

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

WT/DS296

**ANSWERS OF THE
UNITED STATES OF AMERICA
TO THE PANEL’S QUESTIONS TO THE PARTIES FOLLOWING
THE SECOND SUBSTANTIVE MEETING OF THE PANEL**

August 6, 2004

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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 U.S. 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 inquiry 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 percent) 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

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 U.S. market based on a disaggregated analysis of the pricing data.

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

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

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

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"].

⁶ Korea Second Oral Statement, para. 20.

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

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

sources of DRAM products. Hynix's subsidized subject imports were the lowest priced more often than Micron's U.S. DRAM products; Hynix's subsidized subject imports were the lowest priced more often than Infineon's U.S. DRAM products; Hynix's subsidized subject imports were the lowest priced more often than Samsung's U.S. DRAM products; and finally, Hynix's subsidized subject imports were the lowest priced more often than DRAM products from Hynix's own Eugene, Oregon facility.

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

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

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 often than Infineon's non-subject DRAM products.

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

11. There are a number of flaws with Korea's arguments in the referenced paragraph 22. Once again, Korea attempts to challenge the adequacy of the ITC's price undercutting analysis by shifting the discussion to non-subject imports. However, as noted above, the focus of

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

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

Article 15.2 of the SCM Agreement is on the significance of the price undercutting by subsidized subject imports, not non-subject imports.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

frequency of undercutting by non-subject imports was fairly steady at 46.6 percent of instances in 2000, and 47.7 percent in 2001. Undercutting by subsidized subject imports increased to 69.8 percent of all observations in 2002, about 10 percentage points higher than the percentage for non-subject imports in that year (60.7 percent).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

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.

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.

§ 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 U.S. 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 U.S. 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" inquiry to the relevant inquiry 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

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

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 Investigation²⁷

Subsidized subject imports

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

Domestic industry

- Increasing U.S. shipments in terms of bits, but declining unit values; declining market share.
- Small and relatively stable end-of-period inventories.
- Overall decline in average production capacity and wafer starts.
- Increase in capacity utilization, but capacity utilization is expected to be high in this industry.
- Idling of certain production capacity and deferral of upgrades and expansions of production facilities and equipment.
- Four U.S. producers ceased DRAM production in the United States.
- Increasing production quantities in terms of bits, but increases were smaller than increases in apparent U.S. consumption.
- General declines in employment and wages over the period of investigation.
- Due to a large decline in unit sales value, operating income declined from a \$2.7 billion profit in 2000 to a loss in excess of \$2 billion in 2001, and losses continued into 2002.
- As a ratio to net sales, operating income was 32.2 percent in 2000 then became a loss of 79.2 percent in 2001 and a loss of 50.8 percent in 2002; declines in capital expenditures (26-27, Tables III-1, III-5, IV-4, C-1).

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

Between 2000 and 2001

Subsidized subject imports

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

Domestic industry

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

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

29. Indeed, to provide a further example of the changes occurring between 2000 and 2001 using even more detailed data, we refer the Panel to the pricing data summaries in the ITC's report. As the ITC recognized, PC manufacturers accounted for the vast majority of the revenues on sales of DRAM modules.²⁸ In 2000, Hynix's subsidized subject imports in this sales channel were priced *above* the domestic industry in fully 75 percent of all observed price comparisons.²⁹ In 2001, this pattern reversed itself profoundly when Hynix *undercut* the domestic industry's module prices to this important segment in 68 percent of all price comparisons.³⁰ Price undercutting for modules to PC OEMs remained at 68 percent of observations in 2002.³¹

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

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

31. Whereas the record indicated, and the ITC found, that nearly all of the subject imports and domestically produced DRAM products were standard DRAM products,³⁴ such was not the case with non-subject imports. The ITC collected data on the percentage of imported products and U.S. shipments of DRAM products in 2001 and 2002 that were "standard" DRAM products, Rambus DRAM products, and other "specialty" DRAM products. Questionnaire respondents were asked to differentiate the reported information for Rambus DRAM products containing dice

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

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

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

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

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

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

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

fabricated in Korea by “Samsung” and the portion containing dice fabricated in Korea by “others”, and to differentiate the reported information for specialty DRAM products containing dice fabricated in Korea by “Samsung” and the portion containing dice fabricated in Korea by “Others.”³⁵ As the United States previously explained,³⁶ Rambus or specialty DRAM products accounted for approximately one-fifth of all U.S. shipments of non-subject imports in 2001. The corresponding percentage in 2002 was somewhat higher than in 2001.

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

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

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

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

35. The ITC separately examined the volume and price effects of subsidized subject imports and their impact on the domestic industry, and it separately examined the volume and price effects of non-subject imports on the domestic industry, but there was no requirement that it compare and contrast the two. So long as subsidized subject imports themselves materially injured the domestic industry, and so long as the ITC provided a satisfactory explanation of the nature and extent of the injurious effects non-subject imports were having on the domestic industry to show that it did not attribute the injury from other factors to the subsidized subject imports, then the ITC complied with the requirement to separate and distinguish other factors, as

³⁵ See, e.g., Importers’ Questionnaire at question II-10(a) (Exhibit GOK-44(b)).

³⁶ US Answers to Panel Questions (Answer to Question 17).

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

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

articulated by the Appellate Body. As explained above in the response to the question concerning paragraph 22, the ITC satisfied these requirements in the DRAMs investigation.

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

37. Korea then multiplies these suspect market share figures by the frequency with which those imports undersold the domestic industry's DRAM products and pronounces that in 2001 the portion of undercutting by subject imports was about 5 percent of the market, but the portion of undercutting by non-subject imports was about 27 percent of the market. Leaving aside the problems with the underlying market share figures, Korea's calculation attempts to use the undercutting data for a purpose for which it is not suited. The undercutting data shows the number of monthly comparisons in which the weighted average subject import price was below the weighted average price of the domestic like product. The undercutting comparisons are for specific products and do not even cumulatively account for all of the sales of either subject imports or of the domestic like product during the period of investigation. Consequently, there is no basis whatsoever to take the percentage of months where there was undercutting by the subject imports and then to multiply that by the market share of subject imports to derive a figure that purports to reflect what percentage of shipments in the U.S. market were undersold by subject imports. For exactly the same reason, the data collected by the ITC cannot be used to posit a percentage of the market which was undersold by non-subject imports, as Korea presents to the Panel, for a specific product type. Contrary to Korea's implication, the frequency of undercutting, while significant in and of itself, says nothing about the quantity of imports in the observed months that were undercutting the domestic like product. Instead, this figure reflects that the weighted-average price of the imports in question for each of those months was lower than the weighted-average price of the domestic industry's DRAM products.

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

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

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

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

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

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

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

42. Based on its analysis of the pricing data, the ITC ascertained that prices for nearly every pricing product and channel of distribution declined substantially over the period of investigation. It observed that prices for domestic products and subsidized subject imports followed the same general trends and were generally similar for sales to PC OEMs across all products. More particularly, the product-specific data showed price declines of 70 to 90 percent from late 2000 through 2001, a modest rebound in early 2002, then a further decline over the

⁴⁰ See US Second Submission, paras. 109-113.

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

course of 2002. The ITC identified record evidence indicating that the price decline in 2001 was the “most severe in history.”⁴²

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

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

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

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

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

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

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

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

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

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

authorities' analyses have been found to be WTO-consistent in situations where the authorities analyzed factors that were subsumed within other factors.⁴⁷

48. The ITC clearly separated and distinguished the role of subject import supply sources from domestic and non-subject import supply sources. The ITC's examination and explanation is more fully described above in response to questions concerning paragraphs 20, 22, 34, and 37. Moreover, it is important to bear in mind that the ITC's analysis of subject and non-subject imports was not based only on a macro-economic analysis of trends and projected causes. The ITC also contacted purchasers of DRAM products, and those purchasers identified Hynix as a source of low-priced DRAM products and confirmed that the domestic industry lost sales and/or revenues due to competition from Hynix.⁴⁸ This anecdotal evidence is a further indication that the ITC did "separate and distinguish" the subsidized subject imports from non-subject imports, and that it did find independent evidence that low prices of the subsidized subject imports were injuring the U.S. industry.

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

49. In the referenced paragraph 49, Korea asserts that there is "nothing" in the Prime Minister's Decree, the Public Fund Oversight Act, or any specific MOU, "to suggest that the GOK *would* intervene in the *day-to-day* credit decisions of the various banks." (Emphasis added.) There are several problems with this statement.

50. First, the DOC did not find that the cited measures suggested that the GOK necessarily *would* intervene in banks' credit decisions. Instead, the DOC reasonably found, based upon their plain text, that these measures gave the GOK the *ability* to intervene in banks' credit decisions should it choose to do so.

51. For example, Prime Minister Decree No. 408, on its face, gave the GOK legal authority to intervene in the lending decisions of a bank in the exercise of the GOK's shareholder rights.⁴⁹ The Decree also permitted supervisory agencies to request "cooperation" from financial institutions for the purpose of stabilizing financial markets or attaining the "goals of financial policy."⁵⁰ Another legislative action considered by the DOC was the Public Fund Oversight Act.

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

⁴⁸ See, e.g., USITC Pub. 3616 at 25 (Exhibit GOK-10).

⁴⁹ The decree was issued in November 2000, precisely when the GOK began pursuing its Hynix bailout policy.

⁵⁰ *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4); Prime Minister Decree No. 408, Articles 5 and 6 (Exhibit GOK-45). The investigation record reflects that on more than one occasion, the GOK did, in fact, request "cooperation" from various creditors to assist Hynix. For example, an FSS official stated: "It is unsound that both Hyundai Electronics and the creditor group, the banks which agreed to resolve the liquidity of Hyundai Electronics, are refusing to provide support even resorting to expedient measures. Now that we have

(continued...)

This law required Korean private banks to sign contractual commitments with the government – MOUs – in exchange for the massive recapitalizations received from the GOK. The MOUs provided for GOK intervention in a bank’s fiscal operations.⁵¹

52. An additional legislative action considered by the DOC was the Corporate Restructuring Promotion Act (CRPA), which was enacted immediately prior to Hynix’s October restructuring and refinancing. The DOC found that the CRPA permitted a handful of Hynix’s creditors to dictate restructuring terms to other Hynix creditors,⁵² and provided the Financial Supervisory Service (FSS), a government entity, with formal power to request creditors’ assistance, and to instruct creditors not to press payment claims, with respect to Hynix’s restructuring.⁵³ As discussed in response to Questions 2 and 6, below, the DOC did not rely upon the mandatory nature of the CRPA, in and of itself, or in the abstract, as evidence of entrustment or direction. Rather, the DOC found that the mandatory nature of the CRPA, *coupled with the specific factual circumstances present in this case*, provided an effective tool through which the GOK was able to effectuate its Hynix policy.

53. Another problem with the referenced paragraph 49 is that the DRAMs investigation simply was not about the “day-to-day” credit decisions of banks. Instead, it involved extraordinary government action aimed at ensuring that billions of dollars were funneled to a company that the GOK regarded as so important that it would not be left to the mercies of the marketplace and allowed to fail.

54. Finally, the United States has never contended – nor did the DOC find – that the GOK *needed* to intervene on a daily basis with the banks in order to entrust or direct them to assist Hynix. The GOK only needed to intervene as necessary to ensure that the banks stayed in line. The DOC reasonably found that the aforementioned measures gave the GOK the ability to

⁵⁰ (...continued)

requested for cooperation using multiple channels, we are expecting support to be provided sooner or later.” *Financial Community’s Support for Hyundai Electronics—A U.S. Subsidiary Facing Insolvency Risk*, MAEIL ECONOMIC DAILY, March 7, 2001 (emphasis added) (translated version) (Exhibit US-69). The FSS also invited officials from Shinhan Bank and Hanmi Bank to a meeting to “*request their cooperation*” when several banks retracted their earlier promises to increase purchase limits on Hynix’s export bills of exchange (“D/A loans”). *Creditor Group Conflicts With Government Over Supporting Hyundai Group*, MAEIL ECONOMIC DAILY, February 2, 2001 (emphasis added) (translated version) (Exhibit US-68). A March 7, 2001 Mael Economic Daily article further commented that, “[a]s things are going awry, the Financial Supervisory Service is desperately ‘making every effort,’ as the highly-placed official of FSS calls the presidents of the banks concerned, urging that the limit be extended following the convening of people from the appropriate banks to make an earnest *request for cooperation*.” *Financial Community’s Support for Hyundai Electronics – A U.S. Subsidiary Facing Insolvency Risk*,” MAEIL ECONOMIC DAILY, March 7, 2001 (emphasis added) (translated version) (Exhibit US-69).

⁵¹ *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4); *Government of Korea Verification Report* at 4 (referencing Exhibits 1-2 through 1-6) (Exhibit US-12). During the investigation, the DOC requested the GOK to produce an MOU, but it declined to do so. See US Second Oral Statement, para. 8.

⁵² *Issues and Decision Memorandum* at 54-55 (Exhibit GOK-5).

⁵³ *Government of Korea Verification Report* at 19 (Exhibit US-12).

intervene as it considered necessary. Furthermore, the DOC found that record evidence made clear that the GOK *did* intervene in banks' credit decisions.

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

55. As explained in prior U.S. submissions, the DOC rejected loans from Hynix's private creditors for use as a benchmark because it found those loans to be government financial contributions (with the exception of loans from Citibank). After consideration of record evidence, the DOC also rejected loans from Citibank for use as a benchmark. The reasons why the DOC rejected Citibank as a suitable benchmark can be summarized as follows:⁵⁴

- Citibank's involvement was small in absolute and percentage terms compared to the involvement of the government-owned and controlled banks.
- Citibank itself acknowledged that its participation was only a symbolic gesture.⁵⁵
- There was substantial record evidence that Citibank's risk assessment of Hynix was influenced by the GOK's policy to support Hynix and prevent its failure. For example, a Citibank official stated that Citibank needed a clear signal from the Korean banks that they were willing to support Hynix before they would commit funds.
- Record evidence showed that Citibank was influenced by the significant and continuing involvement of the GOK in propping up Hynix, rather than by its belief that Hynix was a commercially worthy credit risk in its own right.⁵⁶
- 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

⁵⁴ For a more extensive discussion of the DOC's rejection of Citibank as a benchmark, see US First Submission, paras. 197-204.

⁵⁵ See *Hynix Verification Report* at 19 (Exhibit US-43).

⁵⁶ US First Submission, paras. 200-201.

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 favorable 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 behavior 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 In a similar vein, Citibank officials indicated

⁵⁷ The Panel in *Brazil – Aircraft*, para. 7.24, found that a determination of the existence of benefit should be based upon "objective benchmarks ... reflecting the terms under which the beneficiary of the financial contribution would be operating in the absence of the government financial contribution." In addition, in *US – Softwood Lumber*, para. 103, the Appellate Body found that, for purposes of establishing the existence of benefit, an investigating authority may reject proposed benchmarks shown to have been distorted by government involvement in the market.

that Citibank had decided to “ride” with the ROK banks to see if Hynix could make it as an ongoing concern, and that Citibank made a bet that the ROK banks would protect their exposure.⁵⁸

These statements by Citibank officials indicate that Citibank would not have extended credit on comparable terms (or perhaps not at all) absent the participation of the government entrusted and directed banks.

60. As noted, the loans provided by Citibank represented a small fraction of the full amount of the syndicated loan. If Citibank had provided the entire amount, the financial risk (and hence the interest rate) would have been greater. The increased risk stems from three factors:

- Citibank’s overall exposure (based simply on the size of the loan) would have been much higher;
- Citibank would have had no assurance that the GOK-directed banks would have been willing to support Hynix; and
- While the advisory fees earned by Citibank provided meaningful protection against potential losses on a small loan, they would have provided no meaningful protection were Citibank to have financed the full syndicated loan.

61. Given the record evidence, the DOC reasonably concluded that Citibank loans to Hynix, including its portion of the syndicated loan, were unsuitable as benchmarks.

2. *With regard to para. 32 of the Second Written Submission of the US, are the “actions that directly evinced entrustment and direction” those set forth in section 1(a) – (c) of that submission? Is the US arguing that there is both direct and indirect evidence of entrustment / direction?*⁵⁹

62. Yes, it is the U.S. position that there is both direct and indirect (also referred to as “circumstantial”) evidence of government entrustment or direction. Reliance on both types of evidence is entirely consistent with the SCM Agreement.⁶⁰ In fact, circumstantial evidence,

⁵⁸ *Issues and Decision Memorandum* at 9-10 (Exhibit GOK-5), citing *Hynix Verification Report* at 19, 20 (Exhibit US-43).

⁵⁹ In order to better address the Panel’s questions, we have broken our answer to Question 2 into two parts.

⁶⁰ *See, e.g., US - OCTG Sunset*, para. 7.296, in which the panel noted that “there are no rules in the Anti-Dumping Agreement as to the type of evidence that can support an investigating authority’s findings.” The same holds for the SCM Agreement.

secondary sources, and reasonable inferences are often essential analytical tools, as prior panels have acknowledged.⁶¹

63. As we have noted previously, recognition of the importance of both types of evidence and the reasonable inferences to be drawn from the evidence as a whole is particularly important in the case of indirect subsidies. This is because, given the very nature of such subsidies, there may often be little, if any, direct evidence of the government's role. Thus, reliance on these analytical tools is essential if Article 1.1(a)(1)(iv) of the SCM Agreement is to have any meaning.

64. As noted above, there was both direct and indirect evidence of government entrustment and direction in the DRAMs investigation. For example, there was direct evidence that the GOK decreed publicly, on numerous occasions, that Hynix would not be allowed to fail and that the GOK gave explicit instructions aimed at fulfilling that goal. There is also direct evidence in the form of the Kookmin prospectus that the GOK directed the lending decisions of banks in which the GOK had a relatively small proportion of voting shares. Moreover, there is a host of secondary sources that document the GOK's adoption and implementation of its Hynix bailout policy.

65. With respect to the phrase "[i]n addition to taking actions that directly evince entrustment and direction", the United States was distinguishing between the government actions described in paragraphs 32-36 that enabled Hynix's creditors to fulfill their assigned task of resolving the Hynix financial crisis (*i.e.*, credit limit waivers and coercion of credit rating agencies) and evidence that more directly supported the conclusion that the GOK, in fact, entrusted or directed them to undertake that task. The United States did not mean to suggest that all of the evidence discussed in sections 1(a)-(c) was "direct" – as opposed to "indirect" – evidence of entrustment or direction. Moreover, regardless of whether a particular piece of evidence is labeled "direct", "indirect" or "circumstantial", it is all relevant. The real issue is whether, based upon all of that evidence, the DOC could reasonably conclude that the GOK entrusted or directed Hynix's creditors to resolve the company's financial crisis.

Why is mandatory participation under the CRPA included as an "action [...] that directly evinced entrustment and direction", when at para. 33 of its replies to the Panel's questions, the US asserts that "[t]he DOC did not find that mandatory participation under the CRPA constituted, in and of itself, entrustment or direction"?

66. As discussed above, the United States did not mean to suggest that all of the evidence discussed in section 1(a)-(c) was "direct" evidence of entrustment and direction. Moreover, with

⁶¹ See, e.g., *Argentina – Bovine Hides*, para. 11.28 (complainant clearly may establish the existence of an export restriction on the basis of circumstantial evidence); *US - Wheat Gluten*, para. 174 (a panel must draw inferences on the basis of all the facts of record relevant to the particular determination to be made); and *US - DRAMS*, para. 6.79 (panel found that investigating authority properly relied on secondary sources).

respect to the CRPA, classification is not straightforward, because the CRPA did not represent a single piece of evidence, but rather a host of facts specific to Hynix.

67. With respect to the CRPA itself, as a law viewed *in the abstract*, the DOC did not find that mandatory participation under the CRPA, in and of itself, constituted entrustment or direction. The CRPA did not, however, operate in a vacuum. As detailed in the previous U.S. submissions, the structure of the CRPA enables a handful of the largest creditors to dominate the restructuring process and to dictate the results to every other creditor.

68. The CRPA mandated that all Hynix creditors participate in the Creditors Council. As previously noted, the GOK enacted the CRPA in August 2001, precisely at the time when Hynix and other Hyundai Group companies were on the brink of bankruptcy and required significant financial assistance to avoid financial failure.⁶² As GOK officials noted at verification, “the National Assembly passed the Corporate Restructuring Promotion Act (‘CRPA’) to make sure that the banks *could not avoid* participating in workouts.”⁶³ A Ministry of Finance official stated that: “[w]e’ve decided to force all creditor financial institutions to take part in the meetings in order to prevent some of them from refusing to attend and pursuing their own interests by taking advantage of bailout programs.”⁶⁴

69. Further, the CRPA provides the GOK with a very valuable tool to prevent creditors from seeking to liquidate a troubled company. Pursuant to Article 14, at the request of the lead creditor bank, the FSS can prevent creditors from placing a company in liquidation. This is precisely what the FSS did in the Hynix bailout.⁶⁵ While Korea has attempted to minimize the impact of this provision,⁶⁶ this provision effectively forecloses any and all creditors from seeking liquidation unless and until the GOK’s objectives are achieved through the CRPA procedures.

70. With respect to the DRAMs investigation, the Creditors’ Council was dominated by creditors that were owned and controlled by the GOK. In turn, the GOK had a stated, public policy that it would not allow Hynix to fail, and had taken, and continued to take, actions aimed at ensuring that Hynix did not fail. Under these *specific, factual circumstances*, the DOC reasonably concluded that the GOK was able to use the CRPA as a mechanism to ensure that all Hynix’s creditors participated in the restructuring and recapitalization measures benefitting Hynix. For example, by naming the KEB, the GOK’s lead bank for Hynix, as head of the Council, the GOK positioned itself to take full advantage of the KEB’s longtime role as agent

⁶² US First Submission, para. 84.

⁶³ *Issues and Decision Memorandum* at 54 (Exhibit GOK-5), citing *Government of Korea Verification Report* at 8 (Exhibit US-12).

⁶⁴ *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4), citing *Foreign Banks Required to Attend Creditor Meetings for Ailing Firms*, KOREA TIMES, July 22, 2001; *Issues and Decision Memorandum* at 60 (Exhibit GOK-5).

⁶⁵ *Government of Korea Verification Report* at 19 (Exhibit US-12).

⁶⁶ Korea Second Oral Statement, para. 39.

and facilitator of the GOK's credit and management decisions.⁶⁷ In short, the GOK knew that it could entrust or direct the banks to carry out the task of saving Hynix.

71. The following excerpt from a news report, entitled '*Gangster-Style*' Solution for Hynix, underscores the significance of the CRPA when, as in the DRAMs investigation, the Creditors' Council is dominated by government-owned and controlled banks:

Bank executives are about to have a meeting of the "Financial Institution Council" to pass a resolution of the support plan for Hynix Semiconductor. The executives of the main creditor banks, Korea Exchange Bank and other banks such as Hanvit, Korea Development Bank, and Chohung Bank, have smiles on their faces. In contrast, the executives of Shinhan, KorAm, Hana, Korea First, and Kookmin Bank stepped glumly into the meeting room. They were supposed to cast "aye" votes that would 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 October 30, 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

⁶⁷ *Issues and Decision Memorandum* at 56-57 (Exhibit GOK-5); *Hynix Verification Report* at 13-14 (Exhibit US-43). At verification, KEB officials confirmed that GOK had traditionally followed the main bank principle, and that the KEB had a long history of being the main bank for the Hyundai Group. *Hynix Verification Report* at 12 (Exhibit US-43). Also, record evidence reflected the following: "Main banks were designated by the government on the basis of the bank's exposure to chaebols; for each chaebol, the government designated a bank, who has the largest exposure to that chaebol, as the main bank of the chaebol. Once designated, however, the main bank was not changed even if the main bank lost its status as the principal source of credit to the chaebol." *Corporate Governance in Korea*, Il Chong Nam *et al.*, KOREA DEVELOPMENT INSTITUTE (from Organisation for Economic Co-operation and Development conference on Corporate Governance in Asia: A Comparative Perspective) (Seoul, March 3-5, 1999) ("In short, main banks acted as *de facto* government agents in terms of regulation and monitoring.") at 2 (copy attached as Exhibit US-131). In effect, "[T]he principal transaction banks have been largely the agent of the GOK in their supervisory role. As such, PTBs were more concerned about whether corporate clients' behaviors were conforming to the government rules and regulations rather than trying to help them with their investment and financing plans." *Korea's Economic Crisis and Corporate Governance*, Sang-Woo Nam, SCHOOL OF PUBLIC POLICY AND MANAGEMENT, KOREA DEVELOPMENT INSTITUTE (undated) at 47 (copy attached as Exhibit US-132).

The United States notes here that all of the new exhibits attached to these answers were part of the administrative record before the DOC.

would they use the value of a liquidated concern as opposed to the value of a continuing concern?

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

The message was loud and clear: “Do not even think of opposing this plan.” Banks initially went ballistic: “It doesn’t make any sense, its just plain ridiculous.” However, they ended up giving their consent, “swallowing the mustard while crying in tears,” as the old Korean saying goes. There simply wasn’t any room for any other choice. The result in support was all set in advance.... Another aspect was that the state-affiliated banks were coercing commercial banks in the private sector. The government and the creditor group may breathe a sigh of relief after keeping Hynix alive in this way.⁶⁸

72. Thus, given the facts of the DRAMs investigation, it is easy to see why and how the GOK could entrust and direct Hynix’s creditors to save the company. The GOK was able to use the CRPA to determine the outcome of Council deliberations so as to assist Hynix.

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

73. With respect to the second part of the question, the United States agrees that there must be evidentiary support warranting the inclusion of creditors in a finding of entrustment/direction. If, however, by use of the words “evidence showing that creditors ... *were actually* entrusted/directed” (emphasis added), the Panel is suggesting that it is necessary for authorities to have *direct* evidence for every bank and every event, the United States would not agree.

74. As the United States has noted previously, governments typically have a wide range of tools at their disposal to deliver a financial contribution indirectly, and these tools may vary greatly in terms of their transparency. Where governments have political reasons for wanting to obscure their role in providing assistance to a particular company or industry, they may choose to

⁶⁸ ‘Gangster-Style’ Solution for Hynix, DONG-A DAILY (November 1, 2001) (copy attached as Exhibit US-133).

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 program with several interrelated phases, one of which was the syndicated loan. The program 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 program.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 February 2, 2001 to request their "cooperation" when they expressed reluctance

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* (January 27, 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).

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 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 U.S. 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 program; there was evidence that at various points the GOK applied pressure on the three banks; and for every phase of the bailout program there was evidence of GOK entrustment/direction, albeit not always specific to these three banks. In light of this evidence, it was reasonable for the DOC to infer that the GOK entrusted/directed Shinhan, KorAm and Hana to participate in the syndicated loan. Indeed, in light of the evidence, the inference that the GOK did not entrust/direct these banks to participate in the syndicated loan seems implausible.

4. *At para. 18 of its Answers to the Panel's questions, the US asserts that "The DOC did not find specifically that government-owned and controlled private entities 'were instruments through which the GOK entrusted/directed other entities'. Rather, the DOC found, for example,*

⁷¹ *Creditor Group Conflicts With Government Over Supporting Hyundai Group*, MAEIL ECONOMIC DAILY, February 2, 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, June 21, 2001 (Exhibit US-64).

⁷⁴ *KorAm Reluctantly Continues Financial Support for Hynix*, KOREA TIMES, June 21, 2001 (Exhibit US-64).

⁷⁵ *Corporate Restructuring and Reform: Lessons from Korea*, W. Mako, KOREAN CRISIS AND RECOVERY, David T. Coe & Se-jik Kim, eds., 2002, at 213-14 (Exhibit US-20).

that the GOK exercised control over Hynix's creditors generally through government-owned and controlled banks, because those banks played a dominant role in the Creditors Councils." Does the US response mean that control over creditors through government-owned and controlled private entities is not relevant to the issue of entrustment / direction of those creditors? How does the concept of the exercise of control over creditors differ from the notion of entrustment / direction of those creditors?

81. The Panel is correct that the DOC did not find that the government-owned and controlled banks were "instrumentalities" through which the GOK entrusted or directed other creditors. To the contrary, the DOC found that it was the GOK that entrusted or directed Hynix's creditors. However, the DOC also found that the GOK's task was facilitated by its ownership and control over banks that dominated the Hynix Creditors' Council.

82. The U.S. response at paragraph 18 does not mean that control over creditors is irrelevant to the issue of entrustment/direction of those creditors. While government control over a private party may not be essential to a finding of entrustment/direction, the presence of control may provide direct or circumstantial evidence of entrustment/direction.

83. With respect to the Panel's question concerning the difference between the concept of "control" over creditors and the notion of "entrustment/direction" of those creditors, in the abstract, a government could have control over a private entity, but never entrust or direct the private entity to do 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 U.S. 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

⁷⁶ Bank for International Settlements, "The Banking Industry in the Emerging Market Economies: Competition, Consolidation and Systemic Stability," BIS Papers No. 4 at 95 (August 2001) (Exhibit US-13). The 15.1% figure included preferred stock.

⁷⁷ *Issues and Decision Memorandum* at 58-59 (Exhibit GOK-5); *Kookmin Bank Prospectus* (June 18, 2002) at 22 (Exhibit US-46); *Kookmin Bank Prospectus* (September 10, 2001) (Exhibit US-45); see also Government Control of Banks Diehard, KOREA TIMES (March 13, 2000) (Exhibit US-127); *Kookmin Urges Seoul to Sell off its Stake*, FINANCIAL TIMES (November 10, 2001) (copy attached as Exhibit US-137).

FSC, “to speak for the government in the second-stage restructuring plan with Kookmin and other banks.”⁷⁸ As with the other creditors, the GOK also blocked Kookmin from finding Hynix in default.⁷⁹

86. Thus, there was more than ample evidence on the DOC record that, even though the Group C banks were not controlled by the GOK purely on the basis of GOK ownership, the GOK nonetheless had the ability to direct their behavior.

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

87. By the statement at paragraph 24 of our written answers that “this was a situation where the GOK said to the banks: ‘If you know what’s good for you, you are going to help us bail out Hynix,’” the United States was not intending to suggest that the issue of entrustment or direction requires an analysis of the bank’s motives. The United States did, however, wish to convey the GOK’s ability to obtain the banks’ cooperation through punitive measures and threats thereof.

6. *At para. 33 of its Answers to the Panel’s questions, the US asserts that “[t]he DOC did not find that mandatory participation under the CRPA constituted, in and of itself, entrustment or direction. Rather, the DOC found that the GOK used the CRPA as a vehicle to effectuate the GOK’s Hynix policy.” Does this mean that the alleged mandatory nature of the CRPA is not relevant to the issue of entrustment / direction?*⁸⁰

88. As stated above in response to Question 2, the DOC’s finding that the GOK used the CRPA as a “vehicle” to effectuate the GOK’s Hynix policy does not mean that the mandatory nature of the CRPA was not relevant to the issue of entrustment or direction. Rather, it was the mandatory nature of CRPA, *coupled with the specific factual circumstances present in the DRAMs investigation and the application of the CRPA to the Hynix bailout*, that constituted evidence of GOK entrustment/direction.

⁷⁸ *Government Control of Banks Diehard*, KOREA TIMES (March 13, 2000) (Exhibit US-127); *Highhanded Companies Sued for Unilateral Shareholders Meeting*, KOREA TIMES (April 5, 2000) (copy attached as Exhibit US-138); *Seoul Pushes for a New ‘Big Bang’ in Banking*, ASIA TIMES (March 18, 2000) (copy attached as Exhibit US-139); *Soundness of Financial Sector Still Remains Remote*, KOREA TIMES (September 2, 2002) (copy attached as Exhibit US-140).

⁷⁹ *GOK Verification Report* at 19 (Exhibit US-12).

⁸⁰ In order to better address the Panel’s questions, we have broken up our answer to Question 6 into three parts.

How does the notion of entrusting / directing someone to carry out an objective differ from using something as a vehicle to have someone effectuate that objective?

89. If the United States understands the question correctly, the difference is perhaps best described as the difference between ends and means. In abstract, the “ends” is entrustment/direction and the “means” is the method used to entrust/direct. In the context of the DRAMs investigation, the ends was the entrustment/direction of Hynix’s creditors to provide assistance to Hynix, and the CRPA was a means by which the GOK entrusted/directed those creditors to provide such assistance. As an evidentiary matter, the means used can be informative in ascertaining the ends.

If the October 2001 restructuring had occurred in isolation, would the CRPA in and of itself have been sufficient evidence of entrustment /direction?

90. The United States is not in a position to state definitively what the relevant DOC decisionmaker would find if faced with the situation hypothesized by the Panel. However, it seems quite unlikely that entrustment/direction would be found if the CRPA was the only piece of evidence.

91. Of course, in the DRAMs investigation, the CRPA was not the only evidence of entrustment or direction pertaining to the October bailout. There was other evidence, and the extent of the additional evidence of entrustment or direction in October must be put in its proper perspective.

92. With the enactment of the CRPA, Hynix’s Creditors’ Council was formalized. As previously discussed, Hynix’s Creditors’ Council was dominated by government-owned and controlled banks. Furthermore, even before the October restructuring, the KEB had been hand-picked by the GOK as the lead bank, and was in charge of the Creditor Group and acted as a liaison between the banks and the GOK. The implications of this structure in terms of the evidence necessary to support a finding of entrustment or direction should not be underestimated. That is, the advantage of the Council structure and having the KEB as lead bank was that the GOK could utilize one bank as point person and avoid having to dictate terms to each Council member individually.

93. In addition, by the time of the October bailout, the GOK was aware that its Hynix bailout policy was coming under increased international scrutiny. In particular, the United States had begun to raise its concerns regarding the subsidization of Hynix directly with Korea.⁸¹ Press

⁸¹ See, e.g., *GDS Offering Memorandum* at 90 (copy attached as Exhibit US-151) (acknowledging that the “United States Trade Representative has challenged the KDB Fast Track Debenture Program ... as constituting a preferential governmental subsidy in contravention of subsidy regulations of the World Trade Organization. A draft resolution disputing the program was submitted to the United States Congress in February 2001 and remains under

reports reflected that due to rising trade tensions, the GOK could no longer afford to openly discuss supporting Hynix. As one commentator stated, “Whenever the creditor group attempts to shy away from providing support, the government has talked to them, or even twisted their arms, to bring support for Hynix. The government has to avoid trade disputes while trying to keep Hynix alive. Hence the government is not in a position to openly talk about support.”⁸² Another commentator 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 August 3, 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

⁸¹ (...continued)
review.”).

⁸² *Hynix, Will it Really Survive?*, NEWSMAKER, No. 439 (August 30, 2001) (copy attached as Exhibit US-141).

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

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

⁸⁵ *Deputy Prime Minister Chin, ‘Government will Take Actions to Turn Around Hynix’*, KOREA ECONOMIC DAILY (August 4, 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 (August 4, 2001) (translated version) (Exhibit US-143); *see also Jin Vows to Eliminate Uncertainties Thru Furthering Restructuring Efforts*, KOREA TIMES (August 4, 2001) (copy attached as Exhibit US-144). The New

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]henver the creditor group attempts to shy away from providing support, the government has talked to them, or even twisted their arms, to bring support for Hynix."⁸⁹ It also observed: "For years Hynix has been considered a "second Daewoo" by various market voices. The government and the creditor group are scrambling to turn it around and keep it alive, but the market is not convinced of the possibility of its success The government and the creditor group have absolutely decided to keep it alive."⁹⁰

99. Another August report stated that "[A]s for the government, it is difficult for them to give up on Hynix because the ruin of Hynix would symbolize the demise of the DJ [Kim Dae Jung] Administration's "Big Deal" policy (the artificial merger of Hyundai Electronics and LG Semiconductor.)"⁹¹ A short time later, Deputy Prime Minister Jin publicly criticized delays by Hynix creditor banks in putting together the upcoming bailout as further jeopardizing Hynix's financial situation.⁹²

100. In September 2001, Keun-Yung Lee, Chairman of the Financial Supervisory Commission stated in a news conference: "Of three problematic companies, the government will determine

⁸⁶ (...continued)

York Times, reporting on former Deputy Prime Minister and Minister of Finance Jin Nyum's views in this regard, stated: "His preference for a hands-off stance by the government did not necessarily extend to some of the giant corporate invalids that the country is trying to deal with, like Daewoo Motor and Hynix Semiconductor." *Korean Official Defends Seoul's Efforts on Economy*, THE NEW YORK TIMES, (February 23, 2002) (copy attached as Exhibit US-145).

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

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

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

⁹⁰ *Hynix, Will it Really Survive?*, NEWSMAKER, No. 439 (August 30, 2001) (Exhibit US-141).

⁹¹ *Hynix Practically in Default, What's the Problem?*, CHOSUN DAILY (August 29, 2001) (translated version) (Exhibit US-25).

⁹² *See Banks Open Talks on Hynix Lifeline*, BBC NEWS (September 3, 2001) (copy attached as Exhibit US-147).

how to handle Daewoo Motor and Hynix Semiconductor Inc. by the end of September.”⁹³ Several days before a meeting of Hynix’s creditors in mid-September 2001, he said that when they met, they would strike a compromise on the bailout plan for Hynix, and disclosed knowingly that: “All the related parties are committed to resolving the Hynix matter as soon as possible.”⁹⁴

101. In addition, in connection with the October bailout, the GOK rewarded certain Hynix creditors by allowing them to utilize preferential tax provisions available only to lenders of companies involved in formal court reorganization. Under Korean law, banks could qualify for tax deductions for bad debt when the debtor was in a court-supervised reorganization, composition, or mandatory composition under Article 44 of the Special Law on Tax Reduction and Exemption. Although Hynix was not in bankruptcy status under Article 44, the Korean Office of Tax Administration issued a special exception authorizing loans of 1.5 to 1.6 trillion won held by five Hynix creditor banks to be considered as tax deductible expenses.⁹⁵ Absent this favor from the Office of Tax Administration, those creditors would not have qualified for this preferential and significant tax treatment.⁹⁶

102. The DOC properly considered this evidence in the context of Hynix’s utterly dismal financial condition at the time of the October bailout. Over the course of the summer of 2001, Hynix’s financial situation had deteriorated to near insolvency. Standard and Poor’s had lowered Hynix’s credit rating to selective default,⁹⁷ and Hynix had overdue payments of US\$202.1 million owed to its U.S. subsidiary.⁹⁸ As Standard and Poor’s noted in an August 16, 2001 revision to Hynix’s rating, “the outlook revision reflects the worsening prospects for Hynix’s profitability and cash flow protection measures amid a severe market downturn in the company’s mainstay dynamic random access memory (DRAM) business.” The notification went on to note that “in the second quarter of 2001, the 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

⁹³ *FSC Chairman Promises Sale of Daewoo Motor This Month*, KOREA HERALD (September 10, 2001) (copy attached as Exhibit US-148).

⁹⁴ *FSC Chairman Promises Sale of Daewoo Motor This Month*, KOREA HERALD (September 10, 2001) (Exhibit US-148).

⁹⁵ *The Office of National Tax Administration’s Decree to Recognize the Creditors’ Write-Off of the Hynix Loan as a Tax Deductible Expense ... May Give Rise to an Issue of Preferential Treatment*, KOREA ECONOMIC DAILY (November 6, 2001) (translated version) (copy attached as Exhibit US-149).

⁹⁶ *The Office of National Tax Administration’s Decree to Recognize the Creditors’ Write-Off of the Hynix Loan as a Tax Deductible Expense ... May Give Rise to an Issue of Preferential Treatment*, KOREA ECONOMIC DAILY (November 6, 2001) (translated version) (Exhibit US-149).

⁹⁷ *See Standard and Poor’s Press Release* (October 5, 2001) (copy attached as Exhibit US-150).

⁹⁸ *See GDS Offering Memorandum* at 57 (Exhibit US-151).

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 Program and decide to designate the lions share of it for Hynix and other Hyundai companies; Ministers meet with Citibank officials to plan the 800 billion won syndicated loan; and the KEIC guarantees the loans made in connection with the syndicated loan.
- January 2001 – Economic Ministers meet again to hammer out the D/A financing plan for Hynix, forcing cooperation from the KEB and KEIC.
- February 2001 – Economic Ministers meet again to follow up on the D/A financing, and the FSC calls Shinhan and KorAm to a mandatory meeting to request their “cooperation.”
- March 2001 – The FSC orders all Hynix creditors to a meeting at FSC offices to secure their commitments on the D/A financing “in the form of a covenant” and requires the formation of the Hynix Creditor Council.
- April 2001 – The Economic Ministers meet yet again to follow up on the D/A financing, and the GOK meets again with Citibank.

⁹⁹ See *Standard and Poor’s Press Release* (October 5, 2001) (Exhibit US-150).

- May 2001 – The May restructuring occurs and a KEB official echoes the GOK’s continuing support for Hynix on the basis of the economic and strategic consequences of its survival, stating “[i]f Hynix is placed under receivership, [the ROK’s] exports will be severely battered [because] Hynix accounts for 4 percent of exports. As far as I know, the government is now working out a series of powerful measures to ensure the survival of [Hynix].”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 program).
- 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 and Hynix Semiconductor Inc. by the end of September.”¹⁰² In that same month, in a prospectus filed with the U.S. Securities and Exchange Commission, Kookmin admits that the GOK can direct its lending decisions.
- October 2001 – The GOK leads the October 2001 bailout, engineering the restructuring under the CRPA.

105. As this brief chronology shows, from the period November 2000 to October 2001, the record before the DOC contained evidence of GOK activity in virtually every month. Thus, the

¹⁰⁰ *Creditors Deny Hynix Receivership Rumors*, KOREA TIMES (May 4, 2001) (Exhibit US-26).

¹⁰¹ *Deputy Prime Minister Chin, “Government will Take Actions to Turn Around Hynix,”* KOREA ECONOMIC DAILY (August 4, 2001) (translated version) (Exhibit US-118).

¹⁰² *FSC Chairman Promises Sale of Daewoo Motor This Month*, KOREA HERALD (September 10, 2001) (Exhibit US-148).

notion that the October bailout was somehow disconnected from the other major events that made up the overall Hynix bailout simply cannot be supported on the basis of the evidence before the DOC. To the contrary, the GOK never wavered in its Hynix policy. The October bailout was merely the last in a series of interrelated, overlapping actions undertaken by the GOK to assist Hynix during the DOC's period of investigation.

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

106. Regarding evidence pertaining specifically to Pusan, Pusan, along with other Hynix creditors, reportedly met on multiple occasions directly with GOK officials to discuss assisting Hynix.¹⁰³ Pusan 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,¹⁰⁵ and the GOK compelled its participation in Hynix's bailout through the CRPA.¹⁰⁶ Furthermore, like the other creditors, the GOK forced it to participate in the March 10, 2001 meeting between Hynix's creditors and the FSC.¹⁰⁷ Like the other creditors, the GOK also blocked it from finding Hynix in default.¹⁰⁸

107. Other relevant evidence is the fact that the GOK's Hynix bailout policy consisted of a single program, and the evidence of entrustment/direction that does not pertain specifically to Pusan. Finally, there is the context in which the DOC had to consider this evidence, which included the facts relating to Hynix's dismal financial situation and the fact that Pusan offered no

¹⁰³ *Meetings on 12/20/00: Self-Rescue Before Asking for Help*, THE KOREA ECONOMIC DAILY (January 11, 2001) (translated version) (Exhibit US-81); *1/9/01: Government and Creditor Group 'Bewildered' by Hyundai Electronics 'Dogged Clamoring'*, KOOKMIN DAILY (January 11, 2001) (translated version) (Exhibit US-82); *Self-Rescue Before Asking for Help*, THE KOREA ECONOMIC DAILY (January 11, 2001) (translated version) (Exhibit US-81); *3/10/01: The Grace Period Decision for Three Affiliates of Hyundai Group – Stories of Inside and Outside*, KOREAN SEOUL ECONOMIC DAILY (March 11, 2001) (translated version) (Exhibit US-79); *Grace Period Discussion on Hyundai Electronics*, MAEIL ECONOMIC DAILY (March 10, 2001) (translated version) (copy attached as Exhibit US-136); *The Creditor Group Finalizes Financing Package for 3 Hyundai Affiliates*, NAEOE ECONOMIC DAILY (March 10, 2001) (translated version) (Exhibit US-78); *GOK Verification Report* at 18-19 (Exhibit US-12).

¹⁰⁴ *Hynix Verification Report* at 13, 14, 16 (Exhibit US-43).

¹⁰⁵ *Issues and Decision Memorandum* at 51-52 (Exhibit GOK-5); *GOK Verification Report* at 16-17 (KDB Fast Track Program blanket waiver) (Exhibit US-12).

¹⁰⁶ CRPA, Art. 2 (Exhibit US-51).

¹⁰⁷ *3/10/01 Meeting with FSC: Bank Should be Allowed to Make Decision on the Matter of Support for Specific Companies*, MAEIL ECONOMIC DAILY (March 11, 2001) (copy attached as Exhibit US-146); *Grace Period Discussion on Hyundai Electronics*, MAEIL ECONOMIC DAILY (March 10, 2001) (translated version) (Exhibit US-136); *Hynix, Will it Really Survive?*, NEWSMAKER, No. 439 (August 30, 2001) (Exhibit US-141); *Never-ending Aid for Hyundai*, KOREA TIMES (March 12, 2001) (Exhibit US-80); *Seoul's Continuing Support Spawns Fresh Debate Over HEI's Viability*, KOREA HERALD (March 14, 2001) (copy attached as Exhibit US-157); *The Creditor Group Finalizes Financing Package for 3 Hyundai Affiliates*, NAEOE ECONOMIC DAILY (March 10, 2001) (translated version) (Exhibit US-78); *The Grace Period Decision for Three Affiliates of Hyundai Group – Stories of Inside and Outside*, KOREAN SEOUL ECONOMIC DAILY (March 11, 2001) (translated version) (Exhibit US-79); *GOK Verification Report* at 18-19 (Exhibit US-12).

¹⁰⁸ *GOK Verification Report* at 19 (Exhibit US-12).

legitimate credit risk analysis for assisting Hynix. These factors are discussed in more detail in the response to Question 3, above.

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

108. The percentages set forth in Figure US-4 are approximate, because the precise percentages are business proprietary. Thus, the exact percentages have been rounded, and the discrepancy noted by the Panel reflects this rounding.

109. According to Figure US-4, Group A creditors accounted for over 15% of the Council vote, Group B creditors accounted for over 50% of the Council vote, and Group C creditors accounted for over 18% of the Council vote for the October 2001 restructuring. The remaining portion of the Council vote for the October 2001 restructuring – approximately 17% – was held by over 90 separate entities, such as investment trust companies, leasing, financing companies, and other financial institutions. Many of these other financial entities were wholly owned subsidiaries of, or majority owned by, one of Hynix's Group A or Group B creditors.

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

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

¹¹⁰ *Micron's March 14, 2003 Comments to the U.S. Department of Commerce* at 77 (copy attached as Exhibit US-152); see also *Micron Case Brief* (May 22, 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 favor 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 favor.") (Exhibit GOK-30).

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

... Their [foreign banks'] source of funds was from their head offices and, as respondents correctly illustrate, the appointment of their senior officials was not

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

subject to influence by the GOK. Petitioners proffer no evidence that foreign banks in Korea were “inescapably influenced by the controls on every other sector of the banking industry.” Rather, they speculate that these banks would be no less influenced than their Korean counterparts by the lead of the Korean Development Bank and the Bank of Korea to extend credit to certain government-favored projects. This is not a conclusion reached by any of the commercial bankers at verification, and petitioners do not point to any evidence that would support this contention.¹¹²

113. The DOC’s conclusions regarding the lack of entrustment and direction of Korean branches of foreign banks applied only to that category of banks, and *not* to Korean banks that may have had some level of foreign ownership. Such banks were Korean commercial banks, subject to all Korean banking laws, regulations and oversight. Moreover, most of these Korean commercial banks, including Shinhan, KorAm, Kookmin, Hana, and H&CB, had some level of government ownership, even when there was also some foreign ownership. Moreover, for each of these banks, the GOK was the single largest shareholder based on both common and preferred shares. These banks were thus a distinct category from wholly foreign banks that operated branches within Korea.

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

114. Although government ownership is a relevant factor to be considered in an analysis of entrustment or direction, the United States is *not* arguing that the GOK’s ownership interest in Kookmin *per se* allowed it to control the bank. In the section of our submission referred to in the Panel’s question, the United States was refuting Korea’s claim that the GOK was legally precluded from intervening in the banking sector.¹¹³ In doing so, we did not limit our analysis to government control by virtue of ownership. Rather, we discussed the issue of the GOK’s legal rights as a shareholder, *plus* the evidence related to Kookmin. We specifically cited Kookmin’s SEC prospectus as evidence of government control or influence over banking decisions, even in a situation where the GOK had only a 10 percent voting interest. The key point made by the Kookmin prospectus is that it represents a formal acknowledgment by the bank that, at the behest of the GOK, it made loans to troubled high-technology borrowers that it would not otherwise make. Moreover, Kookmin’s annual report expressly listed Hynix, a high-technology company, as its top troubled borrower. In addition, Kookmin’s rationale for assisting Hynix echoed the

¹¹² *Stainless Steel Plate in Coils From the Republic of Korea, Final Negative Countervailing Duty Determination*, 64 Fed. Reg. 15530, 15542 (March 31, 1999) (copy attached as Exhibit US-154). The DOC’s analysis of direction of credit in the *Stainless Steel Plate in Coils From the Republic of Korea* investigation forms part of the record in the instant investigation. See *Direction of Credit Memorandum*, Attachment 4 at 17 (Exhibit US-8).

¹¹³ The United States recognizes that this may not have been clear from the heading of the section.

government's objectives referenced in Kookmin's 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 program ... **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 program.*

115. The constituent parts of the subsidy program were the 800 billion won syndicated loan, the KDB Fast Track bond program, the May 2001 restructuring package, and the October 2001 restructuring package. Benefits conferred under the subsidy program during the period of investigation were attributable to all types of new and restructured loans (including bonds), as well as debt forgiveness, debt-to-equity swap, and retroactive interest rate reduction prior to the swap. The following is a list of the specific types of financial instruments that the DOC countervailed: syndicated loan; KDB bonds; convertible bonds; new loan (in lieu of convertible bonds) from the Industrial Bank of Korea, a government entity; foreign currency loans (new and/or restructured); KDB Industry Facility loans (new and/or restructured); short-term loans (new and/or restructured); usance loans (new and/or restructured); overdraft loans (new and/or restructured); general loans (new and/or restructured); D/A loans (new and/or restructured); five-year, zero-interest debentures; retroactive interest rate reduction prior to debt-to-equity swap; debt held by investment trust companies; operating and capital leases; various other loans (new and/or restructured).¹¹⁵

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

116. No, the United States does not accept that the Hynix-only import figures are a reasonable proxy for the total import figures. The United States has discussed in detail subject import volume and the increasing trends in subject import volume both absolutely and relative to domestic production and consumption during the period of investigation.¹¹⁶ Notwithstanding the constraints imposed on the United States by virtue of the confidentiality of the underlying data, the United States provided as much information as possible within the confines of its obligations

¹¹⁴ See US Second Submission, para. 18, and the materials cited therein; *see also Issues and Decision Memorandum* at 59 (Exhibit GOK-5).

¹¹⁵ See *Hynix 2001 Audited Financial Statements* at 38-41 (Exhibit US-125), and *October Restructuring Package* (Exhibit GOK-23(e)).

¹¹⁶ See US Answers to Panel Questions (Answers to Questions 15 and 18).

to protect the confidentiality of the underlying information. We refer the Panel to prior U.S. submissions for an explanation of why the Hynix-only import figures are an unacceptable proxy, an explanation of why Korea's compilation of Hynix's data is flawed compared to the U.S. compilation in Confidential U.S. Figure 1, and some observations based on the Hynix-only data.¹¹⁷

117. Indeed, given Korea's failure to challenge the ITC's treatment of this data as confidential and its failure to challenge as inadequate the ITC's summary of the confidential information in the public version of its report, Korea's continuing attempt to assign values to the confidential data is unwarranted. Under the terms of Article 12 of the SCM Agreement, the United States is obligated to protect the confidentiality of data submitted during the ITC's investigations. However, *all* 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 U.S. shipments of DRAM products were an important portion of U.S. shipments of non-subject imports during the period of investigation, offered products that "differ[ed] *substantially* from and were not interchangeable with products made by U.S. producers."¹¹⁸ Thus, by Hynix's own admission, Samsung's imports were less likely to compete with U.S.-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*

¹¹⁷ US Second Submission, paras. 114 to 118; and US Second Oral Statement, paras. 34-36.

¹¹⁸ *See, e.g.*, November 27, 2002 Postconference Brief of Hynix and Samsung at 52 (Exhibit US-100) (emphasis added).

¹¹⁹ *See, e.g.*, November 27, 2002 Postconference Brief of Hynix and Samsung at 50-56 (Exhibit US-100).

percentage of Samsung's U.S. 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 U.S. 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

123. The ITC confirmed the validity of these arguments through its data collection efforts. The ITC collected information from importers on the percentage of imported products and U.S. shipments of DRAM products in 2001 and 2002 that were "standard" DRAM products, Rambus DRAM products, and other "specialty" DRAM products. Importers were asked to differentiate the reported information for Rambus DRAM products containing dice fabricated in Korea by "Samsung" and the portion containing dice fabricated in Korea by "Others" and to differentiate the reported information for specialty DRAM products containing dice fabricated in Korea by "Samsung" and the portion containing dice fabricated in Korea by "Others."¹²⁵ The responses indicated that a significant percentage of non-subject DRAM products were non-standard DRAM products, such as Rambus or specialty DRAM products.¹²⁶ Korea does not challenge the ITC's treatment of this information as confidential under either Article 12.4 or Article 22.5 of the SCM Agreement. Because the Panel requested a non-confidential summary of the underlying confidential percentage, we confirmed in response to question 17 of the Panel's Questions Following the First Substantive Panel Meeting that of all U.S. shipments of non-subject imports in 2001, approximately one-fifth were Rambus or specialty DRAM products. The corresponding percentage in 2002 was somewhat higher than in 2001.

124. The information collected by the ITC concerning the share of imports that were "standard," "specialty," "Rambus," and "other" DRAM products was based on the value share of

¹²⁰ See, e.g., November 27, 2002 Postconference Brief of Hynix and Samsung at 50 n.69 (Exhibit US-100) (emphasis added).

¹²¹ See, e.g., November 27, 2002 Postconference Brief of Hynix and Samsung at 53 (Exhibit US-100) (emphasis added).

¹²² See, e.g., November 27, 2002 Postconference Brief of Hynix and Samsung at 55-56 (Exhibit US-100).

¹²³ See, e.g., November 27, 2002 Postconference Brief of Hynix and Samsung at 50-56 (Exhibit US-100).

¹²⁴ See, e.g., Hearing Transcript at 168-175, 258-260 (Exhibit US-94).

¹²⁵ See, e.g., Importer's Questionnaire at question II-10(a) (Exhibit GOK-44(b)).

¹²⁶ The exact percentage is confidential.

the questionnaire respondents' total U.S. shipments. The ITC provided draft questionnaires to the parties during the final phase of its investigation in which it proposed collecting this data on a value-basis. In Hynix's comments on the questionnaire responses, Hynix never asked the ITC to collect the data on a quantity basis as well.

125. In its answer to question 16 of the Panel's Questions Following the First Substantive Panel meeting, Korea asserts based on "public evidence" that Rambus DRAM products accounted for less than 10 percent of total DRAM sales by Samsung, which Korea characterizes as the major supplier of Rambus DRAMs. There are a number of problems with this assertion. First, Korea's estimate is based solely on Rambus DRAMs and does not even purport to consider specialty DRAM products. Second, the information cited by Korea is based on data for the global market gathered by Gartner/Dataquest, not the U.S. market, whereas the data collected by the ITC was tailored to the U.S. market. Finally, the percentage submitted by Korea conflicts with the percentage that Korea offered to the Panel during the First Substantive Panel Meeting. It is the recollection of the United States that in response to a question from the Panel, Korea's counsel estimated that Rambus and specialty DRAM products accounted for approximately 20 percent of all non-subject import shipments to the U.S. market. When the United States inquired as to the source of this estimate in the ITC record, Korea's counsel responded that he had asked Hynix the previous night and that 20 percent was Hynix's estimate based on its knowledge of the market.

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

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

¹²⁷ See, e.g., USITC Pub. 3616 at 4 (Exhibit GOK-10).

was a single domestic like product consisting of DRAM products that corresponded to the scope of the investigation.¹²⁸

127. 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.

128. 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 U.S. shipments of standard, Rambus, and specialty DRAM products from non-subject sources.

129. 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.

130. 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.

131. 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 U.S. market.

132. 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

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).

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.

133. 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 ?*

134. 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 U.S. submissions, included the KEB’s participation in the syndicated loan.

135. 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

136. 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

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

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

¹³³ *Government of Korea Questionnaire Response* (February 3, 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 (November 28, 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).

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 ?

137. 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.

138. 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 May 7, 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,” and was characterized as a central portion of the overall recapitalization plan for Hynix. Along with the KDB Fast Track Program, it was presented as the cornerstone for restoring Hynix’s liquidity.¹⁴¹ The Offering Memorandum also noted that the May restructuring would close “substantially concurrently,” with the closing of the GDS,¹⁴² thus highlighting the automaticity of the assistance agreed to in May. Finally, the “Risk Factors” section of the Offering Memorandum did not even mention the “contingency” related to the May bailout – something that surely would have, and should have, been featured prominently, if in fact, such a risk existed.¹⁴³ Overall, the characterization of the May restructuring in the Offering Memorandum clearly gave the impression that the funds and restructuring would be forthcoming, and immediate.

139. In addition, Korea’s assertion also was contradicted by the Offering Memorandum’s discussion of the GOK’s direct support of Hynix through the KDB fast track program. The KDB fast track program was in operation before the May restructuring package and was never conditioned upon the result of the GDS offering. In fact, the Offering Memorandum expressly specified in numerous places how the GOK stood behind Hynix. In order to demonstrate GOK’s continuing support to Hynix, the Offering Memorandum specifically stated that, “as a supplement to the May restructuring package, approximately 2.0 trillion won in additional

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

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).

¹⁴⁰ *Hynix GDS Offering Memorandum* at 4-5 (Exhibit US-151).

¹⁴¹ *Hynix GDS Offering Memorandum* at 4 (Exhibit US-151).

¹⁴² *Hynix GDS Offering Memorandum* at 4 (Exhibit US-151).

¹⁴³ *Hynix GDS Offering Memorandum* at 18-32 (Exhibit US-151).

financing was expected to continue to be available to Hynix from May 31, 2001 through the remainder of 2001 under the debenture rollover program sponsored by KDB”.¹⁴⁴ Thus, Hynix was clearly relying on the support of the GOK in selling its GDS shares and the alleged contingency – assuming *arguendo* that it actually existed – was largely inconsequential.

140. It also was noteworthy that the GOK pushed Korea’s investment trust companies to purchase Hynix corporate debentures in May as a way to support the GDS offering.¹⁴⁵ According to press reports, the FSS called on the investment trust companies to buy Hynix convertible bonds as part of the May restructuring, saying that attracting foreign capital for Hynix could not be done without cooperation of the investment trust companies.¹⁴⁶

141. Finally, even after the May announcement was made, but before the GDS offering closed, Hynix creditor banks entered into an agreement on June 12, 2001, setting the terms of the underwriting agreement for the issuance of the KRW 1,000 billion of convertible bonds.¹⁴⁷ If it was truly the case that the banks were waiting until the successful conclusion of the GDS to decide whether to proceed with the May bailout, why would they meet again before the GDS even closed to work out the details and then sign an agreement with respect to the terms of the underwriting?

142. 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?*

143. 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 percent 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.

¹⁴⁴ *Hynix GDS Offering Memorandum* at 4 (Exhibit US-151).

¹⁴⁵ *Hynix GDS Offering Memorandum* at 6 (Exhibit US-151). The Offering Memorandum described under the title of “Proposed Investment Trust Refinancing Transaction,” that certain Korean investment trust companies were contemplating a potential investment of approximately 680 billion won in aggregate principal amount of Hynix debentures.

¹⁴⁶ *Creditor Group ... Asks Investment Trust Companies to Take Over 750 Billion Won of Hynix Corporate Debentures*, THE KOREA ECONOMIC DAILY (May 30, 2001) (translated version) (copy attached as Exhibit US-155); *see also Finance/Conflict Between Banks and Investment Trust {Companies} Over Support for Hynix*, DONG-A DAILY (May 4, 2001) (translated version) (copy attached as Exhibit US-156).

¹⁴⁷ *Hynix GDS Offering Memorandum* at 5 (Exhibit US-151).

144. 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	<i>Corporate Governance in Korea</i> , Il Chong Nam <i>et al.</i> , KOREA DEVELOPMENT INSTITUTE (from Organization for Economic Co-operation and Development conference on Corporate Governance in Asia: A Comparative Perspective) (Seoul, March 3-5, 1999)
132	<i>Korea's Economic Crisis and Corporate Governance</i> , Sang-Woo Nam, SCHOOL OF PUBLIC POLICY AND MANAGEMENT, KOREA DEVELOPMENT INSTITUTE (undated)
133	'Gangster-Style' Solution for Hynix, DONG-A DAILY (November 1, 2001)
134	GOK Questionnaire Response (February 4, 2003)
135	Countervailing Duty Petition (November 1, 2002)
136	Grace Period Discussion on Hyundai Electronics, MAEIL ECONOMIC DAILY (March 10, 2001) (translated version)
137	Kookmin Urges Seoul to Sell off its Stake, FINANCIAL TIMES (November 10, 2001)
138	Highhanded Companies Sued for Unilateral Shareholders Meeting, KOREA TIMES (April 5, 2000)
139	Seoul Pushes for a New 'Big Bang' in Banking, ASIA TIMES (March 18, 2000)
140	Soundness of Financial Sector Still Remains Remote, KOREA TIMES (September 2, 2002)
141	Hynix, Will it Really Survive?, NEWSMAKER, NO. 439 (August 30, 2001)
142	An Expensive Decision, ASIAMONEY (September 2001)
143	Deputy Prime Minister Chin, 'Government will Take Actions to Turn Around Hynix', KOREA ECONOMIC DAILY (August 4, 2001) (translated version)
144	Jin Vows to Eliminate Uncertainties Thru Furthering Restructuring Efforts, KOREA TIMES (August 4, 2001)
145	Korean Official Defends Seoul's Efforts on Economy, THE NEW YORK TIMES, (February 23, 2002)
146	Bank Should be Allowed to Make Decision on the Matter of Support for Specific Companies, MAEIL ECONOMIC DAILY (March 11, 2001)
147	Banks Open Talks on Hynix Lifeline, BBC NEWS (September 3, 2001)

148	<i>FSC Chairman Promises Sale of Daewoo Motor This Month</i> , KOREA HERALD (September 10, 2001)
149	<i>The Office of National Tax Administration's Decree to Recognize the Creditors' Write-Off of the Hynix Loan as a Tax Deductible Expense ... May Give Rise to an Issue of Preferential Treatment</i> , KOREA ECONOMIC DAILY (November 6, 2001) (translated version)
150	Standard and Poor's Press Release (5 October 2001)
151	<i>Hynix GDS Offering Memorandum</i>
152	<i>Micron's March 14, 2003 Comments to the U.S. Department of Commerce</i>
153	<i>Micron Case Brief</i> (May 22, 2003)
154	<i>Stainless Steel Plate in Coils From the Republic of Korea, Final Negative Countervailing Duty Determination</i> , 64 Fed. Reg. 15530 (March 31, 1999)
155	<i>Creditor Group ... Asks Investment Trust Companies to Take Over 750 Billion Won of Hynix Corporate Debentures</i> , THE KOREA ECONOMIC DAILY (May 3, 2001) (translated version)
156	<i>Finance/Conflict Between Banks and Investment Trust {Companies} Over Support for Hynix</i> , DONG-A DAILY (May 4, 2001) (translated version)
157	<i>Seoul's Continuing Support Spawns Fresh Debate Over HEI's Viability</i> , KOREA HERALD (March 14, 2001)