

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

WT/DS296

**SECOND WRITTEN SUBMISSION
OF THE
UNITED STATES OF AMERICA**

July 9, 2004

TREATMENT OF BUSINESS PROPRIETARY INFORMATION

The United States notes that, with one exception, the entire text of this second written submission and the accompanying exhibits is public information. The one exception is paragraph 117 of the submission, which contains business proprietary information (“BPI”) derived from the BPI exhibits attached to Korea’s first written submission. The BPI information in paragraph 117 is noted with double brackets and a **bold** font.

In this public version of the U.S. second written submission, the BPI has been deleted and replaced with “* * *”.

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<i>Canada – Aircraft (AB)</i>	<i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, Report of the Appellate Body adopted August 29, 1999
<i>EC – Tube (Panel)</i>	<i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, Report of the Panel, as modified by the Appellate Body, adopted 18 August 2003
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<i>Egypt – Rebar</i>	<i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, Report of the Panel adopted October 1, 2002
<i>Mexico – HFCS</i>	<i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States</i> , WT/DS132/R, Report of the Panel adopted 24 February 2000
<i>Thailand – H-Beams (Panel)</i>	<i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, Report of the Panel, as modified by the Appellate Body, adopted 5 April 2001
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I. INTRODUCTION

1. We are now at the mid-point in the panel process, and Korea has failed utterly to satisfy its burden of proving that a reasonable, unbiased authority could not have made the same determinations as the U.S. Department of Commerce (DOC) and the U.S. International Trade Commission (ITC). At the outset, it is worth noting some of the key flaws in Korea's arguments to date.

2. To accommodate its failure to satisfy its burden of proof, Korea has sought to shift the burden of proof to the United States by asserting, without any citing to any authority, that "the investigating authority bears the burden of proof"¹ In addition, it has attempted to distort the standard of review by urging the Panel to engage in a *de novo* review of the record and consider what a reasonable, unbiased authority "should" have found.²

3. With respect to subsidy issues, Korea has falsely portrayed the DOC's approach to the issue of "entrustment or direction" as extremist. However, there was nothing extreme or exotic about the DOC's interpretation of the "entrust or directs" standard. Instead, the real issue concerning the bailout of Hynix is not one of treaty interpretation, but one of evidence. Korea has failed to prove that a reasonable, unbiased authority – looking at the same evidentiary record as was before the DOC – could not have found that the Government of Korea (GOK) entrusted or directed Hynix's creditors to rescue the dying firm. Indeed, Korea would have the Panel believe that the GOK was not in the business of entrusting or directing Korean banks to bail out troubled companies, notwithstanding the fact that Kookmin Bank was warning U.S. investors that this was *exactly* what the GOK was doing.³

4. Unable to overcome the evidentiary record compiled by the DOC, it is Korea itself that takes an extremist approach. Specifically, Korea seeks to read into Article 1.1(a)(1)(iv) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") a special evidentiary standard. Aside from the fact that the text offers no support whatsoever for this special evidentiary standard, the adoption of Korea's proposed bank-by-bank, transaction-by-transaction approach effectively would render that provision meaningless.⁴

5. Turning to the injury issues, it is by now apparent that Korea's assertion that the evidence used by the ITC was not "positive evidence" is baseless. Indeed, Korea has conceded "that the ITC correctly tabulated its data, at least in all material respects."⁵ Thus, Korea's argument is not about whether the ITC's final material injury determination was based on positive evidence,

¹ *First Written Submission by the Republic of Korea*, 19 April 2004, para. 26 [hereinafter "Korea First Submission"].

² *Closing Statement of the United States of America at the First Substantive Meeting of the Panel*, June 24, 2004, para. 9 [hereinafter "US Closing Statement"].

³ *See First Written Submission of the United States of America*, May 21, 2004, paras. 69-78 [hereinafter "US First Submission"] and Exhibits US-46 and US-92.

⁴ *See US Closing Statement*, para. 1.

⁵ *First Substantive Meeting – Oral Statement of the Government of Korea*, 23 June 2004, para. 5 [hereinafter "Korea Oral Statement"].

because the evidence supporting the ITC’s determination was unquestionably affirmative, objective, verifiable, and credible. Korea simply wants the Panel to reweigh the evidence or selective portions of the evidence.

6. With respect to import volume, Korea has retreated from its earlier insistence that import volume trends were declining, because even the evidence it submitted to the Panel showed increases. To overcome this problem, Korea persists in advocating a “brand name” approach that is totally divorced from the SCM Agreement’s requirement to look at subsidized “imports.”

7. In the sections that follow, the United States will discuss these and other defects in Korea’s arguments. The United States is confident that the Panel will find that the challenged determinations of the DOC and the ITC were based upon positive evidence, and objective examination of *all* of the evidence, and were otherwise consistent with the provisions of the SCM Agreement.

II. THE DOC’S SUBSIDY DETERMINATION WAS CONSISTENT WITH U.S. WTO OBLIGATIONS

8. Korea argues that the DOC’s subsidy determination was improperly predicated on a “U.S. style” bankruptcy approach to corporate restructurings.⁶ This dispute, however, is not about the validity of a particular “approach” or a specific restructuring “mechanism”.⁷ Rather, this dispute is about the DOC’s determination that the GOK-directed bailout of Hynix gave rise to countervailable subsidies, and whether that determination was inconsistent with the terms of the SCM Agreement.

9. The United States’ previous submissions set out in great detail the evidentiary and legal bases for the DOC’s finding of financial contribution, benefit, and specificity. Rather than restating previous material, the United States will take the opportunity in this second written submission to respond to issues raised by Korea in the course of the first substantive meeting with the Panel.

⁶ Korea Oral Statement, para. 35.

⁷ Indeed, the fact that the International Monetary Fund (IMF) may have recommended changes to Korea’s corporate workout mechanisms, and that Korea adopted some form of the “London Approach” to restructurings, is irrelevant. *See* Korea Oral Statement, para. 36. First, any connections to international financial institutions like the IMF does not insulate a particular program from the countervailing duty remedy or the disciplines of the SCM Agreement. *See* US First Submission, note 382. Second, the IMF made recommendations to Korea only regarding methods of overhauling its workout system; it did not formulate or bless the new provisions. In fact, the IMF remained highly critical of Korea, and in particular the unhealthy role that GOK-owned banks were playing in the rescue of troubled companies. *See* US First Submission, para. 42. At one point, the IMF took issue with Korea’s record concerning “out-of-court” workouts, and suggested that greater reliance should be put on court supervised insolvency in order to accelerate the restructuring of distressed companies. In this regard, the IMF directors “urged the authorities to refrain from pushing creditors into bailing out troubled companies ...” *Preliminary Determination*, 68 Fed. Reg. at 16773 (Exhibit GOK-4).

A. The DOC’s Determination That the GOK Entrusted and Directed Hynix’s Creditors to Provide Financial Contributions to Hynix Was Supported by the Evidence, Was Based on an Objective Examination, and Was Consistent With Article 1.1(a)(1)(iv) of the SCM Agreement

10. Record evidence showed that the GOK adopted an explicit policy to keep Hynix from failing.⁸ Record evidence also showed that the GOK took affirmative actions to entrust and direct Hynix’s creditors to provide financial contributions to Hynix during the period of review.⁹ The GOK did so by exercising control over Hynix’s creditors in its multiple roles as lender, owner, legislator and regulator. Where necessary, the GOK also used coercion as a means of effectuating its Hynix policy.¹⁰

11. The DOC concluded that the GOK’s actions resulted in financial contributions within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement. This conclusion was not based on a “narrow perspective”, “generalized statements of government intent or desire”, or “weak or no evidence”, as Korea argues.¹¹ Rather, this inescapable conclusion was based on undisputed and explicit facts on the record of the underlying investigation and the ordinary meaning of the text of Article 1.1(a)(1)(iv).

1. Hynix’s Creditors Could Not Say “No” to Participation in the GOK’s Hynix Bailout Program

12. Early in the countervailing duty investigation, both the GOK and Hynix conceded – in fact argued – that the various bailout phases were part of a single overall restructuring program for Hynix.¹² During each phase, the creditor banks rescheduled over and over again their existing loans with Hynix, while providing additional liquidity whenever Hynix needed more. Furthermore, each phase of the Hynix bailout involved essentially the same banks.¹³ Eventually, the majority of the loans were converted into equity as part of the October restructuring

⁸ US First Submission, paras. 38-53.

⁹ US First Submission, paras. 54-103.

¹⁰ US First Submission, paras. 104-126.

¹¹ Korea Oral Statement, paras. 3, 35, 41; *First Substantive Meeting - Closing Statement of the Government of Korea* (24 June 2004), para. 6 [hereinafter “Korea Closing Statement”].

¹² See, e.g., Hynix Questionnaire Response (January 27, 2003) at 14 and 15 (copy attached as Exhibit US-119) (Hynix stated that, in September 2000, “Citibank and SSB, Hynix’ financial advisors retained to devise a financial restructuring plan, presented a fully integrated proposal to completely realign the financial structure of Hynix The important point, for purposes of this submission, is that many of the financial transactions that are separately identified in the [DOC’s] questionnaire (each with their own sub-heading) were, in fact, all part of Citibank and SSB’s original integrated plan for a complete financial restructuring of Hynix.”).

¹³ See *Answers of the United States of America to the Panel’s Questions to the Parties Following the First Substantive Meeting of the Panel*, July 9, 2004, Figure US-4 [hereinafter “US Answers”].

package.¹⁴ The manner in which the various phases of the bailout program overlapped and were interrelated is illustrated graphically in the attached Figure US-3, entitled “The Constituent Parts of the Hynix Debt Restructuring”.

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

a. GOK Ownership and Control of Hynix’s Creditors

14. Korea asserts that, legally, the government was precluded from intervening in the banking and financial sectors of Korea. A plain reading of the legal instruments cited by Korea belies Korea’s assertion.

15. For example, 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.”¹⁵ 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”.¹⁶ Thus, regardless of the “primary purpose” of the Decree,¹⁷ the fact is that, on its face, the Decree gave the GOK the legal authority to intervene in the lending decisions of a bank in the exercise of the GOK’s shareholder rights.¹⁸ Thus, rather than diminishing the GOK’s authority to intervene in the decisions of financial institutions, the Decree actually legitimized the GOK’s rights to intervene under the guise of stabilizing financial markets or exercising its shareholder rights to elect and appoint the banks’ decision makers and to make credit policy decisions.¹⁹

16. Similarly, with respect to the Public Fund Oversight Act, the law on its face provides for government intervention in the financial sector. For example, the Act required Korean private banks to sign contractual commitments with the GOK (“Memoranda of Understanding” or

¹⁴ US First Submission, para. 144.

¹⁵ Prime Minister Decree No. 408 (Exhibit GOK-45).

¹⁶ Prime Minister Decree No. 408 (Exhibit GOK-45) (emphasis added).

¹⁷ Korea Oral Statement (First Meeting), para. 47.

¹⁸ *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4); Prime Minister Decree No. 408 (Exhibit GOK-45).

¹⁹ *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).

“MOUs”) in exchange for the massive recapitalizations they received from the government.²⁰ These MOUs provided the GOK with a contractual right to intervene in the day-to-day business and credit decisions of Korean banks.²¹ The MOUs set financial soundness, profitability, and asset quality targets, and included a detailed plan for implementation.²² Thus, the DOC reasonably concluded that by entering into MOUs, “[t]he GOK in this manner can be directly involved in the fiscal operations of the bank.”²³

17. Bank-specific evidence also belies Korea’s assertions that the GOK was precluded from intervening in the banking and financial sectors of Korea. For example, Kookmin Bank, in which the GOK had less than 10 percent ownership in terms of common shares with voting rights, admitted in sworn submissions to the U.S. Securities and Exchange Commission (“SEC”) that it had been, and still was, subject to GOK influence in its lending decisions. Specifically, Kookmin’s June 2002 prospectus stated: *“The Korean government promotes lending to certain types of borrowers as a matter of policy, which we may feel compelled to follow.”* The prospectus also states *“However, government policy may influence {Kookmin} to lend to certain sectors or in a manner in which {Kookmin} otherwise would not in the absence of the government policy.”*²⁴ These statements were a clear and unequivocal acknowledgment by a private bank that the GOK could and did influence its lending decisions.

18. In an attempt to dismiss this direct evidence of GOK influence over the lending decisions of private banks, Korea asserts that GOK had no control or influence over Kookmin and argues that the language in the Kookmin prospectus had nothing to do with Hynix.²⁵ However, the prospectus speaks for itself.²⁶ Moreover, Kookmin’s financial statements suggested that the statements in its prospectus related to Hynix. For example, Kookmin specifically noted in its 2001 Annual Report that Kookmin’s “financially troubled” borrowers included Hynix

²⁰ *Government of Korea Verification Report* at 4 (referencing Exhibits 1-2 through 1-6) (Exhibit US-12).

²¹ *See Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).

²² *Preliminary Determination*, 68 Fed. Reg. at 16774 ((Exhibit GOK-4).

²³ *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).

²⁴ *Kookmin Bank Prospectus* (June 18, 2002) at 22 (emphasis added) (Exhibit US-46).

²⁵ Korea Oral Statement, para. 53.

²⁶ The DOC properly assessed Kookmin’s statements under the SEC’s “plain meaning” rule, which governed Kookmin’s filings with the SEC. In that regard, it should be noted that the penalties for making false or misleading statements to the SEC are severe. For example, violations of Sections 11 and 12(2) of the Securities Act can and do result in the issuer having to refund to investors all of the millions of dollars raised by it in an offering. In addition to the remedies provided in Sections 11 and 12(2), the Securities Act provides other types of monetary damages. Lawyers and accountants that assist in the preparation of fraudulent prospectuses may face multi-million dollar liability based on allegations of malpractice or aiding and abetting. Deliberate violations are crimes that can lead to fines or imprisonment.

Semiconductor.²⁷ In fact, Kookmin listed Hynix as its single largest financially troubled borrower.

19. The GOK's ownership interests in Hynix's creditor banks was a significant, though not dispositive, factor in the DOC's analysis of entrustment or direction. For example, the GOK's common shares carried voting rights, and its ownership stake allowed it to determine bank management through the nominating committee process.²⁸ Thus, the GOK's ownership interests in Hynix's creditors provided the means by which it could entrust aspects of Hynix's restructuring and recapitalization to these banks.

b. The Corporate Restructuring Promotion Action (“CRPA”)

20. The GOK enacted the CRPA in August 2001, precisely at the time when Hynix and other Hyundai Group companies were on the brink of bankruptcy and required significant financial assistance to avoid financial failure.²⁹ These high profile insolvencies were looming at a time when officials in Korea believed that the voluntary corporate workout system that had existed under the Corporate Restructuring Act (CRA) needed to be amended because it allowed creditors to opt out of restructuring. As GOK officials stated during the verification, “because of this hesitation on the part of creditors to put companies under workout programs, the National Assembly passed the Corporate Restructuring Promotion Act (“CRPA”) to make sure that the banks could not avoid participating in workouts.”³⁰

21. Pursuant to the CRPA, creditor banks were “obligated to use the workout system if financial indicators showed that the company needed to be put under a workout plan.”³¹ Thus, at the core of the CRPA was the desire to ensure across-the-board participation by all creditor banks in companies undergoing corporate workouts. Article 2 of the CRPA made participation in the restructuring process mandatory.³²

²⁷ *Kookmin Bank, Annual Report 2001* at 58 (copy attached as Exhibit US-120). The DOC also found that the statement in Kookmin's prospectus was mirrored in Kookmin's loan approval documents for the December 2000 syndicated loan. *Hynix Verification Report* at 23 (Exhibit US-43). Hynix claimed proprietary treatment for the precise language.

²⁸ See *Financial Experts Report*, Meeting 2, at 5-6; Meeting 5, at 12; and Meeting 5, at 11 (Exhibit GOK-30) (“In those cases [of public fund injections and greater government ownership], the government has interfered in the governance of the banks. 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.”); see also *Government of Korea Verification Report*, at 4 (Exhibit US-12) (“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.”).

²⁹ US First Submission, para. 84.

³⁰ *GOK Verification Report* at 8 (Exhibit US-12).

³¹ *Issues and Decision Memorandum* at 54 (Exhibit GOK-5); *GOK Verification Report* at 8 (Exhibit US-12).

³² CRPA, Article 2 (Exhibit US-51).

22. Citibank officials characterized the CRPA as way for the larger creditors to force their decisions on smaller creditors.³³ Independent analysts, such as Standard and Poor’s, noted that the CRPA provided the GOK with “a powerful voice in lending decisions”, and concluded that the GOK could utilize its powers to “force some financial institutions to make new loans against their will” and “strip[] the financial services companies of their independence in lending decisions.”³⁴ Thus, while the CRPA may have been modeled in some respects on the so-called “London Approach”, the GOK’s version was government-driven, with the GOK playing a direct role in working out debts with financial institutions owned and controlled by the GOK.

23. The structure of the CRPA enables a handful of banks – the “Creditors’ Council” – to dominate the restructuring process, to establish the terms and details of the agreement, and to dictate the results to every other creditor. In fact, this is precisely what happened in the Hynix October restructuring. Pursuant to Article 27(1), banks holding 75 percent of a company’s debt set the financial restructuring terms for all of the company’s creditors.³⁵ During verification, officials of the Korea Exchange Bank (KEB) confirmed the voting structure of the CRPA, stating that “a resolution passed as long at 75 percent of the creditors in terms of exposure approved the agenda item.”³⁶ Citibank confirmed the effectiveness of this voting structure, stating that “creditor banks holding 75 percent of Hynix’ debt can impose their decisions on everyone else ... [and that, while] foreign creditors wanted more freedom to maneuver ... they didn’t see that they had much choice”³⁷

24. Public entities, such as the Korea Development Bank (KDB), and private entities owned and controlled by the GOK, were by far Hynix’s largest creditors.³⁸ Under the CRA/CRPA voting structure, even when these banks did not account for 75 percent of the votes, they had sufficient voting power to block any actions that the minority creditors might propose. The DOC found that in both the May and October restructurings, GOK-owned and controlled banks held a majority of the voting rights; *i.e.*, a blocking majority.³⁹

25. In an effort to recast the CRPA as a voluntary process, Korea asserts that “many” of Hynix’s creditors “walked away” from the October restructuring, opting to exercise “appraisal rights”, and were able to obtain “what they could have obtained through liquidation.”⁴⁰ In fact, it was impossible for any creditor to “walk away” from the Hynix bailout, and none did.

³³ *Hynix Verification Report* at 20-21 (Exhibit US-43). Hynix claimed proprietary treatment for the exact language used by the Citibank officials who were interviewed in the course of the DOC’s verification of Hynix.

³⁴ *Korean Restructuring Law May Hurt Credit Growth and Credit Quality of Financial Firms*, STANDARD & POOR’S (September 26, 2001) at 1-2 (copy attached as Exhibit US-124).

³⁵ CRPA, Article 27(1) (Exhibit US-51).

³⁶ *Hynix Verification Report* at 15 (Exhibit US-43).

³⁷ *Issues and Decision Memorandum* at 54 (Exhibit GOK-5).

³⁸ See US Answers, Figure US-4.

³⁹ See US First Submission, paras. 68, 147-8.

⁴⁰ Korea Oral Statement, paras. 51, 55.

26. The investigation record establishes that Hynix creditor banks did not have any choices beyond the three options offered under the proposed restructuring plan developed by Hynix’s 18 largest creditors – which were public and private entities owned and controlled by the GOK – and presented to all creditors for a vote on October 31, 2001. Contrary to Korea’s suggestions at the first substantive meeting with the Panel, none of the three options in the plan can properly be characterized as a “walk away” option, or the equivalent of liquidation rights. Moreover, there was no fourth option outside the plan approved by the Creditors’ Council.

27. Based on information submitted by Hynix and the GOK, there were only three options open to Hynix creditor banks. As Hynix noted in its questionnaire response, “under the plan, creditors fell under three tiers depending on whether they decided to extend new loans to Hynix and/or convert debt to equity.”⁴¹ The options available to Hynix creditors were:

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

28. Option 3 is what Korea characterizes as “walking away” from Hynix and receiving “basically what they would have obtained in liquidation.”⁴² By asserting that the four Option 3 banks “walked away,” Korea implies that the banks received some form of compensation and that was the end of their relationship with Hynix. In fact, the terms of Option 3 prevented the four banks from severing their ties with Hynix. Under the terms of Option 3, the banks were required to accept a five-year interest-free debenture from Hynix, thus condemning them to maintain a financial relationship with Hynix at least until 2006.

29. In addition, what the Option 3 banks “obtained” was not comparable to what they might have received in liquidation, for the following reasons:

- The banks were foreclosed from even seeking liquidation. Korea implies that, under the CRPA, Hynix’s creditors could have put the company “into court

⁴¹ *Hynix Questionnaire Response* (January 27, 2003) at 54 (Exhibit US-119).

⁴² Korea Oral Statement, para. 51.

receivership if they decided to do so.”⁴³ Apparently, however, what the law giveth, the law also taketh away. Even assuming Korea is accurately characterizing provisions of the CRPA,⁴⁴ the fact remains that Article 14 of the CRPA authorizes the Financial Supervisory Service (FSS) (a government authority⁴⁵) to stop creditors that want to seek liquidation from exercising their rights to call loans and to move companies into receivership.⁴⁶ And, in fact, that is exactly what happened in this case. The FSS did exercise this authority on Hynix’s behalf during the period of investigation.⁴⁷

- As part of the CRPA processes described above, Option 3 banks had no independent rights to seek or establish the value of their outstanding credit to Hynix. Rather, their rights and terms were dictated to them by the GOK-owned and controlled banks and the rest of the blocking majority on the Creditors’ Council;⁴⁸
- In a liquidation situation, creditors would receive payment in the form of cash or assets based upon a mutually agreed liquidation value for the company in question. In this case, however, the banks had no say in what the liquidation value was or how it was calculated. In a liquidation, the value of the company would typically be established with reference to several estimates and with the full review and approval of the creditor banks. Instead, the “liquidation” value used to establish the debenture and write-off amounts for Option 3 banks was only based on the Arthur Anderson evaluation, commissioned and paid for by Hynix and its Creditors’ Council;
- Selecting Option 3 *did not* sever the ties between the Option 3 banks and Hynix. Instead of receiving payment and “walking away,” the Option 3 banks were forced to maintain an on-going financial relationship with Hynix, by accepting interest-free debentures rather than cash payments. Thus, they continued to carry Hynix debt on their books and ran the risk of never being paid if Hynix were to default.

30. Thus, record evidence supported the DOC’s findings that the CRPA enabled the GOK entrust and direct Hynix’s creditors to provide assistance to Hynix. Hynix’s creditors had no options available to them other than the three established by the banks that the GOK owned and controlled. Liquidation was not an option available to the banks that selected Option 3, and what those banks received was not comparable to what they might have received if a liquidation had

⁴³ Korea Oral Statement, para. 55.

⁴⁴ Korea did not support its assertion with a citation to the CRPA. See Korea Oral Statement, para. 55.

⁴⁵ See US First Submission, para. 101 (discussing actions of the FSS).

⁴⁶ CRPA, Article 14 (copy attached as Exhibit US-123).

⁴⁷ *Government of Korea Verification Report* at 19 (Exhibit US-12).

⁴⁸ US First Submission, para. 88.

taken place. Finally, Option 3 banks did not “walk away” – they were not scheduled to be paid until 2006. In other words, no creditor had the option to say “no” to the GOK’s policy to support Hynix and prevent its failure.

c. GOK Coercion

31. Korea asserts that the DOC misconstrued what was merely the benign “intersection” of two events – the Hynix restructuring and financial reforms in Korea.⁴⁹ In fact, the record shows that the Hynix bailout was on a collision course with those reforms. That fact is heavily underscored by the evidence of the GOK’s intimidation of banks such as Korea First Bank (KFB) and KorAm Bank when they threatened the success of the GOK’s plan. Korea has sought to diminish the significance of this evidence by arguing that the DOC’s reliance on the reputable journals that reported the incidents of GOK coercion was an insufficient basis for a finding of government entrustment or direction. As discussed further below, however, such evidence, which in the DRAMs investigation consisted largely of direct quotes from bank officials, can form the basis for such a finding. This and other evidence demonstrated that the GOK was able to, and in fact did, entrust and direct Hynix’s creditors to save the financially distraught company. In short, the record demonstrated that the GOK did make a “special exception”⁵⁰ and a special policy for Hynix.

2. The GOK Ensured That Hynix’s Creditors Would Have No Excuse to Say “No”

32. In addition to taking actions that directly evinced entrustment and direction, the GOK also took actions to ensure that Hynix’s creditors were in a position to effectuate the GOK’s policy to rescue Hynix. One such action was the GOK’s instruction to the FSC⁵¹ to waive the ceiling on loans to a single borrower. Specifically, in a November 2000 meeting, the Economic Ministers concurred on a “resolution of special approval” by the FSC to increase certain banks’ ceiling limits for single borrowers, as requested by the KEB on behalf of Hynix’s creditors.⁵² Because Article 35 of the Banking Act 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,⁵³ a number of Hynix’s creditors were already above their legal limit and would otherwise not have

⁴⁹ Korea Oral Statement, para. 39.

⁵⁰ Korea Oral Statement, para. 45.

⁵¹ 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. The FSC’s authority was subsequently expanded to cover specialized banks. See US First Submission, para. 94.

⁵² *Results of Discussions at the Economic Ministers’ Meeting*, letter from Ministry of Finance and Economy (November 28, 2000) (translated version) (Exhibit US-28).

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

been able to participate in the restructuring and recapitalization of Hynix without the GOK’s special intervention.

33. The FSC approved three credit limit increases for Hynix' creditors “in order to allow them to participate in the Hynix restructuring process.”⁵⁴ The first waiver was for the KDB, KEB and KFB, thereby ensuring the existence of enough participants to raise the 800 billion won December 2000 syndicated loan.⁵⁵ The second was a blanket waiver provided for any bank that participated in the KDB Fast Track Program.⁵⁶ 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.⁵⁷

34. Korea claims that the waivers were simply a “modest” step.⁵⁸ To the contrary, at the time of the DOC’s investigation, the FSC had approved only five cases since January 2000 where an applicant bank applied to exceed its credit ceiling, four of which related to Hynix and other Hyundai Group companies.⁵⁹ These were companies identified by the GOK as being part of its “backbone industries” that should not be liquidated simply to follow “market principles.”⁶⁰ The record evidence showed that, far from applying “market principles,” the FSC waived the credit ceiling for three of Hynix's creditors participating in the December 2000 syndicated loan for economic, social and political reasons.⁶¹

35. Korea makes much of the fact that five banks did not receive a waiver.⁶² The import of this fact is elusive, because these other banks simply did not need a waiver.⁶³ The salient fact is that the GOK waived the ceiling for every Hynix creditor that needed a waiver in order to participate in various restructuring events. Entrustment or direction to the banks to assist Hynix would be meaningless if the banks were legally precluded from complying with the GOK’s directives.

⁵⁴ *Issues and Decision Memorandum* at 50-51 (Exhibit GOK-5); *Government of Korea Verification Report* at 16 (Exhibit US-12).

⁵⁵ 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); see also *Government of Korea Verification Report* at 16 (Exhibit US-12).

⁵⁶ *Government of Korea Verification Report* at 17 (Exhibit US-12).

⁵⁷ *Government of Korea Verification Report* at 16 (Exhibit US-12).

⁵⁸ Korea Oral Statement, para. 49; Korea Closing Statement, para. 5.

⁵⁹ *Issues and Decision Memorandum* at 50-51 (Exhibit GOK-5); *GOK Verification Report* at 16-17 (Exhibit US-12).

⁶⁰ *The State Activism toward the Big Business of Korea, 1998-2000: Path Dependence and Institutional Embeddedness*, Jiho Jang, University of Missouri-Columbia (April 2001) (Exhibit US-17).

⁶¹ *Government of Korea Verification Report* at 16-17 (Exhibit US-12).

⁶² Korea Oral Statement, para. 49.

⁶³ Korea Oral Statement, para. 49.

36. Another of the GOK's actions aimed at effectuating its policy to ensure the survival of Hynix was the GOK's pressure on credit rating agencies. 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.⁶⁴ The FSC, concerned that this lower rating might endanger Hynix's eligibility for the KDB Fast-Track program, reacted by calling credit rating agency officials. FSS officials also met with representatives from the local credit rating agencies at which the representatives were pressured and reprimanded. Agencies subsequently cancelled plans to downgrade or were forced to upgrade credit ratings.⁶⁵ Lower credit ratings would have made it more difficult for the GOK to continue its Hynix bailout program, which was already the subject of intense criticism.

3. The GOK's Actions Evinced Entrustment and Direction

37. Governments typically have a wide range of tools at their disposal to deliver a financial contribution indirectly, and these tools may vary greatly in terms of their transparency. Governments may have political reasons for wanting to obscure their role in providing assistance to a particular company or industry. Thus, cases involving indirect subsidies can present particular challenges for an investigating authority attempting to gather facts and figure out what really happened.⁶⁶

38. In light of these considerations, if Article 1.1(a)(1)(iv) is to have any meaning, it is essential to recognize the importance of examining, on a case-by-case basis, all of the evidence, including primary, secondary, and circumstantial evidence, surrounding possible government entrustment or direction. In other words, an investigating authority must be able to assess the evidence in light of the totality of circumstances.

39. These circumstances would include, not only the specific actions taken by a government, but also the greater context for those actions, including any governmental interest in, and control over, the private parties it is alleged to be entrusting or directing, any inducements of the private bodies allegedly taking action at the government's behest, any governmental policies concerning the company or industry that allegedly benefits from government entrustment or direction, and the views of objective third party observers and scholars who are knowledgeable about a government's policies and practices regarding intervention in the decision-making of firms.

⁶⁴ *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).

⁶⁵ US First Submission, paras. 116-123.

⁶⁶ As Korea itself acknowledges, the Hynix bailout did not involve a "formal program or law". Korea Oral Statement, para. 76.

40. In the case of the Hynix bailout, the reasonableness of the DOC's conclusion that the GOK entrusted or directed Hynix's creditors is not even a close call. The DOC considered a wide range of evidence, including official GOK documentation of high-level meetings and directives; GOK laws; the investigative report of Korea's Grand National Party investigation of the GOK's preferential policies for Hynix and other Hyundai Group *chaebol*; reports of direct meetings between GOK officials and Hynix/Hyundai creditors, confirmed by supporting documentation; sworn submissions to U.S. and Korean regulatory agencies, and reports and website materials of Korean banks; numerous direct quotes from GOK officials in interviews and press conferences; public statements of Hynix's creditors; U.S. Government reports; IMF and OECD reports; public statements of Hynix; book excerpts; newspaper reports; and the reports of scholars, analysts and experts on the GOK's control of the banks, direction of credit practices and Hynix's financial condition.

41. Furthermore, Korea's arguments to the contrary notwithstanding, prior panel reports provide support for the DOC's reliance on secondary sources and the drawing of reasonable inferences based on the record evidence. For example, in *US – DRAMs*, Korea contested the DOC's reliance on, among other things, materials from "independent market analysts' reports from ... brokerage houses ...; business and market news reporting by well-known news organizations ...; and reports from various trade journals."⁶⁷ Korea argued that the DOC's reliance on such sources violated the obligation to "satisfy itself as to the accuracy of the information" under Article 6.6 of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").

42. The panel rejected Korea's argument. The panel agreed with the United States that the DOC properly utilized secondary sources and "applied its considerable experience in market analysis and considered the source of the information, its internal logic and its consistency with other information in determining the accuracy and usefulness of certain news reports presented by the respondents and brokerage house reports presented by the petitioner."⁶⁸ The panel asserted that there was nothing about the use of secondary information, as such, that made it any less reliable a basis on which to make a determination. The panel further stated that: "Korea has failed to identify anything on the record (other than the fact that the information was not verified) to indicate that an unbiased and objective investigating authority could not properly have been satisfied as to the accuracy of this information."⁶⁹

43. In the DRAMs investigation at issue in this dispute, the secondary sources in the record have been shown to be credible and are often corroborated by other reports or documents. For example, the article detailing the GOK's decision to assist Hynix and its series of Ministerial meetings (*Direct Intervention by the Government in Supporting Hynix*, THE KOREA ECONOMIC

⁶⁷ *US – DRAMs*, para. 6.79.

⁶⁸ *US – DRAMs*, para. 6.79.

⁶⁹ *US – DRAMs*, para. 6.79.

DAILY, August 28, 2001 (Exhibit US-29)) was completely corroborated by the underlying official Ministerial documents concerning the GOK’s decisions and orders.

44. In addition, the Appellate Body has recognized the permissibility of relying on reasonable inferences. In *Canada – Aircraft*, the Appellate Body stated as follows:

[I]n all cases, in carrying out their mandate and seeking to achieve the ‘objective assessment of the facts’ required by Article 11 of the DSU, panels routinely draw inferences from the facts placed on the record. The inferences drawn may be inferences of fact: that is, from fact A and fact B, it is reasonable to infer the existence of fact C. Or the inferences derived may be inferences of law: for example, the *ensemble* of facts found to exist warrants the characterization of a ‘subsidy’ or a ‘subsidy contingent ...in fact...upon export performance.’ The facts must, of course, rationally support the inferences made, but inferences may be drawn whether or not the facts already on the record deserve the qualification of a *prima facie* case. The drawing of inferences is, in other words, an inherent and unavoidable aspect of a panel’s basic task of finding and characterizing the facts making up a dispute.⁷⁰

Although the Appellate Body was addressing the role of a panel, its reasoning applies equally to the role of an investigating authority conducting a countervailing duty investigation.

45. Thus, it is not the *type* of evidence that matters. Rather, the issue is whether the domestic authority examined all the pertinent facts and provided an adequate explanation as to how the facts support its determination. The DOC did so in the DRAMS investigation.

B. The DOC’s Determination That GOK-Entrusted and -Directed Restructuring and Recapitalization Measures Conferred Benefits on Hynix Was Consistent With Articles 1.1 and 14 of the SCM Agreement

46. In *Canada – Aircraft*, the panel found that a benefit exists where “the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution.”⁷¹ In reviewing that report, the Appellate Body affirmed that a benefit exists where “the ‘financial contribution’ makes the recipient ‘better off’ than it would otherwise have been, absent that contribution.”⁷² In determining the existence of a benefit, therefore, the issue is the position of the recipient “but for” or “absent” the government’s financial contribution.

⁷⁰ *Canada – Aircraft (AB)*, para. 198.

⁷¹ *Canada – Aircraft (Panel)*, para. 9.112.

⁷² *Canada – Aircraft (AB)*, para. 157.

47. Moreover, the Appellate Body has stated that the point of comparison is “the marketplace”; *i.e.*, a benefit exists where the financial contribution is received on terms more favorable than those available in the market.⁷³ Finally, following the reasoning of the Appellate Body, the *Brazil – Aircraft* panel concluded that the concept of a comparison market necessarily means a “commercial market, *i.e.*, a market undistorted by the government’s financial contribution.”⁷⁴ In other words, only by comparison to a market undistorted by the government’s financial contribution is it possible to determine whether the recipient is better off than it otherwise would have been absent the financial contribution.

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

49. At the first substantive meeting with the Panel, Korea made essentially two arguments with respect to the DOC’s calculation of the benefit in the DRAMs investigation. First, Korea argued that the DOC rejected banks, including Citibank, that could have been used as suitable benchmarks for calculating the benefits attributable to the various elements of the Hynix bailout. Second, Korea argued that the DOC erred in calculating the uncreditworthy benchmark rate by using a risk premium figure that was not Korean. Neither of these arguments withstands scrutiny.

1. Citibank

50. Korea argues that the DOC erred in rejecting Citibank as an appropriate benchmark for measuring the benefit of loans and other financial contributions to Hynix. Consistent with Article 14 of the SCM Agreement, the DOC examined the pertinent facts surrounding the loans and equity investments from Citibank and provided an explanation as to why they did not qualify as appropriate benchmarks.⁷⁵

51. The DOC did not find that Citibank was entrusted and directed by the GOK. Consequently, the DOC undertook an examination of whether loans/equity investments from Citibank could serve as a benchmark for measuring benefit. Consistent with U.S. law and the DOC’s regulations, this analysis included a careful review of the circumstances surrounding Citibank’s extension of financing to Hynix during the period of investigation. Among these circumstances was the fact that Citibank was not a lender to Hynix prior to December 2000; that is after Citibank became, along with Salomon Smith Barney (SSB), Hynix’s financial advisor. In

⁷³ *Canada – Aircraft (AB)*, para. 157.

⁷⁴ *Brazil – Aircraft*, para. 5.29 (emphasis in original).

⁷⁵ *Issues and Decision Memorandum* at 7-11 (Exhibit GOK-5).

addition, Citibank's financing to Hynix consisted of only those same restructuring elements that other Hynix creditors participated in as part of the bailout. In other words, Citibank provided no loans that were not part of the same bailout measures examined by DOC.

52. The reasons why the DOC rejected Citibank as a suitable benchmark are discussed extensively in the paragraphs 197-204 of the United States' first written submission, but can be summarized as follows:

- Citibank's involvement was small in absolute and percentage terms compared to the involvement of the government-owned and controlled banks.
- Citibank itself acknowledged that its participation was only a symbolic gesture.⁷⁶
- There was substantial record evidence that Citibank's risk assessment of Hynix was influenced by the GOK's policy to support Hynix and prevent its failure. For example, a Citibank official stated that Citibank needed a clear signal from the Korean banks that they were willing to support Hynix before they would commit funds;
- Record evidence showed that Citibank was influenced by the significant and continuing involvement of the GOK in propping up Hynix, rather than its belief that Hynix was a commercially worthy credit risk in its own right.⁷⁷
- Citibank and SSB were the exclusive financial advisors to Hynix, and reaped significant fees from this engagement – fees that would justify the token participation on the restructuring packages.
- Evidence showed that Citibank's involvement with Hynix was viewed by Citibank as a stepping stone towards a larger and more lucrative role in helping the GOK to resolve other structural problems in the Korean financial market.

53. While the GOK argues that Citibank's lending was not small, a calculation of Citibank's overall contribution based on Hynix's proprietary data showed that its share of the total was indeed small. The fact that Citibank's contributions in May and October were proportional to its outstanding credit to Hynix, and proportional to what others provided, actually supports the DOC's conclusion that Citibank's lending was small, because Citibank's first loan to Hynix was only in December 2000 and it constituted a minor portion of Hynix's overall debt. Citibank's small debt formed the basis for its proportional share in other elements of the bailout.

⁷⁶ See *Hynix Verification Report* at 19 (Exhibit US-43).

⁷⁷ US First Submission, paras. 200-201.

2. Default Rates

54. The GOK claims that the DOC erred in using historical cumulative default rates published by Moody’s Investor Service to calculate the uncreditworthy benchmark rate used to measure the benefit to Hynix. The GOK does not argue that Hynix was creditworthy during the period of investigation, but rather takes issue with the way in which DOC calculated the “risk premium” added to the benchmark to account for the fact that Hynix was uncreditworthy.⁷⁸ Specifically, the GOK argues that the DOC was obligated to use data concerning Korean default rates provided by Hynix.

55. Nothing in Article 14 of the SCM requires that the DOC use Korean default rates to measure loans benefits. The language of Article 14(b) requires only that the benefit calculation be based on comparable commercial loans that Hynix “could obtain on the market,” but does not prescribe any geographical limitations on the market used.

56. In fact, the DOC examined but rejected the Korean default rates provided by Hynix. First, there was no information provided with the rates offered by Hynix that would have allowed the DOC to ascertain how they were calculated. Second, there was nothing indicating that the historical rates were cumulative average rates, as required under the DOC’s regulations. Only cumulative rates provide the probability of default over the full term of the loan, as opposed to a single year. Third, the default information submitted by Hynix was unreliable on its face, because the data suggested that the default rate for the lowest rated debt was lower than the default rate for the highest rated debt. This inverse relationship made no sense. Accordingly, the DOC reasonable declined to rely on the rates offered by Hynix, because they lacked sufficient information and appeared unreliable on their face.⁷⁹

C. The DOC’s Finding of Specificity Was Consistent With Article 2 of the SCM Agreement

57. Article 2.1(c) of the SCM Agreement contains clear and objective criteria for determining when a subsidy is specific. Where a subsidy is used by certain enterprises or is predominantly used by or granted in disproportionately large amounts to certain enterprises, it is specific in fact. Other than considering the extent of diversification of economic activities and the length of time the subsidy program has been operating, Members are not obligated to conduct any further specificity analysis.

58. Korea argues that the DOC was obligated to use a particular benchmark in considering disproportionate use of subsidies. According to Korea, its tax credit program hypothetical shows

⁷⁸ Korea First Submission, paras. 553-556.

⁷⁹ US First Submission, paras. 205-214.

the flaw in the DOC's analysis of specificity.⁸⁰ Korea misapprehends both the DOC's specificity determination and the *de facto* specificity provisions of the SCM Agreement.

59. Consideration of whether a subsidy program is specific in fact is, by its very nature, a fact- and case-specific determination. Korea's tax credit hypothetical is just that, hypothetical. Analyzing specificity outside the context of case-specific facts and evidence is speculative at best. More importantly, however, the DRAMs investigation was not about hypotheticals.

60. As detailed in the U.S. first written submission, the DOC demonstrated, based on positive evidence, that the GOK-directed bailout was specific in fact to Hynix, and thus actionable under the SCM Agreement.⁸¹ Although Korea disputes whether the bailout was government-directed, it has not disputed that Hynix was the beneficiary of a planned financial restructuring program.

61. The DOC also examined corporate usage of the CRA/CRPA to substantiate its specificity determination. The DOC found that, based on data provided by the GOK, the Hyundai Group companies received an extraordinarily large percentage of financial restructuring and recapitalization aid and that Hynix alone received a very high percentage of such aid.⁸² It is axiomatic that an analysis of disproportionate use is comparative. Korea has simply argued for use of a different comparative benchmark; argument should not be confused with WTO obligation.

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

62. In its oral statement, Korea states that it did not consent to the DOC's meetings with financial experts.⁸³ The United States disagrees with Korea's new interpretation of the facts concerning this issue.

63. In its first submission, Korea conceded that during the investigation it did not object to the DOC's meetings with financial experts, but rather objected to the form of such meetings.⁸⁴ As detailed in the first submission, the DOC considered the GOK's request to allow the GOK's

⁸⁰ Korea Oral Statement, para. 71.

⁸¹ US First Submission, paras. 235-254.

⁸² US First Submission, para. 244. Hynix's restructuring was also many times larger than the average company's restructuring through June 2000. Specificity Memorandum (public version) at 1 (Exhibit US-91) (the exact amounts are proprietary). Furthermore, while 82 percent of the workout value of the average company through June 2000 was in the form of rate changes and/or maturity deferrals, the bulk of Hynix's bailout was in the form of new cash infusions, equity infusions, and debt forgiveness. See Hynix 2001 Audited Financial Statements at 38-40 (copy attached as Exhibit US-125). The amount and nature of Hynix's debt restructuring, therefore, also set Hynix's restructuring apart from all other restructurings in the economy.

⁸³ Korea Oral Statement, para. 74.

⁸⁴ Korea First Submission, paras. 588 (“The GOK did not object [*sic*] the meetings themselves, but objected strongly to the form of the meetings.”).

counsel to monitor the meetings, but ultimately determined to preserve the privacy of the meetings to ensure both full disclosure and confidentiality.⁸⁵ Transparency was ensured by placing summaries of the meetings on the investigation record.

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

III. THE ITC’S INJURY DETERMINATION WAS CONSISTENT WITH U.S. WTO OBLIGATIONS

A. The ITC’s Volume Analysis Was Consistent with the SCM Agreement

65. The ITC examined the volume of subsidized subject imports in three ways: (1) in terms of billions of bits; (2) as a ratio to domestic production; and (3) as a share of apparent U.S. consumption. All three measurements 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 2000.⁸⁶

66. In light of the undisputed high degree of substitutability between subsidized subject imports and the domestic like product,⁸⁷ the ITC found that the volume of subject imports on an absolute basis, as well as the increase in the volume of subject imports both absolutely and relative to both production and consumption in the United States, was “significant.”⁸⁸ Korea’s attempts to refute these findings are futile.

67. Despite its prominence in Korea’s first written submission, the discredited Figure 9 was no longer a feature of Korea’s arguments during the first substantive Panel meeting.⁸⁹ Indeed, Korea no longer contended that the volume trends for subsidized subject imports were “declining”, because even the data it provided to the Panel in Exhibit GOK-41 showed increases.

⁸⁵ See US First Submission, para. 261.

⁸⁶ See, e.g., USITC Pub. 3616 at 20-21 (Exhibit GOK-10).

⁸⁷ See, e.g., USITC Pub. 3616 at 22 & nn. 145-147 (Exhibit GOK-10).

⁸⁸ See, e.g., USITC Pub. 3616 at 20-21 (Exhibit GOK-10); see also US Answers (Answer to Question 15).

⁸⁹ See US First Submission, paras. 292-294 for a discussion of the problems with Figure 9.

68. Instead, Korea argued that “the *Hynix brand* lost market share over the period of investigation”⁹⁰ It maintained that any increase in the volume of subsidized subject imports was related to the temporary shutdown of Hynix’s production operations in Eugene, Oregon between July 2001 and January 2002 to retool the facility.⁹¹ The United States has previously explained why Korea’s brand-name argument has no legal basis under the SCM Agreement given the facts of this investigation.⁹² Korea has not rebutted this argument. Nor has it shown that the ITC’s rejection of Hynix’s factual explanation for the increased volume of subsidized subject imports was unreasonable.⁹³

69. Korea continues to place a great deal of emphasis on relative market share increases. However, there is no legal support for Korea’s assertion that increases in market share are the only indicia that matter for an affirmative material injury analysis.⁹⁴ In addition to a significant relative increase in market share by subsidized subject imports, the ITC also found that subject imports and the increase in subject imports were significant both absolutely and relative to U.S. production.⁹⁵ The SCM Agreement specifies that no one or several of these factors is determinative.⁹⁶

70. Korea’s volume arguments continue to ignore the importance of the conditions of competition in this industry to the ITC’s volume analysis. As the ITC explained, and Korea does not contest, subsidized subject imports were highly substitutable for domestic DRAM products.⁹⁷ As the ITC emphasized, its findings about the volume of subject imports were reinforced by the substantial degree of substitutability between subject imports and domestic shipments.⁹⁸ 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.⁹⁹

71. Korea insists that the volume of subsidized subject imports and the increases in the relative volume of subsidized subject imports were “small.” In so doing, Korea disregards the fact that the degree of product fungibility, price sensitivity, and market differentiation can be

⁹⁰ See, e.g., Korea Oral Statement, para. 7.

⁹¹ See, e.g., Korea Oral Statement, paras. 7, 9, 11, 13.

⁹² See, e.g., US First Submission, paras. 326, 328-334.

⁹³ Compare, e.g., Korea Oral Statement, para. 14 with US First Submission, paras. 325-334 and **Confidential US Figure 1**; and US Answers (Answer to Question 16).

⁹⁴ See US First Submission, paras. 301-307.

⁹⁵ See, e.g., USITC Pub. 3616 at 20-21 (Exhibit GOK-10).

⁹⁶ SCM Agreement, Articles 15.1 and 15.2.

⁹⁷ Subsidized subject imports and domestic DRAM products were used interchangeably, and there were no important differences in product characteristics or sales conditions between them. Throughout the period of investigation, Hynix’s subject Korean operations produced many of the same product densities as domestic producers. Moreover, subject imports and domestic DRAM products were sold largely to the same customers and through the same channels of distribution. See, e.g., USITC Pub. 3616 at 22 (Exhibit GOK-10).

⁹⁸ See, e.g., USITC Pub. 3616 at 21 (Exhibit GOK-10); US Answers (Answer to Question 15).

⁹⁹ See, e.g., USITC Pub. 3616 at 21 (Exhibit GOK-10); US Answers (Answer to Question 15).

relevant in assessing the significance of a given import volume or of a given increase of import volume absolutely or relative to domestic production or consumption. In an investigation involving a highly fungible product, a specific volume or a specific increase of import volume absolutely or relative to domestic production or consumption can be more harmful than a similar increase for a highly differentiated product, because it is more likely to have a direct impact on the market.¹⁰⁰ Given how quickly information is disseminated in the DRAMs industry, it is not surprising that purchasers were reluctant to commit large portions of their purchases to the financially troubled Hynix, although they were free to use Hynix's low-priced offers to ratchet down prices from other potential suppliers.¹⁰¹

72. In sum, an investigating authority has discretion to select the methodology used to analyze the volume of subsidized subject imports, and Korea fails to show that the ITC's methodology was inconsistent with the SCM Agreement. Korea also fails to show how the ITC's volume analysis was not objective and based on positive evidence.

B. The ITC's Analysis of the Price Effects of Subsidized Subject Imports Was Consistent with the SCM Agreement

73. Turning to the ITC's analysis of the price effects of subsidized subject imports, the ITC engaged in one of the most data-intensive, complex pricing analyses it has ever undertaken, consistent with its intent to fully and faithfully examine and understand the pricing complexities of the DRAM market. It collected monthly pricing data for the three-year period between January 2000 and December 2002, as well as for the first quarter of 2003, on eight standard DRAM products that were all among those sold in the largest volumes by domestic producers and importers.¹⁰² The pricing data were clearly representative, accounting, by value, for approximately 45.9 percent of domestic producers' and 36.9 percent of subject imports' U.S. shipments in 2002.¹⁰³ Based on a weighted-average comparison of the price of domestic shipments with the weighted average price of subsidized subject imports for each month of that time period, the ITC found significant price undercutting by subsidized subject imports.¹⁰⁴

74. The level of detail of pricing data obtained by the ITC provided unassailably accurate head-to-head price comparisons. All price comparisons between subject imports and the domestic like product involved direct comparisons of sales of precisely defined DRAM

¹⁰⁰ Moreover, notwithstanding its repeated use of the term "small," Korea points to no language in the SCM Agreement specifying any absolute volume or any increase in volume absolutely or relative to domestic production or consumption that by definition is "significant." There is no such language, as noted in US Answers (Answer to Question 15).

¹⁰¹ See, e.g., USITC Pub. 3616 at 19, 22-25 (Exhibit GOK-10).

¹⁰² See, e.g., USITC Pub. 3616 at 23-24, V-3 to V-9, Tables V-1 to V-18 (Exhibit GOK-10).

¹⁰³ See, e.g., USITC Pub. 3616 at 23, II-8, V-3 (Exhibit GOK-10).

¹⁰⁴ See, e.g., USITC Pub. 3616 at 23-24 (Exhibit GOK-10).

products.¹⁰⁵ Pricing data were further refined by requiring the reporting of sales of each specific product to each of the major channels of distribution through which virtually all DRAM sales are made.¹⁰⁶ This provided even greater accuracy and insight into the head-to-head price competition between the subsidized imports and the domestic like product.

75. Finally, all pricing data were required to be reported on a monthly basis.¹⁰⁷ Thus, each importer and domestic producer provided the monthly quantity and value of sales of each specified DRAM product to each channel of distribution. From these data, a monthly average unit price was calculated providing valuable information not only on pricing trends throughout the full period of investigation, but also the trends in the frequency and magnitude of underselling by subject imports in head-to-head competition.¹⁰⁸

76. The level of accuracy and objectivity of examination permitted by this monthly series of weighted-average price comparisons by product and by channel of distribution was remarkable. These data permitted the ITC to determine in those monthly periods for which price comparisons were available whether the subsidized subject imports were underselling or overselling the domestic like product and by what margins.¹⁰⁹

77. Based on this extensive data, the ITC ascertained that for the majority of possible comparisons, subsidized subject imports undercut the domestic like product at high margins (often over 20 percent), and at increasing frequencies (from 51 percent of possible comparisons in 2000 to 56 percent in 2001 and 70 percent in 2002).¹¹⁰ The ITC identified significant price undercutting to each of the three main channels of distribution (PC OEMs (*i.e.*, original computer equipment manufacturers), other OEMs, and non-OEMs).¹¹¹ The ITC also found that undercutting was consistent and substantial for particular high-revenue products to particular channels of distribution at specific points during the period of investigation. For modules, for example, the most significant sales channel was sales to PC OEMs, and here undercutting reached 100 percent of all price comparisons by the end of the period examined.¹¹²

78. This standard analysis of the ITC establishes a firm basis for judging the significance of price undercutting and goes well beyond that found acceptable by other reviewing panels. For example, it is the understanding of the United States that the EC typically will use a technique in which the margin of undercutting is calculated specifically from only those sales found to be

¹⁰⁵ See, e.g., USITC Pub. 3616 at V-3 (Exhibit GOK-10).

¹⁰⁶ See, e.g., USITC Pub. 3616 at Tables V-1 to V-18 (Exhibit GOK-10).

¹⁰⁷ See, e.g., USITC Pub. 3616 at V-3, Tables V-1 to V-18 (Exhibit GOK-10).

¹⁰⁸ See, e.g., USITC Pub. 3616 at V-3, Tables V-1 to V-18 (Exhibit GOK-10).

¹⁰⁹ See, e.g., USITC Pub. 3616 at V-3, Tables V-1 to V-18 (Exhibit GOK-10).

¹¹⁰ See, e.g., USITC Pub. 3616 at 23-24 & n.164, Tables V-2 to V-17 and V-18 (Exhibit GOK-10).

¹¹¹ See, e.g., USITC Pub. 3616 at 23-24 & n.164, Tables V-2 to V-17 and V-18 (Exhibit GOK-10).

¹¹² See, e.g., USITC Pub. 3616 at 23-24 & n.155 (Exhibit GOK-10).

made at undercutting prices. Sales found to be sold at undercutting prices are thus not offset by sales made at “overcutting” prices. A panel has found the EC approach to be WTO-consistent.¹¹³

79. The ITC approach, in contrast, explicitly recognizes the degree to which subsidized imports both undersell and oversell the domestic like product. This occurs because the number of months in which underselling is found is typically expressed for analytic purposes by the ITC in relation to the total number of monthly observations available, inclusive of months of underselling and overselling. Thus, in its consideration of price undercutting in the DRAMs investigation, the ITC went well beyond the approach found to be WTO-consistent by the panel in *EC – Tube*.

80. The ITC also went well beyond the requirements of the SCM Agreement by collecting and evaluating pricing data on non-subject imports. 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. Korea’s argument in its opening statement that the ITC “ignored the prices of non-subject imports” in its pricing analysis,¹¹⁴ is simply wrong.

81. The pricing data show that the underselling frequency by non-subject imports was lower than, and increased less than, the underselling frequency of subsidized subject imports between 2000 and 2002. In particular, while subject imports were increasing their underselling frequency between 2000 and 2001 from 51 percent of all observations to 56 percent of all observations, the frequency of underselling by non-subject imports was fairly steady at 46.6 percent of instances in 2000, and 47.7 percent in 2001. Underselling by subsidized subject imports increased to 69.8 percent of all observations in 2002, or about 10 percentage points higher than the percentage for non-subject imports in that year (60.7 percent).¹¹⁵ 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.¹¹⁶

82. Equally without merit is Korea’s argument that the ITC should have examined the pricing data on a brand-name basis. 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 imports.¹¹⁷ There is no requirement in the SCM Agreement to analyze price effects on a brand-name basis, nor does Korea identify one.

83. In the DRAMs investigation, the domestic industry was comprised of multiple producers, each producing its own brand-name products. Moreover, shipments of Hynix-brand products

¹¹³ See *EC – Tube (Panel)*, paras. 7.268-7.285.

¹¹⁴ See, e.g., Korea Oral Statement, paras. 16, 20.

¹¹⁵ See, e.g., USITC Pub. 3616 at 25 & n.164, Table V-18 (Exhibit GOK-10).

¹¹⁶ See, e.g., USITC Pub. 3616 at 25 & n.164 (Exhibit GOK-10).

¹¹⁷ See, e.g., *EC – Tube (Panel)*, para. 7.284; *Thailand – H-Beams (Panel)*, para. 7.159.

were comprised of shipments of subsidized subject imports as well as domestic shipments. Thus, use of the brand-name analysis urged by Hynix would not reflect the source country of the DRAM products and would be utterly inconsistent with the requirement under the SCM Agreement to examine the effect “of the subsidized imports” on the “like product,” the product produced by the domestic industry.¹¹⁸

84. 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.¹¹⁹ 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, an inelastic demand, and the rapid dissemination of pricing information.¹²⁰

85. In any event, the ITC *also examined* the pricing data on a disaggregated basis (broken down both by brand-name and by source). Even a disaggregated analysis showed that subsidized subject imports were the lowest-priced product “*more often than DRAM products from any other source.*”¹²¹

86. Contrary to Korea’s repeated arguments, the ITC did not “largely ignore” the “particular and unique competitive dynamics of the DRAM market.”¹²² The ITC identified several reasons why the factual data on undercutting was probative. These included the high degree of substitutability between subject imports and the domestic DRAM products, the overlapping customers and channels of distribution to which subject imports and the domestic DRAM products were sold, the inelasticity of demand, and the importance of price in this particular industry.¹²³

87. 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.¹²⁴ Thus, it found the patterns of frequent, sustained high-margin undercutting by

¹¹⁸ SCM Agreement, Article 15.2.

¹¹⁹ 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.

¹²⁰ *See, e.g.*, USITC Pub. 3616 at 15, 22-25 (Exhibit GOK-10).

¹²¹ *See, e.g.*, USITC Pub. 3616 at 24 (Exhibit GOK-10) (emphasis added).

¹²² *See, e.g.*, Korea Oral Statement, para. 15.

¹²³ *See, e.g.*, USITC Pub. 3616 at 15, 22-24 (Exhibit GOK-10).

¹²⁴ *See, e.g.*, USITC Pub. 3616 at 24 (Exhibit GOK-10).

subsidized subject imports was especially significant in this industry, and could be expected to have particularly deleterious effects on domestic prices.¹²⁵

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

89. The ITC also found that subsidized subject imports depressed prices to a significant degree.¹²⁶ 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.¹²⁷

90. Korea does not challenge the ITC’s finding that there was significant price depression by subsidized subject imports. Instead, to the extent Korea mentions price depression at all, it is in connection with its argument that the ITC did not adequately consider factors other than subsidized subject imports in its price effects analysis. At the first substantive meeting with the Panel, the Panel questioned Korea on this point, but Korea continued to make only non-attribution arguments concerning the ITC’s price depression analysis. In any event, in its discussion of the ITC’s causation analysis, the United States has addressed and rebutted Korea’s argument.¹²⁸

91. In sum, the investigating authority has discretion to select the methodology to analyze the price effects of subsidized subject imports, and Korea fails to show that the ITC’s methodologies

¹²⁵ See, e.g., USITC Pub. 3616 at 24 (Exhibit GOK-10).

¹²⁶ See, e.g., USITC Pub. 3616 at 24-25 (Exhibit GOK-10).

¹²⁷ See, e.g., USITC Pub. 3616 at 15, 22-25, II-9, V-1, Table V-1 (Exhibit GOK-10).

¹²⁸ See, e.g., US First Submission, paras. 444 to 470; US Answers (Answer to Question 23).

were inconsistent with the SCM Agreement. Korea also fails to show how the ITC’s price effects analysis was not objective and based on positive evidence.

C. The ITC’s Analysis of the Impact of the Subsidized Subject Imports Was Consistent with the SCM Agreement

92. The ITC found that many indicators of domestic industry performance declined over the period of investigation. These included capacity, production, market share, employment, and hourly wages.¹²⁹

93. The domestic industry’s operating performance also declined.¹³⁰ The ITC concluded that due 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.¹³¹ The domestic industry continued to experience substantial operating losses in the remainder of the period of investigation.¹³² 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 2002.¹³³ The ITC also determined that during this time, domestic producers continued to make substantial capital expenditures but at increasingly lower levels.¹³⁴

94. The ITC explicitly acknowledged that for some of the impact factors, there were positive trends in the data at specific points during the period of investigation. But, it further analyzed the data and explained why, even for factors showing increases, the value of such “improvements” was limited.¹³⁵

95. Korea does not contest the positive evidence supporting these findings. Instead, Korea continued to reference snippets of information that it believes would support a different conclusion than the ITC reached.¹³⁶ This approach ignores the fact that the ITC examined the domestic industry, as well as the evidentiary record, *as a whole*. Article 15.4 of the SCM Agreement specifies that the relevant inquiry is “the impact of the subsidized imports on the domestic industry,” and Article 16.1 of the SCM Agreement 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

¹²⁹ See, e.g., USITC Pub. 3616 at 25-27 (Exhibit GOK-10).

¹³⁰ See, e.g., USITC Pub. 3616 at 26-27 (Exhibit GOK-10).

¹³¹ See, e.g., USITC Pub. 3616 at 26-27 (Exhibit GOK-10).

¹³² See, e.g., USITC Pub. 3616 at 26-27 (Exhibit GOK-10).

¹³³ See, e.g., USITC Pub. 3616 at 26-27 (Exhibit GOK-10).

¹³⁴ See, e.g., USITC Pub. 3616 at 27 (Exhibit GOK-10).

¹³⁵ See, e.g., USITC Pub. 3616 at 26-27 (Exhibit GOK-10).

¹³⁶ See, e.g., Korea Oral Statement, para. 21.

products constitutes a major proportion of the total domestic production of those products” Other panels have recognized the importance of this language, including the panel in *Mexico – HFCS* and *EC – Tube (Panel)*.¹³⁷ The ITC’s impact analysis concerned the domestic industry as a whole, and thus was consistent with the requirements of Articles 15.5 and 16.1.

96. Moreover, Korea’s arguments about individual domestic producers are also flawed and/or based on a selective reading of the evidence. The public statements that Korea continues to assert show that the U.S. DRAM industry was doing well often pertain to the individual company’s global operations on all products, not just DRAMs. For example, Korea points to information from the website of Infineon AG, whose global operations span a variety of areas, from communications to automotive electronics to security chip products to memory products. Infineon North America’s sales of DRAM products are just one component of a much larger entity.¹³⁸ Micron also produced more than just DRAM products, also having production of flash and CMOS products.¹³⁹ Indeed, the two randomly selected quotations from Micron that Korea asserts show how the domestic industry purportedly assessed its own condition reinforce rather than detract from the ITC’s impact findings. Neither statement establishes nor was intended to suggest that the identified factors show that Micron or the domestic industry did not suffer injury. Rather, they show that, because of good management practices, Micron expected to survive, despite the significant injury that it had suffered.¹⁴⁰

97. For all of these reasons, the ITC’s analysis of the impact of subsidized subject imports is consistent with the SCM Agreement and is otherwise based on positive evidence and an objective examination. Korea fails to shoulder its burden to prove that the United States acted contrary to the requirements of the SCM Agreement.

¹³⁷ *Mexico – HFCS*, para. 7.154; *EC – Tube (Panel)*, para. 7.326.

¹³⁸ See, e.g., Infineon’s November 27, 2002, Postconference Brief at 7 (Exhibit US-98).

¹³⁹ See, e.g., Micron’s Posthearing Brief at Exhibits 5, 6 (Exhibit US-96); Micron’s November 27, 2002 Postconference Brief at 27-30 (Exhibit US-99).

¹⁴⁰ See, e.g., Micron’s Posthearing Brief at Exhibits 5, 6 (Exhibit US-96) (discussing, *inter alia*, declines in net sales and research and development; net losses of \$215 m; slight declines in selling, general and administrative expenses due to cost containment measures, in part from restructuring; declining overall cash and investment balances; and declines in average selling prices, about which Wilbur Stover, VP, Finance and CFO, Micron Technology noted, “As you appreciate, the ongoing price pressure stems from the continued supply of subsidized Korean parts in the market” and Michael Sadler, VP, Worldwide Sales, Micron Technology Inc. commented, “A general over supply of DRAM attributed primarily to the Korean government subsidization program continues to supply the industry. The resulting economics present obvious challenges. We are facing up to those challenges by advancing the technology, browsing the entire product offering, and doing so with the focus on cost reduction”).

D. The ITC’s Analysis of the Volume, Price Effects, and Impact of Subsidized Imports on the Domestic Industry Also Was Consistent with the Requirements of Article 15.5 of the SCM Agreement

98. Finally, the ITC’s analysis was also consistent with the requirements of Article 15.5 of the SCM Agreement.¹⁴¹ The ITC found that the domestic industry producing DRAM products was materially injured by reason of the subsidized subject imports of DRAM products from Korea. The ITC demonstrated a causal nexus between the subsidized subject imports of DRAM products from Korea and the material injury suffered by the domestic industry through its examination of the volume, price effects, and impact of the subsidized subject imports on the domestic industry. No one or several of these factors was decisive. Rather, the material injury determination – and, thus, the ITC’s causation analysis – was based on an analysis of these factors collectively.

99. Thus, in the DRAMs investigation, the ITC integrated the causation discussion and its discussion of how it ensured that it did not attribute material injury from other factors to the subject imports into its analysis of the volume, price effects and impact of subject imports. While this approach is not required by the SCM Agreement, it is certainly consistent with the Agreement. Korea fails to show otherwise.

100. Korea spent a great deal of time during the first substantive meeting with the Panel arguing about the ITC’s examination of factors other than the subsidized subject imports. Its arguments reveal that Korea believes that in investigations like the DRAMs investigation, where there are several factors that may be injuring the domestic industry, an investigating authority is precluded from making an affirmative material injury determination. Korea’s argument has no basis in the provisions of the SCM Agreement. Appellate Body reports also lend the argument no support. The Appellate Body has stated that Article 4.2(b) of the *Agreement on Safeguards* (Safeguards Agreement) does not require that increased imports alone, in and of themselves, are causing serious injury.¹⁴² The same is true in the context of countervailing measures and antidumping duty investigations.¹⁴³

101. The ITC also examined other known factors to ensure that it did not attribute injury from those factors to the subsidized subject imports. In so doing, the ITC properly separated and distinguished other known factors from the subsidized subject imports by providing a satisfactory explanation of the nature and extent of the injurious effects of the other known factors, as

¹⁴¹ This particular aspect of the ITC’s analysis is discussed in considerably more detail in US Answers (Answers to Questions 19-23).

¹⁴² See, e.g., *US – Wheat Gluten*, paras. 70, 79.

¹⁴³ See, e.g., *US – Hot-Rolled Steel (Panel)*, para. 7.260 (reviewing an antidumping duty determination).

distinguished from the injurious effects of the subsidized subject imports. This is all that is required, even in the context of the Safeguards Agreement.¹⁴⁴

102. In order to respond to the specific arguments made by Korea, we provide a few examples below that illustrate how the ITC examined factors other than the subsidized subject imports.¹⁴⁵

103. *Business cycle*: Korea continues to assert that

the ITC never put the condition of the domestic DRAM industry into the context of the overall business cycle. It is not enough to identify the business cycle as a condition of competition. The authorities must explain how that factor has been assessed. It is not reasonable or objective to look at an industry at the ‘bust’ phase of a well-recognized business cycle, and then simply to conclude that all the usual indicia show that the industry is ‘injured.’ Under such an approach any industry in the ‘bust’ phase will always be deemed ‘injured,’ which is not an objective examination.¹⁴⁶

104. The ITC did analyze the business cycle. It found that because growth in demand for DRAM products has been continuous, but supply increases are sporadic, supply and demand in this industry tend to be chronically out of equilibrium, giving the market its characteristic “boom” and “bust” business cycle.¹⁴⁷ The ITC also determined that largely because of the perpetual improvements in production efficiencies experienced by this industry, prices are usually declining.¹⁴⁸ At the same time, the ITC determined that the business cycle (and other factors affecting prices) simply did not explain the unprecedented severity of the price declines that occurred from 2000 to 2001 and that persisted through 2002.¹⁴⁹ Nor could it explain the increasing frequency of underselling by subsidized subject imports during the period of investigation.¹⁵⁰

105. *Capacity*: Korea also continues to argue that “although the ITC received substantial information and data that demonstrated that other suppliers increased DRAM production capacity much more than did Hynix, there is no discussion of this information in the ITC Report. Perhaps the ITC did not say anything because it did not know what to say.”¹⁵¹ It later argues that “[t]he United States seems to believe that by simply referring to the Hynix arguments below, it has

¹⁴⁴ *US - Hot-Rolled Steel (AB)*, para. 226.

¹⁴⁵ This issue also was addressed extensively in the US First Submission, paras. 444-470, and in US Answers (Answer to Question 23).

¹⁴⁶ *See, e.g.*, Korea Oral Statement, para. 22.

¹⁴⁷ *See, e.g.*, USITC Pub. 3616 at 16 (Exhibit GOK-10).

¹⁴⁸ *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).

¹⁴⁹ *See, e.g.*, USITC Pub. 3616 at 24-25 (Exhibit GOK-10).

¹⁵⁰ *See, e.g.*, USITC Pub. 3616 at 24-25 (Exhibit GOK-10).

¹⁵¹ *See, e.g.*, Korea Oral Statement, para. 27.

somehow considered those arguments. If the argument and the evidence was truly considered, why was it rejected and where is the explanation of the rejection?”¹⁵²

106. Korea completely mischaracterizes the ITC’s findings on this issue. 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.¹⁵³ These capacity increases occurred through increasing wafer starts, shrinking die sizes, using silicon wafers with larger diameters, or some combination thereof.¹⁵⁴

107. As support for its findings 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).¹⁵⁵ Contained on these pages are the figures reproduced in Korea’s written submission that Korea accuses the ITC of “completely ignoring.”¹⁵⁶ 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.”¹⁵⁷

108. In other words, the ITC agreed with Hynix that there were capacity increases during the period of investigation and it expressly relied on the same exhibits that Hynix did to support this finding. There was no need to explain why the ITC rejected this evidence because the ITC did not reject it. The ITC accepted this evidence. Moreover, as previously discussed, the ITC expressly considered capacity increases in the context of the business cycle for DRAMs.

109. The ITC’s examination of other known factors is identical to the methodology upheld by the panels in *EC – Tube (Panel)* and *Egypt – Rebar*. By way of comparison, in *Egypt – Rebar*, respondents alleged that the fall in the prices of the domestic like product (rebar) was attributable to a fall in the prices of the primary input for that product (scrap steel). The investigating authority rejected this argument on the grounds that the fall in rebar prices had been greater than the fall in scrap prices. The panel upheld this finding.¹⁵⁸ Similarly, in *Egypt – Rebar*, respondents alleged that increasing financial costs were responsible for contracting profits. The panel found that this assertion was not supported by the record of the investigation, because the

¹⁵² See, e.g., Korea Oral Statement, para. 33.

¹⁵³ See, e.g., Hearing Transcript at 205 (Exhibit US-122) (in which Hynix’s counsel concurs that in this industry where producers need to operate at high capacity utilization levels in light of the high fixed costs associated with DRAMs production, capacity equals supply).

¹⁵⁴ See, e.g., USITC Pub. 3616 at 15-17 (Exhibit GOK-10).

¹⁵⁵ See, e.g., USITC Pub. 3616 at 16 & n.97 (Exhibit GOK-10).

¹⁵⁶ See, e.g., Hynix’s June 19, 2003, Prehearing Brief at 63-66, 112-33 (Exhibit US-101).

¹⁵⁷ See, e.g., USITC Pub. 3616 at 16 & n.97 (Exhibit GOK-10).

¹⁵⁸ *Egypt – Rebar*, at para. 7.121.

decline in revenues had much exceeded the rise in financial costs.¹⁵⁹ In addition, the panel upheld the examination of one “other factor” on the grounds that the effects of the factor could not account for all of the price depression observed with respect to the domestic like product.¹⁶⁰

110. Therefore, the panel in *Egypt – Rebar* did not require the “non-attribution” findings of the investigating authority to be based on an econometric model or some sophisticated quantification exercise. All that the panel in *Egypt – Rebar* required was that the “non-attribution” findings be based on a meaningful explanation as to why the effects of the subsidized imports did not “overlap” with (that is, were notionally distinct from) those of another factor causing injury at the same time.

111. In the DRAMs investigation, the ITC found that the *subsidized imports had price effects that significantly exceeded those of non-subject imports*,¹⁶¹ and that other factors – such as the operation of the business cycle (including by virtue of capacity/supply increases); slowing in the growth of demand; and the product life cycle – could not explain the unprecedented price declines experienced during the period of investigation. Therefore, it is clear that subsidized imports had their own, independent, injurious effects. The U.S. submits that, consistent with the *Egypt – Rebar* report, the Panel should find the ITC’s examination of the price effects of non-subject imports to be consistent with the SCM Agreement.

112. In *EC – Tube*, the EC investigating authority found that the alleged replacement of the domestic like product by cheaper substitutes would have been reflected in lower consumption, which, in any event, had decreased only slightly during the period of investigation and, therefore, was not a significant “other factor” of injury. The panel upheld this finding.¹⁶² As in *EC – Tube*, in this dispute the investigating authority found that effects of one factor (capacity expansions) were subsumed within the effects of another factor (the operation of the business cycle), and determined that the effects of the latter factor could not explain the totality of the injury observed (cumulative price declines that ranged as high as 90 percent, well in excess of the “usual” ranges). These findings supported the ITC’s conclusion about the causal nexus between the subsidized subject imports and the injury to the domestic industry. Consistent with the *EC – Tube* report, the Panel should find the ITC’s examination of the injurious effects of the capacity increases to be consistent with the SCM Agreement.

113. For all of these reasons, the ITC’s analysis of the volume, price effects, and impact of subsidized subject imports on the domestic industry is also consistent with the requirements of

¹⁵⁹ *Egypt – Rebar*, at note 119.

¹⁶⁰ *Egypt – Rebar*, para. 7.122.

¹⁶¹ See, e.g., USITC Pub. 3616 at 25 & n.164, 27 (Exhibit GOK-10) (subsidized imports tended to undersell non-subject imports; the frequency of underselling by the subsidized subject imports increased during the period of investigation and to a greater extent than the frequency of underselling by non-subject imports; and the degree of underselling by subsidized subject imports was greater than the degree of underselling by the non-subject imports).

¹⁶² *EC – Tube (Panel)*, at para. 7.412.

Article 15.5 of the SCM Agreement and is otherwise based on positive evidence and an objective examination. Korea has failed to satisfy its burden of proving that the United States acted contrary to the requirements of the SCM Agreement.

E. Korea Does Not Dispute the ITC’s Treatment of Certain Data as Confidential and Offers No Basis for the Panel to Request Confidential Data

114. Finally, in its opening statement and its oral responses to the Panel’s questions during the first Panel meeting, Korea requested that the Panel ask the United States to provide the entire confidential final determination of the ITC, as well as the entire confidential data tabulations that formed the ITC’s report in this investigation.¹⁶³ Korea also suggested that if the ITC did not provide such information that the Panel look to **Confidential US Figure 1. Confidential US Figure 1** compiled confidential data of Hynix Semiconductor America that was voluntarily provided by Hynix and Korea to the Panel in the form of selective pages from Hynix Semiconductor America’s importer questionnaire response from the final phase of the ITC’s investigation. As we have previously explained, Korea has failed to demonstrate why any or all such confidential information would be necessary or appropriate in this dispute.

115. Reports reviewing other investigating authorities’ antidumping determinations have recognized that it is objective for investigating authorities to base their determinations on the entire agency record (including confidential data). For example, as the Appellate Body recognized in *Thailand – H-Beams* in connection with Article 3.1 of the AD Agreement (the parallel provision to Article 15.1 of the SCM 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.¹⁶⁴

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.¹⁶⁵

¹⁶³ See, e.g., Korea Oral Statement, para. 6.

¹⁶⁴ *Thailand – H-Beams (AB)*, para. 107.

¹⁶⁵ Indeed, as the Panel confirmed during the first substantive panel meeting, all interested party-participants in the ITC’s investigation were permitted access through counsel to *all* confidential information on the agency’s
(continued...)

116. With respect to Korea's suggestion that the Panel look to **Confidential US Figure 1**, we continue to urge the Panel not to rely on the selective confidential information that Korea has provided in this dispute. As we explained in our first written submission:

- * 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. 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.¹⁶⁶
- * 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.¹⁶⁷
- * For any particular time period, the subsidized subject DRAM products exported 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.¹⁶⁸

¹⁶⁵ (...continued)

record under the terms of an administrative protective order, if they so elected. Hynix's counsel had such access.

¹⁶⁶ USITC Pub. 3616 at IV-1, Tables IV-2, IV-4 (Exhibit GOK-10).

¹⁶⁷ 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 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.

¹⁶⁸ 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.

- * It is misleading to suggest that netting the market share for domestic shipments and Hynix Semiconductor America’s market share from 100 percent yields the market share attributable to non-subject imports. The result of such a calculation is the market share of non-subject imports **plus** U.S. shipments of subsidized subject imports by importers other than Hynix Semiconductor America.

117. Nevertheless, should the Panel be inclined to examine the data summarized in **Confidential US Figure 1**, the United States makes the following observations based solely on a comparison of the limited confidential data before the Panel concerning Hynix Semiconductor America’s imports and Hynix Semiconductor America’s U.S. shipments of imported subsidized subject DRAM products with non-confidential information contained in the ITC’s final report.

- * The ratio of subject imports to domestic production increased enormously from 2000 to 2002. If only the data for Hynix Semiconductor America’s U.S. shipments of subsidized subject DRAM products are used as a proxy for subject imports, the ratio of subject imports to domestic production **[[* * *]]** from **[[* * *]]** percent in 2000 to **[[* * *]]** percent in 2001 and was **[[* * *]]** percent in 2002, or **[[* * *]]** the level in 2000. If only the data for Hynix Semiconductor America’s imports of subsidized subject DRAM products is used as a proxy, the ratio of subject imports to domestic production **[[* * *]]** from **[[* * *]]** percent in 2000 to **[[* * *]]** in 2001 and was **[[* * *]]** percent in 2002, or **[[* * *]]** the level in 2000.¹⁶⁹
- * The domestic industry’s market share declined from 43.4 percent in 2000 to 34.3 percent in 2001 and 30.7 percent in 2002. Based solely on Hynix Semiconductor America’s reported data, Hynix Semiconductor America’s U.S. shipments of subsidized subject imports as a share of total U.S. consumption increased from **[[* * *]]** percent in 2000 to **[[* * *]]** percent in 2001 then declined to **[[* * *]]** percent in 2002. Or, using only Hynix Semiconductor America’s reported data, Hynix Semiconductor America’s imports of subsidized subject DRAM products as a share of total U.S. consumption increased from **[[* * *]]** percent in 2000 to **[[* * *]]** percent in 2001 and to **[[* * *]]** percent in 2002. In other words, even based only on Hynix Semiconductor America’s reported data, it is clear that subsidized subject imports gained market share between 2000 and 2001 while domestic producers were losing market share. Likewise, although both the domestic industry and subsidized subject imports lost market share between 2001 and 2002, reliance solely on Hynix Semiconductor America’s reported data shows that subsidized subject imports maintained their market share better than the

¹⁶⁹ Similar trends are evident if Hynix Semiconductor America’s U.S. shipments of subsidized subject imports or Hynix Semiconductor America’s imports of subsidized subject imports are compared with U.S. shipments of domestically produced DRAM products.

domestic industry between 2001 and 2002 at a time of slowing demand. The decline in the domestic industry's market share between 2001 and 2002 was 3.6 percentage points or 10.5 percent, whereas the decline in subsidized subject imports' market share between 2001 and 2002 was [[* * *]] percentage points or only [[* * *]] percent, as measured by Hynix Semiconductor America's U.S. shipments of subsidized subject imports. If Hynix Semiconductor America's imports of subsidized subject imports are used, then the market share attributable to subsidized subject imports actually increased [[* * *]] percentage points or [[* * *]] percent at a time when the domestic industry's market share declined.

- * As shown in **Confidential Figure US-1**, the absolute volume of Hynix Semiconductor America's U.S. shipments of subsidized subject imports [[* * *]] between 2000 and 2002, and if the absolute volume of Hynix Semiconductor America's imports of subsidized subject DRAM products are used as a proxy, the absolute volume [[* * *]] in 2002 than in 2000.

118. For all of these reasons and the additional reasons discussed in our prior submissions to the Panel, the ITC's treatment of certain information as confidential is consistent with the SCM Agreement, and Korea has failed to demonstrate why confidential information is needed in this dispute.

IV. CONCLUSION

119. For the reasons set forth above, as well as in the United States' first written submission, oral statements at the first substantive meeting with the Panel, and responses to the Panel's questions, the United States requests that the Panel reject Korea's claims in their entirety.

TABLE OF FIGURES AND EXHIBITS

Figure US-	Title of Figure
3	The Constituent Parts of Hynix's Debt Restructuring
4	GOK Ownership in Hynix's Creditors and their Participation in Hynix's Restructuring [Note: this figure is attached to the U.S. Answers to the Panel's Questions Following the First Substantive Meeting]

Exhibit US-	Title of Exhibit
118	<i>Deputy Prime Minister Chin, "Government Will Take Actions to Turn Around Hynix</i> , KOREA ECONOMIC DAILY (August 4, 2001) (translated version)
119	<i>Hynix Questionnaire Response</i> (January 28, 2003), pages 14-15, 26, 38-42, 51, 54, 65
120	Kookmin 2001 Annual Report
121	<i>Hynix Semiconductor's Post-Hearing Brief and Answers to Questions by Commissioners and Staff</i> (July 2, 2003) (Non-confidential version)
122	In the Matter of DRAMs and DRAM Modules from Korea, Inv. No. 701-TA-431 (Final), Transcript of the International Trade Commission Hearing (June 24, 2003), pages 205 and 250
123	Corporate Restructuring Promotion Act, Article 14
124	<i>Korean Restructuring Law May Hurt Credit Growth and Credit Quality of Financial Firms</i> , STANDARD & POOR'S RATINGSDIRECT (September 26, 2001)
125	Hynix Audit Report (2001) (selected pages)