ANNEX E

PANEL'S QUESTIONS, ANSWERS AND COMMENTS OF PARTIES

ANNEX E-1

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

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

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

10.

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

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

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

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

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

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

20. The US noted at the first substantive meeting that Article 15.5 of the SCM Agreement refers to a "causal relationship" between the subsidized imports and the material injury to the domestic

20. The U1 noted at the first substantive meeting that Article 15.8ed?

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

B.

ANNEX E-2

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

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

A. QUESTIONS TO US

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

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

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

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

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

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

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

§ 39 : the key missing point – -

ANNEX E-3

REPUBLIC OF KOREA'S ANSWERS TO THE PANEL QUESTIONS

9 July 2004

A. QUESTIONS TO THE UNITED STATES

* * * *

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

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

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

GOK ANSWER: See answer to Q4 above.

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

GOK ANSWER: See answer to Q5 above.

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

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

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Article 1.1(a)(1)(iv) is not about government actions that may or may not have some effect on a private conce

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

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

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

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

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

GOK ANSWER: To clarify for the Panel, KFB participated in the December 2000 syndicated loan, and the May 2001 restructuring. KFB did not participate in the KDB Fast Track Programme, and did not participate in the October 2001 restructuring by refusing any new funds, by declining any debt-

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

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

* * * *

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

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

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

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

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

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

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

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

* * * *

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

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

* * * *

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

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

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[5] *See* GOK Exhibit 47.
[6] *See* GOK Exhibit 48.

B. QUESTIONS TO KOREA

1. Alleged subsidization

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

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

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

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

* * * *

22.

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

* * * *

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

GOK ANSWER: Yes. Korea does not challenge the conclusion that the KDB Fast Track Programme constituted a "financial contribution". Our argument at paragraphs 481 and 482 of Korea's First Submission meant to clarify and respond to US efforts to infer from the KDB Fast Track Programme entrustment or direction of other Hynix creditors.[7]

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

Our first submission addressed at some length the arguments about foreign private bodies (paragraphs 521 through 546), because this aspect of the DOC decision was particularly egregious. Citibank participated in the December 2000 syndicated loan, the May 2001 restructuring, and the October 2001 restructuring. Citibank did not participate in the KDB Fast Track Programme, because meCitibhe KSn of otD.2(a)(2ecauer,, becnot chall to we d-411 9 TD -0.0551 161 1.7945 42 (of tt hold es) e averagnt at pa

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

GOK ANSWER: The CRPA was designed to facilitate restructuring indebted companies. The broader the participation in such restructuring efforts, the mo4a8g

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

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

GOK ANSWER: This finding was made through a number of DOC determinations. They are all cited in the DOC determination in this particular case.[14]

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

*** * * ***

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

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

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

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

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

[14] *See Decision Memorandum*, at 12-15, provided as GOK Exhibit 5.

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

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

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

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

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

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

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

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

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

[19] *See* GOK First Submission, at para. 131.

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

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

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

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

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

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

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

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

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

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

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

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

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GOK ANSWER:

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

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

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

[33] *Id*. at 18.
[34] *Id*. at 21.

ANNEX E-4

ANSWERS OF THE UNITED STATES TO THE

Table of Reports Cited in These Answers

EC

QUESTIONS TO THE UNITED STATES

Alleged Subsidization

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

1. The US Department of Commerce (DOC) found that the series of measures taken by the Government of Korea (GOK) – and the financial institutions that the GOK entrusted or directed – constituted a "single {subsidy} programme," the objective of which was "the complete financial restructuring of Hynix in order to maintain the company as an ongoing concern".[1] As such, the DOC's reference to the "0.2789 Tw (DOC's recompanl14 TcT 0 out sE1875 Twpp1) TjvBrdTD -0.( ) Tj 0 of me1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[9] For purposes of domestic law, the DOC uses the term "government authority" instead of "public body."

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

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

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

15. For purposes of Article 1.1(a)(1), a "public body" is treated in the same manner as a "government". Nevertheless, depending upon the facts of a particular case, one may accurately refer to such public bodies as being owned and controlled by the government. In its

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

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

27. The three options available to Hynix creditors were:

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

(2) withhold new loans, convert 100 per cent of secured loans and 28.46 per cent of unsecured loans to equity, and forgive the remainder; or

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

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

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

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

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

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

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

[18] US First Submission, para. 88.

[19] Korea First Submission, para. 353.

liquidation".[20] Instead, the relationship between the Option 3 banks and Hynix consisted of five elements that distinguished this situation from a typical liquidation process:

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

- Second, the banks were foreclosed from even seeking liquidation. Under the terms of the CRPA, at the request of the lead creditor bank, the Financial Supervisory Service (FSS), a government agency, could stop creditors that wanted to seek liquidation from exercising their rights to call loans and to move companies into receivership. In the case of Hynix, the FSS did request that banks refrain from exercising their creditor rights.[22]

- Third, two of the Option 3 banks, Kyongnam and Kwangju, were 100 per cent government-owned banks and were merged with another 100 per cent government- owned bank, Hanvit, in April 2001, to form Woori Financial Holdings.[23] As a result, there was no need for the GOK to funnel new money tharitIAthese b 333Tf 0.4o, there w1875.3229 .0038 Tc (238Tj T*50.1117 Tc 0
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paragraph (a) of Article 14 of the SCM Agreement. The DOC concluded that such financial contributions provided a benefit to Hynix given that no "reasonable private investor" would have

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

(iii) The last paragraph of page 21 of the ITC's Determination and Views states that the ITC's "findings about the volume of subject imports are reinforced by the substantial degree of substitutability between subject imports and domestic shipments". If the finding that the absolute volume of subsidized subject imports is significant is "reinforced" by considerations of substitutability, what is the initial basis for that finding? In other words, what is the initial basis that is then "reinforced" by considerations of substitutability?

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

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

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

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

46.

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

(iv) Was the ITC's determination of material injury and/or causation based on its finding that the absolute volume of subsidized subject imports was

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

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

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

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

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

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

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

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

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

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

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

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

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

54. As another example, they noted that another "significant market segment" where Samsung had not materially injured the domestic industry was in double data rate ("DDR") DRAM products, which are technically not specialized products, but leading edge SDRAM products. They pointed to evidence that Samsung was clearly out in front of other suppliers in terms of D

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

56. In the global DRAMs market, there are only a handful of producers of DRAM products. As the ITC explained in its final determination, publicly available information about the DRAM industry

(14) The United State

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

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

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

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

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

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

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

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

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

in order for relief to be provided. Under Article 15.5, the volume considerations also include examination of the absolute and relative volume levels, as well as increases either absolutely or relative to either production or consumption in the importing Member. These differences in the manner of analyzing volume between the Safeguards Agreement and the SCM Agreement are

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

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

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

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

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

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

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

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

[87] "Link" is defined as being "[a] connecting part; esp. a thing or person serving to establish or maintain a connection; a means of connection or communication." *New Shorter Oxford English Dictionary* (5th ed. 2002) at 1604. In contrast, "relationship" is defined as "the state or fact of being related". *Id.* at 2520. "Related" is defined as "[h]aving relation." *Id.*

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

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

reasons why it did not find the volume of non-subject imports as significant as otherwise would be suggested.[98]

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

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

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

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

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

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

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

[100] *See, e.g.*, Korea First Submission, para. 166.

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

effects of other factors affecting prices (which could not explain the unprecedented price declines that took place in the US market) as distinguished from the injurious effects of the subsidized subject imports (which undersold the domestic industry at high margins and in increasing frequencies). Thus, th

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

(33)

Comment:

5. See discussion below in response to Question 14.

* * *

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

Comment:

6. No comment.

* * *

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

Comment:

7. No comment.

* * *

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

Comment:

8. See discussion in answer to Question 14 below.

* * *

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

Comment:

9. No comment.

* * *

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

Comment:

10. No comment.

* * *

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

Comment:

11. No comment.

* * *

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

Comment:

12. No comment.

* * *

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

Comment:

* * *

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

* * *

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

Comment:

19. No comment.

* * *

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

Comment:

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

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

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

1c 1.3625* * * TD (21c 0 T -0.1603 18145.25 258he D.) T10j -436.5 -12.75 TD (-225c 0 -Tj --5.25 1TD /F0 11.25 T8 -0.4375

Comment:

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

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

* * *

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

Comment:

24. No comment.

* * *

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

Comment:

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

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

* * *

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

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

Comment:

27. No comment.

* * *

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

31. The ITC stressed two points: the frequency of underselling was "lower", and "increased

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

Comment:

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

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

Comment:

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

* * *

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

Comment:

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

* * *

B. QUESTIONS TO KOREA

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

Answer:

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

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

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

* * *

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

Answer:

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

45. Our point is simply that proper causation analysis takes into account the existence or non-exist

WT/C Bf96/RW WPage EW-74W W48.W WSecond, we further disagree with the assumption that the capacity to c

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

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

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ANNEX E-6

ANSWERS OF THE UNITED STATES

A. QUESTIONS TO THE UNITED STATES

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

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

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

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

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

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

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

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

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

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

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

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

10. Nevertheless, the ITC did examine the weighted average price of non-subject imports. It determined that the undercutting frequency by non-subject imports was lower than, and increased less than, the undercutting frequency of subsidized subject imports during the period of investigation.[9] The ITC found that "subject imports undersold non-subject imports in a majority of instances".[10] Moreover, notwithstanding Korea's focus throughout this dispute on Samsung's non-subject imports, the ITC's disaggregated analysis of the pricing data revealed that subsidized subject imports produced by Hynix in Korea were more often priced lower than Samsung's non-subject imports. Similar statements can also be made with respect to the other two major non-subject import suppliers (Micron and Infineon). Hynix's subsidized subject imports were the lowest priced more often than Micron's non-subject DRAM products, and Hynix's subsidized subject imports were the lowest priced more ceteringt the DRAM8temd thar 87.5f0nTeD)-2s0875 Tc 0.2Tw (detts, Tj 1.225 0 TD -0 Tc 0.1875 Tw ( ) Tj -45226 -12.75

in context.[13] By contrast, in its submissions to the Panel, Korea has opted to examine the evidence in a vacuum and to characterize trends concerning subsidized subject imports as "small" and trends concerning non-subject imports as "dramatic".

15. Korea ignores the following key facts about the DRAMs industry: (1) subsidized subject

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

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

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

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

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

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

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[19] *See, e.g.*, USITC Pub. 3616 at 25 & n.164 (Exhibit GOK-10).
[20] *See, e.g.*, USITC Pub. 3616 at 24 (Exhibit GOK-10).
[21] *See, e.g.*, USITC Pub. 3616 at 24, 25 & n.164 (Exhibit GOK-10).
[22] *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10).
[23] *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10).
[24] SCM Agreement, Article 15.5.
[25] *See, e.g.*, Korea Second Oral Statement, para. 28.

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

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

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

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

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

During the Period of Investigation[27]

Subsidized subject imports

- Volume significant in absolute terms, increased significantly absolutely and relative to both US. production and consumption (20-21, 24).
- 21, 24).

- Idling of certain production capacity and deferral of upgrades and expansions of production facilities and equipment.
- Four US producers ceased DRAM production in the United States.
- Increasing production quant

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

29. Indeed, to provide a further example of th

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

42. Based on its analysis of the pricing data, the ITC ascertained that prices for nearly every pricing product and channel of distribution declined substantially over the period of investigation. It

52. An additional legislative ac

– Citibank and SSB were the exclusive financial advisors to Hynix, and reaped significant fees from this engagement – fees that would justify the token participation on the restructuring packages.

– Evidence showed that Citibank's involvement with Hynix was viewed by Citibank as a stepping stone toward a larger and more lucrative role in helping the GOK to resolve other structural problems in the Korean financial market.

56. Other "unusual aspects" relevant to Citibank's decision to participate in the syndicated loan include the fact that despite its long involvement in the Korean financial market dating back to the 1960s, Citibank was not a lender to Hyundai Electronics or Hynix prior to the December 2000 Syndicated Loan. Furthermore, Citibank did not extend any financing to Hynix other than in GOK entrusted and directed restructurings (and was not a participant in the KDB Fast Track Program). In addition, Citibank's participation in those restructurings was on the same terms as were applicable to government entrusted and directed participants. Citibank also did not seek internal credit approval for its portion of the syndicated loan until after Korean banks had committed to the arrangement. Finally, Citibank did not base its lending decisions on independent credit analyses that a commercial bank normally would consider, but rather upon the assessment of Hynix that SSB prepared for purposes of advancing a plan to restructure Hynix's debt.

57. Thus, contrary to Korea's assertions in the referenced paragraph 76, the DOC did not reject Citibank's lending to Hynix based solely on the relative size of that lending. Instead, the DOC properly rejected Citibank loans as a benchmark on *multiple grounds*, one of which was the size of such loans.

58. Under Article 14(b) of the SCM Agreement, a "benefit" is measured as the difference between "the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market".[57] Thus, under Article 14(b), one must compare what Hynix actually paid on the government loans with what it *would have paid* had it been forced to obtain all of that financing on the market. For example, to measure the benefits of the KRW 700 billion portion of the syndicated loan directed to Hynix by the GOK, Article 14(b) requires an examination of what Hynix would have paid if it had been obligated to obtain the full KRW 700 billion on the market. The relevant question under Article 14(b), therefore, is whether Citibank (or another lender) would have extended to Hynix the full KRW 800 billion credit (without any participation from the GOK-directed banks, and without any governmental interference) on the same favourable terms as the KRW 100 billion loan. The answer is an unequivocal "no".

59. The record demonstrated that Citibank's decision to participate in the syndicated loan, even in its very limited capacity, was conditioned on the behaviour of the GOK-directed banks. As the DOC found in its investigation,

> For example, in regard to the syndicated loan, Citibank officials stated that Citibank wanted to show its commitment, but did not want to be the "lender of last resort" and "needed a clear signal from the ROK banks" that they were willing to support Hynix

as well, and that Citibank did not seek internal credit approval for its portion of the syndicated bank loan until after the ROK banks had committed to the arrangement ...

if any, direct evidence of the government's role. Thus, reliance on these analytical tools is essential if

bring themselves losses on the order of several tens of billions of won, up to 100 billion won. It is no wonder they could not be light-hearted.

On that day, the "ayes" carried the day on the Hynix support proposal. However, practically no one thought that the proposal passed due to merit, or that the proposal was convincing and reasonable.

On 30 October, Korea Exchange Bank sent a unilateral notice to commercial banks, "As for the banks which do not agree to the support proposal, their debts will be paid off based on liquidation value." In other words, those banks will have to give up some 85% of their receivables. This picture has another angle that is difficult to understand. They say they intend to keep Hynix alive. But then, why would they use the value of a liquidated concern as opposed to the value of a continuing concern?

Korea Exchange Bank went on to attach another condition: As for the remaining receivables of 15% or so after the payoff, they will not be paid in cash. Instead, they will be paid in 5-year term Hynix debentures.

The message was loud and clear: "Do not even think of opposing this plan."

Banks initially went ballistic: "It doesn't make any sense, its just plain ridiculous." However, they ended up giving their consent, "swallowing the mustard while crying in tears," as the old Korean saying goes. There simply wasn't any room for any other choice. The result in support was all set in advance.... Another aspect was that the state-affiliated banks were coercing commercial banks in the private sector. The government and the creditor group may breathe a sigh of relief after keeping Hynix

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providing assistance to a particular company or industry, they may choose to employ less transparent methods of delivering assistance. Thus, cases involving indirect subsidies can present particular challenges for an investigating authority attempting to gather facts and figure out what really happened. As the European Communities noted, in practice, evidence of entrustment/direction is more likely to be circumstantial than direct.[69]

75. In light of these considerations, if Article 1.1(a)(1)(iv) of the SCM Agreement is to have any meaning, it is essential to recognize the importance of examining, on a case-by-case basis, all of the evidence, including direct and circumstantial evidence, surrounding possible government entrustment or direction. In other words, an investigating authority must be able to assess the evidence in light of the totality of circumstances. These circumstances would include not only the specific actions taken by a government, but also the greater context for those actions, including any governmental interest in, and control over, the private parties it is alleged to be entrusting or directing; any inducements of the private bodies allegedly taking action at the government's behest; any governmental policies concerning the company or industry that allegedly benefits from government entrustment or direction; and the views of objective third party observers and scholars who are knowledgeable about a government's policies and practices regarding intervention in the decision-making of firms.

76. Turning to the first part of the Panel's question concerning the three banks – Shinhan, KorAm and Hana – the DOC properly found that the Hynix bailout constituted one cohesive programme with several interrelated phases, one of which was the syndicated loan. The programme took place over a relatively short period of time, was undertaken by the same GOK officials at each stage, was coordinated by the same lead bank at each stage, and reflected the same types of tactics at each stage (the enactment of laws, waivers from those laws, threats and coercion). Figure US-3 illustrates how, at each stage, the bailout continuously rolled over debt from one stage to the next. Moreover, while they avoid use of the term "bailout", the GOK and Hynix have conceded that there was a single programme.[70]

77. Second, there was evidence that these three particular banks – Shinhan, KorAm and Hana – were among the banks the GOK had successfully threatened into participation at other stages of this single program. For example, the FSC called Shinhan and KorAm to a meeting at FSC offices on 2 February 2001 to request their "cooperation" when they expressed reluctance to maintain the D/A financing.[71] In addition, the GOK threatened KorAm into participating in the May restructuring when the bank refused to take over its share of the May 2001 1.0 trillion won convertible bond package (34.7 billion won worth) due to Hynix's failure to deliver a written pledge to use its best effort to reduce its debt.[72] The FSS severely rebuked KorAm, with one FSS official stating: "If KorAm does not honor the agreement, we will not forgive the bank."[73] The same FSS official further threatened

[69] Third Party Submission by the European Communities, 26 May 2004, para. 8.

[70] For example, Hynix stated that, in September 2000, "Citibank and SSB, Hynix' financial advisors retained to devise a financial restructuring plan, presented a fully integrated proposal to completely realign the financial structure of Hynix ... . The important point, for purposes of this submission, is that many of the financial transactions that are separately identified in the [Department's] questionnaire (each with their own sub-heading) were, in fact, all part of Citibank and SSB's original integrated plan for a complete financial restructuring of Hynix." *Hynix Questionnaire Response* (27 January 2003) at 14 and 15 (Exhibit US-119). In a later submission, the GOK stated that the December 2000 syndicated loan "was the first step in a several stage financial plan developed and implemented by SSB over the 2000-2001 period." *GOK Questionnaire Response* (February 4, 2003) at A-1 (copy attached as Exhibit US-134).

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

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

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

stern measures against the bank, such as disapproving new financial instruments and subjecting the bank to a tighter audit.[74] In addition, in April 2001, the FSS threatened to fine Hana Bank if it failed to provide emergency liquidity to Hyundai Petrochemical, which was a part of the Hyundai Group that was going through the corporate workout process.[75]

78. Third, there was the other evidence of entrustment/direction that was not specific to these three banks. This evidence is discussed elsewhere in these answers and in prior US submissions, and the United States will not repeat those discussions here.

79. Finally, all of this evidence had to be considered in the context of Hynix's dismal financial condition. This, too, has been discussed elsewhere, and the United States will not repeat the discussion here other than to note that none of the three banks in question produced any sort of legitimate credit analysis in connection with the syndicated loan, or, for that matter, any other phase of the bailout.

80. In sum, there was evidence that the GOK had a policy to bailout Hynix; there was evidence that this policy consisted of a single programme; there was evidence that at various points the GOK

anything. Conversely, a government could entrust or direct a private entity which it did not control, at least in the sense of ownership control.

84. In assessing the variety of ways a government wields power such that it may entrust or direct a private body, the political, cultural and socio-economic context for its actions is particularly germane. This is particularly true in the case of Korea, where the government's clout over the banks is widely acknowledged, and rooted in decades of close collaboration between the government and the financial sector and Korea's strategic industries.

85. In this regard, the example of Kookmin Bank – a Group C bank in Figure US-4 – is instructive. The GOK had a relatively low ownership interest in Kookmin as compared to the Group B banks – a mere 15.1%.[76] However, in a sworn statement to the US Securities and Exchange Commission, Kookmin admitted that the GOK could direct its credit practices.[77] In addition, the GOK hand-picked Kookmin's CEO, Kim Sang-Hoo, former Vice Chairman of the FSC, "to speak for the government in the second-stage restructuri0 nprt or rnment's %estruc5 0 TD -0.1091 Tc 0v T /F0 6o2003oD

observed that with the increasing pressure from abroad, the GOK could soon be grappling with a full-fledged WTO dispute, stating: "Of course the government is very aware of this, and is likely to tread very carefully."[83] Yet another commentator stated in August: "Our government is squirming and cringing over these viewpoints from overseas. If the government goes all out to keep Hynix alive, it will surely be on a collision course with trade friction overseas."[84]

94. Under these circumstances, one would expect the GOK to be more circumspect in its implementation of its Hynix bailout policy. Nonetheless, there was evidence of the GOK's entrustment/direction, albeit evidence of a more circumstantial nature.

95. In July 2001, DRAMs prices fell drastically and Hynix still faced a liquidity crisis. The GOK reiterated its commitment to keeping Hynix afloat, and, during the planning of the October restructuring, continued its practice of public commentary aimed at ensuring the banks' cooperation.

96. For instance, on 3 August 2001, the GOK gave a clear indication to Hynix's creditors that they had no choice but to capitulate to GOK demands when Deputy Prime Minister Jin Nyum reaffirmed the GOK's strong and unwavering commitment to Hynix: "In the event that the creditor group is unable to resolve the Hynix Semiconductor issue, the government will come forward and make a quick decision ... . If Hynix says it needs an additional 1 trillion won, and if the creditor group cannot make a decision whether or not to provide additional support, the financial authorities should decide. We cannot simply leave it blindly to the creditor group."[85] Apparently realizing his excessive candor, Jin quickly added: "This should not be viewed as if the government is running the financial sector. It is not."[86]

97. There is no doubt that Minister Jin's remarks impacted the actions of the banks. The article states: "Accordingly, Korea Exchange Bank, the main creditor bank, and Salomon Smith Barney (SSB), the financial manager, are talking about possible additional support from the creditor group, including debt restructuring."[87] A separate report stated: "Jin also urged the creditor financial institutions of Hynix Semiconductors to speedily resolve the troubled firm's liquidity crisis by forcing more drastic restructuring of the memory chip maker in return for financial support."[88]

98. In connection with these statements, in August 2001, one report noted that "[w]henever the creditor group attempts to shy away from providing support, the government has talked to them, or even twisted their arms, to bring support for Hynix".[89] It also observed: "For years Hynix has been

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[83] *An Expensive Decision*, ASIAMONEY (September 2001) (copy attached as Exhibit US-142).

[84] *Hynix Practically in Default, What's the Problem*?, CHOSUN DAILY (29 August 2001) (translated version) (Exhibit US-25).

[85] *Deputy Prime Minister Chin, 'Government will Take Actions to Turn Around Hynix'*, KOREA ECONOMIC DAILY (4 August 2001) (translated version) (copy attached as Exhibit US-143).

[86] *Deputy Prime Minister Chin, 'Government will Take Actions to Turn Around Hynix'*, KOREA ECONOMIC DAILY (4 August 2001) (translated version) (Exhibit US-143); *see also Jin Vows to Eliminate Uncertainties Thru Furthering Restructuring Efforts*, KOREA TIMES (4 August 2001) (copy attached as Exhibit US-144). The New York Times, reporting on former Deputy Prime Minister and Minster of Finance Jin Nyum's views in this regard, stated: "His preference for a hands-off stance by the government did not necessarily extend to some of the giant corporate invalids that the country is trying to deal with, like Daewoo Motor and Hynix Semiconductor." *Korean Official Defends Seoul's Efforts on Economy*, THE NEW YORK TIMES, (23 February 2002) (copy attached as Exhibit US-145).

[87] *Deputy Prime Minister Chin, 'Government will Take Actions to Turn Around Hynix'*, KOREA ECONOMIC DAILY (4 August 2001) (translated version) (Exhibit US-143).

[88] *Jin Vows to Eliminate Uncertainties Thru Furthering Restructuring Efforts*, KOREA TIMES (4 August 2001) (Exhibit US-144).

[89] *Hynix, Will it Really Survive?*, NEWSMAKER, NO. 439 (30 August 2001) (copy attached as Exhibit US-141).

company posted an operating loss of Korean won (W) 266 billion, compared with an operating profit of W69 billion in the first quarter of the year. EBITDA net interest coverage for the second quarter of the year is estimated at 1.0-1.5 times, an extremely low level". The notification also reflected the commonly held belief that Hynix would require another bailout, noting "current harsh market conditions are once again tightening Hynix's liquidity position, making it difficult for the company to undertake enough capital spending to improve, or even maintain, its technological and cost competitiveness. The company is likely to require additional financial support from its creditors to maintain its competitive position in the global DRAM market while meeting its debt obligations in 2001 and 2002".[99]

103. Clearly, the May bailout had simply not been enough to put Hynix back on its feet, and the GOK and the banks it owned and controlled would once again have to step in to provide another, even larger, bailout in October. Yet, notwithstanding this, none of Hynix's creditors produced a legitimate commercial risk analysis. Hynix's dismal financial condition and the absence of such analyses served to reinforce the DOC's conclusion that Hynix was being kept alive by virtue of GOK entrustment/direction of Hynix's creditors.

104. Finally, the United States believes that it is not possible to view the October bailout in isolation. In this regard, Korea has attempted to characterize the October bailout as disconnected from the events of November 2000, when the Economic Ministers first met to launch the Hynix bailout. This is simply untrue. A brief chronology of events should suffice to demonstrate the link between the GOK's actions in November 2000 and the October 2001 bailout:

November 2000 – The GOK's top Ministry officials meet and order the KEB and the KEIC to execute their plan for Hynix "perfectly," and the FSC meets to grant the credit limit waiver.

December 2000 – The GOK Ministers plan the KDB Programme and decide to designate the lions share of it for Hynix and other Hyundai companies; Ministers meet with Citibank officials to plan the 800 billion won syndicated loan; and the KEIC guarantees the loans made in connectsyndi9usd once aTw (in syndi9se then00 TD u1ara1 0.1875 Tw ( ) Tj -282
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[because] Hynix accounts for 4 per cent of exports. As far as I know, the government is now working out a series of powerful measures to ensure the survival of [Hynix]."[100]

June 2001 – The GOK threatens to sanction KorAm Bank – a bank without substantial GOK ownership – and KorAm then reverses its decision not to participate in the Hynix June 2001 convertible bond offering (part of the May restructuring programme).

August 2001 – Deputy Prime Minister Jin Nyum announces in a breakfast meeting with businessmen at the Korea Press Center that, "[i]n the event that the [Hynix] creditor group is unable to resolve the Hynix Semiconductor issue, the government will come forward to make a quick decision." He then stated, "[i]f Hynix says it needs an additional 1 trillion won, and if the creditor group cannot make a decision whether or not to provide additional support, the financial authorities [i.e. the FSS, FSC and MOFE] should decide. We cannot simply leave it blindly to the creditor group." He added: "This should not be viewed as if the government is running the financial sector. It is not."[101]

September 2001 – The Chairman of the FSC states in a news conference: "Of three problematic companies, the government will determine how to handle Daewoo Motor [1]and Hynix S c. by223[i]ible e Hynix(S) Tj S e i s n o t .

was subject to the KEB's authority as Hynix's lead bank, and regularly attended KEB-convened Hynix creditor meetings.[104] In addition, the GOK waived the statutory credit limits so that Pusan could participate in the KDB bond program

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

110. During the investigation, Micron argued in its petition that DOC should treat lending from Citibank as having been "entrusted and directed" by the GOK.[109] Micron argued that, in light of the long-standing relationship between Citibank and the Government of Korea reaching back to the 1960s, the evidence suggested that "Citibank was asked, if not directed, by the GOK to provide the loan to Hynix on concessionary terms. Such GOK encouragement is tantamount to government directed credit of a debt-restructuring package that was achieved on non-commercial terms."[110]

111. The DOC, however, determined that there was no government direction or entrustment of Citibank. The DOC's determination was based principally on its findings that Korean branches of foreign banks were not subject to GOK direction, and that loans by Citibank in particular were not directed by GOK. As stated in the DOC's *Final Determination*:

> [W]e note that, in past cases, we have found that loans from ROK branches of foreign banks are not subject to the direction of the GOK.... As part of this finding, we found in past cases that loans from Citibank were not directed by the GOK.... Based on these past findings, we have determined that the lending and credit practices of Citibank are not directed by the GOK. However, as discussed in Comments 1 and 5, below, while we find that Citibank's loans from prior periods are acceptable for use as a benchmark, we find that Citibank's loans relating to the Hynix restructuring are not appropriate for use as benchmarks.[111]

112. One of the past cases cited by the DOC, in which it addressed whether foreign banks were subject to government direction is *Stainless Steel Plate in Coils From the Republic of Korea*. In that case, the DOC explained the basis for its finding of no government control or direction over foreign banks (and Korean branches of foreign banks) as follows:

> Petitioners' contention that record evidence establishes that the Korean branches of foreign banks were subject to the same GOK controls and direction that applied to domestic commercial banks is not supported by the record. The record evidence cited by petitioners does not amount to GOK control and direction of these institutions' operations and lending practices.
>
> First, the 1996 and 1998 OECD reports do not support petitioners' arguments. While the 1996 OECD report discusses funding levels by foreign banks in Korea, nowhere does that report state that these banks were subject to the GOK's control or direction. Moreover, the 1998 OECD Report, in discussing the weakness of the Korean banking system, and in attributing responsibility for that weakness partly to the government's direct and indirect intervention in the operations of commercial banks, mentions only domestic commercial banks, not foreign banks....
>
> Petitioner's reliance on the reports issued by the Presidential Commission for Financial Reform, quoted by the Department in the Credit Memo, is equally

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[109] *Countervailing Duty Petition* (1 November 2002) at 57 (copy attached as Exhibit US-135)

[110] *Micron's 14 March 2003 Comments to the US Department of Commerce* at 77 (copy attached as Exhibit US-152); *see also Micron Case Brief* (22 May 2003), at 73 n.213 ("Citibank's close and long-standing relationship with the GOK suggests that Hynix's Citibank loans were either directed by the GOK or made by Citibank to curry favour with the GOK) (copy attached as Exhibit US-153); and *Financial Experts Report* at 8 ("As for the participation of foreign banks, such as Citibank, the expert stated that these banks understand the political system in Korea and work it in their favour.") (Exhibit GOK-30).

[111] *Issues and Decision Memorandum* at 17 (Exhibit GOK-5).

misplaced. The section of the Presidential Report titled "Deregulation of Access to Foreign Capital Markets," cited by petitioners refers to regulations governing access to foreign capital markets, not regulations governing foreign currency-denominated loans from domestic branches of foreign banks in Korea.[] Regulations governing access to foreign capital markets are quite separate from those governing domestic branches of foreign banks in Korea.... This has nothing to do with any GOK controls over the operatio

SEC prospectus.[114] The DOC reasonably found this to be compelling evidence of government entrustment or direction of Hynix's creditors, which, when considered in light of all the other evidence, provided a sound basis for its determination that the Hynix bailout was a government financial contribution.

11. In reply to question 1 from the Panel, the US stated that "the constituent parts of the subsidy programme ... included the 800 billion won syndicated loan, the KDB Fast Track bond programme, the May 2001 restructuring package, the October 2001 restructuring package, and

confidential information collected by, submitted to, and relied upon by the ITC was made available to counsel for interested parties, including Hynix's counsel, under the terms of an administrative protective order.

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

118. In its written submissions, the United States has characterized the amount of non-subject imports consisting of Rambus and specialty DRAM products as "significant". This was the same term that Hynix used during the ITC's investigation.

119. In a postconference brief that Hynix and Samsung submitted jointly during the preliminary phase of the ITC's investigation, they emphasized that Samsung, whose US shipments of DRAM products were an important portion of US shipments of non-subject imports during the period of investigation, offered products that "differ[ed] *substantially* from and were not interchangeable with products made by US producers."[118] Thus, by Hynix's own admission, Samsung's imports were less likely to compete with US-produced products than Hynix's imports.

120. Hynix and Samsung further asserted that "[n]o domestic producer makes Rambus chips, to the best of our knowledge, and Micron's witness Mr. Sadler acknowledged ... that, 'there's only one significant supplier of RAM Bus {sic} DRAM; that would be Samsung from Korea.'"[119] They noted "the incontrovertible fact is that Rambus now accounts for a *significant* percentage of Samsung's US sales, ***, as shown in SSI's questionnaire response".[120] Hynix and Samsung also emphasized that "irrefutable evidence exists that a *very significant* proportion of Samsung's US sales had no competition from" Micron, Infineon, and Hynix.[121]

121. As another example, they noted that another "significant market segment" where Samsung had not materially injured the domestic industry was in double data rate ("DDR") DRAM products, which are technically not specialized products, but leading edge SDRAM products. They pointed to evidence that Samsung was clearly out in front of other suppliers in terms of DDR penetration.[122] For all of these reasons, they argued, imports of Samsung's Rambus, specialty, and leading edge DRAM products could not have materially injured the domestic industry.[123]

122. There was also extensive testimony by witnesses at the Commission's hearing about the extent to which non-subject imports consisted of Rambus and specialty DRAM products.[124]

126. The scope of the DRAMs investigation included standard DRAM products as well as specialty and Rambus DRAM products.[127] As we confirmed during the Second Substantive Panel meeting, no party ever argued that Rambus or specialty DRAM products should have been excluded from the scope of the investigation, and no party ever argued that Rambus or specialty DRAM products were a separate domestic like product(s). Hynix affirmatively argued that there was a single domestic like product consisting of DRAM products that corresponded to the scope of the investigation.[128]

(1) As a result, the figures for apparent domestic consumption and the market share data discussed in the ITC's final determination and, for example, in Table C-1 of the accompanying data tabulations includes Rambus and specialty DRAM products as well as standard DRAM products.

(2) Because domestic producers' and Hynix's subject DRAM production facilities in Korea did not produce Rambus or specialty DRAM products, their market shares reflected exclusively shipments of their standard products. The market share for non-subject imports, however, includes US shipments of standard, Rambus, and specialty DRAM products from non-subject sources.

(3) Thus, the relative losses in market share of the domestic industry vis à vis subsidized subject imports from Korea (as manifested for example in an increasing ratio of subsidized subject imports to domestic industry production) cannot be due to specialty products.

(4) Korea has provided data to this Panel indicating that demand for Rambus DRAMs in particular peaked during the period of investigation.[129] This period also corresponded with an increase in the volume and market share of non-subject imports.

(5) In addition, we wish to reiterate that the pricing data collected by the ITC pertained solely to "standard" DRAM products. No pricing data was collected on Rambus or specialty DRAM products. With respect to the standard DRAM products, non-subject imports were underselling the domestic industry at lower margins and at lower frequencies than subsidized subject imports. Even a disaggregated analysis of the pricing data by brand name and by source revealed that subsidized subject imports produced by Hynix in Korea were the lowest priced source more often than any other source, including more often than any of the suppliers of non-subject imports to the US market.

(6) With respect to price effects, the ITC did not state that the market share gains of non-subject imports were qualified by the prices of non-subject imports, but that the "impact" of non-subject imports on the domestic industry was qualified by their lesser price effects. As the ITC explained, non-subject imports undercut the domestic industry at a lower frequency than subject imports did, providing some support for finding that non-subject imports had "less impact" than their absolute and relative volumes might otherwise indicate.[130] The ITC further emphasized that the "primary negative impact" on the domestic industry was due to lower prices and, on this point, subject imports were large enough and priced low enough to have a significant impact "regardless of the adverse effects caused by non-subject imports".[131] Thus, the ITC qualified the "impact" of non-subject imports which, despite their larger volume, had less of a price effect on the industry and caused less of the injury suffered by the industry (lost profits in particular) due to import undercutting and price depression.

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[127] *See, e.g.*, USITC Pub. 3616 at 4 (Exhibit GOK-10).
[128] *See, e.g.*, USITC Pub. 3616 at 5 (Exhibit GOK-10).
[129] *See, e.g.*, Korea's Second Written Submission para. 213; Korea's First Written Submission paras. 253 to 254; Exhibit GOK 19(c).
[130] *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10).
[131] *See, e.g.*, USITC Pub. 3616 at 27 (Exhibit GOK-10).

(7) Finally, we would like to reiterate that price undercutting does not necessarily lead to market share changes. It can cause a loss of profits or revenues to the domestic industry when it drives prices down, even when purchasers are not willing to commit a large, or any, portion of their purchases to subsidized imports.

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

127. The DOC found that the GOK entrusted and directed all Hynix creditors (except Citibank) to participate in all phases of the Hynix bailout during the period of investigation. This finding, based on the evidence as described in the previous US submissions, included the KEB's participation in the syndicated loan.

128. With respect to the loan limit waiver, the GOK's entrustment/direction of KEB to participate in the syndicated loan required the KEB to take whatever actions were necessary to render it eligible to participate. As previously noted, the November 2000 letter from the Economic Ministers to the Presidents of the KEIC and the KEB, included an instruction to seek a waiver of the ceiling on loans.[132]

129. With respect to loan limit waivers, the DOC did find that the GOK's actions enabled Hynix's creditors, including the KEB, to participate in the restructuring and recapitalization of Hynix in situations where they would have been prohibited by law because they were already above legal lending limits.[133] 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.[134] The FSC subsequently approved credit limit increases for Hynix' creditors "in order to allow them to participate in the Hynix restructuring process".[135] Without the GOK's special intervention, there would not have been enough participants to raise the 800 billion won December 2000 syndicated loan.[136] The DOC found that the GOK waivers "ensured the successful kickoff of Hynix' restructuring".[137]

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

130. Contrary to Korea's assertions,[138] the DOC did, in fact, consider Korea's contention that the creditor banks' participation in the May restructuring was contingent upon the success of the June 2001 GDS offering.[139] However, the DOC did not find Korea's contention persuasive.

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[132] *See* US First Submission, para. 48, and materials cited therein.

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

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

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

[136] *See, e.g., Hyundai Electronics May Seek Loans Beyond Borrowing Limit*, AFX NEWS LIMITED, AFX-ASIA (1 December 2000) (Exhibit US-54); *Panel to Approve Excess Credit Provision to Hyundai Electronics*, KOREA HERALD (2 December 2000) (translated version) (Exhibit US-55); *see also Government of Korea Verification Report* at 16 (Exhibit US-12).

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

[138] Korea Second Submission, paras. 68-69

[139] *Issues and Decision Memorandum* at 39 (Exhibit GOK-5).

131. As a practical matter, the massive May 2001 restructuring package came *before* the June GDS offering. Hynix creditors met and voted to provide such a package on 7 May 2001. The new loans and debt restructuring included in the May package were a focal point of the GDS Offering Memorandum, which was provided to potential share purchasers.[140] In the Offering Memorandum, the May restructuring was labelled "Concurrent Financing Transactions

135. Thus, the DOC reasonably declined to accept the argument that the May restructuring package was conditioned upon the GDS offering. If anything, the "condition" to the May restructuring was nothing more than a "symbolic gesture" designed to disguise the true nature of the May restructuring.

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

136. We understand the Panel's use of the term "small creditors" as referring to those members of the Hynix Creditor's Council other than those listed by name in Figure US-4 (*i.e.*, those grouped under "investment trust companies and other financing companies"). These creditors accounted for approximately 17 per cent of the council vote at the time of the October 2001 restructuring. The DOC countervailed all of the debt held by the "small creditors" that was affected by the October restructuring.

137. As discussed in response to Question 8, above, many of these financial entities were subsidiaries of, or majority owned by, one of Hynix's Group A or Group B creditors. Further, we note that Hynix itself attributed 100% of the debt affected by the October restructuring to the 18 creditors included in Figure US-4, plus HSBC.[148]

[148] *See* Exhibit GOK-23(e). HSBC was a bank that was not included in Figure US-4 because it was not part of the Creditors' Council and, thus, did not vote on the October restructuring package.

TABLE OF EXHIBITS

Exhibit US-	Title of Exhibit
131	*Corporate Governance in Korea*, Il Chong Nam *et al.*, KOREA DEVELOPMENT INSTITUTE (from Organization for Economic Co-operation and Development conference on Corporate Governance in Asia: A Comparative Perspective) (Seoul, 3-5 March 1999)
132	*Korea's Economic Crisis and Corporate Governance*, Sang-Woo Nam, SCHOOL OF PUBLIC POLICY AND MANAGEMENT, KOREA DEVELOPMENT INSTITUTE (undated)
133	*'Gangster-Style' Solution for Hynix*, DONG-A DAILY (1 November 2001)
134	*GOK Questionnaire Response* (4 February 2002)
135	*Countervailing Duty Petition* (1362mber

148	*FSC Chairman Promises Sale of Daewoo Motor This Month*, KOREA HERALD (10 September 2001)
149	*The Office of National Tax Administration's Decree to Recognize the Creditors' Write-Off of the Hynix Loan as a Tax Deductible Expense ¼ May Give Rise to an Issue of Preferential Treatment*, KOREA ECONOMIC DAILY (5 November 2001) (translated version)
150	Standard and Poor's Press Release TigFtoer 2001)

ANNEX E-7

COMMENTS OF THE REPUBLIC OF KOREA ON
ANSWERS OF THE N9(TED1

or directed Shinhan, Koram, or Hana to participate in the syndicated loan? The United States cites to no evidence on this point, and can only cite to evidence related to other transactions and other banks. The GOK believes such efforts to extrapolate from other evidence does not meet the legal standard of Article 1.1(a)(1)(iv).

Para. 79

6. The United States asserts that neither Shinhan, Koram, nor Hana produced any "sort of legitimate credit analysis" to support their decision to extend the syndicated loan.[2] This new factual assertion has several problems.

7. First, the United States cites to no evidence for this factual assertion. As the DOC verification reports indicate, the DOC spent most of its time at verification meeting with KEB, Kookmin, and Citibank. The DOC had a very brief meeting with Shinhan, and no meeting at all with Koram and Hana.[3]

8. Second, this assertion is at odds with the evidence on the record. Citibank made a loan of 100 billion won as part of the syndicated loan. Regardless of when the loan approval was obtained, Citibank did obtain approval to make this large loan. It is simply not credible for the DOC to assert that Citibank made a loan of about US$ 80 million without going through appropriate credit approval. Since Citibank was leading the syndicated loan effort, and was committing to provide 100 billion won itself, it is quite reasonable for other banks to commit to much less than the 100 billion. Shinhan committed to only 50 billion won; Koram committed to 20 billion won; and Hana committed to 30 billion won. Regardless of what other internal loan approval that each bank undertook, this fact alone provides very strong evidence that these Korean banks had a reasonable basis to make this particular loan.

9. The United States tries to impugn the Citibank loan assessment process.[4] But this argument is also inconsistent with the evidence. Specifically, this undocumented factual assertion is at odds with *two* Affidavits submitted by Tom Fallows, the senior Citibank official that had day-to-day responsibility for Citibank's participation in the Hynix restructuring. In a March 2003 Affidavit,[5] Mr. Fallows affirmed the following facts:

- "After extensive analysis of Hynix's financial situation, and Hynix's competitive position in the DRAM market, SSB and Citibank designed a comprehensive restructuring and recapitalization plan for Hynix."[6]

- "Our decision to become a new Hynix lender [in December 2000] was made on the basis of Citibank's standard credit policies and procedures. Given the size of the transaction and the non-investment grade standing of Hynix, the credit process required much more senior approval than would be the normal case for ordinary Korean deals. The Citibank credit process functions separately and apart from SSB, which provided the financial advisor services to Hynix described above.[7]

[2] US Answers to Questions, para. 79.
[3] *See* Exhibit GOK-31, pp. 11-24.
[4] *See* US Answers to Questions, para. 56.
[5] Exhibit GOK-26.
[6] *Id*., para. 6.
[7] *Id*. at para. 12.

10. Thus, a senior Citibank official specifically told the DOC that it had used a heightened credit evaluation process, and that process wa

16. As a general matter, what these and other articles illustrate is that you have to read the US factual assertions very carefully, line-by-line with the articles used to support them. The disconnects are frequent.

Para. 96

17. The US offers a new article at Exhibit US-144, not previously provided the panel, to support its assertion that the Deputy Prime Minister forced banks to finance Hynix. Yet, all the article states is that the Deputy Prime Minister "urged the creditor financial institutions of Hynix Semiconductors

28. The summary to which the statement refers is the same summary that sets forth the "principal condition" attached to the financing. This is the same summary that the United States has cited as not

the GDS in the context of entrustment/direction was to cite it as evidence in support of its argument that the banks were acting based on the company's financial condition.[6] The DOC did not consider this GDS argument to be relevant to the issue of entrustment/direction. As the DOC stated, "[w]hether the terms are sufficiently affected by government action so as to make the provision actionable is a factual element that is relevant to the measurement of 'benefit,' not 'financial contribution.'"[7] Accordingly, the DOC properly addressed the facts surrounding the GDS in the context of "benefit", as Korea acknowledges.[8] Neither Hynix, nor any other party, ever argued in the underlying investigation that the very existence of any contingency related to the May restructuring evinced a lack of government entrustment/direction.

4. Korea's new argument that the very existence of any contingency in connection with the May restructuring evinces a lack of entrustment/direction is fundamentally flawed and, as discussed in our response to Question 16, is not supported by the record evidence.[9] As the United States discussed with the Panel, it is entirely consistent with the concept of entrustment/direction – *i.e.*, giving someone responsibility for a task – to leave the details to the discretion of the entity entrusted/directed. The concern of the government is that the task be performed, not necessarily *how* it is performed. Those entrusted/directed to perform the task may have various options for fulfilling that objective, some of which may be contingent on other events or factors. The fact that the precise method the private entities ultimately used to perform the task may have been contingent on certain events does not in any way suggest that the government did not entrust/direct the entity to carry out the task in the first instance. Thus, the GDS contingency does not obviate the evidence that the GOK entrusted/directed Hynix's creditors to solve the company's financial crisis – one way or another. In this particular case, the irrelevance of the alleged "contingency" is underscored by the timing of, and the facts surrounding, the GDS offering relative to the May restructuring, as evidenced by the Offering Memorandum itself, as discussed in our response to the Panel's question.

Question 17

5. In paragraph 49 of the Korea Second Answers, Korea makes the factual assertion – without