA is irrelevant to the specificity analysis.[384] The relevance of the data, however, should be beyond question given that disproportionate use is expressly listed in Article 2 as a factor that may be considered in a specificity analysis.

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[378] (...continued)
Convention ... neither require nor condone the imputation into a treaty of words that are not there ... " (para. 45). Nevertheless, this is precisely what Korea is asking the Panel to do here, and the Panel should decline to do so.

[379] Korea First Submission, paras. 582-84.

[380] *See, e.g.*, *Issues and Decision Memorandum* at 17-19 (Exh. GOK-5).

[381] *Issues and Decision Memorandum* at 17 (Exh. GOK-5). Explicit support for Hynix was reflected at the highest levels of the GOK. In January 2001, a Blue House official was quoted as stating that "Hyundai is different from Daewoo. Its semiconductors and constructions are [the ROK'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." *Issues and Decision Memorandum* at 49.

[382] In deriving the percentage of financial restructuring and recapitalization aid attributable to Hynix and the Hyundai Group companies, the DOC relied on data for all companies undergoing debt restructuring under the CRA and the CRPA. Korea notes that the CRA and CRPA represent the "London Approach," an "internationally recognized approach to debt-workouts" Korea First Submission, para. 567. Korea also notes that the CRPA was "recommended by the IMF" to promote bank review of the viability of corporate borrowers. Korea First Submission para. 569. The implication seems to be that the imprimatur of international recognition and/or IMF support somehow elevates these debt restructuring laws over the obligations of the SCM Agreement. There is no support in the SCM Agreement or elsewhere in the WTO Agreement for the notion that such a pedigree supercedes the application of the definition of a countervailable subsidy under Article 1of the SCM Agreement. *See, e.g., Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, Report of the Appellate Body adopted April 22, 1998, para. 72.

[383] Specificity Memorandum (public version) at 1-2 (Exhibit US-91). As discussed above, the exact percentages are confidential.

[384] Korea First Submission, para. 568.

4. Korea's Claims Have No Basis in the SCM Agreement and Are Contradicted by the Record Evidence

245. Korea's challenge to the DOC's specificity analysis is premised on unsustainable interpretations of Article 2 of the SCM Agreement. Based on those flawed interpretations, Korea makes the remarkable assertion that there is *no basis* to find that the government-directed bailout of Hynix is, *de facto*, specific.[385]

246. First, in the face of positive evidence that the government specifically directed and entrusted the banks to bail out Hynix, Korea argues that evidence of specificity for purposes of Article 2.1(c) *must* come from a "broader examination" of the "benefits."[386] There is absolutely no support in the text of the SCM Agreement for that assertion. As Korea itself acknowledges, the principles that govern specificity findings are set forth in Article 2. Moreover, the factors to be considered in determining *de facto* specificity are those set out in Article 2.1(c). Three of those factors are limited, predominant or disproportionate "use" of the subsidy at issue. Nothing in the text of Article 2.1(c) requires a broader analysis; *i.e.*, one that looks beyond use of the subsidy at issue. As with so many of its claims, in the face of overwhelming evidence Korea seeks to change the question or add requirements that exist nowhere in the SCM Agreement.

247. For example, nothing in the SCM Agreement dictates a methodology for determining disproportionate use of a subsidy. Nevertheless, contrary to the rules of treaty interpretation, Korea posits that the term "use" *must* be read to have both a "quantitative and qualitative component."[387] The ordinary meaning of the term "use" is, however, the "act of using, fact of being used."[388] Nothing in the ordinary meaning of the term "use" suggests either a quantitative or qualitative component. Rather, it simply relates to the action of using something.

248. Moreover, while there is no reference to "qualitative" factors in examining use, Article 2.1(c) contains explicit references to "quantitative" factors related to use; *i.e.*, the "number" of users, "predominant" use and "disproportionate" use. Thus, the relevant "use" factors are those explicitly set out in Article 2, a list that Korea itself has described as "exhaustive."[389] There is no requirement in Article 2.1(c) to "temper" those quantitative factors based on "qualitative distinctions," and there is no basis for Korea's assumption that a qualitative analysis is necessary to avoid "ridiculous outcomes."[390] Korea's attempt read into the SCM Agreement obligations that are not there should be rejected.

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[385] Korea First Submission, para. 564
[386] *Id*.
[387] Korea First Submission, para. 570.
[388] *The New Shorter Oxford English Dictionary* (1993) (Exhibit US-89).
[389] Korea First Submission, para. 561.
[390] Korea First Submission, para. 570.

249. Korea also argues that what is being "used" is not the vast amount of debt restructuring aid, but rather the CRPA "framework" itself, and that Hynix was only one of over 100 different companies "ushered through" the CRPA.[391] What was "used" in this case, however, was the government-directed Hynix bailout. Nevertheless, assuming *arguendo* that Korea is correct, the GOK's own data, as noted above, demonstrate that members of the Hyundai Group – and Hynix in particular – were granted disproportionately large amounts of the restructuring and recapitalization aid through those frameworks. Thus, even if we accept, for the sake of argument, that there were a 100 companies received restructuring aid and that 100 companies is not a "limited number," the receipt by Hynix of a disproportionate amount of restructuring aid makes the subsidy specific.

250. Undaunted by the evidence of disproportionate use, Korea claims, without any basis in the text of Article 2, that the DOC was required to examine the size and capital of Hynix in relation to the size and capital intensity of all companies undergoing debt restructurings and to consider that debt restructuring aid allocated among participating creditors on a *pro rata* basis, taking into account their existing debt holdings.[392] First, as noted above, Article 2.1(c) does not contain *any* requirements regarding how a disproportionate use analysis is to be conducted, much less the specific analytical methods Korea asserts are required. Furthermore, carried to its logical conclusion, the analytical approach Korea claims is required would imply the untenable notion that the Members intended that the more indebted a company is, the more additional subsidies it may receive without being subject to the subsidy disciplines because the disproportionately large subsidies could never be specific. Thus, Korea's proffered interpretation of Article 2 is directly at odds with the object and purpose of the SCM Agreement.

251. Korea also argues that the DOC's specificity analysis failed to take into account "the extent of diversification of economic activities" and the "length of time" the program has been in existence, as required under Article 2(c) of the SCM Agreement.[393] Korea misapprehends the nature and relevance of these two requirements. Furthermore, these issues were considered in the context of the DOC's investigation.

252. The requirement to consider the extent of diversification of economic activity is premised on the fact that a subsidy may be widely distributed within the economy, and yet appear specific, simply due to the limitations of the domestic economy where the subsidy was granted. To prevent Article 2.1(c) of the SCM Agreement from functioning as a *per se* rule under which any subsidy within a small or undiversified economy automatically would be specific, the "diversification" language requires a consideration of the broader economic context within which the particular subsidy program functions. In this case, there was no dispute that Korea's

[391] Korea First Submission, para. 570
[392] Korea First Submission, paras. 571, 577.
[393] Korea First Submission, para. 572-574.

economy is highly developed and diverse, including such major industries as shipbuilding, automobiles, machineries, petrochemicals, computers, and steel.

253. The requirement to consider the length of time a program has been in operation is premised on the fact that users applying for and receiving benefits under a newly created program may be few in number during the initial phase of the program, thereby making it appear specific. If a newly created program were viewed over a longer period of time, however, the program may be found to be used by a greater number of users than during the initial phase of the program. In deriving the percentage of financial restructuring and recapitalization aid attributable to Hynix and the Hyundai Group companies, the DOC relied on data for all companies undergoing debt restructuring under Korea's CRA/CRPA *from the period July 1998 to March 2003*.[394] Korea has not argued that such a period is an insufficient length of time.[395]

254. In sum, the DOC's determination of specificity is consistent with Article 2 of the SCM Agreement and is substantiated on the basis of positive evidence. Korea's claims to the contrary should be rejected.

D. The DOC's Meetings with Financial Experts Were Not Inconsistent with Article 12.6 of the SCM Agreement

255. Korea claims that the DOC's private verification meetings with financial experts in Korea were inconsistent with Article 12.6 fo the SCM Agreement because the GOK objected to the form of the meetings. The Panel should reject these claims for the following reasons.

256. Article 12.6 provides for investigations in the territory of other Members, provided that they have been notified in good time and do not object to the investigation. In addition, Article 12.6 provides for investigations on the premises of a "firm" in the territory of a Member country. Such investigations are commonly known in U.S. parlance as "verifications." Article 12.6 requires the explicit consent of firms to investigation on their premises and requires that the Member country must be notified and not object. Additionally, investigating authorities are required to disclose or make available the results of its verifications of firms.

257. During the course of its investigation, DOC officials traveled to Korea to verify the questionnaire responses and supplemental submissions of the two Korean DRAMS producers, as well as those of the GOK. Prior to departure, the DOC notified the GOK of its intent to conduct verification within the GOK's territories and of the schedule for verification of the respondent

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[394] *See Specificity Memorandum* (public version) at 1-2 (Exhibit US-91).

[395] *E.g.*, the DOC compared an amount for Hynix's debt restructuring during the period of investigation to an amount for all companies undergoing debt restructuring under **both** the CRA **and** CRPA over the five year period of July 1998 to March 2003. *See Specificity Memorandum* (public version) at 1-2 (Exhibit US-91).

firms.[396] By so doing, the DOC fully complied with its obligations under Article 12.6 and Annex VI to the SCM Agreement. The DOC also obtained the explicit consent of the respondent firms, Hynix and Samsung, to verification on their premises. The DOC also indicated in its schedule that concurrent with its verification proceedings, it planned to meet with independent financial experts during the course of its visit to Korea.

258. At the time, Korea's only objection was related to the substance of the scheduled verification. Korea objected to the scheduled meetings between DOC officials and financial experts without the presence of Korea's counsel.[397] However, as Korea itself concedes, it did not withhold consent to investigations within its territory.[398]

259. Consequently, in order to gather more factual information that would help inform the record of the investigation, DOC officials proceeded to meet with the financial experts, without the presence of Korea's counsel. At these meetings DOC officials spoke with a number of financial sector experts with regard to several issues related to the financial market situation in Korea.[399] The DOC disclosed and made publicly available its report of the meetings with the financial experts by placing a detailed report of the meetings on the administrative record of the proceeding.[400]

260. Korea argues that the DOC's actions were inconsistent with Article 12.6 because the DOC failed to accommodate its request to allow the GOK's counsel to monitor the meetings.[401] Korea is wrong.

261. The DOC has had a longstanding policy and practice of interviewing various officials and experts in the course of its administrative proceedings. Meetings with financial experts assist the DOC in gathering additional information to supplement the administrative record. The privacy of these meetings ensures both full disclosure and confidentiality.[402] The DOC's meetings with financial experts were clearly in the context of gathering additional information to assist in its

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[396] *See* Letter from DOC to Willkie Farr & Gallagher RE: Countervailing Duty Investigation: Dynamic Random Access Memory Semiconductors From the Republic of Korea, dated April 16, 2003 (Exhibit US-110); and Letter from John Brinkman, Acting Office Director, to Hae-yong Kim, Embassy of the Republic of Korea RE: Countervailing Duty Investigation: Dynamic Random Access Memory Semiconductors from the Republic of Korea, dated April 10, 2003 ("Verification Itinerary") (Exhibit US-111).

[397] Letter from Willkie Farr & Gallagher to DOC RE: Korea's Comments on the Proposed Verification Schedule, DRAMS from Korea, dated April 14, 2003 (Exhibit US-112).

[398] Korea First Submission, para. 591.

[399] Memorandum from Christopher D. Cassel, Senior Import Policy Analyst and Melani Miller, Senior Import Compliance Specialist, through Judith Wey Rudman, Program Manager, to Susan H. Kuhbach, Director, RE: Private Financial Experts Verification Report, dated May 15, 2003 ("Financial Experts Report") (Exhibit GOK-30).

[400] *Id*. (Exhibit GOK-30).

[401] Korea First Submission, paras. 590, 592.

[402] Letter from DOC to Willkie Farr & Gallagher RE: Countervailing Duty Investigation: Dynamic Random Access Memory Semiconductors From the Republic of Korea, dated April 16, 2003 (Exhibit US-110).

countervailing duty investigation. Transparency was preserved by placing summaries of the meeting on the public record.

262. There is no requirement in Article 12.6 that DOC officials must permit counsel for government of the Member in question to be present for its meetings with financial experts. Indeed, any assertions that the presence of Korea's counsel would ensure the reliability of the written record fail to account for the fact that representatives from the U.S. domestic industry are never permitted to attend any part of the verification proceedings.

263. While Article 12.6 gave Korea the right to object to investigations conducted within its territory, the right of denial cannot be extended to encompass a right to dictate the specific procedures that the DOC will follow in the conduct of its verification proceedings. Consequently, the DOC was not required to negotiate with the GOK over the details of its investigatory proceedings. If Korea had wanted to, it could have chosen to withhold its consent to investigations within its territory. It did not.

264. After full disclosure of the report on the meetings with the financial experts, interested parties were encouraged to respond by submitting factual information to rebut any factual information contained in the report.[403] Both the domestic U.S. interested party, Micron,[404] and the respondent firms, Samsung and Hynix[405] took advantage of this opportunity and provided additional information in response to the DOC's report on its meeting with the financial experts. This additional information was added to the factual information on the administrative record and considered by the DOC in its *Final Determination*.

265. For the foregoing reasons, the Panel should find that the DOC did not act inconsistently with Article 12.6 of the SCM Agreement.

V. THE ITC'S INJURY DETERMINATION IS CONSISTENT WITH U.S. WTO OBLIGATIONS

266. In this appeal, Korea does not challenge the ITC's finding of a single domestic like product, the ITC's definition of the domestic industry, or the ITC's related party analysis. With respect to the ITC's findings concerning the volume and price effects of subsidized subject imports[406] and the ITC's causation analysis, Korea variously argues that certain portions of these findings are not based on positive evidence or an objective examination as required by Article

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[403] Memorandum from Team through Susan H. Kuhbach, Director, RE: Briefing and Hearing Schedules, dated May 16, 2003 (Exhibit US-113).

[404] Letter from Hale and Dorr to DOC RE: Dynamic Random Access Memory Semiconductors from the Republic of Korea – Factual Information Submission, dated May 22, 2003 (Exhibit US-114).

[405] Letter from Willkie Farr & Gallagher to DOC RE: Citibank's Affidavit In Response To the Private Financial Experts Verification Report, dated May 22, 2003 (Exhibit GOK-29).

[406] The term "subject imports" refers to those imports that were found by the DOC to be subsidized.

15.1 of the SCM Agreement, that the ITC did not set forth "in sufficient detail" the findings and conclusions reached on all issues of fact and law it considered material, or that certain portions of these findings are inconsistent with the substantive obligations of Articles 15.2, 15.4 and 15.5 of the SCM Agreement. As shown below, Korea's claims are without merit, and Korea fails to demonstrate a *prima facie* case that the ITC determination is inconsistent with any of the cited provisions.

267. Notwithstanding the ITC's thorough and sweeping rejection of Korea's contentions, Korea has opted to ignore the "big picture" in favor of presenting carefully selected portions of the ITC's determination in isolation. The ITC, however, properly rejected such a piecemeal approach and focused instead on the interrelationship of numerous elements that together demonstrated material injury by reason of DRAM imports from Korea.

A. Overview of the ITC Determination

268. In its final determination, the ITC found a single domestic like product corresponding to the scope of the investigation. Thus, the domestic like product consisted of all DRAM products regardless of "chip" density, including semifinished and finished products[407] and all DRAM product types (including specialty DRAM products).

269. For purposes of identifying the relevant domestic industry, the ITC examined which types of production-related activities were sufficient to warrant treating U.S. companies undertaking those activities as domestic producers (and shipments of their resulting products as shipments of the domestic industry).[408] More specifically, the ITC examined whether companies that fabricate uncased DRAMs, companies that package cased DRAMs into DRAM modules, and fabless design houses were engaged in sufficient production-related activities. It analyzed these issues using its normal six-factor test.[409] Based on these considerations, the ITC found that producers that fabricate uncased DRAMs should be included in the domestic industry, but that companies that only package DRAMs into DRAM modules and fabless design houses did not engage in sufficient production-related activities to warrant their inclusion in the domestic industry.[410]

270. The ITC also considered whether assembly of uncased DRAMs into cased DRAMs constituted sufficient production-related activities to include companies that assemble uncased DRAMs into cased DRAMs in the domestic industry. Again, the ITC examined the relevant

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[407] That is, the domestic like product included uncased (unassembled) DRAMs, cased (assembled) DRAMs as well as DRAMs packaged into memory modules.

[408] *See, e.g.*, USITC Pub. 3616 at 6-11 (Exhibit GOK-10)

[409] Under this test, the ITC considers the following: (1) the source and extent of the firm's capital investment; (2) technical expertise involved in U.S. production-related activities; (3) value added to the product in the United States; (4) employment levels; (5) quantity and type of parts sourced in the United States; and (6) any other costs and activities in the United States directly leading to production of the like product.

[410] *See, e.g.*, USITC Pub. 3616 at 7 (Exhibit GOK-10).

facts based on its traditional six-factor test, and found, based on record information, that assembly operations involved sufficient production-related activity to constitute domestic production. Noting the absence of any dispute that the output of DRAM assembly operations – cased DRAMs – were part of the domestic like product, and in light of its finding that assembly operations were sufficient production-related activities to constitute domestic production, the ITC included companies that assembled DRAMs in the United States in the domestic industry, and it treated the output of those operations, cased DRAMs, as shipments of the domestic industry.[411]

271. In its analysis of the domestic industry, the ITC also discussed whether certain companies producing the domestic like product in the United States, including Hynix Semiconductor Manufacturing America, were "related parties." The ITC did not exclude any producers on that basis.[412]

272. Accordingly, for purposes of its final determination, the ITC defined the domestic industry as including domestic producers Micron, Dominion, Infineon, Samsung Austin Semiconductor, Fujitsu, NECELAM, Payton, Hynix Semiconductor Manufacturing America (HSMA), and IBM, several of whom ceased production of the domestic like product in the United States during the period examined by the ITC (the Commission's "period of investigation").[413]

273. In its final investigation, the ITC collected and examined data for the full years 2000, 2001, and 2002, and for the first quarter ("interim") periods of 2002 and 2003.

274. In its final determination, the ITC also described the business cycle and conditions of competition distinctive to the DRAMs industry.[414]

Demand: In terms of demand considerations, the ITC noted that, consistent with rising demand for more and faster memory, apparent U.S. consumption of DRAM products increased throughout the period of investigation. It found that demand for DRAM products is derived from and driven by the demand for end-use products, with most DRAM products being used in computers or peripheral equipment and sold to major PC manufacturers ("PC OEMs"), manufacturers of other electronic equipment such as communications equipment ("non-PC OEMs"), and purchasers other than OEMs. It also found that demand was relatively price inelastic.[415]

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[411] *See, e.g.*, USITC Pub. 3616 at 8-11 & n.48 (Exhibit GOK-10)
[412] *See, e.g.*, USITC Pub. 3616 at 12-14 & n.78 (Exhibit GOK-10).
[413] *See, e.g.*, USITC Pub. 3616 at 14, III-1 to III-5 (Exhibit GOK-10).
[414] *See, e.g.*, USITC Pub. 3616 at 15-19 (Exhibit GOK-10).
[415] *See, e.g.*, USITC Pub. 3616 at 15 (Exhibit GOK-10).

Supply: With respect to supply, the ITC found that due to rising demand for more and faster memory, the industry is characterized by rapid technological advancements in terms of density, die shrinks, and addressing technology, each of which starts a new "learning curve" or product life cycle for the producer. The ITC acknowledged that price trends are generally correlated with the product life cycle, whereby prices start high for a new, state-of-the-art product and decline rapidly as experience is gained and the product becomes a commodity. The ITC found that to keep abreast of new technology, producers must invest constantly in costly new capital equipment and research and development as well as maximize capacity utilization. To meet rising U.S. and global demand, capacity to produce DRAM products increased over the period of investigation both in the United States and globally. These capacity increases occurred through increasing wafer starts, shrinking die sizes, using silicon wafers with larger diameters, or some combination thereof. The ITC noted that in addition to subsidized DRAM products from Korea, there were also shipments into the U.S. market of domestically produced DRAM products and shipments of DRAM products from non-subject sources.[416]

Business and Product Life Cycles: With continuous growth in demand but sporadic supply increases, the ITC noted that supply and demand in the DRAM products market tend to be chronically out of equilibrium. Historically, because of the stark product life cycles and the chronic supply/demand disequilibrium, it noted that this market has since the 1970s been characterized by repeated "boom" and "bust" periods.[417]

The ITC also noted that in the short term, prices may differ by product type for technologically advanced or specialty DRAMs, which begin their life cycles as high-revenue-generating products, but as products exit the introductory phase of their cycle and an increasing number of suppliers join the market, DRAMs are rapidly transformed into commodity goods that compete on the basis of price. The ITC also observed that largely because of the perpetual improvements in production efficiencies experienced by this industry, prices are usually declining but that the unit value of DRAMs sold in the U.S. market (on a per billion bit basis) declined precipitously during the period of investigation.[418]

Global considerations: The ITC acknowledged the increasingly global nature of the DRAMs market, in terms of both producers and purchasers, and found because of low transportation costs, commodity standard DRAM products could be shifted easily from one customer location to another, or purchases shifted from one source to another.[419]

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[416] *See, e.g.*, USITC Pub. 3616 at 15-17 (Exhibit GOK-10).

[417] *See, e.g.*, USITC Pub. 3616 at 16 (Exhibit GOK-10). Incidentally, the figure 1 that Korea references in its submission as depicting the DRAM business cycle does not concern the DRAM industry, but rather the considerably broader integrated circuit industry cycle, as stated in the slide ("IC Industry Cycles").

[418] *See, e.g.*, USITC Pub. 3616 at 17-18 (Exhibit GOK-10).

[419] *See, e.g.*, USITC Pub. 3616 at 16, 18 (Exhibit GOK-10).

Unfair Import Findings: The ITC also discussed the DOC's findings that subject imports produced by Hynix benefitted from unfair subsidies. It noted the DOC's findings that the Government of Korea directed credit to the "strategic" Korean semiconductor industry through 1998 and specifically to Hynix and companies that continued to be, or were part of, the Hyundai Group from 1999 through June 30, 2002, including via loans, convertible bonds, extensions of maturities, D/A financing, usance financing, overdraft lines, debt forgiveness, and debt-for-equity swaps that the DOC determined were direct transfers of funds from government-directed financial institutions. The ITC also took note of the fact that the DOC found Hynix uncreditworthy between January 1, 2000 and June 30, 2002, and unequityworthy at the time of the October 2001 debt-to-equity swap. The ITC also noted that the DOC found a total net countervailable subsidy of $2 billion for the period January 1, 2001 to June 30, 2002, or a rate of about 44.71 percent *ad valorem*.[420]

275. The ITC considered information on the subsidies received by Hynix as a condition of competition in the DRAMs market. The ITC found that, at a minimum, the pattern of Korean government action permitted Hynix to continue operations uninterrupted by bankruptcy or other disruption, and as such, formed part of the context under which subject imports competed in the U.S. market over the period examined.[421]

276. Finally, the ITC observed that during a portion of the investigation period, Korean DRAM products produced by Hynix were subject to an antidumping duty order in the United States.[422]

277. Taking into consideration the business cycle and conditions of competition distinctive to the DRAMs industry, the ITC found that subsidized subject import volume on an absolute basis as well as the increase in that volume over the period of investigation relative to U.S. production and apparent consumption was significant. The ITC stated that its findings about the volume of subject imports were reinforced by the substantial degree of substitutability between subject imports and domestic shipments, explaining that the commodity-like nature of domestic and subject imported DRAM products magnified the ability of a given volume of imports to impact the domestic market and industry.[423]

278. Based on its findings of a high degree of substitutability between the domestic and subject products and its findings concerning the importance of and rapid transmission of pricing information in this industry, the ITC found significant price underselling and price depression by subsidized subject imports. It noted that subject imports undersold the domestic like product at

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[420] *See, e.g.*, USITC Pub. 3616 at 19 (Exhibit GOK-10).

[421] *See, e.g.*, USITC Pub. 3616 at 19 & nn.126-27, I-2 to I-5 (Exhibit GOK-10). As the ITC explained, it based its determination on the statutory factors concerning the volume, price, and impact on the subject imports on the domestic industry. *Id*. at n.127.

[422] *See, e.g.*, USITC Pub. 3616 at 18-19, I-1 n.3 (Exhibit GOK-10).

[423] *See, e.g.*, USITC Pub. 3616 at 20-21 (Exhibit GOK-10).

high (often greater than 20 percent) margins and at frequencies that increased over the period of investigation. The ITC examined the pricing data in a number of different ways, and observed that prices for nearly every pricing product and channel of distribution declined substantially over the period of investigation, including for particular high-revenue products to particular channels of distribution at specific points during the period of investigation. Although it recognized other variables having an effect on prices in this market, in the absence of significant quantities of subsidized subject Korean product competing in the same product types at high margins and at increasing frequencies of underselling, the ITC found that domestic prices "would have been substantially higher."[424]

279. In light of these findings and its finding of declines in nearly all of the domestic industry's performance indicators, and after examining other factors to ensure that it did not attribute injury from those sources to subject imports, the ITC concluded that subject imports had a significant adverse impact on the domestic industry. Thus, it determined that the domestic industry in the United States was materially injured by reason of subject imports of DRAM products from Korea that the DOC had found to be subsidized by the Government of Korea.[425]

B. The United States Complied with the Obligations of SCM Agreement Article 15.1, Which Requires the Determination to Be Based on "Positive Evidence" and an "Objective Examination"

280. Korea's assertion that the ITC's injury determination is inconsistent with U.S. obligations under Article 15.1 of the SCM Agreement is incorrect, because that determination was based on positive evidence and an objective examination by the ITC. The ITC set forth in a separate report the findings and conclusions reached on all issues of fact and law considered material by the ITC. The ITC's narrative views and related data tabulations set forth its analysis in more than sufficient detail.[426]

281. Article 15.1 provides that a determination of injury

> shall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products.[427]

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[424] *See, e.g.*, USITC Pub. 3616 at 22-25 (Exhibit GOK-10).
[425] *See, e.g.*, USITC Pub. 3616 at 25-28 (Exhibit GOK-10).
[426] USITC Pub. 3616 (Exhibit GOK-10).
[427] (Footnote omitted.)

As the Panel in *United States – Softwood Lumber* recognized, this provision is substantively identical to Article 3.1 of the *Agreement on the Implementation of Article VI of the GATT 1994* ("AD Agreement").[428]

282. With respect to Article 3.1 of the AD Agreement, the Appellate Body has stated in several reports that "Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect ... [and] informs the more detailed obligations" in the remainder of Article 3.[429] It follows that Article 15.1 of the SCM Agreement is an overarching provision that sets forth a Member's fundamental, substantive obligations and informs the more detailed obligations concerning injury determinations in the remainder of Article 15.

283. Thus, the investigating authority must ensure that its determination of injury, and more specifically, its findings under SCM Agreement Articles 15.2, 15.4, and 15.5, are made on the basis of "positive evidence" and involve an "objective examination." As the Appellate Body has noted, while "positive evidence" involves the facts underpinning and justifying the injury determination, "objective examination" is concerned with the investigative process itself. The Appellate Body has interpreted "positive evidence" as follows:

> The term 'positive evidence' relates, in our view, to the *quality* of the evidence that authorities may rely upon in making a determination. The word 'positive' means, to us, that the evidence must be of an *affirmative, objective* and *verifiable* character, and that it must be *credible*.[430]

The Appellate Body has defined an "objective examination":

> The term 'objective examination' aims at a different aspect of the investigating authorities' determination. While the term 'positive evidence' focuses on the facts underpinning and justifying the injury determination, the term 'objective examination' is concerned with the investigative process itself. The word 'examination' relates, in our view, to the way in which the evidence is gathered,

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[428] *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, Report of the Panel adopted 26 April 2004, para. 7.24 [hereinafter "*United States – Softwood Lumber*"]. We indicate elsewhere in this submission other instances where we agree that the language of specific provisions of the SCM Agreement is similar to language of specific provisions of the AD Agreement such that reports by panels and the Appellate Body concerning the corresponding provisions of the AD Agreement might be informative.

[429] *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, Report of the Appellate Body adopted 5 April 2001, para. 106 [hereinafter "*Thailand - H-Beams*"].

[430] *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, para. 192 (emphasis added) [hereinafter "*US - Hot-Rolled Steel*"]; *Thailand – H-Beams*, para. 106.

> inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word 'objective,' which qualifies the word 'examination,' indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness.[431]

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

> In short, an 'objective examination' requires that the domestic industry, and the effects of [subsidized] imports be investigated in an *unbiased* manner, *without favouring the interests of any interested party*, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an 'objective examination' recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.[432]

284. Applying these standards to the ITC's final determination, it is clear that the determination is based on positive evidence and an objective examination. Although these issues will be discussed in considerably more detail in subsequent sections, we provide a brief overview of the ITC's proceedings and final determination to provide some context for why Korea's allegations that the ITC's determination is not based on positive evidence and an objective examination are so misplaced in this case.

1. The Final Injury Determination is Based on Positive Evidence

285. The ITC's final injury determination is based on positive evidence. The SCM Agreement does not require the investigating authority to identify all factual evidence supporting or detracting from its report. For a final material injury determination, Article 22.3 simply requires "sufficient detail" of the "findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." In its narrative views and accompanying data tabulations, the ITC identified and discussed specific factual evidence supporting its determination, even for some of its most detailed subsidiary findings, as discussed below. The ITC explained why it found some evidence more reliable than other record evidence, and addressed contrary factual arguments.[433] Thus, the ITC's analysis was painstaking, going well beyond the detail required.

286. Significantly, a careful reading of Korea's submission shows that Korea really does not challenge the positive evidence on which the ITC relied, nor does Korea argue that the ITC's

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

[432] *US – Hot-Rolled Steel*, para. 193 (emphasis added).

[433] Indeed, the ITC's determination sharply contrasts with Korea's first submission, which is replete with conclusory statements but notably lacking in citations to evidence that was before the ITC, the evidence cited by the ITC in its determination, or even text from the ITC's determination.

tabulation of record information was done incorrectly. Instead, Korea directs this Panel to look at other evidence and/or asserts that the ITC should have used a different methodology to compile the evidence. In other words, Korea's argument is not about whether the ITC's final material injury determination is based on positive evidence. The evidence supporting the ITC's determination is affirmative, objective, verifiable, and credible. Korea simply implores this Panel to reweigh the evidence in the hope of a different outcome.

2. The ITC Conducted an Objective Examination

287. Korea is also mistaken in its allegation that the ITC failed to conduct an objective examination. In fact, the ITC gathered evidence, made extensive inquiries, and evaluated the evidence in good faith. The ITC's process was fundamentally fair and its investigation proceedings were transparent. To illustrate the fairness and transparency of the ITC's investigation process, we describe that process in detail in Exhibit US-93.

288. The ITC's final determination also reflects the ITC's objectivity. In its first submission, Korea relies on a number of data sets and defines the domestic industry or shipments from a particular source differently depending on the issue. In contrast, the ITC explained its definition of the variables, identified the source of its data, and used consistent definitions and data throughout its final determination. The ITC addressed the injury factors and discussed material factual and legal arguments raised by all interested parties, including those raised by Hynix Semiconductor Inc. and Hynix Semiconductor America. Although Korea makes many allegations in its submission that the ITC "ignored" or "completely avoided" certain facts or arguments, the explicit language of the ITC's determination demonstrates otherwise.

289. Korea also takes issue with the methodologies the ITC used in its analysis. The ITC did not invent new methodologies for the DRAMs investigation. Instead, it applied methodologies that it uses routinely in its investigations. These methodologies have been found by the ITC's reviewing courts to be consistent with U.S. law, and they have never been found inconsistent with U.S. obligations under the SCM Agreement or the AD Agreement. Indeed, the SCM Agreement does not specify any methodologies that are contrary to those used by the ITC. Korea does not allege otherwise.

290. In short, the ITC's investigation was conducted in an unbiased manner, without favoring the interests of any interested party or group of interested parties, and the final injury determination reflects the ITC's objective examination. Korea's contentions that the ITC favored petitioner Micron or the domestic industry or was biased against Hynix Semiconductor Inc. and Hynix Semiconductor America lack any foundation.

C. The ITC's Volume Analysis was Proper

291. Contrary to Korea's assertions, the ITC's conclusions about the significance of the volume of subsidized subject imports from Korea on an absolute basis as well as the increase in

that volume relative to production and consumption, are based on positive evidence and an objective examination. The ITC's analysis of the volume of subsidized imports is also otherwise consistent with U.S. obligations under Articles 15.1 and 15.2 of the SCM Agreement.

1. The ITC's Volume Analysis is Based on Data in Confidential Questionnaire Responses, Not the Various Sources Cited and Miscited in Korea's First Submission

292. At the outset, we emphasize that the ITC made it very clear that it relied on a single consistent set of data from questionnaire responses for its examination of the volume of subsidized subject imports.[434] By contrast, throughout its first submission, Korea refers to a varying set of data sources. For example, for volume figures it refers to: Hynix Marketing Staff data based on WSTS data on global DRAM consumption in billions of bits; Gartner/Dataquest data on market share in "the Americas" on a revenue-basis; data from Hynix Semiconductor America's importer questionnaire response on a shipment value-basis; public data in the ITC's final determination; and "hybrid" data constructed from a mixture of these sources. By selectively using other data sources, Korea repeatedly makes statements in its submission that are completely inconsistent with the data used by the ITC in its injury determination.

293. In one of the more disturbing examples, Korea's submission contains a table identified as figure 9 that purportedly represents "U.S. Market Shares." There are numerous problems with this table, including the following:

* Information for U.S. shipments of domestic producers in that table is based on their share of the U.S. market on a quantitative basis (billions of bits). This information for 2000, 2001, 2002, and interim 2003 is drawn directly from the public version of the ITC's report that summarized information obtained through confidential questionnaire responses.[435]

* With great fanfare, Korea reports that it has obtained the consent of Hynix to make U.S. shipment information public from Hynix Semiconductor America's importer questionnaire response. But, what Korea does not disclose is that the market share information that appears in figure 9 for "U.S. shipments of Hynix subject product," while derived from Hynix Semiconductor America's confidential importer questionnaire response, only reflects commercial shipments of subsidized subject imports by Hynix Semiconductor America, and not total U.S. shipments of subsidized subject imports by Hynix Semiconductor America.

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[434] *See* USITC Pub. 3616 at 20 n.134 (Exhibit GOK-10), where the ITC explained why it was relying on information in the questionnaire responses and why other possible sources of data posed problems.

[435] *See, e.g.*, USITC Pub. 3616 at Table IV-5 (Exhibit GOK-10). Korea's submission also purports to include corresponding information for 1999, although it is apparent that the ITC based its determination on the three-year period 2000 to 2002, plus the first quarter of 2003 ("interim 2003").

* Moreover, what Korea refers to as "U.S. shipments of Hynix subject product" represents Hynix Semiconductor America's commercial shipments on a ***value*** basis as a share of total U.S. shipments on a value basis. Korea's use of value rather than quantity data is another method of artificially reducing the market share of Hynix Semiconductor America. In a countervailing duty investigation involving low-priced sales by subsidized subject imports from Korea, one would expect a value-based market share (even if calculated correctly) to be lower than a quantity-based market share.

* Even more importantly, however, it is ***misleading*** to compare a quantity-based market share figure for domestic shipments with a value-based market share for "U.S. shipments of Hynix subject product." This error is further compounded by the next row of Korea's figure 9 table wherein the quantity-based market share for domestic shipments and the value-based market share for "U.S. shipments of Hynix subject product" are netted from 100 percent to arrive at what the submission refers to as "U.S. shipments of non-subject product." It is simply ***wrong*** to compute the market share for non-subject imports by netting out two variables consisting of entirely different units of measurement.

* Even if the market shares for domestic shipments and what the submission refers to as "U.S. shipments of Hynix subject product" were computed based on the same unit of measurement, it is ***even more troubling*** to imply that when they are netted from 100 percent, the result is the market share attributable to non-subject imports. As a factual matter, Hynix Semiconductor America was not the only importer of subsidized subject merchandise from Korea during the period of investigation. The ITC based its final determination on the questionnaire responses of 30 firms that supplied usable information on their imports of DRAM products, and Hynix Semiconductor America was one of 12 such companies that reported importing subject merchandise from Korea.[436] Because the U.S. shipments of subsidized subject merchandise by the other importers are not taken into consideration in figure 9 of Korea's submission, it is incorrect to imply that the market share numbers in the third row of that figure correspond to non-subject imports, rather than U.S. shipments of non-subject imports **plus** U.S. shipments of subsidized subject imports by importers other than Hynix Semiconductor America.

294. In light of these problems with the data, as presented by Korea, we call attention at the outset to several trends in the data used by the ITC in its final determination:

[436] USITC Pub. 3616 at IV-1, Tables IV-2, IV-4 (Exhibit GOK-10).

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

* Subsidized subject import volume increased over the period of investigation.

* In terms of billions of bits, subsidized subject imports increased between 2000 and 2001 and between 2001 and 2002.

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

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

* Thus, in addition to an increase in subsidized subject imports over the period of investigation in absolute terms, the volume of subsidized subject imports relative to U.S. consumption and relative to U.S. production also increased over the period of investigation.[437]

Although these trends, which are indicative of an increasing volume of subsidized subject imports, are discussed in the public version of the ITC's determination, Korea's submission asserts an entirely different and incorrect set of data trends.[438] For that reason, it is imperative to set the record straight at this juncture.

2. Korea's First Submission Contains Only Selective Confidential Data

295. Along these same lines, we must emphasize that Korea's first submission contains only selective confidential data. Although the Hynix companies submitted a substantial amount of confidential information during the ITC's proceedings, Korea has submitted only a sampling of the information to this Panel. Among other information, Korea has not provided copies of Hynix Semiconductor Inc.'s foreign producer questionnaire responses or Hynix Semiconductor Manufacturing America's domestic producer questionnaire responses. Instead, of all of the confidential data the Hynix companies submitted to the ITC during its proceedings, Korea has submitted to this Panel a **single** document, Hynix Semiconductor America's importer

[437] *See, e.g.*, USITC Pub. 3616 at 20-22 (Exhibit GOK-10); *see also, e.g.*, Hearing Transcript at 243-245 (Exhibit US-94).

[438] For example, Korea's first submission (before para. 96) wrongly contains a sub-heading entitled "the evidence before the ITC demonstrates that Hynix Drams steadily lost market share over the period of investigation."

questionnaire response from the final phase of the ITC's investigation, and **even for this document**, Korea has submitted **only selective** pages. It is paradoxical, for lack of a better term, for Korea to provide to this Panel only certain of the confidential data that the Hynix companies submitted to the ITC and simultaneously accuse the agency of lacking objectivity.

296. As the Appellate Body has recognized regarding the language of Article 3.1 of the AD Agreement:

> [i]n our view, the ordinary meaning of these terms does not suggest that an investigating authority is required to base an injury determination only upon evidence disclosed to, or discernible by, the parties to the investigation. An anti-dumping investigation involves the commercial behaviour of firms, and, under the provisions of the *Anti-Dumping Agreement*, involves the collection and assessment of *both* confidential and non-confidential information. An injury determination conducted pursuant to the provisions of Article 3 of the *Anti-Dumping Agreement* must be based on the *totality* of that evidence. We see nothing in Article 3.1 which limits an investigating authority to base an injury determination only upon non-confidential information.[439]

Thus, it was objective for the ITC to base its injury determination on a review of the entire record, and not just data that could be released in the public version of an opinion.

297. The exact figures underlying the ITC's analysis are not all apparent from the public version of the ITC's determination. Consistent with the U.S. statute, the ITC's regulations, and ITC practice,[440] although the ITC normally treats confidential information aggregated from more than three questionnaire responses as public information, there is a limited exception to this rule. This investigation involves the exception. As explained in An Introduction to Administrative Protective Order Practice in Import Injury Investigations (Third Edition), USITC Pub. 3403 (Mar. 2001) (answers to first frequently asked questions) –

> [t]he ITC has established criteria as to when it will treat as proprietary aggregate business information – that is, information that pertains collectively to more than one company. Aggregate business information pertaining to fewer than three companies normally is always treated as proprietary. Information pertaining to three or more companies normally is treated as publishable, unless two companies account for more than 90 percent of the data, or unless one company accounts for more than 75 percent of the data.

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[439] *Thailand – H-Beams*, at para. 107.
[440] *See, e.g.*, 19 U.S.C. §§ 1677f(a)(4), 1677f(b)-(c); 19 C.F.R. § 207.7.

298. In this particular investigation, 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, throughout 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. In order to protect the confidentiality of the Korean importer data, much of the numeric data discussed in the ITC's volume analysis is not revealed in the public version of the report. As indicated in the ITC's report on page ii, "Information that would reveal confidential operations of individual concerns may not be published and therefore has been deleted from this report. Such deletions are indicated by asterisks."[441] In this submission, when directly quoting portions of the ITC's report involving confidential information, we use the same approach, substituting asterisks ("***") for the confidential data.

299. Korea has voluntarily made certain of Hynix Semiconductor America's confidential data from the ITC's record available to the Panel. We refer the Panel to **Figure US-1**, provided as an attachment to this submission, which summarizes in tabular form some of the confidential information that Korea has provided to this Panel.

300. Nevertheless, for several reasons, we urge the Panel not to rely on the selective confidential information that Korea has provided in this dispute:

* It was only a selective subset of the confidential data that was used by the ITC in its final determination.

* For trends in volume data, the Panel should refer to the public version of the opinion rather than to any trends evident in or derived from any of the data sources submitted by Korea.

* For absolute and relative comparisons, the Panel should not rely on the data provided by Korea based on Hynix Semiconductor America's importer questionnaire response. Although Hynix Semiconductor America was an importer of subsidized subject imports, it was not the only importer of subsidized subject merchandise from Korea during the period of investigation, as noted above.

* For any particular time period, the imports of subject DRAM products by importer Hynix Semiconductor America may be higher than or lower than the volume of subject DRAM products shipped in the U.S. market for that time period.[442]

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[441] USITC Pub. 3616 (Exhibit GOK-10).

[442] There are many (or even a combination of) reasons why, including, *inter alia*: (1) other companies also imported subsidized subject merchandise during the period of investigation; (2) products imported during that period

(continued...)

* For any particular time period, the subsidized subject exports of DRAM products made by Korean producer Hynix Semiconductor, Inc. may be higher than or lower than the total U.S. shipments of subsidized subject imports into the United States reflected in Hynix Semiconductor's importer questionnaire response for that time period.[443]

3. Under the SCM Agreement, There are Multiple Ways to Examine Subsidized Subject Import Volume

301. As noted above, Article 15.1 of the SCM Agreement requires investigating authorities to examine "the volume of the subsidized imports." Article 15.2 further provides, in pertinent part, that

> [w]ith regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member.

This language is substantively identical to the language in the corresponding provisions of Articles 3.1 and 3.2 of the AD Agreement.

302. Therefore, based upon the clear text of Article 15.2, which uses the disjunctive terms "either" and "or," analysis of the volume of subject imports should include consideration of the absolute volume of subsidized subject imports, a significant increase in the volume of subsidized subject imports in absolute terms, a significant increase in the volume of subsidized subject imports relative to production in the importing Member, or a significant increase in the volume of subsidized subject imports relative to consumption in the importing Member.

303. In the DRAMs investigation, the ITC found that the volume of subsidized subject imports was significant and that the increase in that volume absolutely and relative to production and consumption in the United States was significant. That is, the ITC examined volume in each of the ways contemplated by Articles 15.1 and 15.2.

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[442] (...continued)
may have been kept in inventory; (3) products imported during a previous period may have been shipped from inventory; and (4) products imported into the United States may have been re-exported for sale elsewhere.

[443] There are many (or even a combination of) reasons why, including, *inter alia*: (1) other companies also imported subsidized subject merchandise during the period of investigation; (2) transit time; (3) exports to the United States were not actually imported (because, for example, they were transshipped through United States to another destination); and (4) exports to the United States were imported into the United States, but not shipped during the same time period because, for example, they were put in inventory.

304. Korea would have this Panel ignore most of the ITC's analysis and focus solely on whether the increase in subject import volume relative to consumption in the United States was significant; *i.e.*, whether the increase in market share of subject imports from Korea over the period of investigation is significant. Korea even goes so far as to argue that "... the only objective means of assessing the volume impact of subject imports is by examining relative changes in market share."[444]

305. Korea's approach directly contravenes the last sentence of Article 15.2, specifies that "no one or several" of the Article 15.2 factors "can necessarily give decisive guidance." Under the plain language of Article 15.2, there is no requirement that the investigating authority find that the increase in subsidized subject import volume relative to consumption is significant. Korea is thus mistaken that the SCM Agreement requires investigating authorities to find a "significant" increase in market share by subsidized subject imports.

306. Of course, in the DRAMs investigation, the ITC found not only that the increase in subsidized subject import volume relative to U.S. consumption was significant, but also found that the volume of subsidized subject imports was significant both absolutely and relative to production in the United States. Thus, the final determination clearly reflects that the ITC "considered" the relative increase in subsidized subject import volume within the meaning of Article 15.2.

307. In *Thailand – H-Beams*, the Panel observed that Article 3.2 does not require that the term "significant" be used in the determination of an investigating authority to characterize an increase in subject imports.[445] In the investigation at issue in that dispute, the investigating authority did not use the term "significant," but the panel found certain statements indicated that the authorities did consider the "significance" of the increase in imports.[446]

4. The ITC's Finding that the Volume of Subsidized Subject Imports and the Increase in the Volume on an Absolute Basis Was Significant Is Based on Positive Evidence and an Objective Examination

308. Contrary to Korea's assertions, the ITC's analysis of subsidized subject import volume and the increase in subsidized subject imports on an absolute basis is based on positive evidence and an objective examination.

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[444] Korea First Submission, para. 89.

[445] *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, para. 7.161 [hereinafter "*Thailand - H-Beams (Panel)*"].

[446] *Id.*, para. 7.170 ("We note in particular in this regard that the authorities went beyond a mere recitation of trends in the abstract and put the import figures into context.").

309. The ITC found that the volume of subsidized subject imports and the increase in that volume on an absolute basis was significant. The ITC discussed the volume of subsidized subject imports in terms of billions of bits, as a ratio to domestic production, and as a share of apparent U.S. consumption. It found the absolute volume of subsidized subject imports was significant in and of itself. The ITC also examined the increase in subsidized subject import volume over the period of investigation, noting that in terms of billions of bits, the volume of subsidized subject imports increased between 2000 and 2001 and between 2001 and 2002.[447]

310. Tying its volume analysis to the relevant conditions of competition in this industry, and putting the data in context, the ITC explained why subsidized subject import volume was significant stating that its "findings about the volume of subject imports are reinforced by the substantial degree of substitutability between subject imports and domestic shipments," and it noted that "[t]he commodity-like nature of domestic and subject imported DRAM products magnifies the ability of a given volume of imports to impact the domestic market and industry."[448]

311. It is reasonable for an investigating authority to consider substitutability in its volume analysis. Whether the product is fungible and price sensitive, or whether the market is highly differentiated can be relevant in assessing the significance of a given import volume. In fact, as discussed in more detail below, even though non-subject imports had a higher market share and increased their market share by a "substantially larger amount than" subject imports during the period of investigation, non-subject imports were not as substitutable with domestic DRAM products for product mix reasons and were not sold at such low prices as subsidized subject imports. The ITC concluded that subsidized subject import volume and pricing were "themselves sufficient to have a significant negative impact on the domestic industry."[449]

312. In this investigation, the ITC found that subsidized subject imports were highly substitutable for domestic DRAM products.[450] Korea does not contest the high degree of substitutability between subsidized subject and domestic DRAM products.

313. Positive evidence supports the ITC's finding that subsidized subject imports and domestic DRAM products were highly substitutable. As the ITC explained, the degree of substitution

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[447] Other panels have upheld affirmative material injury determinations where the investigating authority examined volume "trends" over a *single* year. *See, e.g.*, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, Report of the Panel adopted 17 November 2000, para. 8.266 [hereinafter "*Guatemala – Cement II*"]. In this investigation, the ITC examined a three-year period plus interim data for 2003, consistent with its practice in other investigations and consistent with, in the AD Agreement context, the Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations adopted on May 5, 2000 by the Committee on Anti-Dumping Practices. G/ADP/6. This is further evidence of the ITC's objectivity in this investigation.

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

[449] *See, e.g.*, USITC Pub. 3616 at 21, 25, 27 (Exhibit GOK-10).

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

between domestic and imported DRAM products depended on such factors as DRAM type (*e.g.*, density, addressing mode), quality (*e.g.*, standards, reliability of supply, defect rates, etc.), and conditions of sale (*e.g.*, price discounts/rebates, lead times between order and delivery dates, payment terms, product services, etc.). DRAMs of similar density, access speed, and variety (regular 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.[451]

314. In light of the high degree of substitutability between subsidized subject imports and domestic DRAM products and the adverse price effects of subsidized subject imports, the ITC reasonably found the volume of subsidized subject imports in this investigation was significant on an absolute basis based on the conditions of competition in this investigation. That is, the ITC analyzed the significance of volume in this investigation in the relevant factual context.

315. Korea also argues that in this industry absolute increases do not matter because with the continual movement in the DRAMs industry to higher densities (*e.g.*, from a 64 Mb to a 128 Mb DRAM), volume, when measured in terms of total bits, increases.[452]

316. The ITC specifically acknowledged in its opinion that "the use of bits as a unit of measurement [could] present difficulties for [its] analysis, as total bits are a function of chip density and product mix, both of which changed over the period of investigation."[453] Although it noted that it did not view the absolute increase in subsidized subject imports in the DRAM market measured in terms of bits the same way it might view the increase of such magnitude in the volume of imports of another product, it explained, in a portion of the opinion omitted from Korea's submission, that it *nevertheless* found the absolute volume of subsidized subject imports and the increase in that volume relative to U.S. production and consumption was "significant."[454] In other words, the ITC discussed Korea's concerns and rejected them.

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[451] *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). 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 and ***." 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, II-1 to II-3 & n.3, II-4 to II-7, Tables II-1 to II-3, V-3 (Exhibit GOK-10).

[452] Korea First Submission, paras. 93-94.

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

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

317. Thus, the ITC reasonably found that subsidized subject import volume was significant on an absolute basis. This analysis was objective and supported by positive evidence, and was otherwise consistent with U.S. obligations under the SCM Agreement.

5. The ITC's Finding that the Increase in the Volume of Subsidized Subject Imports Relative to U.S. Production Was Significant Is Based on Positive Evidence

318. The ITC's finding that the increase in the volume of subsidized subject imports relative to U.S. production was significant is also supported by positive evidence and an objective examination and is otherwise consistent with U.S. obligations under the SCM Agreement.

319. With the continual movement to higher chip densities, production measured in bits would normally be expected to increase. Yet, domestic production of uncased DRAMs, measured in billions of bits, actually declined from 82.6 million in 2000 to 81.2 million in 2001 before increasing to 115.2 million in 2002.[455] At the same time that total domestic production was declining, the ratio of subsidized subject imports to domestic production increased by a confidential magnitude. Indeed, even over the entire period of investigation, the ratio of total subsidized subject imports to U.S. production increased by a confidential magnitude, as did the subsidized subject import ratio to U.S. shipments.[456]

320. Korea does not dispute the ITC's conclusion, based on this factual data, that the increase in the volume of subsidized subject imports was significant relative to U.S. production.[457] Indeed, Korea does not even address this finding in its submission. On that basis, alone, Korea clearly has failed to make a *prima facie* case that the ITC's volume analysis is inconsistent with U.S. obligations under the SCM Agreement.

6. The ITC's Finding that the Increase in the Volume of Subsidized Subject Imports Relative to Apparent U.S. Consumption Was Significant Is Based on Positive Evidence

321. Finally, the ITC's finding that the increase in subsidized subject imports' market share over the period of investigation was significant is based on positive evidence and is consistent with U.S. obligations under the SCM Agreement.

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[455] In terms of 1,000 wafer starts, domestic production declined from 2,659 in 2000 to 2,359 in 2001 and increased to 2,509 in 2002, an overall decline, and was 607,000 in interim 2003 compared to 600,000 in interim 2002. *See, e.g.*, USITC Pub. 3616 at 26 (Exhibit GOK-10).

[456] *See, e.g.*, USITC Pub. 3616 at 15-16, 20-21 & n.138, 26 & n.174, IV-3 (unnumbered table), Table C-1 (Exhibit GOK-10).

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

322. As the ITC noted, apparent U.S. consumption of DRAM products measured in billions of bits increased each year of the period of investigation from 98.8 million in 2000 to 146.7 million in 2001, 186.9 million in 2002, and 55.3 million in interim 2003 compared to 42.8 million in interim 2002. It noted that subject imports' market share increased between 2000 and 2001, then declined between 2001 and 2002, and it noted subject imports' market share in interim 2002 and interim 2003. Notwithstanding the decline in subject market share between 2001 and 2002, the ITC found that subject imports' market share in 2002 was "still significantly higher than in 2000" and that this increase relative to apparent U.S. consumption over the period of investigation was "significant."[458]

323. Subsidized subject imports gained market share between 2000 and 2001 while domestic producers were losing market share. The domestic industry's market share by quantity declined from 43.4 percent in 2000 to 34.3 percent in 2001 and 30.7 percent in 2002, while its market share in interim 2003 was 29.8 percent compared to 30.4 percent in interim 2002. Both subsidized subject imports and the domestic industry lost market share between 2001 and 2002,[459] but during this time of increasing, but slowing demand, subsidized subject imports *maintained* their market position *better than domestic producers*.[460]

324. Korea asserts that the increase in subject import volume relative to apparent U.S. consumption was "small."[461] In addition to using a table (figure 9) that is rife with errors, as shown above, Korea focuses on the percentage-point increase over the period of investigation, ignoring that this was equivalent to an increase in market share of a certain percentage magnitude over the period of investigation.[462] Whether a particular percentage point or percentage increase is significant depends on the circumstances of a particular case and is a factual matter appropriately within the investigating authorities' purview. The ITC analyzed volume in this investigation in terms of the conditions of competition distinctive to this industry. By putting the volume data in context, the ITC reasonably concluded that the increase in subsidized subject import volume relative to apparent U.S. consumption in this investigation was significant in light of the high degree of substitutability of subsidized subject imports and the domestic like product and the price effects of subsidized subject imports.

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[458] *See, e.g.*, USITC Pub. 3616 at 20-21, Tables IV-4, IV-5, C-1 (Exhibit GOK-10).
[459] Domestic producers' market share declined 3.6 percentage points or 10.5 percent during that time.
[460] *See, e.g.*, USITC Pub. 3616 at 20, 21, 24, 26 & n.174, Tables IV-4, IV-5, C-1 (Exhibit GOK-10).
[461] *See, e.g.,* Korea First Submission, paras. 106-108.
[462] *See, e.g.*, USITC Pub. 3616 at Tables IV-4, IV-5, C-1 (Exhibit GOK-10).

a. Korea's Factual Explanation for Why the Increase in the Market Share of Subsidized Subject Imports Is Not Significant Lacks Foundation

325. Repeating an argument made by Hynix during the ITC's proceedings,[463] Korea argues that subject imports increased market share because Hynix's U.S. manufacturing facility in Eugene, Oregon was closed between July 2001 and January 2002 to accelerate a planned upgrade and did not resume significant commercial production until September 2002.[464] Korea would have this Panel believe that, in large measure, the increased subject imports were entering the U.S. market to replace other Hynix-brand products while the Eugene facility was being upgraded.

326. This argument is flawed for many reasons. First, even if this explanation of the circumstances were accurate, it does not detract from the fact that a domestic producer was losing sales to subsidized subject imports. Although Hynix conceded that its U.S. subsidiary was a related party, it argued that appropriate circumstances did not exist to exclude Hynix Semiconductor Manufacturing America from the domestic industry. The ITC ultimately agreed and included Hynix Semiconductor America in the domestic industry.[465] Thus, even if subsidized subject imports were replacing sales of Hynix Semiconductor America, that meant that they were replacing sales of a domestic producer and, *inter alia*, displacing U.S. production workers.

327. More importantly, however, the ITC in its final determination explicitly identified a missing factual predicate to Hynix's argument that explained why, in the DRAMs investigation, any declines in Hynix's Oregon production of DRAM products or in the Hynix-brand U.S. market share were inapposite.[466] The ITC's discussion of this information in its final determination is confidential because it is drawn from confidential data reported in Hynix's questionnaire responses. We refer the Panel, however, to **confidential Figure US-1**, which is appended to this submission and which summarizes some of the confidential information that Korea has submitted to this Panel. The factual problem with Korea's argument is identified in that figure and explained in the text accompanying that figure.

328. Another flaw with Korea's argument is that it is premised on the notion that the ITC should have examined the impact of subsidized subject imports on a "brand-name" basis.[467]

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[463] *See, e.g.*, Hearing Transcript at 11-12, 18-19, 198-200, 243-248, 276-279, 297-298 (Exhibit US-94).

[464] *See, e.g.,* Korea First Submission, paras. 31-32.

[465] *See, e.g.*, USITC Pub. 3616 at 12-13 (Exhibit GOK-10).

[466] *See, e.g.*, USITC Pub. 3616 at 21 n.139, II-2 n.4 (Exhibit GOK-10); Micron's Posthearing Brief, Exh. 2 at 36-37 (Exhibit US-96).

[467] In its submission, Korea continues to rely on volume data from outside sources computed on a brand-name basis, although the ITC explicitly stated that it relied on confidential questionnaire responses, and not the brand-name based sources that Hynix cited before the agency. *See, e.g.*, USITC Pub. 3616 at 20, n.134 (Exhibit GOK-10).

Through a "brand-name" analysis, Korea seeks to "exclude" from subject import volume those imports of subsidized subject DRAM products that it alleges "merely replaced" DRAM products produced by Hynix's Eugene facility.

329. During the course of the agency proceedings, Hynix succeeded in persuading the DOC that Hynix-brand products made in the United States should not be included in the scope of the investigation, but Hynix-brand products made in Korea were in the scope and thus were "subject merchandise."[468] Thus, the Hynix brand included not only DRAM products fabricated in the United States by Hynix's Eugene facility, but also subsidized subject DRAM products.

330. There was more than one brand name of DRAM products being produced in the United States, and some of the brand names of products produced in the United States bore the same brand name as products being produced by non-subject producers outside the United States, such as Samsung, Infineon, and Micron. Thus, the brand names of DRAM products did not indicate their country source, and did not correspond to the relevant inquiry under the SCM Agreement.

331. Article 15.1 of the SCM Agreement directs the investigating authority to base its injury determination on an examination of "the volume of the subsidized imports" and "the consequent impact of these imports on the domestic producers of such products." Likewise, SCM Agreement Article 15.2 explains that with regard to "the volume of subsidized imports," the investigating authority shall consider whether there has been a "significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member," and SCM Agreement Article 15.4 indicates that the relevant inquiry is the "impact of the subsidized imports on the *domestic industry*." (emphasis added).

332. The data used by the ITC in this investigation was consistent with these provisions. First, the data used by the ITC concerned "the volume of the subsidized imports from Korea." Second, the ITC analyzed the significance of the volume of subsidized subject imports and increases in that volume relative to indicators for "the domestic industry." The ITC's use of this data, which was tailored to the relevant inquiry under the SCM Agreement concerning "the volume of the subsidized imports" and "the consequent impact of these imports on the domestic producers of such products," was thus reasonable and objective. Korea fails to demonstrate otherwise.[469]

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[468] *See, e.g.*, Conference Transcript at 73-74 (Exhibit US-95).

[469] There is another distinction between the data relied upon by the ITC in its final determination and the data cited by Korea in its submission. In its submission, Korea refers to some data sources based on global DRAM market share, a brand-name basis, and/or market share in "the Americas" (a region that includes North and South America). On the other hand, the ITC's volume analysis relies on data for subsidized subject imports' market share in the U.S. market, which, again, is the relevant inquiry under the SCM Agreement. In sum, on this point as well as in parts of its first submission, Korea randomly cites to whatever data suits its purposes irrespective of the factual reliability or legal significance of the data or data source.

333. On the facts of the DRAMs investigation, the brand-name approach suggested by Korea would not be consistent with the SCM Agreement. The approach by the ITC in this investigation is consistent with the SCM Agreement and with the approach endorsed in reports by other reviewing panels. As other panels have recognized, investigating authorities have considerable discretion in determining what methodology to apply to examine the volume of subject imports because the SCM Agreement (or the corresponding provisions of the AD Agreement) does not require any particular methodology. For example, in *Thailand – H-Beams*, the panel stated that "it is for the investigating authorities in the first instance to determine the analytical methodologies that will be applied in the course of an investigation, as [the SCM Agreement] contains no requirements concerning the methodology to be used."[470]

334. For all of these reasons, even if Hynix's U.S. production was reduced or the volume of Hynix-brand DRAM products shipped in the U.S. market was declining, the ITC objectively found that subject imports' absolute and relative increase in volume indicated subject imports' significance in the U.S. market, by relying on data concerning "the volume of the subsidized imports" and "the consequent impact of these imports on the domestic producers of such products." Korea's argument that the increase in subsidized subject imports was not significant has no basis in the facts or in the text of the SCM Agreement.

b. The Time Period Examined by the ITC Contained the Time Period for Which the DOC Made Subsidy Findings

335. Korea also argues that "all of the increase in Hynix import market share occurred from 2000 to 2001, *prior to* Hynix receiving the bulk of the alleged subsidies in the 4th quarter of 2001. In fact, the data demonstrate that *after* Hynix received the vast majority of the alleged subsidies, the market share of Hynix's imports actually decreased from 2001 to 2002, and then decreased again from interim 2002 to interim 2003."[471]

336. This argument also has many failings. First, it is incorrect that "all of the increase" in Hynix's market share occurred between 2000 and 2001, because subsidized subject imports' market share in 2002 was significantly greater than in 2000, as the ITC noted.[472]

337. Furthermore, although Korea points to no requirement in the SCM Agreement that this be the case,[473] some of the subsidies that the DOC found benefitted Hynix predated the period for

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[470] *Thailand – H-Beams (Panel)*, para. 7.159 (regarding the parallel provision in AD Article 3.2).

[471] Korea First Submission, para. 107.

[472] *See, e.g.*, USITC Pub. 3616 at 20, Tables IV-4, IV-5, C-1 (Exhibit GOK-10).

[473] Moreover, as one panel has recognized in the AD Agreement context, "the period of review for injury need only 'include' the entirety of the period of review for dumping." *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, Report of the Panel adopted 19 May 2003, para. 7.287 [hereinafter "*Argentina – Poultry*"]. The ITC's injury investigation was based on the period 2000 to 2002, and interim 2003, and included the DOC's period of review for subsidies of January 1, 2001 to June 30, 2002.

which the DOC made its subsidy finding.[474] In its subsidy finding, the DOC determined the applicable subsidy rate by allocating the subsidies received by Hynix to the period January 1, 2001 to June 30, 2002. The fact that the DOC examined the period January 1, 2001 to June 30, 2002 for that purpose does not detract from its finding that Korean producers, and more specifically Hynix and its corporate predecessors, benefitted from subsidy programs, some of which began even prior to the time period the ITC examined in its injury determination.

338. The ITC was aware of these findings. In its final determination, it cited the DOC's findings that the GOK directed credit to the "strategic" Korean semiconductor industry through 1998 and specifically to Hynix and companies that continued to be, or were part of, the Hyundai Group from 1999 through June 30, 2002. The ITC also took note of the fact that the DOC found Hynix uncreditworthy between January 1, 2000 and June 30, 2002, and unequityworthy at the time of the October 2001 debt-to-equity swap.[475] Thus, Korea's argument lacks both legal and factual foundation.

c. The ITC Used Consistent Definitions of Subject Imports, Domestic Shipments and Non-Subject Imports

339. Korea's final challenge to the ITC's volume analysis also lacks merit. Korea asserts that the ITC used "inconsistent definitions of domestic industry, subject imports, and non-subject imports" that "prevented an objective examination of subject import volumes."[476]

340. Korea does not contest the definition of subject imports used by the ITC in this investigation. In light of the DOC's scope determination, the ITC defined subject import shipments as consisting of all DRAM products regardless of density, including cased and uncased DRAMs as well as DRAMs packaged into memory modules and including all DRAM product types, if the DRAMs or DRAM modules were made from subject Korean-fabricated dice (by the Hynix companies), regardless of casing location.[477] Hynix was pleased with this definition because it meant that DRAMs fabricated in the United States in the Eugene, Oregon facility but cased in Korea (since Hynix had no casing facilities in the United States) were not in the scope of the investigation or subject to any eventual countervailing duty order.[478]

341. The ITC defined shipments of "domestic" products to include "DRAMs and DRAM modules made from (1) U.S. fabricated dice, regardless of assembly location, and (2) Samsung Korean-fabricated dice that were assembled in the United States (***), and (3) 3rd-source-

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[474] Indeed, whereas AD Agreement Article 3.4 refers to "the magnitude of the margin of dumping," SCM Agreement Article 15.4 makes no reference to evaluating the subsidy margin.

[475] USITC Pub. 3616 at 19 (Exhibit GOK-10).

[476] *See* Korea First Submission, paras. 115-127.

[477] *See, e.g.*, USITC Pub. 3616 at 4-5, III-5, Table IV-5 at n.2 (Exhibit GOK-10).

[478] *See, e.g.*, Conference Transcript at 73-74 (Exhibit US-95); USITC Pub. 3616 at III-5 (Exhibit GOK-10).

fabricated dice that were assembled in the United States."[479] The ITC defined shipments of "non-subject" imports to include "Samsung Korean-fabricated and 3rd-source-fabricated dice that were not cased in the United States."[480]

342. Korea argues that the ITC should have treated shipments in the U.S. market of DRAMs and DRAM modules that were made from third-source-fabricated dice that were assembled in the United States as shipments of non-subject imports rather than as domestic shipments.[481] Once again, Korea is asking the Panel to find that the ITC was required to use a methodology that is not required by the SCM Agreement and that is internally inconsistent.

343. In contrast, the methodology used by the ITC in this investigation was consistent with the SCM Agreement, internally consistent, and avoided a data errors. As explained above, the ITC, applying its normal six-factor test, examined whether certain production-related activities, if conducted in the United States, were sufficient to warrant treating the companies engaging in those activities as domestic producers.[482] As part of this inquiry, the ITC considered whether assembly of uncased DRAMs into cased DRAMs constituted sufficient production-related activities to include companies that assembled uncased DRAMs into cased DRAMs in the domestic industry. Based on record information, the ITC found that assembly operations involved sufficient production-related activity to constitute domestic production.[483] It noted the absence of any dispute that the output of DRAM assembly operations – cased DRAMs – were part of the domestic like product. In light of its finding that assembly operations were sufficient production-related activities to constitute domestic production, the ITC included companies that assembled DRAMs in the United States in the domestic industry. It treated the output of those operations – cased DRAMs – as shipments of the domestic industry.[484]

344. Korea does not dispute, and neither did Hynix, the ITC's application of its six-factor test to determine what activities were sufficient to warrant treating the companies engaging in those activities in the United States as domestic producers. Korea also does not dispute (and neither did Hynix during the agency's proceedings) the ITC's definition of the domestic industry as those producers that fabricate DRAMs in the United States and those producers that assemble DRAMs in the United States, but not module "packagers" or fabless design houses. In other words, Korea does not challenge the ITC's determination based on Article 16 of the SCM Agreement. Instead, Korea would have the ITC define the domestic industry for certain purposes as "producers of the

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[479] *See, e.g.*, USITC Pub. 3616 at 6-11, 17 n.103, Table IV-5 n.1 (Exhibit GOK-10).

[480] *See, e.g.*, USITC Pub. 3616 at 6-11, Table IV-5 n.2 (Exhibit GOK-10).

[481] For factual reasons, there was never an issue about how to treat any shipments in the U.S. market of DRAM products made from subject dice that might be assembled in the United States. *See, e.g.*, USITC Pub. 3616 at 10 n.48 (Exhibit GOK-10).

[482] *See, e.g.*, USITC Pub. 3616 at 6-11 (Exhibit GOK-10).

[483] *See, e.g.*, USITC Pub. 3616 at 8-11 (Exhibit GOK-10).

[484] *See, e.g.*, USITC Pub. 3616 at 10-11 & n.48 (Exhibit GOK-10).

domestic like product," but then abandon that definition when it comes to calculating industry shipments.

345. However, having found what constituted domestic production, having defined the domestic industry as producers of the domestic like product engaged in those production activities, and having found no basis to exclude any producer from the domestic industry, it was certainly objective for the ITC to have applied the same, rather than a different, definition of the domestic industry for purposes of calculating the shipments of the domestic industry. Including companies in the domestic industry and in turn relying on their compiled financial information for one purpose while applying a different definition of domestic production for purposes of assessing trade data (*i.e.*, U.S. shipments, market share, etc.) would be anomalous.

346. Neither the SCM Agreement nor the AD Agreement directly addresses this particular fact pattern, although both specify that "the term 'domestic industry' shall ... be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products ... ."[485]

347. Other panels have reinforced the importance of this language. For example, in *Mexico – Corn Syrup*, the panel found that Mexico's determination was inconsistent with its obligations under Articles 3.1, 3.2, 3.4 and 3.7 of the AD Agreement, because Mexico defined the domestic industry as all domestic producers of sugar but then "failed ... to assess the question of injury to those producers on the basis of their production of the like product, sugar. Instead, it assessed the question of threat of injury only with reference to that portion of sugar producers' production that was sold in the industrial market, and took no account of the fact that almost half of production was sold in the household market."[486] As the panel explained in that case, "[n]othing in Article 3.6 allows the investigating authority to consider information concerning production of a product sub-group that is **narrower** than the like product produced by the domestic industry."[487] In that case, the Mexican investigating authority "**explicitly stated** that it excluded from its consideration sugar sold in the household market, and limited its examination to sugar sold in the industrial market, despite the fact that it had determined that there was only one like product at issue, sugar, and one industry, cane sugar producers."[488]

348. Likewise, in *EC – Tube*, the panel recalled "that an injury assessment under Article 3.4 deals with the state of the domestic industry as a whole. The *Anti-Dumping Agreement* provides that 'injury' means 'material injury to a *domestic industry*, threat of material injury to a *domestic industry* or material retardation of the establishment of *such an industry*. (emphasis added). The

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[485] SCM Agreement Article 16.1; AD Agreement Article 4.1.

[486] *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, Report of the Panel adopted 24 February 2000, para. 7.154 [hereinafter "*Mexico – HFCS*"].

[487] *Mexico – HFCS*, para. 7.157 (emphasis in original).

[488] *Mexico – HFCS*, para. 7.158 (emphasis in original).

focus of an injury determination is therefore the state of the 'domestic industry.' The domestic industry consists of the producers of the 'like product.'"[489]

349. The approach used by the ITC in this investigation, which defined the domestic industry as companies engaging in domestic production of the domestic like product and applied the same definition throughout the final determination, is thus consistent with the SCM Agreement. Korea does not explain why it believes the approach it advocates is required by the SCM Agreement, and does not succeed in showing that the ITC's approach is inconsistent with the SCM Agreement.[490]

350. The methodology used by the ITC in this investigation was objective because it avoided double-counting data.[491] In investigations such as this one concerning both semi-finished and finished products, there is a risk of double-counting if a product is counted once as a semi-finished product (*e.g.*, uncased DRAMs) and again as a finished product (*e.g.*, as cased DRAMs and/or as DRAM modules). The ITC endeavored to avoid this problem in this investigation. In order to measure U.S. shipments, questionnaire data were aggregated for all commercial shipments and company transfers. Then, to avoid double counting, company transfers of uncased and cased DRAMs that were used by reporting producers of the domestic like product to make the downstream subject DRAM products were netted from that figure. Likewise, if applicable, U.S. shipments were also adjusted for producer purchases of the upstream product destined for downstream production.[492]

351. The fact that the ITC resolved this issue in a way that Korea does not like does not detract from the fact that the ITC thoroughly considered this issue, as reflected, *inter alia*, in the lengthy discussion of it in the final determination.[493] Moreover, as Hynix recognized early in the investigation, the data in this investigation was collected in such a way that it permitted the ITC to resolve this issue in any one of several different ways.[494]

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[489] *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, para. 7.326 (citations omitted) [hereinafter "*EC – Tube (Panel)*"].

[490] By including financial data associated with casing of the product in the United States in the domestic industry but treating shipments of those products made from 3rd-source fabricated dice as non-subject imports, Korea's approach double-counts.

[491] As additional evidence of the ITC's objectivity, as indicated in the final determination, Hynix argued in its prehearing brief filed during the ITC's proceedings that the data compiled and presented in the ITC's prehearing report overstated the volume and market share of subject imports because such data double counted certain cased DRAMs sold by a particular company to another company and the DRAM modules containing such U.S.-purchased cased DRAMs sold by a certain company to its U.S. customers. Domestic producer and petitioner, Micron, disagreed that there was any double-counting. ITC staff followed up on this issue, and identified and netted out in the final report such apparent double-counting. *See, e.g.*, USITC Pub. 3616 at IV-1 n.4 (Exhibit GOK-10).

[492] *See, e.g.*, USITC Pub. 3616 at 17 n.103, Table IV-5 nn.1-2 (Exhibit GOK-10).

[493] *See, e.g.*, USITC Pub. 3616 at 6-11 (Exhibit GOK-10).

[494] *See, e.g.*, Conference Transcript at 117-120 (Exhibit US-95).

352. Finally, the ITC indicated its awareness of the exact amount of shipments that were at issue, explicitly quantifying them in its final determination.[495] In the end, however, even Hynix admitted, and the facts on the record in the final phase of the ITC's record indicated, "the disposition of this issue [did] not have any significant impact on [the ITC's] analysis. Had [the ITC] reached a different conclusion regarding this issue, the net effect would be a somewhat higher level of non-subject import shipments and a somewhat lower level of domestic shipments. The volume, market share, and pricing of subject imports would be unaffected."[496]

353. For all of these reasons, the ITC's methodology, which used the same definitions of domestic industry, non-subject imports, and subject imports throughout the final determination, is objective and otherwise consistent with SCM Agreement Articles 15.1, 15.2 and 15.4.

7. Summary

354. For all of the foregoing reasons, the ITC's analysis of subject import volume on both an absolute and relative basis is based on positive evidence and an objective examination.[497] The ITC considered the volume data in the context of the factual circumstances at issue in this investigation. Korea fails to show why the ITC's volume analysis is inconsistent with U.S. obligations under SCM Agreement Articles 15.1 and 15.2, let alone with SCM Agreement Article 22.3. Moreover, Korea's arguments concerning the ITC's analysis of subsidized subject import volume ignore the ITC's findings, discussed below, of significant underselling and significant price depression by subsidized subject imports.

D. The ITC's Analysis of the Price Effects of Subsidized Subject Imports Is Based on an Objective Examination and Positive Evidence and Is Otherwise Consistent with the Requirements of Articles 15.1 and 15.2 of the SCM Agreement

355. Under Article 15.1, a determination of injury shall be based on positive evidence and an objective examination of "... the effect of the subsidized imports on prices in the domestic market for like products." Article 15.2 elaborates that "[w]ith regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance."

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[495] *See, e.g.*, USITC Pub. 3616 at 10-11 nn.48, 50 (Exhibit GOK-10).

[496] *See, e.g.*, USITC Pub. 3616 at 10-11 & nn.48, 50, 54 (Exhibit GOK-10); Hynix's Posthearing Brief at Exh. 1 at 62 (Exhibit US-108).

[497] Korea's remaining argument concerning non-subject import volumes is addressed below in the discussion of the ITC's causation analysis.

These provisions are substantively identical to the corresponding provisions of Articles 3.1 and 3.2 of the AD Agreement.

356. The ITC's analysis of the price effects in this investigation clearly comports with the approach favored in *Thailand – H-Beams*.[498] In its analysis of subsidized subject imports' price effects, the ITC found "significant" underselling and "significant" price depression by subsidized subject imports. Confirmed lost sales and revenue to subsidized subject imports reinforced its findings.[499]

357. Making only limited challenges to these findings, Korea argues that the ITC should have used a different methodology to ascertain underselling, and asserts that the ITC misinterpreted the lost sales/lost revenue evidence.

1. However Measured, There Was Significant Underselling by Subsidized Subject Imports from Korea

a. The Weighted-Average Analysis Was Based on Representative Data, and the Conclusions Drawn from This Analysis Are Incontrovertible

358. The ITC found significant underselling by subsidized subject imports based on an analysis of eight different pricing products that compared the monthly weighted-average price of domestic shipments with the monthly weighted-average price of subsidized subject imports for each month between January 2000 and March 2003.[500] Korea does not challenge the data underlying the ITC's weighted-average pricing analysis, nor is there any basis to do so.

359. According to domestic producers and importers, virtually all domestic and subject imported products were standard (rather than specialty) DRAM products. The eight pricing products used in the ITC's analysis were standard DRAM products, and all were among those

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[498] The panel in that dispute stated as follows:

> [W]e do not read the textual term 'consider' in Article 3.2, second sentence to require an explicit 'finding' or 'determination' by the investigating authorities that the price undercutting, price depression or price suppression is, in so many words, 'significant.' Nevertheless, we consider that it must be apparent from the documents forming the basis for our review that the investigating authorities have given attention to and taken into account whether there has been significant price undercutting by the dumped imports, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.

Thailand – H-Beams (Panel), para. 7.179.

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

[500] *See, e.g.*, USITC Pub. 3616 at 23-24, V-3 to V-9, Tables V-1 to V-18 (Exhibit GOK-10).

sold in the largest volumes by domestic producers and importers.[501] The pricing data accounted, by value, for approximately 45.9 percent of domestic and 36.9 percent of subject imports' U.S. shipments in 2002.[502] These data are clearly representative.[503]

360. In this investigation, the ITC collected monthly, rather than the quarterly pricing data it ordinarily collects, out of respect for the inherent conditions of competition in this industry in which prices can change frequently, and it collected this pricing data for the three-year period 2000 to 2002 plus interim 2003 that included the period of time examined by the DOC to ascertain the countervailable subsidy rate.[504] Other panels have upheld underselling analyses where investigating authorities based their determinations on data concerning a single year and for time periods that did not necessarily coincide with time period for which the margin of dumping or countervailable subsidy rate was determined.[505]

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

362. For the majority of possible comparisons, subsidized subject imports undersold the domestic like product at high margins (often over 20 percent), and at increasing frequencies (from 51 percent of possible comparisons in 2000 to 56 percent in 2001 and 70 percent in 2002). For cased DRAM sales to PC OEMs, subsidized subject imports undersold the domestic like product in 34 of 91 possible comparisons, for cased DRAM sales to other OEMs, subsidized subject imports undersold the domestic like product in 67 of 128 possible comparisons, and for cased DRAM sales to non-OEMs, subsidized subject imports undersold the domestic like product in 104 of 140 possible comparisons. For module sales to PC OEMs, subsidized subject imports undersold the domestic like product in 57 of 95 possible comparisons, for module sales to other OEMs, subsidized subject imports undersold the domestic like product in 41 of 67 possible comparisons, and for module sales to non-OEMs, subsidized subject imports undersold the domestic like product in 74 of 93 possible comparisons.[506]

363. The ITC also found that underselling was consistent and substantial for particular high-revenue products to particular channels of distribution at specific points during the period of

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[501] The ITC asked questionnaire respondents to segregate their pricing data in terms of the locations where the dice were fabricated and cased, and as a result, questionnaire respondents often had to report multiple pages for *each* pricing product in order to reflect each of the possible factual permutations.

[502] *See, e.g.*, USITC Pub. 3616 at 23, II-8, V-3 (Exhibit GOK-10).

[503] Indeed, one panel has noted that by their very nature, data such as these are objective and verifiable. *EC – Tube (Panel)*, para. 7.274.

[504] *See, e.g.*, USITC Pub. 3616 at V-3 to V-9, Tables V-1 to V-18 (Exhibit GOK-10).

[505] *See, e.g.*, *EC – Tube (Panel)*, para. 7.277; *Guatemala – Cement II*, paras. 8.266, 8.276.

[506] *See, e.g.*, USITC Pub. 3616 at 23-24 & n.164, Tables V-2 to V-17 and V-18 (Exhibit GOK-10).

investigation. For modules, for example, the most significant sales channel was sales to PC OEMs, and here underselling reached 100 percent of all price comparisons by the end of the period examined.[507]

364. The ITC explained that in a commodity-type market which adjusts quickly (even biweekly) to price changes, significant price disparities between suppliers would not usually be expected. Thus, it found the patterns of frequent, sustained high-margin underselling by subsidized subject imports was especially significant in this industry,[508] and could be expected to have particularly deleterious effects on domestic prices.[509]

365. The ITC noted in its price effects analysis the high degree of substitutability between subject imports and the domestic like product,[510] the overlapping customers and channels of distribution to which subject imports and the domestic like product were sold, and the importance of price in this particular industry.[511]

366. Consideration of such industry conditions in evaluating the significance of subsidized subject imports' price effects is entirely appropriate for this shows how the ITC analyzed the underselling in this investigation in the context of the factual record. The panel in *Thailand – H-Beams* recognized the importance of an investigating authority's going beyond a mere recitation of the data and putting the factual data in context.[512] The ITC did just that in this investigation.

b. The ITC's Methodology for Its Underselling Analysis was Reasonable

367. Lacking any basis to dispute the conclusions drawn from the weighted-average pricing analysis, Korea merely asserts that the ITC's weighted-average pricing analysis was "wrong for this industry."[513] However, the fact that Korea would have preferred the ITC to apply a different methodology is simply irrelevant. As other panels have found, it is for the investigating authorities in the first instance to select methodologies to analyze the price effects of subject

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[507] *See, e.g.*, USITC Pub. 3616 at 23-24 & n.155 (Exhibit GOK-10).

[508] In contrast, as discussed infra in the section concerning the ITC's causation analysis, the ITC found that the frequency and level of underselling by non-subject imports was lower than, and increased less than, the underselling frequency of subsidized subject imports between 2000 and 2002. *See, e.g.*, USITC Pub. 3616 at 25 & n.164 (Exhibit GOK-10). That is, contrary to Korea's argument (*e.g.*, at para. 132 of its first submission), the ITC also used the same weighted-average comparison methodology to examine prices in the U.S. market of non-subject imports.

[509] *See, e.g.*, USITC Pub. 3616 at 23-24 & nn.154-55, 164 (Exhibit GOK-10).

[510] On the other hand, although Korea repeatedly states otherwise, non-subject imports were not as substitutable for product mix reasons, *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10), as discussed below in the section concerning the ITC's causation analysis.

[511] *See, e.g.*, USITC Pub. 3616 at 22-24 (Exhibit GOK-10).

[512] *Thailand – H-Beams*, at para. 7.170.

[513] Korea First Submission, para. 149.

imports. Articles 15.1 and 15.2 (like the parallel provisions of Articles 3.1 and 3.2 of the AD Agreement) do not specify any particular methodology to be used in making this analysis.[514] There is no requirement in the Agreement to analyze price effects on a brand-name basis, nor does Korea identify one.

368. As the ITC explained, it was entirely reasonable to analyze the pricing data using a weighted-average pricing analysis that segregated pricing on a country-specific basis, rather than the brand-name analysis advocated by Hynix, and now Korea. Here, as in many investigations, the domestic industry was comprised of multiple producers, each producing its own brand-name products. Moreover, shipments of Hynix-brand products were comprised of shipments of subsidized subject imports as well as domestic shipments. Thus, use of the disaggregated analysis by brand name urged by Hynix would not reflect the source country of the DRAM products and would be utterly inconsistent with the requirement under the SCM Agreement to examine the effect "of the subsidized imports" on the "like product," the product produced by the domestic industry. Korea's disregard for distinctions between subsidized imports and the domestic like product eliminates the *single most basic and fundamental distinction* underlying the injury framework of the SCM Agreement.

369. On the other hand, by comparing the weighted-average price of subsidized subject imports with the weighted-average price of domestic shipments for each time period, the ITC's methodology in this investigation addressed the inquiry posed by Article 15.2 – the assessment of the price effects of the subsidized imports on the domestic industry.

370. Indeed, in some respects, the use of weighted-average comparisons for an underselling analysis benefits companies like Hynix to the extent that shipments of products that oversold the domestic products reduce the weighted-average frequency and magnitude of the underselling margins. In upholding the EC's use of a weighted-average comparison to analyze price effects, the panel in *EC – Tube (Panel)* cited favorably language of a previous (unadopted) panel report under similar provisions of the Tokyo Round Anti-Dumping Agreement, in which the panel found that investigating authorities were not required to make a weighted average to weighted average comparison to calculate underselling. As that panel explained, "to require an investigating authority to base its analysis of undercutting on weighted average margins of undercutting which offset undercutting prices with "overcutting" prices would require the investigating authority to conclude that no undercutting existed when in fact there might be substantial volumes of sales at undercutting prices which might contribute toward material injury suffered by a domestic industry ... ."[515]

371. As was the case in the investigation at issue in *EC – Tube (Panel)*, the methodology employed by the ITC in the DRAMs investigation did "not create undercutting where there [was]

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[514] *See, e.g., EC – Tube (Panel)*, para. 7.284; *Thailand – H-Beams*, para. 7.159.

[515] *EC – Tube (Panel)*, para. 7.280 (citing panel report in *EC – Audio-Cassettes* (unadopted), ADP/136, para. 436-439).

no single incidence of undercutting: rather, it reflect[ed] the undercutting that occur[ed] and the frequency and magnitude of that undercutting."[516] Even based on a comparison of the weighted-average price of subsidized subject import shipments with the weighted-average price of domestic shipments on a monthly basis, the record indicated a high frequency and magnitude of underselling, particularly significant given the conditions of competition in this industry involving a fungible product and an inelastic demand.[517]

372. In its first submission, Korea fixates on the idea of conducting a disaggregated analysis of the pricing data to determine the lowest-priced supplier. For an analysis of which brand-name source was the lowest-priced supplier, transaction-specific (rather than monthly) pricing data would have been more suitable, but there are many transactions in this industry and it would have been too onerous to expect questionnaire respondents to report transaction-specific data for the three-year period usually examined by the ITC. Even in its comments on draft questionnaires for this investigation, Hynix did not ask the ITC to collect transaction-specific pricing data.[518] Other panels have recognized that a transaction-specific analysis, which in many cases would be "impossible or at least impracticable," is not required to assess underselling.[519] In its submission, Korea does not distinguish the facts of this investigation meaningfully from those in other investigations such that the ITC should have applied a different pricing methodology here. The ITC would have been arbitrary had it deviated from this practice without justification. Nonetheless, as noted above, the ITC went beyond its usual approach and collected monthly rather than quarterly pricing information in this investigation.

373. For all of these reasons, the ITC's underselling methodology was reasonable for this industry and consistent with U.S. obligations under the SCM Agreement.

c. Brand-Name-Specific Price Comparisons Are Not Mandatory, But Doing One on This Factual Record Actually Provided Further Support for the ITC's Conclusions

374. Notwithstanding the foregoing, Korea repeats arguments that Hynix raised before the agency that instead of an examination of prices on a weighted-average basis, it preferred a disaggregated analysis of the pricing data on a brand-name basis.[520] In so doing, Korea ignores that the ITC *also examined* the pricing data on a disaggregated basis (broken down both by brand-name and by source). The ITC examined the monthly pricing data it had collected for the

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[516] *EC – Tube (Panel)*, para. 7.279.

[517] *See, e.g.*, USITC Pub. 3616 at 15, 22-25 (Exhibit GOK-10).

[518] *See, e.g.*, Comments on Draft Final Phase Questionnaires by Hynix Semiconductor Inc. and Hynix Semiconductor America (Mar. 24, 2003) (Exhibit US-97).

[519] *EC – Tube (Panel)*, para. 7.276.

[520] Korea First Submission, paras. 145-163. Indeed, because Hynix's counsel had access to the confidential record data in this investigation, they prepared their own disaggregated analysis of the pricing data in support of their request that the ITC do one.

eight "standard" DRAM pricing products on a disaggregated basis (by brand-name by source) on shipments in the U.S. market between 2000 and 2002 and in interim 2003.[521] The ITC found that even a disaggregated analysis showed that subsidized subject imports were the lowest-priced product "*more often than DRAM products from any other source*."[522] (emphasis added).

375. In the ITC's disaggregated analysis of the pricing data, there were eight possible sources of DRAM products,[523] and yet subsidized subject imports were the lowest-priced product more often than any other source, and at a magnitude that was greater than would be expected if each source were the lowest-priced product one-eighth of the time, as might be expected in an industry like this involving a fungible product.[524]

376. Korea proposes a hypothetical in its submission that it asserts helps to illustrate the significance of the ITC's analysis of the pricing data on a disaggregated basis.[525] Korea does not give any reason why its hypothetical has any relevance to the ITC's findings. For example, Korea's hypothetical is predicated on the mistaken assumption that there were only ten sales of DRAM products during the period of investigation, notwithstanding that there were thousands of transactions during the period of investigation. Thus, the hypothetical conveniently overlooks the importance of the fact that subsidized imports from Korea were the lowest-priced source on a disaggregated analysis of the pricing data, notwithstanding that this investigation involved an industry where there were thousands of transactions over the investigation period and where the products for which the pricing data were gathered were highly substitutable for one another.

377. Korea asks this Panel to "instruct the United States to provide the actual confidential 'lowest price' pricing data provided in Table E of the ITC Staff Report."[526] Alternatively, Korea asks that the United Stats "provide a sufficient public summary of this lowest price pricing data so that distinctions between Hynix, non-subject and U.S. producers can be made." Korea fails to demonstrate any basis for this request.

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[521] *See, e.g.*, USITC Pub. 3616 at 24, V-9, Appendix E (Exhibit GOK-10). Its disaggregated analysis was based on the data submitted by Hynix, Infineon, Micron, and Samsung covering U.S. shipments of domestic, subject, and non-subject products.

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

[523] These were subsidized subject imports, shipments of domestic Hynix products, shipments of domestic Micron products, shipments of imported Micron products, shipments of imported Samsung products, shipments of domestic Samsung products, shipments of imported Infineon products, and shipments of domestic Infineon products.

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

[525] Korea First Submission, para. 161.

[526] Korea First Submission, para. 155.

378. Article 12.4 of the SCM Agreement recognizes that "[a]ny information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities." Although SCM Agreement Article 12.4.1 provides that "[t]he authorities shall require interested Members or interested parties providing confidential information to furnish non-confidential summaries thereof" and that these "summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence," the same article, SCM Agreement Article 12.4.1 also provides that "[i]n exceptional circumstances, such Members or parties may indicate that such information is not susceptible of summary."

379. The ITC has already provided a summary of this data in sufficient detail to permit a reasonable understanding of the confidential data. As the ITC stated in its final determination, "We gave only limited weight, therefore, to Tables E-1 through E-5 of the staff report that identify the lowest priced firm in each month by product and channel of distribution. Nevertheless, as these tables indicate, even a disaggregated analysis of the pricing data shows that subject DRAM products from Hynix's Korean facilities were the lowest-priced product *** percent of the time, or *more often than DRAM products from any other source*."[527] (emphasis added). Korea does not even argue that the ITC failed to comply with the requirements of SCM Agreement Article 12 in this context.

380. More importantly, Korea has failed to demonstrate why this information is needed in this dispute. Under Article 13.1 of the DSU, a panel may request such information as the panel considers "necessary" and "appropriate." However, Korea's request does not provide any basis for this Panel to conclude that the confidential information in question meets *either* of the criteria under DSU Article 13.1. As Korea is aware, the role of this Panel is **not** to conduct *de novo* review, but to determine whether the U.S. measure is inconsistent with the SCM Agreement. Korea fails to show why this information is necessary or appropriate given that the ITC has already provided an adequate summary of this data that is sufficiently detailed to permit a reasonable understanding of the information.

381. Korea also questions[528] the ITC's statement that "[s]ubject import prices that are below weighted-average domestic prices can impact the market even when they are not the lowest single price in the market at a given point in time."[529] However, as the ITC explained in its final determination, the market for DRAM products was a commodity-type market that adjusted quickly (even biweekly) to price changes. The existence of most-favored-customer, best-price

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[527] *See, e.g.*, USITC Pub. 3616 at 24 (citation omitted) (Exhibit GOK-10).
[528] Korea First Submission, para. 157.
[529] *See, e.g.*, USITC Pub. 3616 at 24 (Exhibit GOK-10).

clauses, and other informal arrangements and the quick dissemination of information in this industry meant that low prices had an almost immediate impact on the marketplace.[530] Thus, the ITC found that the pattern of frequent, sustained underselling by subsidized subject imports, often at high margins, was especially significant in this market, and could be expected to have particularly deleterious effects on domestic prices.[531]

382. There is certainly no requirement under the SCM Agreement that subsidized subject imports be the lowest-priced product throughout the investigation based on a weighted-average pricing analysis, let alone based on a disaggregated analysis by brand name. Subsidized subject imports, nonetheless, were the lowest-priced product more often than any other source even on a disaggregated basis, and even when not priced lowest, low-priced subsidized subject imports helped purchasers pressure other suppliers on price.[532] Indeed, the plain language of the SCM Agreement contemplates that subsidized subject imports could have adverse price effects even without gaining any market share. No one or several of the SCM Agreement Article 15.2 factors can necessarily give decisive guidance, so there is no requirement that there be any increase in subsidized subject import volume, let alone in terms of market share because, for example, imports can have adverse price effects without gaining market share if they force the domestic industry to lower its prices in order to retain its share of the market. Of course, in this investigation, in addition to frequent and significant underselling, subsidized subject imports increased in absolute volume, increased relative to domestic production, and *also gained market share*.[533]

383. In any event, as the ITC explained, it gave only limited weight to Tables E-1 through E-5 of the staff report that identified the lowest-priced firm in each month by product and channel of distribution.[534] The ITC reasonably found that, even based on a disaggregated pricing analysis, subsidized subject imports were most often the lowest-priced source.

384. Thus, the ITC analyzed the price effects of subsidized subject imports in the factual context of this industry. Its finding that there was significant underselling by subsidized subject imports is based on positive evidence and an objective examination, and is otherwise consistent with U.S. obligations under SCM Agreement Articles 12, 15 and 22.

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[530] *See, e.g.*, USITC Pub. 3616 at 22-23 & n.148 (Exhibit GOK-10); Hearing Transcript at 70-75, 92-96, 98-102, 226-230 (Exhibit US-94).

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

[532] *See, e.g.*, Hearing Transcript at 70-75, 92-96, 98-102, 107-109, 226-230 (Exhibit US-94).

[533] Hynix was known to be a financially troubled company. The fact that purchasers, including manufacturers of computers and other electronics, chose not to rely more heavily on Hynix through much larger purchase volumes over time did not prevent Hynix prices from being used to leverage down U.S. suppliers' prices.

[534] *See, e.g.*, USITC Pub. 3616 at 24 & n.157, Tables E-1 to E-5 (Exhibit GOK-10).

2. The ITC Properly Found that Subsidized Subject Imports Depressed Prices to a Significant Degree

385. The ITC also properly found that subsidized subject imports depressed prices to a significant degree.

386. Specifically, the ITC found that prices for nearly every product and channel of distribution declined substantially over the period of investigation, with prices for subsidized subject imports and domestic DRAM products following the same general trends, including for sales to PC OEMs. 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. As the ITC noted, the record indicated that demand in this industry was relatively price inelastic, so these dramatic price declines were unlikely to generate additional demand. The ITC noted that the price decline in 2001 was the most severe in history, and pricing continued to decline in 2002. Although it acknowledged that slowing demand played some role in the price declines, together with the operation of the DRAMs business cycle and product life cycles, the ITC found that the unprecedented severity of the price declines indicated that supplier competition was an important factor. More specifically, it pointed to the significant quantities of subsidized subject imports that competed in the same product types at increasing frequencies of underselling, and noted that the underselling corresponded with the substantial price decline over this period. Without such significant quantities of low-priced products, the ITC concluded domestic prices would have been substantially higher.[535]

387. Other than its argument that the ITC did not adequately consider other factors in its analysis of the price effects of subject imports, which is addressed below in the section discussing the ITC's causation analysis, Korea does not challenge the ITC's finding that there was significant price depression by subject imports. In other words, Korea appears to concede that positive evidence supports the ITC's finding of significant price depression by subsidized subject imports.[536]

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[535] *See, e.g.*, USITC Pub. 3616 at 15, 22-25, II-9, V-1, Table V-1 (Exhibit GOK-10).

[536] Indeed in somewhat similar circumstances, other panels have upheld the investigating authority's price effects analysis. For example, in *Guatemala – Cement II*, the panel disagreed with Mexico's claim that Guatemalan authority's examination of the effect of dumped imports on the price of domestic sales was inconsistent with Article 3.2 of the AD Agreement. The panel stated that "[b]ased on the evidence of declining prices and inability to achieve established price levels, coinciding with imports at lower prices we find that an objective and unbiased investigating authority could have properly concluded that the dumped imports were having a negative effect on the prices of the domestic industry." *Guatemala – Cement II*, para. 8.276.

3. Confirmed Lost Sales/Lost Revenue Allegations Reinforce the ITC's Findings Concerning Subject Imports' Price Effects

388. Korea asserts that the ITC's analysis of the price effects of the subsidized subject imports in this investigation was not objective, in part because "no customer identified Hynix as the 'price leader.'"[537] Later, however, it acknowledges that the ITC specifically investigated which supplier was considered the "price leader" because question III-25 of the purchasers' questionnaire asked:

> Please list the names of any firms you considered price leaders in the U.S. DRAMs or DRAM modules market during January 2000 - March 2003. A price leader is defined as (1) one or more firms that initiate a price change, either upward or downward, that is followed by other firms, or (2) one or more firms that have a significant impact on prices.

389. Korea mischaracterizes the ITC's findings on this point. Most purchasers did not identify a price leader in the U.S. market, which the ITC observed was "not surprising in a commodity industry characterized by frequent (even biweekly) price changes such as the DRAM product market."[538] At the same time, as the ITC also noted, certain purchasers identified Hynix as a source of low-priced DRAM products, and confirmed that the domestic industry lost sales and/or revenue due to competition from Hynix.[539] Indeed, a Hynix representative admitted during hearing testimony before the ITC that Hynix was sometimes the price leader, stating that "So the one thing I would disagree with is that it's not Hynix who is leading the charge *all the time*."[540] (emphasis added). Thus, the confirmed lost sales and revenue allegations indicated that subsidized subject imports had an impact on the pricing and volume in this industry, and the ITC's reliance on these data to support its findings of underselling and material injury by subsidized subject imports is based on positive evidence.

390. Nonetheless, Korea suggests that evidence of "significant" lost sales and lost revenues is required, asks this Panel to reweigh the evidence, and intimates that there was a need for evidence of Hynix's price leadership.

391. On the contrary, while evidence of lost sales and revenue may be probative on the issue of underselling and causation, the lack of such evidence will not vitiate an investigating authority's determination. Moreover, Korea fails to identify any requirement under Article 15 to find price leadership, because there is no such requirement. The ITC reasonably relied on the evidence it had of lost sales and revenues to support its adverse price effects findings, and the fact that any

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[537] Korea First Submission, para. 132.
[538] *See, e.g.*, USITC Pub. 3616 at 25 (Exhibit GOK-10).
[539] *See, e.g.*, USITC Pub. 3616 at 25, II-5, Table V-19 (Exhibit GOK-10).
[540] *See, e.g.*, Hearing Transcript at 228 (Swanson) (Exhibit US-94).

were confirmed in an investigation of a fungible good is noteworthy, even if Korea would weigh them differently.

392. Indeed, Korea's concession that during the bust phase of the DRAMs cycle the price is determined by the lower cost producers is particularly telling, given the enormous subsidies that the DOC determined that Hynix received. Korea admits that "Hynix at one time may have been a low cost producer."[541] In a feeble attempt to show that Hynix was not the lowest-cost supplier during the period of investigation, Korea asserts that "the evidence before the ITC" showed that Hynix was not.[542] But the only so-called "evidence" that Korea identifies is portions of a document, which Korea concedes in its submission were never even provided to the ITC.[543] Surely Korea does not expect that the ITC could have addressed evidence that was not before it. Indeed, in similar circumstances, panels have refused to consider such evidence on the grounds that the evidence was not made available to the investigating authority during the investigation, and that consideration of the evidence would constitute impermissible *de novo* review.[544]

4. Summary

393. For all of these reasons and notwithstanding Korea's unfounded assertions that the ITC's determination is contrary to "economic logic," the ITC's findings of adverse price effects based on significant underselling by subsidized subject imports and significant price depression by subsidized subject imports are based on positive evidence and an objective examination and the ITC's price effects analysis is otherwise consistent with U.S. obligations under Article15.

E. The ITC's Analysis of the Impact of Subsidized Subject Imports on the Domestic Industry Is Also Based on an Objective Examination and Positive Evidence and Is Otherwise in Accordance with U.S. Obligations Under Article 15.4 of the SCM Agreement

394. Article 15.1 of the SCM Agreement provides that a determination of injury shall be based on positive evidence and an objective examination of "the consequent impact of [the subsidized] imports on the domestic producers of such products." Article 15.4 further explains that,

> [t]he examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential

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[541] Korea First Submission, para. 139.
[542] *Id.*
[543] *Id.*, note 72.
[544] *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, Report of the Panel adopted 1 October 2002, para. 7.21.

> negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments ... . This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

These provisions are substantively identical to the corresponding provisions in Articles 3.1 and 3.4 of the AD Agreement.

395. With regard to AD Article 3.4, the Appellate Body has found that evaluation of all fifteen factors listed in AD Article 3.4 is mandatory.[545] Significantly, however, the Appellate Body also has found that the text of Article 3.4 "does not address the *manner* in which the results of the investigating authority's analysis of each injury factor are to be set out in the published documents."[546] It also noted that "[t]he requirements of 'positive evidence' and 'objective examination' in Article 3.1 of the Anti-Dumping Agreement similarly do not regulate the manner in which the results are to be set out."[547] The same analysis should hold true with respect to Articles 15.1 and 15.4 of the SCM Agreement.

396. It is readily apparent that the ITC's final determination at issue in this dispute more than satisfies the requirements of Articles 15.1 and 15.5 to evaluate the fifteen material injury factors. The ITC collected data on all of the enumerated injury factors. Korea does not argue to the contrary. The wealth of data on the ITC's record concerning injury factors is apparent even by a review of only the public version of USITC Pub. 3616 (Exhibit GOK-10).

397. Korea also does not allege that the ITC failed to disclose the data to the interested parties on which it made its evaluation of these factors or used information that was not on the record to make its determination. Indeed, the Hynix companies had access not only to the public record of the ITC's investigation, but their counsel had access to confidential record information under the terms of an administrative protective order. The tabular compilation of record data that is part of the report of the ITC's final determination (*i.e.*, the Roman numeral-numbered pages of USITC Pub. 3616 (Exhibit GOK-10) that follow the narrative views) was provided to all interested parties, and the confidential version to their counsel under the administrative protective order as a "prehearing" report and then an updated version was circulated as a final report.

398. Nor is this a case where the investigating authority collected or examined certain factors based on certain time periods and other factors based on other time periods, without any

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[545] *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil,* WT/DS219/AB//R, Report of the Appellate Body adopted 18 August 2003, para. 131 [hereinafter "*EC – Tube (AB)*"].

[546] *EC – Tube (AB)*, para. 157.

[547] *EC – Tube (AB)*, para. 158.

objective explanation why.[548] As the ITC indicated throughout its views, the final determination was based on the three-year period 2000 to 2002 and interim 2003, and the report demonstrates that related data was collected for each of those years as well as interim 2002 and interim 2003.[549]

399. Although a "checklist" approach is not required,[550] it is also clear from the text of the ITC's narrative views (not to mention the accompanying data tabulations) that the ITC evaluated the enumerated SCM Agreement Article 15.4 factors.[551] The ITC's evaluation of the specific factor "growth" is also apparent from the final determination. Just as the Appellate Body found was the case with regard to the EC determination at issue in *EC – Tube*, in this investigation, in analyzing other enumerated Article 15.4 factors, including sales, profit, output, market share, employment, wages, profits, return on investment, and capacity utilization, the ITC "traced developments" from 2000 to 2002 and interim 2003, and its examination of data for these factors "touched upon the performance and relative diminution or expansion of the domestic industry." For example, the ITC found that "domestic industry performance, as measured by many of the statutory performance factors, declined over the period of investigation" and discussed trends in the data during the period of investigation for domestic production capacity, domestic production, market share, employment, wages, sales, capacity utilization, profits, and return on investment.[552] The ITC also noted "the slower growth of the industry's domestic sales,"[553] and summarized that "the domestic industry's performance declined over the period of investigation with respect to many indicators, and its financial performance worsened precipitously."[554] Therefore, as was the situation in *EC – Tube*, the "declines" and "losses" that the ITC observed with respect to several of the factors "pointed to a lack of growth." Indeed, Korea does not even allege that the ITC did not evaluate this factor.

400. It is also apparent from the final determination that the ITC evaluated the factors in context, weighed them against one another, and after a thorough evaluation of the state of the domestic industry, the ITC reasonably concluded that the subsidized subject imports had a significant adverse impact on the domestic industry. As the ITC explained, "[d]omestic industry

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[548] For example, in *Argentina – Poultry*, para. 7.283, the Panel found a *prima facie* case of a violation of the Article 3.1 requirement of an "objective" examination when the investigating authority examined different factors using different time periods, and did not demonstrate why the use of different periods was justifiable on the basis of objective grounds.

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

[550] As long as it is implicit from the discussion that an investigating authority has evaluated all of the enumerated injury factors, the investigating authority need not discuss each by name. *EC – Tube (AB)*, paras. 160-161.

[551] *See, e.g.*, USITC Pub. 3616 at 25-26 (explicitly acknowledging the ITC's evaluation of output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, research and development, and factors affecting domestic prices) (Exhibit GOK-10).

[552] *See, e.g.*, USITC Pub. 3616 at 26-27 (Exhibit GOK-10).

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

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

performance, as measured by many of the statutory performance factors, declined over the period of investigation. Average domestic production capacity declined from 3.0 million wafers in 2000 to 2.6 million wafers in 2001 then increased to 2.7 million wafers in 2002, a level that was still less than in 2000, and was 669,000 wafers in interim 2003 compared to 660,000 wafers in interim 2002. Domestic production, as measured by wafer starts in terms of 1,000 wafers declined from 2,659 in 2000 to 2,359 in 2001 and increased to 2,509 in 2002, an overall decline, and was 607,000 in interim 2003 compared to 600,000 in interim 2002."

401. The ITC also found that "[d]omestic industry market share by quantity declined from 43.4 percent in 2000 to 34.3 percent in 2001 and 30.7 percent in 2002, while its market share in interim 2003 was 29.8 percent compared to 30.4 percent in interim 2001. The number of PRWs and hourly wages also generally declined over the period of investigation."

402. The ITC also concluded that "[d]ue to a large decline in unit sales value, a $2.7 billion operating income in 2000 was reversed in 2001 when the industry experienced more than $2 billion in operating losses," and it found that "[t]he domestic industry continued to experience substantial operating losses in the remainder of the period of investigation." The ITC examined operating income as a ratio to net sales, and ascertained that as a ratio to net sales, "operating income was 32.2 percent in 2000 before declining to losses of 79.2 percent in 2001 and 50.8 percent in 2002; operating losses as a share of net sales in interim 2003 were 51.6 percent compared to 17.3 percent in interim 2002." The ITC identified that "[d]uring this time, domestic producers continued to make substantial capital expenditures but at increasingly lower levels, with reported capital expenditures decreasing from $1.8 billion in 2000 to $1.6 billion in 2001 and $*** in 2002; capital expenditures in interim 2003 were $*** compared to $*** in interim 2002."

403. Putting its analysis in context, the ITC concluded that "[i]n sum, the domestic industry's performance declined over the period of investigation with respect to many indicators, and its financial performance worsened precipitously. Declining prices are the primary reason for the industry's large operating losses, and as discussed above, subject imports contributed materially to the steep price declines that occurred over the period."[555] (citations omitted)

404. The ITC explicitly acknowledged that for some of the injury factors, there were positive trends in the data at specific points during the period of investigation. But, it further analyzed the data and explained why, even for factors showing increases, the value of such "improvements" was limited.[556] In the ITC's words:

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[555] *See, e.g.*, USITC Pub. 3616 at 26-27 (Exhibit GOK-10).

[556] Although there are fifteen mandatory factors for the investigating authorities to evaluate, there is no requirement that each of the fifteen factors show declines for an affirmative material injury determination. As the panel stated in *EC – Tube (Panel)*:

(continued...)

> Few factors showed improvement over the period of investigation. The volume of domestic producers' domestic shipments in billions of bits increased from 42.9 million in 2000 to 50.3 million in 2001 and 57.4 million in 2002 and was 16.5 million in interim 2003 compared to 13.0 million in interim 2002.[557]

405. At the same time, the ITC explained that "[i]ncreases in shipments measured in bits are expected given the DRAMs learning curve and do not necessarily indicate healthy industry performance. From 2000 to 2002, the rate of growth in industry shipments (33.9 percent) lagged the growth in U.S. apparent consumption (89.2 percent)." The ITC also acknowledged the following:

> Domestic producers' capacity utilization rate also increased over the period of investigation from 89.7 percent in 2000 to 92.0 percent in 2002, and was 90.7 percent in interim 2003 compared to 90.9 percent in interim 2002. At the same time, however, the record indicates that domestic producers idled certain production capacity during the period of investigation and deferred upgrades and expansions of production facilities and equipment.[558] (citations omitted)

The ITC evaluated the significance of this data, and concluded that "[d]ue to the capital-intensive nature of this industry, we would expect domestic producers to operate at high capacity utilization levels."[559]

406. In evaluating the injury factors, the ITC took into account the conditions of competition and business cycle distinctive to this industry, as evident from the discussion above drawn from the "impact" portion of its opinion, some of the following examples and some discussed further in later sections of this submission.

* For example, in its analysis of subject import volume, the ITC specifically discussed increasing demand, the presence of other suppliers in the U.S. market,

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[556] (...continued)
> [w]e do not find in Article 3.4 a requirement that each and every injury factor, *in isolation*, must necessarily be indicative of injury. Rather, an examination of the impact of the dumped imports on the domestic industry under Article 3.4 includes an evaluation of all relevant economic factors having a bearing on the state of the industry to produce an overall impression of the state of the domestic industry. We therefore examine whether, in light of the *overall* development and interaction among injury indicators collectively, the record data overall would preclude a finding by an unbiased and objective investigating authority that the domestic industry was injured.

EC – Tube, at para. 7.329 (emphasis in original).

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

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

[559] *See, e.g.*, USITC Pub. 3616 at 26 n.175 (Exhibit GOK-10).

and the commodity nature as well as the high substitutability of subject and domestic DRAM products.

* Similarly, in its price effects analysis, the ITC discussed, for example, the global nature of this industry, the high degree of substitutability and overlapping customers and channels of distribution of subject and domestic DRAM products, the presence of other supply sources in the U.S. market, increases in demand but at slower growth rates, the importance of price in this industry, and other factors such as the product life cycle, the business cycle, and increases in capacity that affect price.

* Finally, in its analysis of subject imports' impact on the domestic industry, it discussed, for example, capacity and production increases, idled equipment, deferred upgrades and expansions, the capital-intensive nature of the industry, severe price declines, increasing demand, and the presence of other suppliers in the U.S. market.

407. Indeed, the ITC's evaluation of injury factors and its consideration of the conditions of competition and business cycle distinctive to this industry permeates its entire final determination.[560] In its narrative views, for example, the ITC explicitly incorporated its findings in other sections of its narrative views and frequently cited to the accompanying data tabulations.[561]

408. Korea does not dispute the positive evidence supporting the ITC's conclusions. Instead, Korea only makes two limited arguments regarding the ITC's impact analysis. First, Korea asserts that the ITC did not consider the business cycle in its analysis of the impact of the subsidized subject imports on the domestic industry. The United States addresses and refutes this argument in the discussion of the ITC's causation analysis, below.

409. Second, Korea argues that the ITC should have weighed the factors differently, and asserts that in this industry there are only five key indicia. This argument suffers from two major defects.

410. First, Article 15.4 contains a non-exhaustive list of enumerated factors for evaluation, specifies that no one or several of these factors is determinative, and, as evident in the reports of

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[560] As the panel in *US – Lumber* stated, "[w]e do not mean to suggest that all aspects of the investigating authorities' determination must be entirely contained in the specific parts of the report dealing with particular issues. Certainly, in dispute settlement, a Member may argue the consistency of an anti-dumping or countervailing duty determination based on the entirety of that determination." *U.S. – Lumber*, at para. 7.136.

[561] Indeed, the transcript of the ITC's public hearing further shows the depth with which the ITC examined the SCM Agreement Article 15 factors in this investigation. Some illustrative excerpts from the hearing transcript discussed herein are provided in Exhibit US-94.

other panels and the Appellate Body, it is the investigating authorities that are to weigh the factors in any given investigation, not interested parties or other Members.[562] In addition, while Korea focuses on a select set of criteria, the ITC's final determination reflects evaluation of positive evidence concerning a variety of factors showing changes in the industry's condition, as illustrated above. The ITC evaluated these factors based on the time period from 2000 to 2002 and interim 2003, the same time period it used for its analysis of the volume and price effects of subject imports. Meanwhile, Korea uses different time periods depending on the point that it seeks to make, as illustrated in Figure US-2.

411. At the same time, even the select criteria that Korea asserts are important in this industry[563] showed declines during at least part, if not the entire, period of investigation –

> *Capital expenditures*: As the ITC emphasized, "[t]he cost of a new fabrication facility (and equipment) is estimated to be more than $2 billion, whereas the cost of a new assembly facility is estimated to be approximately $300 million. Both fabbing operations and assembly operations warrant continuing ... capital spending to keep up with the latest product and process developments."[564] Although the domestic industry "continued to make substantial capital expenditures," the ITC expressed its concern that such capital expenditures were "at increasingly lower levels, with reported capital expenditures decreasing from $1.8 billion in 2000 to $1.6 billion in 2001 and $*** in 2002; capital expenditures in interim 2003 were $*** compared to $*** in interim 2002."[565]
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> *Market share*: The ITC evaluated the domestic industry's market share and found that it "declined from 43.4 percent in 2000 to 34.3 percent in 2001 and 30.7 percent in 2002, while its market share in interim 2003 was 29.8 percent compared to 30.4 percent in interim 2002."[566]

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[562] *See, e.g.*, *EC – Tube (AB)*, paras. 160-166.

[563] *See* Korea First Submission, paras. 190-218.

[564] (Citations omitted.)

[565] *See, e.g.*, USITC Pub. 3616 at 9, 16, 27 & n.40, I-8, II-1, II-3, VI-2, Tables VI-4, C-1 (Exhibit GOK-10); Exhibit GOK-44(a) at Question III-8.

[566] *See, e.g.*, USITC Pub. 3616 at 26, Tables IV-5, C-1 (Exhibit GOK-10). Indeed, of the eight companies fabricating DRAM products in the United States in 2000, only four remained at the end of the period of investigation, and all four were suffering large operating losses. Of the four exiting companies, three ceased production of DRAM products at their U.S. facilities altogether, and the fourth sold a fabrication facility to Micron, but poor market conditions caused the idling of all but 5 percent of that plant's capacity. *See, e.g.*, USITC Pub. 3616 at III-1 to III-5 (Exhibit GOK-10).

> *Cash flow*: The domestic industry's cash flow (net operating profit plus depreciation) also declined over the period of investigation.[567]
>
> *Access to capital markets*: Cash flow problems were exacerbated when domestic producers' credit ratings were lowered. For example, the ITC emphasized that Micron's credit rating was lowered in December 2002 by Standard and Poor's and in January 2003 by Moody's.[568]
>
> *Research and development*: The ITC explained the significance of research and development in this industry in that "both fabbing operations and assembly operations warrant continuing research and development ... to keep up with the latest product and process developments." The ITC examined the research and development expenditures of specific companies and by production process, and for the domestic industry as a whole, "R&D expenses decreased from 2000 to 2001 and then increased in each subsequent comparative period."[569]

Thus, even these criteria do not support Korea's assertion that the domestic industry was in a strong condition.

412. Furthermore, although Korea cites bits of data about individual producers in its submission, the ITC examined the domestic industry, as well as the record, as a whole. Article 15.4 specifies that the relevant inquiry is "the impact of the subsidized imports on the domestic industry," and Article 16.1 clarifies that "[f]or the purposes of this Agreement, the term 'domestic industry' shall ... be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products ... ."

413. Other panels have reinforced the importance of this language. For example, in *Mexico – Corn Syrup*, the panel found that Mexico's determination was inconsistent with its obligations under AD Articles 3.1, 3.2, 3.4 and 3.7 wherein Mexico defined the domestic industry as all domestic producers of sugar but then "failed ... to assess the question of injury to those producers on the basis of their production of the like product, sugar. Instead, it assessed the question of threat of injury only with reference to that portion of sugar producers' production that was sold in the industrial market, and took no account of the fact that almost half of production was sold in the household market."[570]

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[567] *See, e.g.*, USITC Pub. 3616 at 26-27, VI-1 n.4, Tables VI-1, C-1 (Exhibit GOK-10); Exhibit GOK-44(a) at Questions III-6.

[568] *See, e.g.*, USITC Pub. 3616 at 27 n.179 (Exhibit GOK-10).

[569] *See, e.g.*, USITC Pub. 3616 at 9, 16 & n.40, Tables VI-4, C-1 (Exhibit GOK-10); Exhibit GOK-44(a) at Question III-8.

[570] *Mexico – HFCS*, para. 7.154.

414. Likewise, in *EC – Tube*, the panel recalled "that an injury assessment under Article 3.4 deals with the state of the domestic industry as a whole. The *Anti-Dumping Agreement* provides that "injury" means "material injury to a *domestic industry*, threat of material injury to a *domestic industry* or material retardation of the establishment of *such an industry*." (emphasis added). The focus of an injury determination is therefore the state of the "domestic industry.' The domestic industry consists of the producers of the 'like product.'"[571]

415. The ITC's impact analysis concerned the domestic industry as a whole, and thus is consistent with the requirements of SCM Agreement Articles 15.5 and 16.1.

416. In any event, Korea's specific arguments about individual domestic producers are also flawed. For example, some of the data that Korea cites in its submission pertains to the global DRAMs market or the global operations of Micron or Infineon, not just their U.S. operations or their DRAMs operations. The ITC's impact analysis focused on the domestic industry's performance in the U.S. market and on its operations concerning DRAM products, as opposed to other products. With respect to the excerpts from public statements by Micron and Infineon to the financial community that were submitted by Hynix during the ITC's investigation, when read in context, these statements supported, rather than detracted from the ITC's findings in this investigation. Korea uses two randomly selected quotations from Micron as evidence of how the domestic industry itself purportedly assesses its condition. Neither statement, however, establishes or was intended to suggest that the identified factors show that Micron or the domestic industry did not suffer injury. Rather, they show that, because of good management practices, Micron expected to survive, despite the significant injury it had suffered.[572] Thus, Korea is simply mistaken that the ITC "failed to confront seriously the evidence contrary to its conclusion." This evidence was not "contrary" to its conclusion.

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[571] *EC – Tube (Panel)*, para. 7.326.

[572] For example, Korea is mistaken in its assertion that public statements by company officials were a more accurate reflection of their performance in the U.S. market for DRAMs products. The factual predicate for this argument is Korea's assertion that three of the four companies produce little else other than DRAMs, so statements about how they were doing were in fact statements about how their DRAM businesses were doing. For instance, Infineon's operations span a variety of areas, from communications, to automotive electronics, to security chip cards, to memory products, and include production of products outside the United States. Infineon North America's U.S. sales of DRAM products are only a portion of Infineon's total worldwide sales. Contrary to Korea's assertions, therefore, statements by Infineon AG about its overall company operations are not evidence pertaining to its U.S. DRAMs operations, which were the operations relevant to the ITC's inquiry in this case. *See, e.g.*, Infineon's November 27, 2002, Postconference Brief at 7 (Exhibit US-98). Likewise, the public statements that Korea cites, when read in full context supported, rather than detracted, from the ITC's findings. *See, e.g.*, Micron's November 27, 2002 Postconference Brief at 27-30 (providing point-by-point examples) (Exhibit US-99); Micron's Posthearing Brief at Exhibits 5, 6 (Exhibit US-96).

Moreover, Korea asserts that during the period of investigation, Micron "began exploring a possible acquisition of Hynix," *see* Korea First Submission, para. 53, note 121, but as Micron explained in response to a question from Commissioner Koplan at the ITC's hearing, it was Hynix that approached Micron about purchasing Hynix. *See, e.g.*, Hearing Transcript at 113-114 (Exhibit US-94).

417. For all of these reasons, based on its evaluation of the factors in context, its weighing of the factors against one another, and after thoroughly evaluating the state of the domestic industry, the ITC reasonably concluded that subsidized subject imports had a significant adverse impact on the domestic industry, and its evaluation of the SCM Agreement Article 15.4 factors was based on positive evidence and an objective examination.

F. The ITC's Causation Analysis Is Also Based on Positive Evidence and an Objective Examination and Is Otherwise in Accordance with U.S. Obligations Under Articles 15.1 and 15.5 of the SCM Agreement

1. The Pertinent Provisions of the SCM Agreement

418. Article 15.1 of the SCM Agreement requires that the final determination shall be based on "positive evidence" and an "objective examination," of the volume of the subsidized imports, their price effects, and their impact on the domestic industry. The authority's obligation to examine these factors is further specified in Articles 15.2 and 15.4. In addition, Article 15.5 provides as follows:

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

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.

419. Thus, in ascertaining whether there is a "causal relationship" between subsidized imports and injury to the domestic industry in countervailing duty investigations, authorities must examine several factors. They must demonstrate a causal relationship between the subsidized imports and the injury to the domestic industry based on an examination of all relevant evidence before the authorities. The authorities also must examine any known factors other than the

subsidized imports which at the same time are injuring the domestic industry to ensure that injury caused by these other factors is not attributed to the subsidized imports.

420. As discussed above, evaluation of the enumerated "factors" in Article 15.4 is *mandatory* to the extent that Article 15.4 states that the "examination of the impact of subsidized imports on the domestic industry *shall* include" (emphasis added) those factors. In contrast, there is no such requirement to evaluate each or any of the factors referenced in the last sentence of Article 15.5 in every countervailing duty investigation. As the panel found in *Thailand – H-Beams* regarding the parallel provision in 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."[573]

421. The Appellate Body has explained that in order for the "known factors" obligation to be triggered, 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."[574] Regarding whether a factor is "known" to the investigating authority, the panel in *Thailand – H-Beams* found that other "known factors" would include factors "clearly raised before the investigating authorities by interested parties in the course of an AD investigation." It explained that investigating authorities are not required to seek out such factors on their own initiative.[575]

422. Consistent with this logic, it is apparent from other panel reports that there is no requirement to collect detailed information concerning "other factors," including non-subject imports. 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.[576]

2. Additional Requirements Indicated in Reports of the Appellate Body

423. Korea's arguments concerning the ITC's causation analysis in this investigation are predicated largely on Appellate Body reports issued in the context of the *Agreement on Safeguards* ("Safeguards Agreement"). These are not useful in examining causation in a

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[573] *Thailand – H-Beams (Panel)*, para. 7.231
[574] *EC – Tube (AB)*, para. 175.
[575] *Thailand – H-Beams (Panel)*, para. 7.273.
[576] *EC – Tube (Panel)*, para. 7.389.

different type of investigation governed by a different agreement with a different object and purpose.

424. The injury inquiry in a countervailing (and antidumping) duty investigation has many critical distinctions from an inquiry in a safeguards investigation. In a countervailing duty investigation, an affirmative determination of "material injury" is based on an examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on the domestic producers of such products.[577] In a safeguards investigation, the standard is whether the product is being imported into the Member's territory "in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces the like or directly competitive products."[578] "Serious injury" is defined under Article 4.1(a) of the Safeguards Agreement as "a significant overall impairment in the position of a domestic industry." As the Appellate Body emphasized in *US – Lamb Meat*, "serious injury" is a much higher standard than "material injury".[579] The "causal relationship" of the SCM Agreement is thus different from the "causal link" requirement of the Safeguards Agreement.

425. Therefore, there is no basis for importing a causation standard associated with a "serious" injury requirement into a countervailing duty investigation, which is governed by a "material" injury requirement. It bears repeating that, as the Appellate Body emphasized in *U.S. – Lamb Meat*, "serious injury" is a much higher standard than "material injury."

426. The United States recognizes that the Appellate Body, when interpreting the language concerning the investigating authorities' obligation in antidumping duty investigations not to attribute injury caused by other factors to the subject imports, has referenced the Safeguards Agreement, as well as other reports reviewing determinations of competent authorities under the

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[577] In turn, Article 15.2 of the SCM Agreement specifies that investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member and whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress or suppress prices to a significant degree. Article 15.4 provides a non-exhaustive list of factors, no one or several of which necessarily give decisive guidance, that the investigating authority shall examine concerning the impact of the subsidized imports on the domestic industry.

[578] Safeguards Agreement Article 2.1.

[579] 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 ... ." *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, para. 124 (citations omitted) [hereinafter "*US – Lamb Meat"*].

Safeguards Agreement. The United States contends that in the DRAMs investigation, the ITC met the standards articulated by the Appellate Body in those other reports.

427. The Appellate Body has stated: "in order to comply with the non-attribution language in [AD Agreement Article 3.5], 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."[580] To comply with this obligation, 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."[581]

428. Even in the context of reviewing safeguards determinations, 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.[582] Nor is there any such requirement in Article 15 of the SCM Agreement. Likewise, the Appellate Body in *U.S. – Wheat Gluten* found that the causation requirement of the Safeguards Agreement can be met where serious injury is caused by the interplay of increased imports and other factors.[583]

429. Moreover, 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."[584]

430. As a result, it does not matter where in an investigating authority's determination the causation arguments are addressed. The SCM Agreement does not specify how a final determination is to be organized, let alone where the causation analysis must take place.[585]

431. Korea fails to identify any requirement in the plain text of the SCM Agreement to support its argument that the investigating authority is to "take the added step of examining other factors to ascertain their role in injury to the domestic industry" in order to "isolate" subject imports or the effects of the subject imports and other known factors on the domestic industry. Indeed, the

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[580] *EC – Tube (AB)*, para. 188 *quoting US – Hot-Rolled Steel*, para. 226.

[581] *US – Hot-Rolled Steel*, para. 226.

[582] *See, e.g.*,*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, paras. 70, 79 [hereinafter "*US – Wheat Gluten*"]; *U.S. – Lamb Meat*, paras. 165-170.

[583] *U.S. – Wheat Gluten*, at paras. 67-68.

[584] *EC – Tube (AB)*, para. 189, relying on *US – Hot-Rolled Steel.*

[585] *See, e.g., EC – Tube (Panel)*, at para. 7.405.

relevant language of Article 15.5 (and of Article 3.5 of the AD Agreement) is substantively identical to language in Article 3:4 of the Tokyo Round Anti-Dumping Code.

432. In a report concerning Article 3:4 of the Tokyo Round Anti-Dumping Code, the panel found that there was no requirement to "isolate" the effects of other possible causes of injury from the effects of the subject imports. As the panel found in that dispute, under Article 3:4 of the Tokyo Round Anti-Dumping Code, the investigating authority was to ensure that it did not attribute injury from those sources to subject imports, and the focus was "not on a precise indication of the extent of injury caused by these possible other factors."[586] In elaborating that the non-attribution obligation did not further require either a quantification of the injury from these various sources or an isolation of the injury caused by the dumped imports, the panel explained that:

> this did not mean that, in addition to examining the effects of the imports under Articles 3:1, 3:2, and 3:3, the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway. Rather, it meant that the USITC was required to conduct an examination sufficient to ensure that in its analysis of the factors set forth in Articles 3:2 and 3:3 it did not find that material injury was caused by imports from Norway when material injury allegedly caused by imports from Norway was in fact caused by factors other than these imports ... ."[587]

433. In *US – Hot-Rolled Steel*, the Appellate Body rejected the reliance of the panel in that dispute on *US – Atlantic Salmon* to the extent that *US – Atlantic Salmon* stood for the proposition that an investigating authority need not "identify" the injury caused by other factors.[588] However, neither in *US - Hot-Rolled Steel* nor in subsequent reports has the Appellate Body found any requirement for the investigating authority to "isolate" the injurious effects of the unfair imports. Instead, the standard articulated has been whether the investigating authorities provided a satisfactory explanation of the nature and extent of the injurious effects of those other factors, as distinguished from the injurious effects of the unfair imports.

3. The ITC's Causation Analysis

434. In the DRAMs investigation, the ITC integrated the causation discussion and its discussion of how it ensured that it did not attribute material injury from other factors to the subject imports into its analysis of the volume, price effects and impact of subject imports. While this approach is not required by the SCM (or the AD) Agreement, it is certainly consistent

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[586] *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, Report of the Panel adopted 27 April 1994, para. 552 [hereinafter "*U.S. – Atlantic Salmon*"].

[587] *Id.*, para. 555.

[588] *US – Hot-Rolled Steel*, para. 228.

with the Agreement, and Korea fails to show otherwise. The ITC did not analyze causation issues in a vacuum, but analyzed them in context to determine whether there was a causal relationship between subject imports and the material injury experienced by the domestic industry and to ensure that it did not attribute injury from other factors to the subject imports.

435. The ITC's final material injury determination demonstrated that there was a causal relationship between the subject imports from Korea and the material injury to the domestic industry. The ITC's analysis is based on an examination of all relevant evidence before it. The causation analysis in the ITC's final injury determination, therefore, is consistent with the requirements of Articles 15.1 and 15.5.

436. In its arguments concerning the ITC's causation analysis, Korea continues to make many of the same discredited arguments already addressed above. For example, Korea insists that the volume of the subsidized imports from Korea (or their market share) declined over the period of investigation, even though that was not the case. Korea repeats its arguments about the methodology used by the ITC to analyze price effects, and misstates or ignores the results of that analysis. It ignores much of the ITC's evaluation of the impact of subject imports, and seeks to have this Panel reweigh other evidence. Korea continues its practice of citing an ever varying set of data sources and time periods. Korea questions why the ITC relied on the same time period throughout its determination (2000 to 2002 and interim 2003), regardless of the issue, even though it was objective to do so, and even though no party, including Hynix in its comments on the draft final phase questionnaires issued in the investigation, ever asked the ITC to collect data covering a broader time period. Korea's arguments go well beyond hyperbole, contending at every turn that the ITC "put on blinders," "ignored," "refused to consider," "provided no or insufficient analysis," and "failed to confront" various factual arguments. Notwithstanding Korea's rhetoric, in its final determination, the ITC clearly evaluated and addressed these arguments, as is evident from the plain language of the determination.

437. As demonstrated in the ITC's final determination and discussed in more detail in preceding sections, subsidized subject imports were in the U.S. market at volumes that were significant both on an absolute basis and relative to apparent U.S. production and consumption. On an absolute basis, subsidized subject imports were significant compared to domestic production, were an even higher ratio compared to U.S. shipments of DRAM products, and had significant market share throughout the period of investigation. Notwithstanding continual movement to higher densities, domestic production, however measured, declined between 2000 and 2001 and was lower in 2002 than in 2000; domestic producers lost market share throughout the period of investigation. The ratio of subsidized subject imports to domestic production increased between 2000 and 2001, and over the entire period of investigation (*i.e.*, between 2000 and 2002). Subsidized subject imports gained market share between 2000 and 2001 while the domestic industry was cutting production and losing market share and after removal of the

antidumping duty order on subject imports from Hynix's corporate predecessors.[589] Even between 2001 and 2002 when the rate of growth of apparent U.S. consumption slowed, subsidized subject imports maintained market share better than the domestic industry.[590]

438. The substantial degree of substitutability between subsidized subject imports and domestic shipments reinforced the ITC's conclusions concerning the volume and price effects, and magnified the ability of a given volume of subsidized subject imports to impact the domestic market and industry. Throughout the period of investigation, Hynix produced many of the same product densities of the same product type as domestic producers. The standard DRAM products subsidized by Korea and produced by the domestic industry were sold largely to the same customers and through the same channels of distribution.[591]

439. The ITC evaluated underselling using representative pricing data for eight large-volume standard DRAM products, and determined that underselling by subsidized subject imports was significant. Based on weighted-average price comparisons, subsidized subject imports undersold the domestic like product at high margins (often greater than twenty percent), at frequencies that increased from 52 percent of comparisons in 2000 to 70 percent in 2002. The underselling was significant for sales of both cased DRAMs and DRAM modules regardless of the distribution channel (PC OEMs, other OEMs, and non-OEMs). Indeed for sales to non-OEMs, which were the most significant purchasers of cased DRAMs, subsidized subject imports undersold the domestic like product in 104 of 140 possible comparisons, and for module sales to PC OEMs, which were the most significant purchasers of DRAM modules, subsidized subject imports undersold the domestic like product in 57 of 95 possible comparisons. There was also consistent and substantial underselling for high-revenue products to specific distribution channels. Even based on a disaggregated pricing analysis, subsidized subject imports were the lowest-priced more often than any other source.[592]

440. The ITC evaluated the underselling and found it particularly significant in light of the conditions of competition in the DRAMs industry. In this industry, purchasers bought products under contracts from multiple sources using contracts that generally did not specify price and quantity, but might specify the percentage of overall purchases or a range of overall purchases awarded to a supplier. Prices were negotiated and purchase shares allocated for fairly short

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[589] The ITC examined the change in subject import volume since filing of the countervailing duty petition and determined the change was related to the pendency of the investigation, a conclusion it noted was not inconsistent with record data showing an increase in subject import volume between 2000 and 2001, after the October 5, 2000, revocation of the previous antidumping duty order on DRAMs from Korea. *See, e.g.*, USITC Pub. 3616 at 21, Table IV-3 (citing Hynix's Posthearing Brief at Exh. 1 at 17) (Exhibit GOK-10); *see also, e.g.*, Micron's Posthearing Brief at Exh. 1 at 29-31 (containing a letter from Hynix to its customers warning them of likely countervailing duties and reassuring them of Hynix's intention to embed its DRAMs on PC motherboards or, alternatively, to "drop ship" the DRAMs to offshore locations "to avoid such duties.") (Exhibit US-96).

[590] *See, e.g.*, USITC Pub. 3616 at 20-21 (Exhibit GOK-10).

[591] *See, e.g.*, USITC Pub. 3616 at 21-23 (Exhibit GOK-10).

[592] *See, e.g.*, USITC Pub. 3616 at 23-24 (Exhibit GOK-10).

periods of time (including for intervals of one week to three months), often two weeks. Purchasers and producers were aware of competing prices, and the existence of most-favored customer and best price clauses, as well as more informal arrangements, meant that low prices offered by one supplier affected other suppliers' market prices, particularly as purchasers changed the share allocated to suppliers frequently. The ITC evaluated the underselling in light of these conditions of competition in a commodity-type market which adjusts quickly to price changes, and concluded that the patterns of frequent, sustained underselling by subsidized subject imports, often at high margins, were especially significant.[593]

441. Subsidized subject imports depressed prices to a significant degree, with prices for nearly every pricing product and channel of distribution declining substantially over the period of investigation. 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 evaluated the increasing frequency of underselling by subject imports from 2000 to 2002 and determined that the underselling corresponded with the substantial decline in U.S. prices over these same years. Based on this evaluation, the ITC concluded that "[i]n the absence of significant quantities of subject Korean product competing in the same product types at relatively low prices, domestic prices would have been substantially higher."[594]

442. The domestic industry's performance declined over the period of investigation with respect to many indicators, and its financial health worsened precipitously. The ITC determined that declining prices were "the primary reason" for the industry's large operating losses and its conclusion that "subject imports contributed materially to the steep price declines that occurred over the period." The ITC based its decision on the drastic deterioration in the domestic industry's condition that occurred after the 2000 and the role that subject imports played in that deterioration. Given its conclusions about the significant absolute and relative volume of subject imports, its conclusions of significant underselling and price depression by subsidized subject imports, and its evaluation of the declines in nearly all of the domestic industry's performance indicators, the ITC concluded that subsidized subject imports were having a significant adverse impact on the domestic industry producing DRAM products.[595]

443. Therefore, in its final determination in this investigation, the ITC clearly analyzed trends in both injury factors and the volume and price effects of the subsidized subject imports. The ITC evaluated the rate (direction and speed) and amount (volume) of the subsidized subject imports as well as the relative increase in the volume of subsidized subject imports. The ITC also evaluated the rate and extent of underselling and price depression by subsidized subject imports. It also examined changes in the injury factors in reaching its conclusion as to injury and causation. More specifically, the ITC explored the relationship between the factors indicative of

[593] *See, e.g.*, USITC Pub. 3616 at 22-24 (Exhibit GOK-10).
[594] *See, e.g.*, USITC Pub. 3616 at 24-25 (Exhibit GOK-10).
[595] *See, e.g.*, USITC Pub. 3616 at 25-27 (Exhibit GOK-10).

the volume and price effects of the subject imports and the movements in injury factors. This evaluation was central to its causation analysis and determination. The ITC demonstrated an "overall" temporal relationship or coincidence between the subsidized subject imports and the material injury of the domestic industry, and in demonstrating a causal link between the subsidized subject imports and the injury to the domestic industry, the ITC evaluated the relevant factors in the context of the business cycle and conditions of competition distinctive to this industry. As shown below, the ITC also established explicitly in clear and unambiguous terms that the injury caused by factors other than subject imports was not attributed to subject imports.

4. The ITC's Examination of Factors Other than Subsidized Subject Imports

444. The ITC also examined other factors to ensure that it did not attribute injury from those factors to subject imports.

a. The ITC Examined Non-Subject Imports

445. Although Korea would have this Panel believe that the ITC completely disregarded the absolute and relative increase of non-subject imports, the ITC evaluated the presence of non-subject imports, determining that non-subject imports were in the U.S. market throughout the period of investigation and at absolute volumes that were higher than subsidized subject imports.[596] The ITC also recognized that some domestic producers were responsible for some of the non-subject imports.[597]

446. 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."[598]

447. 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.[599]

448. First, the ITC determined after examining the composition of non-subject imports that a significant portion of non-subject imports were Rambus and specialty DRAM products for which

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[596] *See, e.g.*, USITC Pub. 3616 at 21, 25, 27, Tables IV-4, IV-5, C-1 (Exhibit GOK-10).

[597] *See, e.g.*, USITC Pub. 3616 at 6, 10-11, 17, 18 (Exhibit GOK-10).

[598] *See, e.g.*, USITC Pub. 3616 at 21, Tables IV-4, IV-5, C-1 (Exhibit GOK-10). As explained above in the discussion of the volume of subject imports, the tables that Korea cites (*e.g.*, figure 9) to illustrate market share is replete with errors and should be disregarded.

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

domestic producers had no significant production during the period of investigation.[600] 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, non-subject imports were not as substitutable with subject or domestic DRAM products for product mix reasons. In the questionnaires issued in this investigation, the ITC collected information on the percentage of imported products and U.S. shipments of DRAM products in 2002 that were "standard" DRAM products, Rambus DRAM products, and other "specialty" DRAM products.[601] In addition to examining the data compiled from questionnaire responses, Commissioners questioned witnesses at the hearing about the extent to which non-subject imports were Rambus and other "specialty" products.[602] Indeed, before the agency, Hynix itself, in a joint submission filed with Korean producer Samsung, 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, were not interchangeable with, and thus did not compete with products made by U.S. producers. Therefore, they argued, imports of Samsung's Rambus, specialty, and leading edge DRAM products could not have materially injured the domestic industry.[603] It was reasonable for the ITC to rely on the detailed information collected by the ITC in this investigation concerning product mix issues and the level of substitutability among products from various sources as well as the statements of Korean producers Samsung and Hynix made during the ITC's proceedings. Thus, the ITC's conclusion of more limited substitutability between non-subject imports on the one hand and domestic shipments and subsidized subject imports on the other was based on positive evidence and an objective examination.

449. 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 do not collect *any* pricing data on non-subject imports, the ITC collected pricing data on non-subject imports in this investigation.[604] According to that pricing data, while the frequency with which non-subject imports undersold domestic-produced DRAM products increased between 2000 and 2002, the underselling frequency by non-subject imports was lower than, and increased less than, the underselling frequency of subsidized subject imports

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

[601] Importers were asked to report the portion of their U.S. shipments in 2002 that were Rambus 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)); USITC Pub. 3616 at II-6 to II-7 (Exhibit GOK-10). Indeed, Hynix, itself, argued that to its knowledge, no domestic producers were capable of producing Rambus DRAMs and that only Korean producer Samsung had such production capability. *See, e.g.*, USITC Pub. 3616 at II-7 (Exhibit GOK-10).

[602] *See, e.g.*, Hearing Transcript at 49-50, 80-85, 91-92, 168-175, 258-260 (Exhibit US-94).

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

[604] In that regard, we note that the ITC's investigative process in this investigation went well beyond that upheld in *EC – Tube (Panel)*, at para. 7.389, wherein the panel found that the EC's examination of Eurostat data which could not be segregated into the specific category of products at issue in that case, was sufficient.

between 2000 and 2002. 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.[605] 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.[606] 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.[607] In other words, contrary to Korea's claims (*e.g.*, at paras. 250-263) that it "ignored" the prices of non-subject imports, the ITC evaluated non-subject imports in its analysis of the price effects of subsidized subject imports, and based on a weighted-average and a disaggregated analysis, it ascertained that there was significant underselling by subsidized subject imports and that subsidized subject imports were the lowest-priced more often than DRAM products from any other source.[608]

450. Thus, the ITC reasonably found that the more limited substitutability of non-subject imports coupled with the fact that non-subject imports undersold domestic DRAM products at lower frequency than subsidized subject imports did, indicated that non-subject imports had less impact than their absolute and relative volumes might otherwise have indicated.

451. Moreover, it also found that, while non-subject imports' market share grew, the "primary negative impact" on the domestic industry was due to lower prices.[609] 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.[610]

452. Thus, contrary to Korea's assertion, the ITC evaluated the nature and the extent of the injurious effects of non-subject imports, and examined non-subject imports in a "comprehensive" way to ensure that it did not attribute injury to subsidized subject imports. Its findings are based on positive evidence and an objective examination. Korea simply wants this Panel to reweigh the evidence or ignore the ITC's analysis.

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[605] Throughout its submission, Korea asserts based on a disaggregated analysis that non-subject imports were "more frequently the lowest price source in the U.S. market," that the "frequency of non-subject imports being the lowest price source grew," and that on a weighted basis, "the frequency of non-subject imports being the lowest price source almost doubled." These statements are *flatly* contradicted by the ITC's finding, based on a disaggregated analysis, *See, e.g.*, USITC Pub. 3616 at 24 (Exhibit GOK-10), that subject imports were the lowest-priced source more often than any other source, discussed above.

[606] *See, e.g.*, USITC Pub. 3616 at 25 & n.164 (Exhibit GOK-10).

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

[608] Korea repeats its arguments about the methodologies used by the ITC in this investigation to evaluate underselling, which we already addressed above.

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

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

b. The ITC Evaluated Other Reasons for the Price Declines

453. Korea argues that the price declines during the period of investigation were due to other factors (such as product life cycles and business cycle changes in demand and supply that lead to "boom" and "bust" periods characteristic of this industry).[611] Although Korea asserts otherwise, the ITC explicitly evaluated these factors in its determination.

454. *Product Life Cycle*: The ITC examined price trends in the DRAM products industry and determined that they are generally correlated with the product life cycle, whereby prices start high for new, state-of-the-art products, decline rapidly as the product becomes a commodity, and continue to decline until the product is replaced by the next generation of technology, unless the product becomes a "legacy" product in short supply.[612] Korea does not dispute the ITC's conclusion or the positive evidence supporting it.

455. *Demand*: The ITC examined the issue of demand in this industry. It observed that historically, demand for more and faster memory has risen each year. Contrary to Korea's repeated characterization of a "collapse" in demand (echoing Hynix's argument in the agency proceedings),[613] the ITC examined data received in response to questionnaires tailored to this investigation, and determined that apparent U.S. consumption of DRAM products in terms of billions of bits *increased* from 98.8 million in 2000 to 146.7 million in 2001 and to 186.9 million in 2002, and was 55.3 million in interim 2003 compared to 42.8 million in interim 2002.[614] The ITC concluded that the *"slowing* in the growth of apparent U.S. consumption" in the latter portion of the period of investigation might be due in part to a decline in the quantity of personal computers sold.[615] It identified 2001 as the first year for which the number of personal computers sold declined rather than increased, and it also examined other possible reasons identified by questionnaire respondents, such as a slump in the telecommunications and network industry and a general recession.[616] Whereas the ITC evaluated changes in demand and possible explanations for these changes over the period of investigation based on positive evidence concerning demand in the U.S. market, the data sources that Korea uses in its submission concern "the Americas" or "global markets."

456. *Supply*: Contrary to Korea's contention,[617] the ITC did not "completely forget" or "deliberately ignore" supply increases or their contribution to prices in the DRAMs market. The

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[611] Korea First Submission, paras. 264-296.

[612] *See, e.g.*, USITC Pub. 3616 at 15-18, 25, I-11 (Exhibit GOK-10); Hynix's Prehearing Brief at 67-72 (Exhibit US-101); Micron's Postconference Brief at 35-36 (Exhibit US-99); Conference Transcript at 47-49 (Exhibit US-95); Hearing Transcript at 128-133 (Exhibit US-94).

[613] Korea First Submission, paras. 284-296.

[614] *See, e.g.*, USITC Pub. 3616 at 15, 24, II-4, Tables IV-4, IV-5, C-1 (Exhibit GOK-10).

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

[616] *See, e.g.*, USITC Pub. 3616 at 24, II-4 (Exhibit GOK-10).

[617] Korea First Submission, paras. 264-283.

ITC recognized that increases in supply can come in several ways in this industry: by increasing wafer starts, shrinking die sizes (to increase the number of chips that can be produced on a wafer of a certain size) or using wafers with larger diameters.[618] It also recognized that to meet rising U.S. and global demand, *capacity* to produce DRAM products increased over the period of investigation both in the United States and globally.[619] As support for its conclusion of increased U.S. and global capacity, the ITC referred, *inter alia*, to pages 63-66 and 112-33 of Hynix's Prehearing Brief (Exhibit US-101).[620] Contained on these pages are the figures now reproduced in Korea's submission that Korea accuses the ITC of "completely ignoring."[621] The ITC also evaluated data collected in questionnaire responses and determined that "[a]lthough the domestic industry's wafer starts declined over the period of investigation, production quantity in billions of bits increased as domestic producers produced more bits per wafer."[622] Positive evidence supports the ITC's findings.

457. *The Business Cycle*: The ITC also analyzed the business cycle, ascertaining that because growth in demand for DRAM products has been continuous, but supply increases are sporadic, supply and demand in this industry tend to be chronically out of equilibrium, giving the market its characteristic "boom" and "bust" business cycle.[623] The ITC also determined that largely because of the perpetual improvements in production efficiencies experienced by this industry, prices are usually declining.[624] Positive evidence supports the ITC's evaluation of the industry business cycle.

458. 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

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[618] *See, e.g.*, USITC Pub. 3616 at 15-16 & n.98 (Exhibit GOK-10).

[619] The ITC further noted that it did not find the existence of global pricing negated the effect of subsidized subject imports in the U.S. market. Noting undisputed evidence that the U.S. market was the largest market for DRAM products, it explained that prices in the U.S. market are a significant constituent element of the overall global pricing environment. It found that the volume and price effects of subsidized subject imports were significant in the U.S. market. *See, e.g.*, USITC Pub. 3616 at 25 (Exhibit GOK-10).

[620] *See, e.g.*, USITC Pub. 3616 at 16 & n.97 (Exhibit GOK-10).

[621] *See, e.g.*, Hynix's June 19, 2003, Prehearing Brief at 63-66, 112-33 (Exhibit US-101).

[622] *See, e.g.*, USITC Pub. 3616 at 16 & n.97 (Exhibit GOK-10). Moreover, with respect to Korea's claims concerning inventories (*e.g.*, at n.22), the record indicated that "End-of-period inventory levels of uncased dice were low throughout the period examined," "[e]nd-of-period inventories of cased dice fell *** from *** percent of total shipments in 2000 to *** percent of total shipments in 2002, and were lower for the first quarter of 2003 compared to the first quarter of 2002. Inventory levels of modules as a ratio to total shipments was *** lower in 2002 compared to 2000, and lower at the end of the first quarter of 2003 compared to the first quarter of 2002." *See, e.g.*, USITC Pub. 3616 at II-2, Table C-1 (Exhibit GOK-10); Micron's Posthearing Brief at Exh. 2 at 27-28 (Exhibit US-96).

[623] *See, e.g.*, USITC Pub. 3616 at 16 (Exhibit GOK-10).

[624] *See, e.g.*, USITC Pub. 3616 at 24, 25; Hynix's June 19, 2003, Prehearing Brief at 9-10 (Exhibit US-101); Micron's November 27, 2002 Postconference Brief at 15-16, 37-41 (Exhibit US-99).

occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor."[625]

459. The ITC analyzed the pricing data and 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 evaluated record evidence indicating that the price decline in 2001 was the "most severe in history," and observed that pricing continued to decline in 2002.[626] 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.[627]

460. The ITC concluded based on positive evidence and an objective examination 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.[628]

461. Therefore, the ITC analyzed the nature and the extent of the injurious effects of other factors that were affecting prices, and examined these factors in the factual context of the record in this investigation to ensure that it did not attribute injury from those factors to subsidized subject imports.[629] Contrary to Korea's assertions,[630] the ITC did not ignore these findings in its discussion of the impact of the subsidized subject imports on the domestic industry. As a matter of fact, in its discussion of the impact of the subsidized subject imports on the domestic industry,

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

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

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

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

[629] In *EC – Tube*, the Appellate Body stated that "we do not find that an examination of *collective* effects is necessarily required by the non-attribution language of the *Anti-Dumping Agreement*. In particular, we are of the view that Article 3.5 does not compel, *in every case*, an assessment of the *collective* effects of other causal factors, because such an assessment is not always necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors." para. 191 (emphasis in original). Indeed, the Appellate Body further stated that "[w]e believe that, depending on the facts at issue, an investigating authority could reasonably conclude, without further inquiry into *collective* effects, that "the injury ... ascribe[d] to dumped imports is actually caused by those imports, rather than by the other factors." *Id.*, para. 192 (emphasis in original). We agree that there is no such requirement. Korea does not allege that one exists either. In any event, as illustrated by the ITC's findings discussed here, the ITC's final injury determination is also consistent with any such "interpretation" of SCM Agreement Article 15.5.

[630] *See, e.g.*, Korea First Submission, para. 290.

the ITC *explicitly* referenced its discussion in the price effects section of its narrative views of the price declines that took place in this industry during the period of investigation.[631]

462. The ITC's findings in this regard are reasonable and based on an objective examination and positive evidence. Accordingly, they are consistent with U.S. obligations under Articles 15.1 and 15.5.

463. Incidentally, Korea also argues that the final determination did not meet the obligation under SCM Agreement Article 15.4 to examine the business cycle distinctive to the DRAMs industry as an "other" "relevant factor."[632] The panel in *Thailand – H Beams*, in a finding subsequently explicitly endorsed by the Appellate Body,[633] contrasted the requirement to examine the enumerated factors with "other" relevant economic factors," in the context of the AD Agreement provision that is substantively identical to Article 15.4 of the SCM Agreement, stating:

> We thus read the Article 3.4 phrase "shall include an evaluation of all relevant factors and indices having a bearing on the state of the industry, including ..." as introducing a mandatory list of relevant factors which must be evaluated in every case. We are of the view that the change that occurred in the wording of the relevant provision during the Uruguay Round (from "such as" to "including") was made for a reason and that it supports an interpretation of the current text of Article 3.4 as setting forth a list that is not merely indicative or illustrative, but, rather, mandatory. Furthermore, we recall that the second sentence of Article 3.4 states: "This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance." Thus, in a given case, certain factors may be more relevant than others, and the weight to be attributed to any given factor may vary from case to case. Moreover, there may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required.[634]

464. The industry's "business cycle" is not an enumerated factor under Article 15.4. Whether or not this Panel finds that the business cycle distinctive to the DRAMs industry is an "other" "economic factor" for purposes of Article 15.4, the ITC's examination of this factor in this investigation is also consistent with U.S. obligations under Article 15.4. As shown above, the ITC explicitly analyzed the business cycle in its final determination and its notorious periods of "boom" and "bust," and it directly evaluated this factor in its analysis in the context of the facts

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[631] *See, e.g.*, USITC Pub. 3616 at 27 ("Declining prices are the primary reason for the industry's large operating losses and, *as discussed above*, subject imports contributed materially to the steep price declines that occurred over the period.") (emphasis added) (Exhibit GOK-10).

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

[633] *Thailand – H Beams (AB)*, at para. 125.

[634] *Thailand – H-Beams (Panel)*, para. 7.225.

of this investigation. Although much of the ITC's evaluation of this issue appears in the "price effects" section of the final determination, the ITC expressly cross-referenced this analysis in its evaluation of the "impact" of the subsidized subject imports on the domestic industry.[635] The ITC's reasoning is clear, and there is no requirement in the SCM Agreement that its evaluation of this (or any other factor) appear in any particular place in the final determination.[636]

465. Accordingly, the ITC's evaluation of the business cycle is also consistent with U.S. obligations under SCM Agreement Article 15.4.

c. The ITC Also Examined the Domestic Industry's Actions

466. Korea's final argument is that the ITC never considered that the domestic industry was responsible for the injury. This argument also has no merit.

467. First, contrary to Korea's assertions,[637] the ITC specifically evaluated what Korea (and Hynix) refer to as "mis-steps" by domestic producer Micron. 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.[638] 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.[639] 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.[640] This "harm was not isolated to Micron and was due mainly to lower prices."[641]

468. Second, even though, as pointed out in the determination, Hynix *never* even argued that exports might be another causal factor, the ITC also evaluated the domestic industry's exporting activities.[642] The ITC identified the "increasingly global nature of the DRAMs market, both in

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[635] *See, e.g.*, USITC Pub. 3616 at 24 -25, 27 (Exhibit GOK-10).

[636] As the panel in *EC – Tube* concluded, "[p]rovided that it is clear that a determination takes a given factor into account, *it is immaterial where in the determination such attention is indicated*. Where it is clear that an investigating authority evaluates a given causal factor in substance it is not essential that this evaluation must, in form, appear in a section entitled 'causation' in the determination." *EC – Tube (Panel)*, para. 7.405 (emphasis added).

[637] Korea First Submission, paras. 297-313.

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

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

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

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

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

terms of producers as well as purchasers."[643] 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.[644]

469. 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."[645] Based on this evaluation of the data, the ITC concluded that "while the industry's export performance played a role in the injury it experienced, it [did] not sever the causal link between subsidized subject imports and material injury to the domestic industry."[646] Contrary to Korea's suggestion,[647] the ITC clearly considered these facts, and its findings are based on positive evidence and an objective examination.

470. 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.

d. The Facts in This Investigation Are Distinguishable from Those in the ITC's Investigation of DRAMs from Taiwan

471. Korea implies in several places that the ITC's findings in this investigation are inconsistent with the ITC's findings in another investigation of DRAM products, the ITC's investigation of DRAMs from Taiwan. The ITC issued a negative determination in that investigation.

472. Korea does not identify any requirement in the SCM Agreement for an investigating authority to distinguish its findings in one investigation from its findings in another entirely different proceeding involving entirely different subject countries, an entirely different time period, and thus, an entirely different record. There simply is no need for an investigating authority to "reconcile" its factual findings in one investigation with those in another.

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[643] *See, e.g.*, USITC Pub. 3616 at 18 (Exhibit GOK-10).
[644] *See, e.g.*, USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10).
[645] *See, e.g.*, USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10).
[646] *See, e.g.*, USITC Pub. 3616 at 27 n.182 (Exhibit GOK-10).
[647] *See, e.g.*, Korea First Submission, paras. 61-64, 235.

473. Nevertheless, the facts in the investigation at issue in this dispute are distinguishable.

1. In Korean investigation, subsidized subject imports from Korea were highly substitutable for domestic products, and both were qualified and in fact sold to overlapping channels of distribution to many of the same customers, as noted above. By contrast, in DRAMs from Taiwan, Inv. No. 731-TA-811 (Final), USITC Pub. 3256 (Dec. 1999) (for which a copy of the ITC's final determination was provided in Exhibit GOK-16), Taiwan products were not qualified to serve the PC OEM segment of the market, served demand for products the domestic industry no longer was serving, and were sold overwhelmingly to the U.S. spot market and in the form of cased DRAMs, whereas the large majority of domestically produced DRAM products were sold under contract and in the form of modules.

2. Whereas in the Korean investigation there was widespread and significant underselling by subsidized subject imports, in the Taiwan investigation, subject imports from Taiwan generally entered the U.S. market after U.S. producers had already exited the introduction phase of the product life cycle for those products wherein the highest profits are reaped by the first producers to market them.

3. In the Korean investigation, prices declined precipitously, well beyond historical norms, and domestic industry performance indicators declined significantly, but in the Taiwan investigation, DRAM prices uncharacteristically increased at the end of the period of investigation due to tightening supply. Certain purchasers even agreed to unprecedented contracts with domestic and non-subject producers that locked in a high percentage of their purchases.

4. Absent a causal connection between the small volume of subject imports and prices and the decline in domestic DRAM prices in the earlier portion of the period of investigation, the ITC found the domestic industry in the Taiwan investigation was well positioned at the end of the period of investigation, even before the substantial price increases began. In the Korean investigation, the domestic industry was materially injured by reason of subsidized subject imports, as discussed in detail supra. Thus, the factual record in the Korean investigation is very different from that presented in DRAMs from Taiwan.

474. Indeed, the fact that the ITC issued a negative determination in the DRAMs from Taiwan investigation and an affirmative determination in this investigation involving subsidized subject imports from Korea reinforces the ITC's objectivity, including its objectivity in investigations involving DRAM products. The ITC has demonstrated its willingness to issue a negative determination where the facts so warrant, but it issues affirmative determinations where, as here, the facts so warrant.

5. Summary

475. Accordingly, for all of these reasons, the ITC's final material injury determination demonstrated a causal relationship between the subsidized subject imports from Korea and the injury to the domestic industry. The ITC examined all relevant evidence before it, and its analysis is based on positive evidence and an objective examination. Thus, the ITC's causation analysis is consistent with U.S. obligations under Articles 15.1 and 15.5 of the SCM Agreement.

G. The ITC's Final Determination Is Not Inconsistent with U.S. Obligations Under Article 22.3 of the SCM Agreement

476. Korea alleges that because the United States failed to comply with the Article 15.1 obligations to base the determination on "positive evidence" and to conduct an "objective examination," the United States is also not in compliance with its obligations under Article 22.3 of the SCM Agreement. Article 22.3 provides as follows:

> Public notice shall be given of any ... [affirmative] final determination, [and] such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member ... the products of which are subject to such determination ... and to other interested parties known to have an interest therein.

477. Korea does not dispute that public notice was given of the ITC's final determination, the ITC's findings and conclusions were set forth in a separate report, and the notice and report were forwarded to Korea and other interested parties known to have an interest. Korea only alleges that the report did not set forth "in sufficient detail" the findings and conclusions reached on all issues of fact and law considered material by the investigating authority. As the basis for this alleged "procedural" violation of Article 22.3, Korea merely repeats arguments it makes regarding alleged "substantive" violations of Articles 15.2, 15.4, and 15.5.

478. As other panels have pointed out, however, if a determination does not meet the substantive requirements of Article 15 (or of the counterpart in the AD Agreement, Article 3), then it is meaningless to consider whether the public notice of the determination is inconsistent with the procedural requirements of SCM Agreement Article 22 (or of the counterpart in the AD Agreement, Article 12). On that basis, those panels made no findings with respect to the alleged inconsistencies with Article 22 (or of Article 12). Thus, contrary to Korea's position here, those panels declined to separately examine whether there was an inconsistency with Article 22 where

they found an inconsistency with Article 15 (or, in the case of Article 12 of the AD Agreement, an inconsistency with Article 3).[648]

479. Should this Panel find an inconsistency with any of the substantive obligations of Article 15 of the SCM Agreement, we suggest the same approach here.

480. Importantly, however, Korea fails to prove **any** substantive violation of Article 15, as discussed in considerable detail above. It is abundantly clear that the ITC addressed the substantive injury factors, its analysis is supported by positive evidence, and its examination was objective.

481. Korea also fails to prove any inconsistency with Article 22.3. In the separate report referenced in the public notice of the ITC's final determination, the ITC set forth in sufficient detail the findings and conclusions reached on all issues of fact and law it considered material through its narrative views and accompanying data tabulations, as also shown in response to other arguments above. Indeed, Korea implicitly acknowledges as much by virtue of the fact that it has not made any challenge of the ITC's injury determination based on Article 22.5 of the SCM Agreement, which provides as follows:

> A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

482. Korea does not make any arguments based on Article 22.5 concerning the adequacy of the public notice of the conclusion of the ITC's affirmative final injury determination or the public report referenced therein. Thus, Korea implicitly concedes that the notice and report contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures," with "due regard being paid to the requirement for the protection of

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[648] *See, e.g.*, *Argentina – Poultry*, para. 7.293; *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141//R, Report of the Panel, as modified by the Appellate Body adopted 12 March 2001, para. 6.259 [hereinafter "*EC – Bed Linen (Panel)*"]; *US – Softwood Lumber*, para. 7.42; *cf, e.g.*, *US – Antidumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS/179/R, Report of the Panel adopted 1 February 2001, para. 6.55 [hereinafter "*US – Stainless Steel*"] (declining to examine an Article 12 claim after finding an inconsistency with AD Agreement Article 2.4.1 based on the notion of judicial economy).

confidential information." Absent any argument based on Article 22.5, Korea must also be presumed to concede that the notice and report contain "the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers." Indeed, Korea's arguments in these proceedings indicate that, although it might disagree with the outcome or how the ITC weighed the evidence, it had no trouble discerning the rationale of the ITC's final determination.

483. For all of these reasons and because the notice and report of the ITC's final injury determination set forth in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, we urge this Panel to find that the ITC's injury determination is not inconsistent with U.S. obligations under Article 22.3.

VI. OTHER ISSUES

A. The United States Has Not Acted Inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of GATT 1994, Because It Has Not Levied Any Countervailing Duties

484. In Section IV.H of its first submission, Korea alleges that the United States has acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of GATT 1994. The heading of Section IV.H asserts that the DOC "assigned" countervailing duties in excess of the value of the alleged subsidies. Elsewhere, Korea refers to the countervailing duties "imposed" by the DOC.[649]

485. Korea's claims must be rejected, because Article 19.4 and Article VI:3 do not pertain to the "assignment" or "imposition" of countervailing duties, but instead refer to the "levy" of such duties. Korea does not provide any evidence that the United States has levied countervailing duties on DRAMs from Korea. Korea does not even appear to allege that the United States has done so. Therefore, there is no basis for the Panel to find that the United States has acted inconsistently with either of these provisions.

486. Article 19.4 of the SCM Agreement provides as follows:

> No countervailing duty shall be levied [51] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

[51] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

[649] Korea First Submission, para. 594.

Similarly, Article VI:3 of GATT 1994 states as follows:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted ... .

487. Thus, by their terms, the obligations of Article 19.4 and Article VI:3 are limited to the "levy" of countervailing duties. Footnote 51 of the SCM Agreement gives the term "levy" a precise meaning, which is "the definitive or final legal assessment or collection of a duty or tax."[650] Accordingly, the "imposition" of a definitive countervailing duty (or, in U.S. parlance, a countervailing duty order) is not to be equated with the "levying" of a countervailing duty. This distinction between the two different acts is reflected in the first sentence of Article 19.3 of the SCM Agreement,[651] and is consistent with the findings of a GATT panel.[652]

488. Because Korea has not presented evidence establishing even a *prima facie* case that the United States has levied countervailing duties, there is nothing for the United States to rebut at this point. Nevertheless, the United States notes that it is extremely unlikely that it has "levied" any countervailing duties on DRAMS from Korea. This is because of the "retrospective" duty assessment system used by the United States for purposes of its antidumping and countervailing duty laws. Briefly, under this system, the definitive liability for antidumping or countervailing duties is determined *after* merchandise subject to an antidumping or countervailing duty order enters the United States. The determination of definitive duty liability is made at the end of "administrative reviews" which are initiated by the DOC each year on request by an interested

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[650] The same definition of "levy" is found in footnote 12 of the AD Agreement.

[651] The first sentence of Article 19.3 provides as follows: "When a countervailing duty is *imposed* in respect of any product, such countervailing duty shall be *levied*, in the appropriate amounts ... ." (Emphasis added).

[652] In *United States - Countervailing Duties on Non-Rubber Footwear from Brazil*, SCM/94, Report of the Panel circulated 4 October 1989 (unadopted), para. 4.7, the panel noted the following:

> The Panel noted that the interpretation and application of Article VI through the use of the pre-selection system had been codified in the 1967 Anti-Dumping Code and subsequently in the relevant MTN Codes. In particular, a distinction had been introduced in the Code between "levy" and "imposition" of a countervailing duty. The term "levy" had been defined in the Code to mean the definitive or final legal assessment or collection of a duty or tax (Article 4, footnote 14). The term "imposition", although not expressly defined, had been consistently used in the Code (and the 1967 and 1979 Anti-Dumping Codes) in the sense of a decision, following the conduct of an investigation, to collect from a specific date a countervailing (respectively anti-dumping) duty on an imported product. [1]

[1] The Panel noted that the 1967 and 1979 Anti-Dumping Codes also made a distinction between "imposition" and "collection".

party (such as the foreign exporter or the U.S. importer of the imports), beginning one year from the date of the order.[653]

489. An administrative review entails a substantive legal and factual analysis of whether imports of the product during the period of review were dumped or subsidized and, if so, to what extent.[654] The facts pertaining to entries during the period under review are investigated for the first time during an administrative review.[655] The law applied in an administrative review is the law as interpreted by the DOC at the time that it makes its administrative review decision. The DOC's interpretation of the underlying antidumping or countervailing duty laws or regulations may be different from the interpretation it applied in the original investigation or in previous administrative reviews. At the conclusion of the administrative review, the DOC instructs the U.S. Customs Service to assess antidumping and countervailing duties in accordance with the determination of the DOC.

490. In its panel request, Korea alleges an inconsistency with Article 19.4 and Article VI:3 because "the DOC's failure to measure the benefit in accordance with the principles of Article 14 of the SCM Agreement *resulted in* countervailing duties *levied* in excess of the amount allowed under the SCM Agreement and the GATT 1994."[656] By its use of the past tense, Korea is challenging an action that took place in the past. However, the DOC published its countervailing duty order involving DRAMS on August 11, 2003, and the first opportunity for requesting an administrative review that could lead to the "levying" of countervailing duties – August, 2004 – has not even arrived yet. Thus, Korea is accusing the DOC of an action that, under U.S. law, cannot have yet occurred. Moreover, it bears repeating that Korea does not provide any evidence that the United States actually has "levied" countervailing duties.

491. In summary, the Panel should reject Korea's claims under Article 19.4 and Article VI:3, because Korea has failed to establish that the United States has "levied" countervailing duties.[657]

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[653] Although there are other statutory and regulatory provisions applicable to administrative reviews, the key statutory provision is section 751(a) of the Tariff Act of 1930, as amended, 19 U.S.C. 1675(a) (copy attached as Exhibit US-109). In this regard, if no interested party requests an administrative review, duties will be assessed at the cash deposit rate in effect at the time of entry.

[654] In administrative reviews, imports covered by the period under review are imports that entered the United States during the 12 to 18 months prior to the initiation of the review. The DOC does not issue its final determination in the administrative review until 12 to 18 months after the end of the review period.

[655] For example, in any administrative review of the DRAMs order, the DOC quite likely will have to consider the U.S. industry's allegations regarding assistance provided to Hynix in December, 2002. The DOC did not consider these allegations in its investigation.

[656] WT/DS296/2, page 2, para. 6 (21 November 2003) (emphasis added).

[657] Of course, the United States does not agree with Korea's assertions that the countervailing duty rate determined by the DOC is inconsistent with any provisions of the SCM Agreement. However, the Panel does not need to address these assertions in order to dispose of Korea's claims under Article 19.4 and Article VI:3.

B. The Panel Should Reject Korea's Claims Regarding the DOC Countervailing Duty Order Because Korea Failed to Comply with Article 4.4 of the DSU

1. The Panel Should Reject Korea's Claims Regarding the DOC Countervailing Duty Order Because Korea Failed to Comply with Article 4.4 of the DSU

492. Korea's panel request identifies three U.S. actions as the subject of Korea's challenge: (1) the DOC final determination; (2) the USITC final determination; and (3) the DOC countervailing duty order.[658] With respect to the third action – the DOC countervailing duty order – the Panel should dismiss Korea's claims due to Korea's failure to comply with Article 4.4 of the DSU.

493. The second sentence of Article 4.4 provides as follows:

> Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis of the complaint.

Notwithstanding these requirements, as demonstrated above, Korea's second request for consultations did not include any indication of the legal basis of its complaint with respect to the DOC countervailing duty order. Korea did not even indicate a provision of the WTO agreements with which it believed the countervailing duty order to be inconsistent. Not until Korea filed its panel request did the United States learn of the legal basis of Korea's complaint.

494. As demonstrated above, the United States promptly informed Korea that, in its view, Korea's consultation request failed to satisfy the requirements of Article 4.4, but Korea declined to correct the problem.[659] In order to preserve its rights, the United States declined to consult regarding the countervailing duty order, and raised its concerns at the first DSB meeting at which Korea's panel request was considered.[660] Thus, this is not a situation where the respondent slept on its rights.

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[658] WT/DS296/2 (21 November 2003). In its panel request, Korea also references the DOC preliminary determination, but does not make any claims with respect to that determination. In the second paragraph of the request, Korea says that it is challenging the countervailing duty order and the determinations that led to it. In the first paragraph, Korea states that the order "was the result of" the DOC and USITC *final* determinations; *i.e.*, it was the final determinations that led to the order. Moreover, in its first submission, Korea does not advance any claims or arguments concerning the DOC preliminary determination.

[659] *See* Exhibits US-1 through 4, which consist of correspondence between the United States and Korea regarding Korea's consultation requests.

[660] WT/DSB/M/159 (15 January 2004) (Exhibit US-5).

495. Although the requirements of Article 4.4 are minimal, they cannot be ignored. Because Korea ignored them insofar as the DOC countervailing duty order is concerned, the Panel should reject Korea's claims regarding the order.[661]

2. The Panel Should Reject Korea's Claims Under Articles 10 and 32.1 of the SCM Agreement Because Korea Has Failed to Demonstrate an Inconsistency with Some Other Provision of the SCM Agreement or GATT 1994

496. Korea claims that the DOC countervailing duty order is inconsistent with Articles 10 and 32.1 of the SCM Agreement. These claims are dependent claims in that they depend upon a finding of an inconsistency with an obligation contained in some other provision of the SCM Agreement or GATT 1994. Because, as demonstrated above, the United States has not acted inconsistently with any such other provisions, the countervailing duty order is, by definition, not inconsistent with Articles 10 or 32.1.

C. In the Event that the Panel Should Find Any WTO Inconsistencies, the Panel Should Decline to Make the Recommendation Requested by Korea

497. Although it is premature to discuss this topic, the United States notes that Korea requests the Panel to recommend that the United States terminate the countervailing duty order immediately.[662] The United States is confident that the Panel will not find any WTO inconsistencies and, thus, will not need to make any recommendations. Nonetheless, the United States must point out that the remedy sought by Korea is precluded by Article 19.1 of the DSU. Article 19.1 provides for only one recommendation, which is to "bring the measure into conformity" with the relevant agreement. Moreover, insofar as the timing of implementation of a recommendation is concerned, Article 21.3 of the DSU provides that this subject is to be established through DSB approval of a proposal by the Member concerned, through negotiation among the parties to the dispute, or through binding arbitration. Therefore, should the need for recommendations arise, the Panel should reject the recommendation requested by Korea.

VIII. CONCLUSION

498. For the reasons set forth above, the United States requests that the Panel reject Korea's claims in their entirety.

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[661] In this regard, the United States notes that it is not requesting a preliminary ruling from the Panel on this point. For the United States, it is sufficient that the Panel make findings on this point in its interim and final reports.

[662] Korea First Submission, para. 599.

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