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EUROPEAN COMMUNITIES – COUNTERVAILING MEASURES ON DYNAMIC RANDOM ACCESS MEMORY CHIPS FROM KOREA (WT/DS299)

Report of the Panel

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EC – Bed Linen	Panel report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body report, WT/DS141/AB/R, DSR 2001:VI, 2077
EC – Bed Linen (Article 21.5 – India)	Appellate Body report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC – Hormones	Appellate Body report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
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Egypt – Steel Rebar	Panel report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002
Mexico – Corn Syrup	Panel report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345

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Thailand – H-Beams	Appellate Body report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701 Panel report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body report, WT/DS122/AB/R, DSR 2001:VII, 2741
US – Countervailing duty on DRAMs	Panel report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, not yet adopted
US – Export Restraints	Panel report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, 5767
US – Hot-Rolled Steel	Appellate Body report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
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US – Wheat Gluten	Appellate Body report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
US – Wool Shirts and Blouses	Appellate Body report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

I. INTRODUCTION

A. COMPLAINT OF KOREA

1.1 On 25 July 2003, the Government of Korea ("Korea")[1] requested consultations with the European Communities ("EC") pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("*DSU*"), Article 30 of the Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*"), and Article XXII of the General Agreement on Tariffs and Trade 1994 ("*GATT 1994*"), with regard to the provisional countervailing measures imposed on dynamic random access memory chips ("DRAMs") from Korea, as announced in Commission Regulation (EC) No. 708/2003 and published in the Official Journal of the EC on 24 April 2003, and with regard to any final measures on the same products.[2] A first round of consultations took place on 21 August 2003.

1.2 On 25 August 2003, Korea requested further consultations with the EC pursuant to Article 4 of the *DSU*, Article 30 of the *SCM Agreement*, and Article XXII of the *GATT 1994*, with regard to the EC's final countervailing measures imposed on DRAMs from Korea, as adopted by the Council on 11 August 2003 through Regulation No. 1480/2003 and subsequently published in the Official Journal of the EC on 22 August 2003.[3] Korea and the EC held a second round of consultations on 8 October 2003, but failed to reach a mutually satisfactory resolution of the matter.

1.3 On 19 November 2003, Korea requested the establishment of a Panel to examine the matter.[4]

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 At its meeting on 23 January 2004, the DSB established a Panel in accordance with Article 6 of the *DSU* and pursuant to the request made by Korea in document WT/DS299/2.

1.5 At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "[t]o examine, in the light of the relevant provisions of the covered agreements cited by Korea in document WT/DS299/2, the matter referred by Korea to the DSB in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.6 China, Japan, Chinese Taipei and the United States reserved their third-party rights.

1.7 On 24 March 2004, the parties agreed to the following composition of the Panel:[5]

Chairperson: Ms. Luz Elena Reyes de la Torre

Members: Mr. Scott Gallacher

Mr. Thinus Jacobsz

[1] We note that the term "Korea" is used in this report to refer to both the Government of Korea and the country, Korea, depending on the context.
[2] WT/DS299/1 and WT/DS299/1/Rev.1.
[3] WT/DS299/1/Rev.1/Add.1.
[4] WT/DS299/2.
[5] WT/DS299/3 and WT/DS299/3/Corr.1.

1.8 Ms. Luz Elena Reyes de la Torre resigned from the Panel on 22 June 2004. On 27 July 2004, the parties appointed Mr. Gary Clyde Hufbauer as a new Chairman of the Panel. On 29 July 2004, the Panel was re-composed as follows:[6]

Chairman: Mr. Gary Clyde Hufbauer

Members: Mr. Scott Gallacher

Mr. Thinus Jacobsz

C. PANEL PROCEEDINGS

1.9 The Panel met with the parties on 3-4 November and on 9 December 2004. The Panel met with third parties on 4 November 2004.

1.10 The Panel submitted its Interim Report to the parties on 15 March 2005. The Panel submitted its Final Report to the parties on 19 April 2005.

II. FACTUAL ASPECTS

2.1 This dispute arises from the EC's imposition of definitive countervailing duties on DRAMs from Korea. The countervail investigation was initiated on 25 July 2002, following a complaint filed by Infineon, the largest domestic producer in the EC. Micron, the other EC producer, supported the complaint and cooperated in the investigation. The EC sent questionnaires to a number of interested parties, including two exporters in Korea (Hynix and Samsung), the Government of Korea, and a number of Korean financial institutions. The period of investigation ("POI") for the subsidy investigation covered 1 January to 31 December 2001, while the injury POI covered 1 January 1998 to 31 December 2001.

2.2 On 24 April 2003, the Commission published Regulation 708/2003 imposing provisional countervailing duties on DRAMS from Korea (hereafter, "the Preliminary Determination").[7] Two programmes were found to be countervailable subsidies, *i.e.*, the KDB Debenture and the October 2001 Restructuring Programme. The rate of the provisional duty for Hynix was set at 33 per cent. No duty was imposed on Samsung, as the subsidy amount determined for this exporter was *de minimis*.

2.3 On 22 August 2003, Regulation 1480/2003 imposing a definitive countervailing duty on DRAMs from Korea was published (hereafter, "the Final Determination").[8] At this stage, the EC determined that five programmes were countervailable: the Syndicated Loan, the Korea Export Insurance Corporation ("KEIC") Guarantee, the Korea Development Bank ("KDB") Debenture Programme, the May 2001 Restructuring Programme, and the October 2001 Restructuring Programme. The amount of subsidisation for Hynix was 34.8 per cent, while for Samsung it was determined to be *de mininis*. The EC confirmed its provisional finding that the domestic industry suffered material injury and that it was caused by subsidised imports of DRAMs from Korea. The rate of the definitive countervailing duty for Hynix was equal to the subsidy amount, *i.e.*, 34.8 per cent. Given the *de minimis* subsidisation finding, no countervailing duty was imposed on Samsung.

[6] WT/DS299/4.

[7] Commission Regulation (EC) No. 708/2003 of 23 April 2003 imposing a provisional countervailing duty on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea.

[8] Council Regulation (EC) No. 1480/2003 of 11 August 2003 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. KOREA

3.1 Korea requests that this Panel find that the EC has acted inconsistently with its obligations under Articles 1, 2, 10, 12, 14, 15, 19, 22 and 32 of the *SCM Agreement*, as well as Article VI:3 of *GATT 1994*. Specifically, the Korea requests this Panel to find the EC acted inconsistently with:

- Article 1.1(a) of the *SCM Agreement* in determining the existence of financial contributions with respect to the Syndicated Loan, the KEIC Guarantee, the KDB Debenture Programme, and the May and October 2001 Restructuring Programmes;
- Articles 1.1(b) and 14 of the *SCM Agreement* in determining the existence of a benefit, and its measurement, for the Syndicated Loan, the KEIC Guarantee, the KDB Debenture Programme, and the May and October 2001 Restructuring Programmes;
- Articles 1.2 and 2 of the *SCM Agreement* in making an erroneous finding of *de facto* specificity, specifically with respect to the KDB Debenture and the May and October 2001 Restructuring Programmes;
- Articles 19.4 of the *SCM Agreement* and VI:3 of the *GATT 1994* in levying countervailing duties in excess of the amount allowed under those provisions;
- Article 12.7 of the *SCM Agreement* in applying "facts available" with respect to certain aspects of its subsidy investigation;
- Article 15.1 of the *SCM Agreement* because the EC's injury and causation determinations were not based on positive evidence and did not involve an objective assessment of the effects of allegedly subsidized imports;
- Article 15.2 of the *SCM Agreement* because, *inter alia*, the EC determinations improperly assessed the significance of the volume effects of Hynix imports;
- Article 15.2 of the *SCM Agreement* because, *inter alia*, the EC determinations improperly assessed the significance of the price effects of Hynix imports;
- Article 15.4 of the *SCM Agreement* because, *inter alia*, the EC failed to consider all factors relevant to the overall condition of the Community industry;
- Article 15.5 of the *SCM Agreement* because the EC failed to demonstrate the requisite causal link between Hynix imports and injury, and because the EC improperly assessed the role of other factors and, therefore, failed to ensure that it did not attribute the effects of other causes to Hynix's imports;
- Article 22.3 of the *SCM Agreement* because the EC's injury determination did not set forth in sufficient detail the EC's findings and conclusions on all material issues of fact and law; and,
- Articles 10 and 32.1 of the *SCM Agreement* in imposing a definitive countervail measure on DRAMs from Korea that was neither in accordance with the relevant provisions of the *SCM Agreement* nor with the relevant provisions of the *GATT 1994*.

3.2 Korea also requests the Panel to recommend that the EC terminate its countervailing duty order against imports of DRAMs from Korea immediately.[9]

B. EUROPEAN COMMUNITIES

3.3 The EC invites the Panel to reject all claims and arguments raised by Korea in these proceedings.[10]

[9] Korea First Written Submission, para. 677.
[10] EC First Written Submission, para. 581.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties as submitted, or as summarized in their executive summaries as submitted to the Panel, are attached as Annexes (see Table of Annexes, page vi). Replies to questions posed by the Panel were received from both parties.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of those third parties which have made submissions to the Panel, as submitted or as summarized in their executive summaries, are attached as Annexes (see Table of Annexes, page vi). Neither China nor Chinese Taipei made written submissions. China did not submit replies to the Panel's questions.

VI. INTERIM REVIEW

6.1 On 15 March 2005, we submitted the Interim Report to the parties. On 29 March 2005, both parties submitted written requests for the review of precise aspects of the Interim Report. On 5 April 2005, the EC submitted written comments on Korea's comments. Neither party requested an interim review meeting.

6.2 We have briefly outlined our treatment of parties' requests below. Where necessary, we have also made certain technical revisions to our Report.

A. KOREA COMMENTS

Status of the KDB

6.3 Korea asserts that the Panel's characterization with regard to Korea's position regarding the status of the KDB under the Syndicated Loan and the KDB Debenture Programme – as set forth in paragraphs 7.69 and 7.91 – does not fairly describe its position during the panel procedure. Korea asserts that in footnote 339 to its First Written Submission and in its response to question 1 of the Panel, it made it clear that it did not agree that the KDB is a public body and that, given the other issues involved in the dispute, it was simply unnecessary to contest the public body issue. Korea requests the Panel to more accurately reflect Korea's position on the KDB in the Final Report. The EC considers that the Report accurately reflects Korea's position and notes that Korea is unable to make any concrete suggestion for re-drafting. In our view, the Report appropriately reflects Korea's position. We note that our Report does not state that Korea agrees with the EC's characterization of the KDB as a public body. We only conclude that Korea chose not to contest this characterization. It is clear from both the footnote referred to by Korea in its comments on the Interim Report, and in its answer to question 1 of the Panel, that Korea was not contesting this determination of the KDB as a public body. In its comments on the Interim Report, Korea once again confirmed that it was not contesting the public body issue. We therefore do not consider it necessary to amend our Report and reject Korea's request in this respect.

Qualifications to the Panel's analysis of benefit and the May 2001 Restructuring Programme

6.4 Korea asserts that a qualification similar to that contained in paragraph 7.200 should appear after paragraphs 7.201 to 7.203, in case these paragraphs were to be maintained in the Final Report. The EC has no difficulty with such an amendment. We have amended the Report as requested by Korea.

Qualifications and Corrections to the Panel's Analysis of the KEB

6.5 Korea requests that the Panel reiterate in paragraph 7.134 its earlier conclusion set forth in paragraph 7.103 that evidence of past conduct, whether direction or otherwise, cannot establish entrustment or direction with respect to a future event. The EC does not agree that past conduct is irrelevant to a future event and fully reserves its legal position in this respect. We are of the view that our footnote 143 sufficiently explains our position with regard to the EC' s reliance on the question of evidence relating to government direction at the time of the Syndicated Loan for the purposes of establishing government direction with regard to the KEB's participation in the October 2001 Restructuring Programme. The statement referred to by Korea in paragraph 7.103 about the use of evidence concerning past events has to be read in the context of our discussion of the May 2001 Restructuring Programme. While, in our view, evidence of past conduct cannot as such establish entrustment or direction with respect to a future event, this does not mean that it is irrelevant. The importance of such evidence has to be seen in the context in which it is used and the purposes for which it is used. We explain in our Report the different context of the May and October Restructuring Programmes. We thus do not find it necessary to amend our Report and reject Korea's request in this respect.

6.6 In addition, Korea asserts that our finding in paragraph 7.134 is premised on a serious factual error. Korea considers that the Panel improperly found relevant the EC's considerations that the KEB was until 1998 a specialized government bank. According to Korea, evidence on the record before the investigating authority showed that since December 1989 the KEB was a public corporation under the Korean Commercial Code and its shares were traded on the Korean Stock Exchange. Korea asserts that under these circumstances, the Panel should revise its discussion and analysis of the KEB's participation in the October 2001 Restructuring. The EC points out that the investigating authority referred to the year 1998 with respect to Korea's shareholding in the bank. In light of these comments, we have amended our Report in paragraphs 7.133 and 7.134 in order to more accurately reflect what the investigating authority asserted with regard to the KEB. This clarification does not, however, change the basis for our analysis that we find relevant the EC's considerations concerning the important role played by the Korean Government in the KEB in the past.

Comments on Panel's Analysis of the KDB Debenture Programme

6.7 Korea asserts that in paragraphs 7.197 and 7.198, the Panel gives the appearance of effectively adopting certain factual assertions from the EC Final Determination which Korea considers to have been contradicted by evidence of record. In particular, Korea considers that comments made before the investigating authority by the KDB contradict the authority's conclusion that the CBO programme was created only for relatively small firms and that the KDB controlled the roll-over of programme bonds placed in CBO funds.[11] Korea requests that the Panel either note the basis for the EC authority's conclusions within its discussion and identify the contested facts or disassociate itself from these facts. The EC considers that Korea nowhere indicates where these alleged facts were contested during the panel proceedings. In addition, the EC argues that the exhibit referred to by Korea contains mere assertions by one of the interested parties made before the investigating authority.

6.8 We note that our task is not to conduct a *de novo* review of the investigation, rather to examine whether the authority provided a reasonable and reasoned explanation of how the facts support the determination made. In the paragraphs referred to by Korea, we consider that similar arguments were made before the investigating authority as were made before us concerning the KDB Debenture Programme. The investigating authority responded to these arguments in the Final Determination, and therefore we considered it useful to directly quote from the Final Determination.

[11] Korea refers to KDB's Comments on the European Commission's Final Disclosure Document (30 June 2003). (**Exhibit GOK-17**)

In relevant part, we considered reasonable the investigating authority's explanations provided in the Final Determination. The two alleged inconsistencies raised by Korea in its comments are clearly not essential to the overall analysis of the investigating authority, as is also evidenced by the fact that Korea did not put much emphasis in its arguments before the Panel on these alleged inconsistencies. In our view, the two alleged errors in the EC investigating authority's statement which we quoted are not particularly relevant to the question of benefit to Hynix. We do not consider it necessary for us to further examine the correctness of the statements made. We therefore reject Korea's request to amend our Report in this respect.

Comments on Panel's Analysis of Financial Contribution with respect to Woori Bank in the October 2001 Restructuring Programme

6.9 Korea asserts that in paragraph 7.121, the Panel noted that the record of the investigation shows that Woori Bank participated as an Option 1 bank in the October 2001 Restructuring Programme on the basis of public policy considerations. Korea disagrees with this conclusion, pointing to some evidence of record allegedly showing that Woori Bank decided to participate in the October 2001 Restructuring Programme based on commercial considerations. Korea is of the view that the EC's reliance on only three paragraphs of what is a detailed commercial analysis in the so-called Loan Committee Report discussing what the EC viewed as public policy considerations is improper and takes these factors out of context. Korea requests that the Panel reconsider its entrustment or direction analysis and calculus with respect to Woori Bank and the October Restructuring Programme, given that the misstatement of the record of investigation identified above affected the Panel's ultimate conclusions regarding Woori Bank's participation in the October 2001 Restructuring Programme. The EC considers that the facts on the record simply show that, as well as the "commercial" explanations provided by Woori Bank, public policy considerations also played a role, as Korea admits in its comments. The EC therefore sees no reason to amend the Report on this point.

6.10 We note that we do not state in our Report that the record of evidence shows that Woori Bank based its participation *only* on public policy considerations. However, as Korea acknowledges, the record shows that Woori Bank participated, *inter alia*, on the basis of such public policy considerations. In light of Korea's comments, we decided to clarify the first sentence of paragraph 7.121 to reflect this nuance. However, this does not alter our overall assessment with regard to Woori Bank. First, as we state in paragraph 7.121, we consider relevant in the context of an examination of government entrustment or direction the fact that a private body bases its decision to invest on public policy considerations, albeit only in part. Moreover, Woori Bank's public policy reasons for participating was only one piece of evidence that led us to the conclusion that the EC's determination of government direction with regard to Woori Bank was justified. It was certainly not the only evidence of such direction, nor was it a determinative factor in our assessment. In sum, we reject Korea's request to reconsider our analysis with respect to Woori Bank's participation in the October 2001 Restructuring Programme.

B. EC COMMENTS

Paragraph 8.1

6.11 The EC requests the Panel to replace in Section "VIII. Conclusions and Recommendations", the term "countervailing measures" (plural) in paragraph 8.1 with "definitive countervailing measure" as the Panel did not make any findings with respect to the provisional measures imposed. Korea did not provide any comments on this request. We agree with the proposed change, and have amended our Report accordingly.

"Entrustment or direction"

6.12 With regard to the Panel's findings regarding entrustment or direction generally, the EC first requests that the Report should always refer to "entrustment or direction" and not just "direction". Second, the EC requests the Panel to reconsider the question of the relevance of the totality of the facts and evidence available. The EC asserts that, for example, the existence of an express guarantee – the KEIC Guarantee – by Korea because Hynix was considered too big to fail, throughout the POI, as well as the implied guarantee, is highly relevant to the question of entrustment or direction in the context, for example, of the October 2001 Restructuring Programme. No comments were received from Korea on these requests.

6.13 With regard to the EC's first request, we note that the use of the term "direction", rather than "entrustment or direction", when discussing the EC investigating authorities' determinations is not accidental. We made a deliberate choice to use this term as the EC investigating authority itself made findings of government direction, and not government entrustment. We therefore reject the EC's request in this respect. In the general section of the Report entitled "General standard of entrustment or direction under Article 1.1(a)(1)(iv) of the *SCM Agreement*", where we discuss the legal standard in more general terms, we did add the term "entrustment" in the middle of paragraph 7.59.

6.14 As far as the EC's second request is concerned, we recall that our views as to the "totality of facts" argument of the EC are set forth in paragraph 7.63. We see no reason to change this view at this stage. We therefore reject the EC's request in this respect.

Paragraph 7.87

6.15 The EC requests the Panel to delete the word "potential" in the first sentence of paragraph 7.87. No comments were received from Korea on this request. We note that the investigating authority found in paragraph 45 of the EC Final Determination, which is quoted in paragraph 7.86 of our Report, that the guarantee is a financial contribution by the government within the meaning of Articles 2.1(a)(iv) and (i) of the EC's basic Regulation, which provisions are in relevant part identical to Article 1.1(a)(1)(iv) and (i) of the *SCM Agreement* and refers to a direct or potential direct transfer of funds. We have amended our Report to more accurately reflect the fact that the EC made a finding of a direct or potential direct transfer of funds.

Paragraph 7.320

6.16 The EC requests the Panel to delete the words "the usual practice of making" in the final sentence of paragraph 7.320. No comment was received from Korea on this request. We accept the EC's comment and have amended our Report accordingly in order to clarify the EC's views on this matter.

Paragraph 7.393

6.17 The EC requests the Panel to make two changes to paragraph 7.393: (1) state in the second sentence that Hynix imports increased by "(361 per cent overall)" instead of by "(461 per cent overall)" and (2) to end the third sentence with the following: "and fell from 31.4 per cent in 2000 to 20 per cent in 2001". No comments were received from Korea on this request. We accept the EC's comments and have amended our Report accordingly.

VII. FINDINGS

7.1 This case concerns a challenge by Korea of the definitive countervailing measure imposed by the EC on imports of DRAMs from Korea. The EC found that, of the two Korean DRAMs producers, Hynix and Samsung, the latter did not receive a subsidy above *de minimis* and it thus decided not to

impose any countervailing duty on imports from this producer. However, the EC determined that, from December 2000 through November 2001, Korea extended subsidies to Hynix, either through the provision of a financial contribution by its public bodies or by directing private bodies to take part in the restructuring operation of Hynix. The EC determined that such financial contributions conferred a benefit to Hynix and thus constituted subsidies in the sense of the *SCM Agreement*. Examining developments in the state of the domestic industry from 1998 to 2001, the EC concluded that the subsidized imports of DRAMs were causing injury to the domestic producers of DRAMs. The EC thus imposed a countervailing duty on imports of DRAMs from Hynix equal to the margin of subsidization of 34 per cent *ad valorem*.

7.2 Korea's challenge concerns both the EC's subsidy determination, and the determination of injury to the domestic industry. In particular, Korea claims that the EC's finding of a financial contribution by the government is not consistent with Article 1.1(a) of the *SCM Agreement*. Korea further claims that the EC's determination of the existence and amount of benefit conferred to Hynix was in breach of Articles 1.1(b) and 14 of the *SCM Agreement*, and that the EC failed to demonstrate that some of the alleged subsidy programmes were specific in the sense of Articles 1.2 and 2 of the *SCM Agreement*. A final claim relating to the subsidy determination concerns the use of facts available by the EC which Korea considers to have been inconsistent with Article 12.7 of the *SCM Agreement*.

7.3 With regard to the injury determination, Korea submits that the EC failed to properly examine the volume and price effects of the allegedly subsidized imports and did not adequately evaluate all relevant factors having a bearing on the state of the domestic industry as required by Articles 15.1, 15.2 and 15.4 of the *SCM Agreement*. In addition, Korea claims that the EC did not establish the required causal relationship between the subsidized imports and the injury to the domestic industry found to exist and failed to ensure that injury caused by other factors was not attributed to the subsidized imports thereby acting in breach of Article 15.5 of the *SCM Agreement*.

A. GENERAL ISSUES

1. Standard of Review

7.4 Article 11 of the *DSU* sets out the mandate of the Panel in WTO dispute settlement proceedings. It provides that:

> [t]he function of the panel is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly a panel should make *an objective assessment of the matter before it*, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or giving the rulings provided for in the covered agreements. (emphasis added)

7.5 The requirement under Article 11 of the *DSU* for a panel to make an objective assessment of the matter before it has been interpreted, *inter alia*, in the context of trade remedies other than anti-dumping (for which the *AD Agreement* contains its own specific standard of review) to entail an examination by the panel of whether the investigating authority examined all relevant facts, whether adequate explanation has been provided of how the facts support the determination made, and consequently, whether the determination was made consistent with the international obligations of the Member concerned. In this regard, we recall the Appellate Body's guidance regarding the application of Article 11 of the *DSU* in the *US – Lamb* case:

> "[w]e wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the

> competent authorities, this does not mean that panels must simply *accept* the conclusions of the competent authorities. To the contrary, …, a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines the explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an "objective assessment" …, panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate."[12] (emphasis in original)

7.6 We are, therefore, fully conscious of the fact that it is not the role of the Panel to perform a *de novo* review of the evidence which was before the investigating authority at the time it made its determination. We will, therefore, examine whether on the basis of the record before it, a reasonable and objective investigating authority could have reached the conclusions the EC investigating authority reached with regard to the determination of subsidization and injury.

2. Burden of Proof

7.7 In WTO dispute settlement proceedings, the burden of proof with respect to a particular claim or defence rests with the party that asserts such claim or defence.[13] The burden of proof is "a procedural concept which speaks to the fair and orderly management and disposition of a dispute".[14] In the context of the present dispute, which is concerned with the assessment of the WTO consistency of a definitive countervailing measure imposed by the EC, Korea is obliged to present a *prima facie* case of violation of the relevant articles of the *SCM Agreement*. In this regard, the Appellate Body has stated that "a *prima facie* case is one which, in the absence of *effective refutation* by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case".[15] Thus, where Korea presents a *prima facie* case in respect of a claim, it is for the EC to provide an "effective refutation" of Korea's evidence and arguments, by submitting its own evidence and arguments in support of the assertion that the EC complied with its obligations under the *SCM Agreement*. Assuming evidence and arguments are presented on both sides, it is then our task to assess that evidence and those arguments in order to determine whether Korea has established that the EC acted inconsistently with its obligations under the *SCM Agreement*. The role of the Panel is not to make the case for either party, but it may pose questions to the parties "in order to clarify and distil the legal arguments".[16]

B. CLAIMS CONCERNING THE EC'S SUBSIDY DETERMINATION

7.8 Korea challenges the EC's subsidy determination with regard to each of the five restructuring measures through which the EC found that subsidies were provided to Hynix. Korea considers that the EC's findings that each of these five restructuring efforts constituted a financial contribution by the government that conferred a benefit are inconsistent with Articles 1 and 14 of the *SCM Agreement*.

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[12] Appellate Body report, *US – Lamb*, para. 106.
[13] Appellate Body report, *US – Wool Shirts and Blouses*, p. 14.
[14] Appellate Body report, *Canada – Aircraft*, para. 198.
[15] Appellate Body report, *EC – Hormones*, para. 104.
[16] Appellate Body report, *Thailand – H-Beams*, para. 136.

7.9 In general, Korea claims that the EC's financial contribution analysis with respect to these five measures is flawed as it failed to establish, *inter alia*, that the private bodies that participated in the restructuring measures were entrusted or directed by the Government of Korea to do so. Moreover, Korea asserts that the EC's benefit analysis failed to rely on the correct market benchmarks and illegitimately considered all measures as grants, in clear contradiction with the nature of the measures adopted. The EC, on the other hand, rejects all of Korea's assertions and considers that the investigating authority conducted an objective examination in which it found sufficient evidence that Korea entrusted or directed private bodies to participate in the restructuring. In addition, the EC argues that, in light of the reasonable conclusion that no market operator would have provided financing to Hynix in the course of the period of investigation, the investigating authority was entitled to consider all measures as grants.

7.10 In light of the reference that will need to be made to the various restructuring efforts found to constitute subsidies to Hynix, we consider it useful to first describe briefly each of these five programmes which were examined by the EC. We will then examine in detail the claims and arguments of the parties with respect to the EC's determination of financial contribution and benefit for each of these programmes.[17]

7.11 We note that the record shows that Hynix's financial situation was critical during the years following the financial crisis in Korea of 1997, and that, by the end of 2000, Hynix had accumulated more than USD 9.46 billion of liabilities, almost twice its net worth and more than four times the market capitalisation of the company.[18] It appears that the important problem that Hynix was facing consisted of the maturing of the majority of these liabilities in the year 2001, which would imply serious liquidity problems for Hynix. The EC determined that, by November 2000, Korea decided to take action to "alleviate Hynix' cash crunch" and provided subsidies through five different support and restructuring programmes from December 2000 to October 2001: the Syndicated Loan, the KEIC Guarantee, the KDB Debenture Programme, the May 2001 Restructuring Programme and the convertible bonds purchase in particular, and the October 2001 Restructuring Programme.

7.12 The Syndicated Loan of a total amount of KRW 800 billion was part of a financial plan to resolve the problem of a "mismatch" between Hynix's cash flow and the extent of debt obligations that matured and had to be repaid in 2001. While ten banks participated in the Syndicated Loan, the EC examined only three banks, the Korea Development Bank ("KDB"), the Korea Exchange Bank ("KEB") and the Korea First Bank ("KFB") and considered that their participation in the Syndicated Loan constituted a financial contribution by Korea conferring a benefit on Hynix. The EC found the KDB to be a public body, and the KEB and KFB (each participating in the Syndicated Loan for an amount of KRW 100 billion) to be acting under the direction of Korea.

7.13 In January 2001, Hynix benefited from an increase in its 90 day D/A (documents against acceptance) export credit facility from USD 800 million to USD 1.4 billion. It documents each export transaction, on the basis of which it receives immediate payment from the fourteen participating banks. The overseas purchasers later pay the banks. The Korea Export Insurance Corporation ("KEIC") guarantees that the banks will receive payment, in case either the exporter or the importer goes bankrupt. The EC concluded that, without the KEIC Guarantee, the banks would not have been willing to extend the export credit facility for Hynix and determined that the KEIC, as a public body, was therefore providing a financial contribution that conferred a benefit to Hynix.

7.14 Around the same time, *i.e.*, on 4 January 2001, Hynix was admitted to the KDB Debenture Programme. Under this programme, maturing debt was to be rolled-over and re-packaged for investors. Hynix had to pay 20 per cent of the due debt, while 80 per cent was purchased by the

[17] In addition, and for ease of understanding, Annex F-1 contains a timeline of these programmes and salient events in 2000 and 2001 based on the relevant information on the record.

[18] Final Determination, para. 19, referring to Hynix Business plan filed with the FSC, 21 March 2002.

KDB, which then repackaged 70 per cent thereof for sale to investors as collateralised bond obligations ("CBOs") and/or collateralised loan obligations ("CLOs"), guaranteed by the Korea Credit Guarantee Fund ("KCGF"); and 10 per cent was retained by the KDB. The EC found that the bond purchase by the KDB as part of this programme constituted a financial contribution by the government which conferred a benefit on Hynix.

7.15 In May 2001, a further recapitalisation plan, referred to as the "May 2001 Restructuring Programme", was agreed by the eighteen Hynix creditor banks united in the Creditors' Council. The May Programme included an injection of fresh capital into Hynix through the offering of KRW 1.3 trillion of global depositary receipts ("GDRs"); an extension of the maturities of short and long-term debt (a debt roll-over); and the purchase by the creditor banks of convertible bonds ("CBs") worth KRW 1 trillion. The EC found that the creditor banks had been directed by Korea to agree to these measures and countervailed the CBs purchase as being a financial contribution by the government which conferred a benefit on Hynix.

7.16 Finally, on 31 October 2001, the Creditors Financial Institutions Council ("CFIC") decided on a second restructuring package for Hynix, the so-called "October 2001 Restructuring Programme". Creditor banks were given several options, ranging from walking away from Hynix and collecting part of the amount owed as determined by a liquidation report, to providing even further financing. Six banks provided new funds to Hynix and agreed to a new loan of KRW 1 trillion to Hynix with an interest rate of 7 per cent; a debt-to-equity swap by acceptance of bonds convertible into shares; and extending the maturities of existing loans until 31 December 2004, converting the maturing corporate bonds into corporate bonds with a three year maturity and an interest rate of 6.5 per cent and adjusting the interest rate of the remaining loans in Korean currency to 6 per cent. The EC considered that the participation by these six so-called "Option 1" banks in the October 2001 Restructuring Programme constituted a financial contribution by the government which conferred a benefit on Hynix, as these banks were either public bodies or directed to take part in the restructuring by Korea.

7.17 The EC concluded that the overall amount of the subsidy provided by Korea to Hynix through these five programmes was 34.8 per cent *ad valorem*.[19]

1. Claim regarding the EC's determinations of the existence of a financial contribution by the government

(a) Korea

7.18 Korea argues that the EC's findings of financial contribution with regard to five different programmes are inconsistent with Article 1.1(a) of the *SCM Agreement*, mainly because the EC failed to establish that the private bodies that participated in the programme were entrusted or directed by Korea to provide a financial contribution to Hynix.

(i) General standard of entrustment or direction under Article 1.1(a)1(iv) of the SCM Agreement

7.19 With respect to the appropriate legal standard of entrustment or direction under Article 1.1(a) of the *SCM Agreement*, Korea argues that, in order to find a financial contribution through a private body, an authority must demonstrate an explicit and affirmative government action addressed to a particular party to perform a particular task or duty.[20] Korea asserts that the ordinary meaning of the term "entrust" is "to give responsibility for" while the ordinary meaning of "to direct" is "to give a formal order or command".[21] As the French and Spanish versions of Article 1 of the *SCM Agreement* confirm, the most appropriate interpretation of the term "to direct" must be the meaning that conveys

[19] See Final Determination, table in para. 166.
[20] Korea First Written Submission, para. 396.
[21] *Id.*, para. 404.

the idea of ordering the private body to take some action, and not the looser idea of mere guidance or suggestions.[22] Korea argues that Article 1 of the *SCM Agreement* only targets government action. In this context, the terms "entrust or direct" must therefore be read to mean that the disciplines of the *SCM Agreement* apply to the actions of private bodies only in case the private body becomes the instrument of the government. If any discretionary authority is left to private body, its actions cannot be imputed to the government, and the *SCM Agreement* does not apply.[23] In the view of Korea, the "entrusts or directs" standard is not merely an "effects test". Korea argues that the perceived reaction of private entities to reported government inducement, or even confirmed reaction by private entities, *cannot* be the basis on which the Member's compliance with its treaty obligations under the WTO is established. Korea finds support for its interpretation in the report of the panel in *US – Export Restraints*. Korea submits that, under this legal standard, the EC failed to establish that the private bodies that participated in the five programmes which were alleged to constitute a financial contribution were entrusted or directed by the Korean government or a Korean public body to do so.

(ii) Syndicated Loan

7.20 With regard to the Syndicated Loan that was provided by ten banks in December 2000, Korea submits that there is no basis in the facts of the record for the EC's finding that two private banks, the KEB and KFB[24], took part in the loan because they were entrusted or directed to do so. Korea considers that the EC attached undue importance to the letter of the Ministry of Finance and Economy to the KEB dated 28 November 2000. According to Korea, all this letter did was to advise or recommend the KEB to seek a lending limit waiver from the FSC. The letter clearly does not command the KEB to provide financing to Hynix.[25] According to Korea, even if the letter is read to require the KEB to act in a certain manner, then at best the letter requires the KEB to seek a lending limit waiver from the Financial Supervisory Commission ("FSC"), a Korean public body. The letter did not order the KEB to participate in the Syndicated Loan and provide funds.[26] Korea argues that while the FSC waiver which was obtained by the KEB may have enabled the KEB and two other banks which had reached their lending limits to participate in the loan, this does not explain these banks' decision to actually participate in the loan. Korea notes that seven other banks also participated in the loan without the need for a waiver. In sum, while the waiver granted by the FSC, a public body, permitted the transaction, this does not suffice to conclude that this public body or the government required the KEB to take part in the transaction. Korea recalls that the Syndicated Loan was already on the table in early November and that the question in December was simply a matter of how to execute the loan.[27]

(iii) KEIC Guarantee

7.21 Korea submits that the financial contribution that was countervailed by the EC consisted of the extended D/A financing of the creditor banks which was guaranteed by the KEIC. Korea argues that the EC failed to establish that these creditor banks were directed by the government to provide further D/A financing, and ignored the fact that the financing was driven by the very rational and commercial considerations of the creditors involved, as is not contested by the EC.[28] While it may well be correct that a public body such as the KEIC made available export insurance to creditors, this cannot be read to constitute an explicit and affirmative delegation or command by Korea to Hynix creditors to extend such D/A financing in the amount of USD 600 million.[29] The fact that the KEIC

[22] Korea Second Written Submission, para. 162.
[23] Korea First Written Submission, paras. 405-406.
[24] We recall that the KFB contribution was considered to be negligible by the EC and was therefore not countervailed.
[25] Korea First Written Submission, para. 445.
[26] *Id.*, para. 445. (Korea Second Written Submission, para. 187)
[27] Korea First Written Submission, para. 446.
[28] *Id.*, para. 453.
[29] *Id.*, para. 454.

may be considered to be a public body is irrelevant as KEIC only provided insurance, and not any D/A financing. It was the D/A financing which the banks provided that constituted the financial contribution that was countervailed without evidence of entrustment or direction of those banks. [30]

(iv) KDB Debenture Programme

7.22 Korea submits that the EC did not establish that all creditors that took part in the KDB Debenture Programme were entrusted or directed by Korea to provide funds.[31] The EC was therefore not entitled to consider their participation as a financial contribution by the government or a public body under Article 1.1(a) of the *SCM Agreement*. Korea asserts that, even if the EC characterisation of the KDB as a public body is correct, numerous creditors other than the KDB were also involved and the EC did not establish entrustment or direction with regard to these creditors.[32] Korea notes that the KDB Debenture Programme did not actually involve the provision of new funds but merely a refinancing of existing bonds.[33] In any case, Korea points out that there is no evidence on the record that any specific lender was legally obligated by the KDB Debenture Programme to participate in any specific refinancing.[34] Therefore, the EC statement that all Hynix creditors were directed by Korea to participate in the KDB Programme is unsubstantiated and incorrect and reveals a confusion between financial contribution and the possible benefit to Hynix.[35]

(v) May 2001 Restructuring Programme

7.23 Korea submits that the EC's finding that the May 2001 Restructuring Programme of Hynix constituted a countervailable subsidy is also flawed. Korea recalls that the May 2001 Restructuring Programme occurred at a time of rising DRAMs prices and that it was successful only because Hynix could persuade sophisticated international investors to invest a huge sum of money in the company, as was recognised by the EC in the Preliminary Determination.[36] Korea argues that the EC's finding of financial contribution in the context of the May 2001 Restructuring Programme was based on insufficient circumstantial evidence of entrustment or direction.

7.24 In particular, Korea first asserts that the EC relied on erroneous press reports concerning the reason for the presence of an FSS official at one meeting of the Creditors Council and alleging government pressure being exercised on one of the eighteen participating banks. Korea submits that the presence of an FSS official at this one meeting is explained by the fact that it was only logical that the FSS, as the principal Korean agency concerned with bank supervision, was present at the meeting to witness discussion of the prior commitments of the creditors. All this shows, at a maximum, is an abstract government interest, not direction or entrustment.[37] Moreover, Korea argues that the press reports about Korea putting pressure on one bank, the KorAm Bank, were mistaken as this bank was

[30] Korea Second Written Submission, para. 191.

[31] Korea argues that the KDB programme was not specific to Hynix but was designed to address a common problem of maturing bonds in the Korean market. The creditors' decision to apply for the KDB programme was based on commercial considerations. (Korea First Written Submission, para. 458)

[32] Korea First Written Submission, para. 455.

[33] *Id.*, para. 456. Under the programme, 20 per cent of the bonds had to be paid off by the debtor, and of the 80 per cent remaining, KDB only retained 10 per cent of the refinanced bonds. The existing creditors were to hold only 16 per cent of the outstanding debt being refinanced (20 per cent of 80 per cent), and all the rest was refinanced on the open market.

[34] *Id.*, para. 457.

[35] *Id.*, paras. 459-463. Korea points, in particular, to the specific criteria that need to be met in order to be allowed to participate. Moreover, Korea states that the fact that FSC waived the lending limit for certain banks does not equal a requirement to participate in the programme. Finally, Korea asserts that the example provided in the EC Final Determination of the KFB being forced into participating is based on erroneous press reports, as the KFB did not take part in the programme, contrary to what it is stated in the Final Determination.

[36] Korea First Written Submission, paras. 466-469.

[37] *Id.*, para. 472.

simply waiting for certain legal documents from Hynix before finalizing its investment. The KorAm went ahead with the investment as soon as it received the documents concerned.[38]

7.25 Secondly, Korea considers incorrect and inappropriate the reliance of the EC on the fact that there was insufficient market financing available to Hynix by May 2001 to conclude that the participating banks thus must have been acting under the entrustment or direction of the government. Korea refers to opposite conclusions reached by the EC itself in its Preliminary Determination. Moreover, according to Korea, the commercial reasonability of the financing is a matter which relates to the question of benefit to Hynix rather than the question of the existence of a financial contribution.

7.26 Thirdly, Korea also considers inappropriate the EC reliance on alleged earlier cases of directed financial contributions (such as the Syndicated Loan, the KEIC Guarantee and the KDB Debenture Programme) to support of a finding of entrustment or direction in respect of the May 2001 Restructuring Programme. Especially, in light of the fact that the EC itself treated all five restructuring efforts as distinct measures, and in the absence of any demonstrated linkage between the restructuring operations, such past actions are simply irrelevant in establishing direction in the May 2001 restructuring.

7.27 Finally, Korea submits that the EC failed to examine all of the banks involved in the May 2001 restructuring before making findings of an alleged financial contribution provided by all participating banks. The EC relied on press reports concerning alleged pressure put on one bank only, the KorAm Bank, and failed to show that this bank was representative of all others. The EC did not examine which of the banks were alleged to have been entrusted or directed by Korea due to presence of an FSS official at the March meeting of the Creditors Council. Korea argues that it appears that the only basis for the EC's conclusions seems to have been that such presence was not disclosed earlier, which entails an attempt to penalize Korea for an alleged failure to cooperate, and such a penalty is not authorized by Article 12.7 of the *SCM Agreement*.

(vi) October 2001 Restructuring Programme

7.28 With regard to the October 2001 Restructuring Programme, Korea asserts that the EC relied on a patchwork of circumstantial evidence most of which bears no relationship to the October Restructuring Programme as such, but rather rehashes press reports relating to the Syndicated Loan, the FSC waiver, the presence of an FSS official at the March 2001 meeting, and the allegations concerning the KorAm Bank. In fact, Korea submits that the EC based its conclusion of financial contribution in the context of the October 2001 Restructuring Programme on only one new press report. This report contains a statement of the deputy PM which does not address the question of Korea's direction of banks to participate in the October 2001 Restructuring Programme.

7.29 Korea asserts that the EC conclusion of entrustment or direction of the banks that took part in the October 2001 Restructuring Programme was largely based on the fact that the government was a shareholder in a number of these banks. Korea submits that the government-shareholding in and of itself does not prove direction or entrustment. According to Korea, for such a determination to be made, it needs to be positively established that the government actually exercised its control to direct the particular bank in a particular way. The EC failed to do this.[39] Moreover, Korea argues that the existence of a choice that was given to creditors as to whether they wanted to continue to invest in Hynix as well as the fact that some 100 per cent government-owned banks, when given this choice, decided not to participate in the October Restructuring Programme, clearly prove the absence of entrustment or direction.

[38] *Id.*, para. 477.
[39] *Id.*, para. 506.

7.30 In particular, Korea asserts that with regard to Citibank, the EC ignored all relevant evidence (such as a Citibank affidavit; statements of Korea with regard to Citibank, as well as Citibank officials' statements) and merely relies on the alleged close relationship between Citibank and the government, which does not prove direction or entrustment. Korea notes that, in a parallel investigation concerning Hynix, the US Department of Commerce found Citibank not to have been directed. With regard to the KEB, Korea argues that the KEB's low internal rating of Hynix does not show direction by the government, especially since the KEB, as an existing creditor, may have had different objectives than new creditors. The EC's argument, based on an alleged past culture of government influence over the KEB lending practices, even if correct, is unlikely to be valid in 2001 now that an outside international bank like Commerzbank controls the KEB's lending practices. Concerning Woori Bank, Korea points out that the EC ignored the fact that, at the time of the restructuring in October 2001, there were still two banks, Woori Bank and Peace Bank, which later merged as Woori Bank. The EC completely failed to examine Peace Bank's involvement or its alleged direction or entrustment. The fact that Woori Bank seemed to have taken certain public policy objectives into account when deciding to take part in the restructuring is only normal for an important national bank. It does not suffice to conclude, as the EC does, that this bank was entrusted or directed by the government to participate. In the view of Korea, the fact that a Memorandum of Understanding ("MOU") existed between Woori and the government is irrelevant for the October 2001 Restructuring Programme. In any case, this MOU only set forth general prudential rules for Woori Bank as the recipient of public funds.[40] With regard to Chohung Bank, Korea submits that government shareholding does not equal entrustment or direction, as the EC failed to demonstrate that the government actually used its alleged power to influence decisions as shareholder or under the MOU, which was put in place to protect the banks from government influence rather than the reverse. As far as the National Agricultural Cooperative Federation ("NACF") is concerned, Korea submits that the economic public policy objectives of the NACF relate only to the agricultural sector, and do not imply any government direction in a non-agricultural sector like DRAMS. The NACF's cooperative goals have, in any case, no bearing on the question of direction or entrustment.

(b) EC

(i) General standard of entrustment or direction under Article 1.1(a)1(iv) of the SCM Agreement

7.31 According to the EC, the terms "entrust or direct" in Article 1.1(a)(1)(iv) have a wider meaning than the meaning advanced by Korea. The EC argues that the use of the term "direct" in the *SCM Agreement* rather than the term "order" implies that the term "direct" has a wider connotation including "to regulate, conduct or control affairs", "to give commands or orders with authority". It is thus of the view that an indication or a nudge by the government or a public body to a private body is also a "direction".[41] Similarly, the EC submits that the concept of "entrust" indicates a particularly light control and includes the notion of "putting something into the care or protection of someone".[42] The fact that a certain discretionary authority is left to the private body is therefore not inconsistent with a finding of entrustment or direction. Such acts of entrustment or direction may well include threats, encouragements, or even in certain circumstances attending a meeting and monitoring the results of that meeting, depending on the facts of the case.[43]

7.32 According to the EC, the real issue in this case is an evidentiary one. In this respect, the EC emphasises the general problems of evidence gathering in countervail investigations which concern the behaviour of states and the difficulty of finding "the smoking gun". The EC submits that Korea

[40] Korea Second Written Submission, para. 214.

[41] The EC argues that, since Korea acknowledges the government nudged the banks into participating, this acknowledgement equals an admission of government entrustment or direction. (EC First Written Submission, para. 276)

[42] EC First Written Submission, para. 268.

[43] EC response to question 5 of the Panel, paras. 21 and 24.

did not discharge its obligations under the *SCM Agreement* since it did not place evidence in relation to the subsidies determination before the investigating authority at the time of investigation. In this regard, the EC refers, for instance, to the minutes of the Economic Ministers' meeting which were not submitted by Korea. The EC recalls that Article 1.1 of the *SCM Agreement* provides that a subsidy will be *deemed to exist* in any of the circumstances described in that provision, and argues that the use of the term "deemed" refers to the possibility of an evidentiary gap.[44,45]

7.33 According to the EC, the panel report in *US – Export Restraints* is irrelevant to the case at hand and does not in any case support Korea's assertions.[46] The EC is of the view that the panel findings in that report need to be put in context of facts of the case. The EC recalls that the *US – Exports Restraints* case concerns a restriction on exports, which is an inherently prohibitive or passive government action, and thus completely different from the affirmative government action at issue in this case.[47] That panel's interpretation cannot be extended beyond the specific facts of the case as the fact pattern differs significantly from the fact pattern of this case.[48] In any case, the EC considers that the panel report in that case, in so far as it is applicable or relevant, does not support Korea's argument. The EC asserts that the *US – Export Restraints* panel recognized the possibility of a general act of entrusting or directing a private body to take a certain course of action. In other words, there can be government direction or entrustment if a government generally entrusts or directs a company or a bank to act in the public interest and, in such case, there is no need to show that there was a specific entrustment or direction with respect to each specific act leading to a financial contribution.

7.34 The EC considers that it has established the existence of a financial contribution in the sense of Article 1.1(a) of the *SCM Agreement* with regard to each of the five challenged Hynix rescue operations.

(ii) Syndicated Loan

7.35 The EC first notes that it is not contested that the KDB and FSC are public bodies, and that the KDB's participation in the loan thus constituted a financial contribution in the sense of Article 1.1(a)(1) of the *SCM Agreement*. The EC argues that, as far as the two private banks are concerned, the KEB and KFB, there was sufficient evidence on the record to support the conclusion that they had been entrusted or directed to provide the loans to Hynix. The EC submits that the 28 November 2000 letter from the Ministry of Economy and Finance ordered, and thus "entrusted or directed", the KEB to apply for the extension of the credit ceilings, including on behalf of the KDB and KFB. In other words, the letter did more than simply recommend or advise the KEB to seek a waiver.[49] The EC is of the view that it is impossible to dissociate the extension of the credit ceilings from the participation in the loan. While preparatory steps for the Syndicated Loan were taken before the November letter, it was only put in place following the steps taken by the government, at the 28 November Economic Ministers' meeting, the results of which are contained in the letter.[50] The

[44] *Id.*, para. 20.

[45] The EC thus argues that, if the evidence and the totality of the facts reasonably support the view that the government has guaranteed the company, and thus the risk associated with any capital supplied by private banks, then an investigating authority is entitled to conclude that there is a financial contribution within the meaning of Article 1.1 of the *SCM Agreement*, resulting from such government guarantee. Another way of saying essentially the same thing is that, in these circumstances, the private banks have been entrusted or directed by the government to supply the necessary capital, under the umbrella of the overarching government guarantee. (EC response to question 8 of the Panel, para. 47)

[46] EC First Written Submission, para. 279.

[47] EC response to question 4 of the Panel, para. 10.

[48] EC First Written Submission, paras. 282-283.

[49] *Id.*, para. 290.

[50] *Id.*, paras. 291-292. The government thus "provided" or made available to certain banks the right to derogate from the normal prudential banking rules. (EC First Written Submission, para. 294)

participation of other banks does not prove the commercial viability of participation. The EC argues that the other banks were simply not investigated by the EC and, if anything, their participation shows that the "too big to fail"-policy of intervention in favour of Hynix was successful. It convinced other banks to participate in the loan as the credit would be a safe bet.[51] For these reasons, participation by the seven non-examined banks in the Syndicated Loan does not provide a valid benchmark for the commercial reasonability of participation in the Syndicated Loan. The actions of these seven banks were, in any case, profoundly influenced both by the actions of the government in relation to Hynix, and by the actions of the government in relation to the Korean capital markets as a whole.[52]

(iii) KEIC Guarantee

7.36 The EC submits that Hynix would not have been able to obtain the D/A extension by USD 600 million (from USD 800 million to USD 1.4 billion) without the KEIC Guarantee, and this due to its precarious financial situation and the fact that some banks had already reached their prudential lending limits.[53] The EC notes that Korea does not contest the EC's finding that the KEIC is a public body and hence no entrustment or direction in respect of KEIC needs to be demonstrated. In the case of the KEIC however, the EC submits, there is also evidence that the government directed the KEIC to provide the additional guarantee. Moreover, the government itself guaranteed the guarantor - the KEIC - that, in the event of future problems caused by the guarantee to Hynix, the government would provide additional funds to the KEIC. In sum, the EC concludes that Hynix was only able to secure the further guarantee from the KEIC due to government direction to the KEIC and the government's assurance that it would underwrite the guarantee. The EC argues that three letters of 28 November 2000 (from the Ministry of Economy and Finance), 30 November 2000 (from the Ministry of Commerce) and 10 January 2001 (from the three Ministries involved) contain clear and irrefutable evidence of this government direction of the KEIC.

(iv) KDB Debenture Programme

7.37 The EC submits that the KDB is a public body and that the purchase of corporate bonds under the programme was therefore a clear financial contribution in the sense of Article 1.1(a)(1) of the *SCM Agreement*. The EC notes that Korea does not contest its determination of the KDB as a public body. In the view of the EC, of the total programme budget of KRW 2.9 trillion, 1.2 trillion (41 per cent) was used for purchasing Hynix bonds, of which Hynix paid back KRW 280.4 billion under the conditions of the programme, thus receiving a financial contribution of KRW 919.6 billion.

(v) May 2001 Restructuring Programme

7.38 The EC submits that the investigating authority based its determination on the totality of facts, and that it is not appropriate to assess the strength of each piece of evidence in isolation. The EC also notes that the authority was to a certain extent obliged to use facts available due to the non-cooperation of Korean actors.[54]

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[51] *Id*., paras. 286-287.

[52] EC response to question 11 of the Panel, para. 64. As the EC stated:

> "[c]onsider the situation in which a government gives a guarantee that induces a bank to provide a company with risk capital that will certainly be lost. There are essential two ways of viewing this situation, which both lead to essentially the same result. First, the guarantee itself, with no premium, is a financial contribution, the amount of the subsidy being at least equivalent to the capital that it is certain will be lost. Second, the bank has effectively been entrusted or directed to provide a subsidy, the amount of the subsidy being at least equivalent to the capital that it is certain will be lost". (EC response to question 11 of the Panel, para. 62)

[53] EC First Written Submission, paras. 435-437.

[54] *Id.*, para 304.

7.39 Addressing the arguments by Korea, the EC submits, first, that the use of press reports as evidence is common and accepted. The EC asserts that, in this particular case, the press reports concerning the FSS official's presence at the Creditors Council meeting were from a reputable source specialized in economic and financial matters. The EC considers important the fact that the press report was dated the day of the meeting and that the information was thus fresh. Moreover, the EC notes, the government failed to present the written record of the minutes of this meeting to contradict information contained in the press report.[55] The EC further argues that the significance of the press reports has to be put in the context of this case, in which 2/3rds of the CBs were purchased by banks 100 per cent owned by government or with government majority or decisive shareholding. Moreover, and with respect to the press reports concerning the government pressure on one bank, the KorAm Bank, the EC submits that these reports clearly show the reluctance of this bank and the fact that it eventually participated only due to government direction. As these reports are evidence of the willingness of the government to use pressure, there is no reason why the government would not have been as willing and able to similarly put pressure on the other seventeen participating banks.

7.40 Second, the EC emphasises that the absence of alternative financing on the market is very important in the totality of facts on which the authority based its conclusions.[56] The EC considers that the absence of alternative financing is a major factor supporting the authority's conclusion that the banks were entrusted or directed to take part in the restructuring as there would have not been any need for government direction had such alternative financing existed.

7.41 Third, and in a similar vein, the EC submits that the existence of earlier financial contributions is important in the totality of facts given the close temporal and economic connection between the various events. According to the EC, it is only reasonable to assume that the government's interest in saving Hynix would continue.

7.42 Finally, the EC is of the view that no bank-by-bank analysis was required as the totality of facts showed government direction for each of the banks involved in the May 2001 Restructuring Programme.

(vi) October 2001 Restructuring Programme

7.43 The EC considers that the Final Determination sets forth sufficient evidence to support its finding of the existence of a financial contribution to Hynix. The EC asserts that state control or participation is a strong indicator of entrustment or direction. In this regard, the EC asserts that four of the largest Hynix creditors, *i.e.*, the KDB, Woori Bank, Chohung Bank, and the KEB, were either totally or by large majority owned by the government. Of the two less important creditors in the October Restructuring Programme, the NACF and Citibank, one (NACF) is a cooperative established by a special law and jointly managed by the Ministry of Finance and Economy and the Ministry of Agriculture and Fishery.

7.44 In the case of two of the banks, Woori Bank and Chohung Bank, the EC submits that there was direct evidence on the record that they based their decisions on public policy considerations, rather than their own commercial considerations. In the view of the EC, the fact that the failure of company would cause a shock to the national economy would not justify a commercial bank's decision to inject money in a company with no reasonable expectation to receive its money back. The EC asserts that these factors, taken as a whole, are sufficient to demonstrate that there was government entrustment or direction, in particular taking into account that the investigating authority operated under a facts available standard.

[55] The EC considers that the press release which was issued by the FSC shortly after the press report in question and contradicting the information stated therein only shows the degree of connexity between FSS, FSC and the government. The EC concludes that in the case of FSC, "qui s'excuse, s'accuse".

[56] EC First Written Submission, paras. 319-320.

7.45 With regard to Korea's claim that the EC should have taken into account that a number of Hynix's creditor banks with substantial government participation did not participate in Option 1 of the October 2001 Restructuring Programme, the EC states that Korea's argument is posited on the assumption that it was reasonable for any bank to participate in Option 1 because there was a chance that it could recover losses. However, the EC states that it was not commercially reasonable on any view for any of the players to participate in Option 1, irrespective of the amount of exposure at the time of the October 2001 Restructuring Programme. Finally, the EC considers that evidence of prior government entrustment or direction is relevant as it shows the government's involvement which was likely to continue as long as necessary to save Hynix.

7.46 In response to some of Korea's arguments concerning each of the specific participating banks, the EC asserts that the authority did not ignore any Citibank evidence. In fact, according to the EC, what Korea calls "evidence" are no more than self-interested statements and affidavits of little or no probative value. The EC also disagrees with Korea's assertion that Commerzbank controlled the lending practice of the KEB, as in fact, of the twenty directors, only four were from Commerzbank, and the government as the largest shareholder was able to influence the other directors' appointments. Finally, with regard to Woori Bank, the EC emphasises that Peace Bank no longer existed at the time of the investigation and that none of the interested parties made any arguments before the investigating authority about the need to examine Peace Bank. In fact, according to the EC, Peace Bank had effectively been taken over by the government by October 2001.

(c) Panel Analysis

7.47 Korea's claim concerns the definition of a subsidy under Article 1 of the *SCM Agreement*, and the requirement of determining the existence of a financial contribution by the government under Article 1.1(a) of the *SCM Agreement* in particular. Article 1 of the *SCM Agreement* provides in relevant portion as follows:

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;
>
> (....)
>
> and

(b) a benefit is thereby conferred. (footnote omitted)

(i) General standard of entrustment or direction under Article 1.1(a)1(iv) of the SCM Agreement

7.48 Article 1.1 of the *SCM Agreement* thus provides that a subsidy shall be deemed to exist in case there is a financial contribution by the government or any public body within the territory of a Member which confers a benefit. Article 1.1(a)(1) subparagraphs (i) to (iii) set forth three situations that are considered to constitute such a financial contribution by the government. Subparagraph (iv) adds that a financial contribution may also be considered to have been provided *by the government*, in cases where the government has *entrusted or directed a private body* to provide one of the types of financial contributions described in subparagraphs (i) to (iii) of Article 1.1(a)(1) of the *SCM Agreement*. In other words, the Agreement provides that a financial contribution will be considered to have been provided by the government in cases where the government or a public body itself provides such a financial contribution, or in cases where the government entrusts or directs a private body to do so.

7.49 In our view, two situations thus need to be distinguished. If the government or a public body carries out one of the functions illustrated in subparagraphs (i) to (iii), then such action constitutes a financial contribution in the sense of Article 1.1(a) of the *SCM Agreement*. If a private body undertakes the same action, there is no financial contribution in the sense of Article 1.1(a) of the *SCM Agreement*, unless it is established that the private body was entrusted or directed by the government to provide the financial contribution. We note, in this respect, that Article 1.1(a)(1) of the *SCM Agreement* clarifies that the term "government" as used in the *SCM Agreement* covers both the government as such, as well as any public body within the territory of a Member. In our view, therefore, and the parties do not seem to disagree in this respect, there is no need for a finding of entrustment or direction in cases where it has been established that the party providing the financial contribution was itself a public body.

7.50 However, in cases where the financial contribution was provided by a private body, as the investigating authority considered to have been the case on a number of occasions with respect to support for Hynix, the disciplines of the *SCM Agreement* will not apply as there is no financial contribution *by the government*, unless it can be demonstrated that the private body was entrusted or directed by the government to provide such a financial contribution. We will thus need to examine the exact scope and meaning of the terms "entrust" and "direct" as used in Article 1.1(a)(1)(iv) of the *SCM Agreement*.

7.51 Article 3.2 of the *DSU* requires us to interpret the terms of the various WTO Agreements in accordance with the "customary rules of interpretation of public international law". This is a reference to the rules of treaty interpretation laid down in the *Vienna Convention on the Law of Treaties* (the "Vienna Convention"), particularly Articles 31-32 thereof.[57] We will therefore examine the ordinary meaning of the terms used in Article 1 of the *SCM Agreement*, in their context and in light of the object and purpose of the Agreement.

7.52 The ordinary meaning of the term "entrust" is "to give (a person etc.) the responsibility for a task" or "to commit the execution of (a task) to a person".[58] The term "direct" in turn means, *inter alia*, "to give authoritative instructions to; order (a person) *to do*, (a thing) *to be done;* order the performance of."[59] In other words, the term "entrust" refers to a delegation over the performance of a

[57] See, e.g., Appellate Body report, *US - Reformulated Gasoline*, page 17.
[58] The New Shorter Oxford Dictionary, Third edition, p. 831.
[59] *Id.*, p. 681. In a similar vein, another dictionary defines the term "direct" (followed by to + Infinitive, as is the case in the provision in question) as "to give a formal order or command to". (The Concise Oxford Dictionary, Ninth edition, p. 382)

task, while the term "direct" refers to a more direct command, an order.[60] Both, in our view, clearly contain the notion of the imposition of a *requirement* or an *obligation* on the person that is entrusted with a task or that is directed to carry out a task. The private body that is directed to provide a financial contribution or is entrusted to do so, is thus acting on behalf of the government, and its actions can therefore be ascribed to the government.

7.53 The use of these terms is not surprising in the context of the *SCM Agreement* which, like the WTO Agreements generally, deals with government behaviour and not the behaviour of private parties. Article 1.1(a)(1) provides that the first element of a subsidy is a "financial contribution by a government or any public body". All four subparagraphs (i) to (iv) thus deal with government behaviour. Subparagraphs (i) to (iii) focus on explaining what is meant by a financial contribution, while subparagraph (iv) deals with situations in which the financial contribution was provided by a private body, but acting under the entrustment or direction of the government. In this context, the terms "entrust or direct" thus bridge the distance between private parties' actions, which fall outside the scope of the *SCM Agreement*, and the government behaviour to which the disciplines of the *SCM Agreement* apply. By entrusting or directing a private body to carry out one of the functions illustrated in subparagraphs (i) to (iii), the government is providing a financial contribution, and the private parties' actions may thus be attributed to the government.[61]

7.54 Korea argues on the basis of the language used in the report of the panel in the *US – Export Restraints* case that there is a requirement to demonstrate an explicit and affirmative act by government to a particular entity to perform a particular task. In our view, the specific language of the panel in that case was inspired by the facts of that case, which are entirely different from the facts currently before us. Indeed, the panel in *US – Export Restraints* made it quite clear that the scope of its rulings was squarely focussed upon the particular fact pattern that Canada – the complainant in that case – had cited, *i.e.*:

> "… a border measure that takes the form of a government law or regulation which *expressly* limits the quantity of exports or places *explicit* conditions on the circumstances under which exports are permitted, or that takes the form of a government-imposed fee or tax on exports of the product calculated to limit the quantity of exports."[62] (emphasis added)

7.55 The panel in *US – Export Restraints* then observed that it was these "essential characteristics" of an export restraint that delineated the scope of Canada's claims in that case and the panel's rulings.[63]

7.56 We share that panel's basic understanding of the terms "entrust" or "direct" as requiring a government action which obliges a private body to act in a particular way and generally refers to the situation in which government executes a particular policy by operating through a private body. However, we do not feel bound by the precise language used by the panel in the *US – Export Restraints* case which had a completely different factual setting. Neither do we feel that we need to interpret what this panel may or may not have intended to imply by using the words it did, as our task is not to interpret panel reports but rather the provisions of the *SCM Agreement* in accordance with customary rules of interpretation of public international law.

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[60] We note that the panel in the *US – Export Restraints* case based itself on the same definitions to reach a similar conclusion. (Panel report, *US – Export Restraints*, paras. 8.28-8.29)

[61] We find support for our reading of the terms "entrust or direct" in the panel report in the *US – Export Restraints* case, paras. 8.29-8.34.

[62] *Id.*, para. 8.17.

[63] *Ibid*.

7.57 In that respect, we consider that Article 1.1(a)(1) of the *SCM Agreement* does not require that the government's entrustment or direction be conveyed to the private bodies in a particular way. Rather, it encompasses entrustment or direction irrespective of the precise form it takes. As the *US – Export Restraints* panel observed, it follows from the ordinary meanings of the two terms "entrust" and "direct" that the action of the government must contain an element of delegation (in the case of entrustment) or command (in the case of direction).[64] And such delegation or command should invariably take the form of an affirmative act. But it does not necessarily need to be "explicit". It could be explicit or implicit, informal or formal.[65] The key is being able to identify such entrustment or direction in each factual circumstance. This will obviously need to be determined, on a case-by-case basis, whether an investigating authority could reasonably have concluded on the basis of all of the relevant and probative evidence before it that such entrustment or direction existed.[66]

7.58 This ordinary meaning of the terms "entrusts or directs" is consistent with the object and purpose of the *SCM Agreement* to discipline certain – but not all – forms of government action which distort international trade. As such, Article 1.1.(a)(1)(iv) should not be read too broadly so that it encapsulates the actions of private bodies acting independently of government delegation or command. But neither should it be read too narrowly so that it allows governments to escape their obligations under the *SCM Agreement* by acting indirectly, implicitly or informally through private bodies. In our view, the ordinary meaning of the terms "entrusts or directs" that we have outlined above in paras. 55-56 fits squarely in line with the object and purpose of the *SCM Agreement*.

7.59 We consider that it is important to distinguish between the legal standard that has to be met and the evidence that is relied upon to prove government entrustment or direction. We note that the EC placed much importance on the fact that the private bodies participating in the various restructuring efforts were not acting in a commercially reasonable way. We agree with the EC that, when demonstrated, such non-commercial behaviour may well be seen as an indication of possible government entrustment or direction. It can thus be taken into account as an element of evidence that the government was perhaps entrusting or directing these private bodies to act in a certain way, but it is not sufficient as evidence of government entrustment or direction as such. Rather, it raises evidentiary issues that the investigating authority will need to work through in order to ascertain whether an action by a private body was the object of some form of government entrustment or direction. In other words, the investigating authority will need to ensure that the evidence of entrustment or direction is probative and compelling and this will obviously differ from case to case. In this respect, we consider that evidence which demonstrates merely that the government encouraged or facilitated private investment would not be sufficient to conclude that the government entrusted or directed such private actions. Something more will be required.[67]

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[64] *Id.*, para. 8.29.

[65] In this regard, we note that the focus of Article 1.1(a)(1)(iv) would be significantly undermined if an "explicit" act was required in all instances. After all, this provision is supposed to encapsulate those instances where the government attempts to execute a particular policy by operating through a private body. In other words, it is trying to ensure that indirect government action does not fall outside the scope of the *SCM Agreement*. If we were to limit the scope of Article 1.1(a)(1)(iv) to only those instances where the government acted "explicitly", governments would be able to circumvent their commitments under this provision by removing those elements that were "explicit".

[66] Neither are we of the view that the *SCM Agreement* contains the requirement that it be demonstrated that the private body was entrusted with, or directed to, execute *a particular task*.

[67] We note that at the time of the investigation, the EC set a very similar standard for entrustment or direction for itself as becomes clear from the Final Determination:

> "(15) With regard to the notion of "direction" in Article 2(1)(a)(iv), this exists where the government **requires** a private body to carry out functions normally vested in the government and the practice does not differ from practices normally followed by governments. It is **not sufficient to show that a government merely encouraged or facilitated** such actions,

7.60 In reviewing the findings of the investigating authority, the extent to which the interested parties cooperated with the authority is, of course, also a relevant element to be taken into account. In those cases where certain essential information which was clearly requested by the investigating authority is not provided, we consider that this uncooperative behaviour may be taken into account by the authority when weighing the evidence and the facts before it. The fact that certain information was withheld from the authority may be the element that tilts the balance in a certain direction. Depending on the circumstances of the cases, we consider that an authority may be justified in drawing certain inferences, which may be adverse, from the failure to cooperate with the investigating authority. We consider relevant, in this respect, the following statement of the Appellate Body in the *US – Hot-Rolled Steel* case concerning the facts available provision of Article 6.8 of the *AD Agreement*, which is very similar both textually and contextually to Article 12.7 of the *SCM Agreement*:

> "[i]n order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort – to the "best of their abilities" – from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters".[68] (emphasis in original)

7.61 While we acknowledge that this statement was, at least in part, based on several paragraphs of Annex II to the *AD Agreement*, we consider that a similar significant degree of cooperation is to be expected of interested parties in a countervailing duty investigation.[69] The fact that the *SCM Agreement* does not contain a similar Annex is not determinative as the role played by the facts available provision in an anti-dumping investigation and a countervailing duty investigation is the same. Article 12.7 of the *SCM Agreement* is an essential part of the limited investigative powers of an investigating authority in obtaining the necessary information to make proper determinations. In the absence of any subpoena or other evidence gathering powers, the possibility of resorting to the facts available and, thus, also the possibility of drawing certain inferences from the failure to cooperate play a crucial role in inducing interested parties to provide the necessary information to the authority.[70] If we were to refuse an authority to take such cases of non-cooperation from interested parties into account when assessing and evaluating the facts before it, we would effectively render Article 12.7 of the *SCM Agreement* meaningless and inutile. We wish to add that we do not suggest that non-cooperation provides a blank cheque for simply basing a determination on speculative assumptions or on the worst information available. Ultimately, the determination has to be made on the basis of the available *facts*, and not on mere speculation. Therefore, and in the absence of such supporting facts, mere non-cooperation by itself does not suffice to justify a conclusion which is negative to the interested party that failed to cooperate with the investigating authority.

7.62 We will therefore now examine, with this standard in mind, the EC determination of a financial contribution concerning each of the five different programmes at issue. We recall in this respect that we must, under Article 11 of the *DSU*, make an objective assessment of the matter before us. This requires us to examine whether the investigating authority examined all relevant facts and whether adequate explanation has been provided of how the facts support the determination made. In

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> although such encouragement or facilitation may be a factor to be considered." (emphasis added)

[68] Appellate Body report, *United States – Hot-Rolled Steel*, para. 102.

[69] In that respect, we see an important similarity between the power of an investigating authority to draw inferences from the failure to cooperate with the authority and the discretionary power of panels in the WTO dispute settlement context, as well as international tribunals of various kinds in public international law, to draw such inferences, as recognized by the Appellate Body in the *Canada – Aircraft* case. (Appellate Body report, *Canada – Aircraft*, para. 202)

[70] We thus disagree with the views expressed by China in its Third Party Oral statement, in this respect. (China Third Party Oral Statement, paras. 6-13)

other words, the question before us is whether on the basis of the record evidence, the EC reached reasoned and reasonable conclusions as to the existence of a financial contribution by the government or a public body in the sense of Article 1.1(a) of the *SCM Agreement*.

7.63 Finally, we wish to add in this respect that in the Final Determination, the EC clearly addressed each of these five different programmes as distinct measures, making findings of a financial contribution and benefit with regard to each of these five programmes. Therefore, we will examine these five programmes as five distinct programmes. We do not consider appropriate the suggestion made by the EC before us on various occasions that evidence with regard to all of the five programmes can be placed in a pot labelled "the totality of facts" and then be drawn upon in justifying a conclusion as to financial contribution and benefit with respect to each different programme. This approach could have been followed perhaps had the investigating authority itself treated the five programmes as one big Hynix bail-out exercise.[71] But it did not do so, and that is why we will thus also examine the merits of the EC determination in light of the specific evidence it relied on to make its findings with respect to each of the different re-financing programmes at issue in this case.

(ii) Syndicated Loan

7.64 The Syndicated Loan was developed by Hynix's financial advisor Salomon Smith Barney Inc. ("SSB") during the second half of 2000 as part of a financial plan to resolve the problem of a "mismatch" between Hynix′s cash flow and the extent of debt obligations that would mature and had to be repaid in 2001, which was sometimes referred to at the time as Hynix′s "short term liquidity problems". Citibank was appointed as lead manager of the Syndicated Loan and Citibank held meetings with domestic banks to present its plan in the course of December 2000. In total, 10 banks participated in the loan which amounted to KRW 800 billion:[72] the Korea Development Bank ("KDB"), Hanvit Bank, Chohung Bank, the Korea Exchange Bank ("KEB"), the Korea First Bank ("KFB"), Kookmin Bank, Citibank, Shinhan Bank, Hana Bank and the KorAm Bank. The EC examined three banks, the KDB, KEB and KFB and considered that their participation in the Syndicated Loan constituted a financial contribution by the government which conferred a benefit on Hynix.

7.65 From the record, we conclude that the loan was released in two tranches and the interest rate of the tranches was set at that of unsecured three-year corporate bonds for BBB- rated companies, plus an additional margin to reflect the risky nature of the financing, bearing in mind the high debt ratio of Hynix. One of the conditions of the loan was the separation of Hynix from the Hyundai group. The loan agreement further provided that the loan amount was to be used exclusively for redeeming the previously issued corporate bonds, refinancing the existing debt or securing liquidity.[73]

7.66 The EC made determinations with regard to the existence of a financial contribution with regard to only three of the ten participating banks, *i.e.*, the KDB, KFB and KEB**.** What these three banks had in common is the fact that, due to the prudential lending limits that had been put in place by the government after the Korean financial crisis of 1997, these banks would not have normally been able to take part in the Syndicated Loan, as they had already reached their lending limits.[74] However, Article 20(3) of the Enforcement Decree of the Banking Act allowed a governmental body, the Financial Supervisory Commission ("FSC"), to grant an approval permitting banks to exceed these

[71] However, the "one big bail-out" approach must, in any case, confront the fact that the financial condition of Hynix changed dramatically (for the worse) between fall 2000 and fall 2001.

[72] For the benefit of better understanding these amounts, we note that at the time KRW 800 billion was around USD 650 million.

[73] EC Preliminary Determination, para. 27. This description of the conditions under the loan agreement was not contested by Korea.

[74] In particular, Article 35 of the Banking Act of Korea provides that no financial institution can extend credits exceeding 25/100 of the relevant financial institution's equity capital to the same individual, corporation and person, or 20/100 to the same individual or corporation.

ceilings "when it is recognised that it is inevitable for industrial development (…) or the stability of national life." The three banks mentioned above received such a waiver from the FSC and participated in the Syndicated Loan.

7.67 The EC determined that one of these three banks, the KDB, was a public body, and its participation in the loan was, therefore, considered to be a financial contribution in the sense of Article 1.1(a) of the *SCM Agreement* without any need for evidence of entrustment or direction.[75] With regard to the KEB and KFB, which each participated in the Syndicated Loan for an amount of KRW 100 million, the EC concluded that these two banks had been directed to take part in the loan by the government in pursuing the public policy goal of alleviating the difficult financial situation of Hynix for reasons of industrial development.[76] It thus found these banks' participation in the Syndicated Loan also to constitute a financial contribution by the government.

7.68 We will thus need to examine the EC's determination with regard to these three banks, the KDB, KEB and KFB. Of these three banks, one was determined to be a public body, while the two other banks, the KEB and KFB were considered as private bodies. We will first examine the EC's determination of the existence of a financial contribution by the government with respect to the public body, the KDB. We will then examine the EC's determination with regard to the KEB and KFB. In this respect, we note that, upon examining the benefit question, the EC concluded that the KFB contribution was negligible and its participation in the Syndicated Loan was therefore not countervailed. For that reason, and in line with the arguments as set forth by Korea in its various submissions before us, our discussion of the EC's determination with regard to the two private bodies, the KEB and KFB, will focus on the KEB only.[77]

7.69 Korea does not challenge the EC determination of the KDB as a public body. Neither does it contest the fact that a loan of the kind extended by the KDB in this programme is a government practice which involves a direct transfer of funds in the sense of subparagraph (i) of Article 1.1(a)(1) of the *SCM Agreement*. In light of our above analysis of the requirements of Article 1 of the *SCM Agreement*, and the fact that Korea did not adduce a *prima facie* case otherwise, we consider that the EC finding that the KDB's participation in the Syndicated Loan constituted a financial contribution by the government is consistent with Article 1.1(a) of the *SCM Agreement*.

7.70 With regard to the loans extended by the two financial institutions that were not considered to be public bodies, the KEB and KFB, the EC reasoned its conclusion that they had been directed by the government to take part in the loan in the following manner:

> "(32) On 28 November 2000, a letter from the Ministry of Finance and Economy, signed by the Minister of Finance and Economy, was sent to the President of the Korea Export Insurance Corporation ("KEIC") and the President of the KEB. The letter transmits the results of the discussion on "alleviating the cash crunch of Hyundai Electronics", which was on the agenda of the Economic Ministers' meeting held on the same day (November 28). The letter orders the recipients to make sure that the measures decided would be "carried out perfectly". The letter also states that the measures to help Hynix were initiated by the Financial Supervisory Service. The letter orders KEB to request an extension of the credit ceilings on behalf of the creditor financial institutions, which according to the results of the Economic

[75] Final Determination, para. 36.
[76] *Ibid*.
[77] The benefit amounts to the extent to which the lending limit was exceeded by the KDB, KFB and KEB. For the KFB, this meant that the amount was negligible. The amount provided by the KDB and KEB were rolled-over into the October 2001 Restructuring Programme. Since the contributions of the KDB and KEB were, in any event, also to be countervailed as part of the October 2001 Restructuring Programme, a single countervailing duty was imposed in relation to both measures, in order to avoid double-counting.

Ministers' discussions would be subject to special approval by the FSC. The Minister thereby imposed an obligation on KEB to apply for the extension and on the FSC to approve such an application.

(33) In December 2000, KEB filed the request for approval of this extended credit limit for Hynix financing and submitted similar requests for Korea First Bank ("KFB") and the KDB. In the FSC decision it was explained that these banks intended to grant a syndicated loan and a D/A facility (documents against acceptance-backed loans) to Hynix. FSC approved these requests on the basis of Article 20(3)1.3. of the Enforcement Decree. This provision allows FSC to extend the ceilings "when it recognises that it is inevitable for the industrial development ... or the stability of the national life". This provision is a public interest provision and shows that from the GOK point of view, the granting of the extra credit was a public interest issue.

(34) It is noted that according to the minutes of the relevant FSC meeting, the FSC Commissioners approved the increase in the credit ceiling for Hynix financing because Hynix was too big and too important to fail. In the minutes the following is explained: "The semiconductor industry is a strategic industry; after Hynix's merger with LG Semicon in 1999, the company accounted for 20 per cent of the world semiconductor market and 4 per cent of the Korean exports. Hynix employs 24,000 employees in the industry, and other involved companies exceed 2,500 with over 150,000 employees. To support the syndicated loan and D/A financing would improve Korea's international competitiveness. Therefore, for the promotion of the electronics industry policy, the FSC finds it in the best interest to increase the ceiling".

(35) It is noted that without the extension of the credit ceilings it would have been impossible for the three abovementioned banks to participate in the syndicated loan. They would have breached their obligations under the Banking Act. The GOK, by directing the FSC to approve the extension and by directing KEB to apply for such extension, had effectively directed the banks to extend the loans in a way that they would not otherwise have been able to do under Korean banking laws. It was evident that the credit limits needed to be lifted in order to provide the financing to Hynix. Indeed, when the GOK and Hynix were invited specifically to comment on the new information indicating the GOK direction as regards the lifting of the credit limits, neither of them indicated in their comments that there would have been another source of funding available to Hynix at the time of the measures. Moreover, neither party invoked any such probability at any other stage of the investigation.

(36) In accordance with the findings set out in recitals 55 to 59 of the provisional Regulation which are hereby confirmed, KDB is considered to be a public body within the meaning of Article 1(3) of the basic Regulation. As regards KEB and KFB, their participation in the syndicated loan for an amount of KRW 100 billion each is considered to be directed by the GOK in pursuing the public policy goal of alleviating the difficult financial situation of Hynix for reasons of industrial development. Therefore, they are in this case considered to be directed by the GOK to carry out a function normally vested in the GOK. The fact that the particular provision of the Enforcement Decree was evoked also demonstrates that lifting the credit limits was considered as a question of public interest. Moreover, the GOK intervention shows that the granting of the extra credit was a question of public interest, which falls within the practices normally followed by governments. Therefore, the participation of the banks in the syndicated loan fulfils the criteria explained in recital 15. Consequently, these measures constitute a financial

> contribution by government within the meaning of the basic Regulation in Article 2(1)(a)(i) for KDB and Article 2(1)(a)(iv) for KEB and KFB." (footnotes omitted)

7.71 In sum, the EC based its finding of government entrustment or direction of the KEB and KFB on three considerations. First, the EC alleges that the letter of the Minister of Finance and Economy of 28 November 2000 orders the KEB to request an extension of the credit ceilings on behalf of the creditor financial institutions, and that, in so doing, the Minister thereby imposed an obligation on the KEB to apply for the extension, and on the FSC to approve such an application.[78] A second important consideration for the EC was that the FSC granted the lending limit waiver based on the public interest provision of Article 20(3) of the Enforcement Decree of the Banking Act.[79] Finally, the EC emphasises the crucial relevance of this waiver as the three banks in question would not have been able to lend without the waiver.[80] Its overall conclusion was therefore that

> "[t]he GOK, by directing the FSC to approve the extension and by directing KEB to apply for such extension, had effectively directed the banks to extend the loans in a way that they would not otherwise have been able to do under Korean banking laws."[81]

7.72 We start our examination by looking at the letter of 28 November 2000 to which the EC attached particular importance in reaching its finding of government-direction of the KEB.[82] The letter which is signed by the Minister of Finance and Economy and sent to the attention of the Presidents of the KEIC and the KEB states as follows[83]:

> "[e]nclosed please find discussion results on alleviating the cash crunch of Hyundai Electronics which are part of discussion items at the Economic Ministers meeting held today (28 Nov., Tuesday). Please make sure they are carried out perfectly."

7.73 The enclosure, entitled "Results of Discussion at the Economic Ministers' Meeting (28 Nov.) (Measures to alleviate the cash crunch of Hyundai Electronics: Initiated by the Financial Supervisory Service)", states in relevant part:

> "[a]s for the issue of (lifting) the ceilings on loans extended to the same borrower in connection with the syndicated loan in won, pursue a resolution of special approval by the Financial Supervisory Commission upon the request of the Korea Exchange Bank representing creditor financial institutions".

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[78] Final Determination, para. 32.

[79] *Id.*, para. 33.

[80] *Id.*, para. 35.

[81] *Ibid*. In the view of the EC, the fact that these banks were directed to take part in the loan is further confirmed by the dire financial state of Hynix as presented by one interested party challenging the provisional negative subsidy determination:

> "[o]ne interested party argued that Hynix was not creditworthy at the time of the measure and therefore the GOK direction is the only possible explanation for the creditors' decision to extend new lending to Hynix." (Final Determination, para. 29)

[82] This is evidenced by the fact, that in the Preliminary Determination, the EC concluded that the banks' participation in the Syndicated Loan was in conformity with market conditions. The only important difference between the negative Preliminary and the positive Final Determination in this respect seems to have been the discovery of the letter, as is clear from para. 30 of the Final Determination.

[83] Document of 28 November 2000 from the Ministry of Finance and Economy to the KEIC and KEB (the "28 November letter"). (**Exhibit EC-3**)

7.74 In our view, this letter – and its enclosure – reveal that the Economic Ministers had decided to take certain action to alleviate the so-called cash crunch of Hyundai Electronics/Hynix. One of the actions they decided on was to pursue a special approval by the FSC of lifting the lending limits upon the request of the KEB. It is clear that the decision taken was thus to require the public body FSC to lift the lending limits, when such a request would be made by the KEB.

7.75 The EC concluded that the letter was clear evidence that the government was directing the KEB to request a lending limit waiver from the FSC and that the KEB was informed that it would receive a positive reply to such a request. The next step in the EC's reasoning is that by directing the KEB to apply for a waiver and by directing the FSC to approve the waiver, Korea had effectively directed the KEB to extend the loans in a way that it would otherwise not have been able to do under Korean banking laws.

7.76 In examining this letter, we find very important that this letter from the government together with its enclosure was directly addressed to the KEB. In the letter the government requests the KEB to make sure that the results of the discussion on alleviating the cash crunch of Hyundai Electronics/Hynix, as set forth in the enclosure are "carried out perfectly". The title of the enclosure itself also refers to "measures to alleviate the cash crunch of Hyundai Electronics". In our view, the fact that the letter was sent to the KEB, may reasonably be read to imply that the government was requiring the KEB to assist in carrying out the measures to alleviate Hynix's cash crunch decided upon by the three Economic Ministers. At the same time, we acknowledge that the text of the letter, and its enclosure, could be read more narrowly to require the KEB *only to apply* for a lending limit waiver, and not to require it to provide a financial contribution by participating in the loan. However, and taking into account the particular circumstances of this case, we do not find unreasonable the conclusion of the EC that this letter actually required the KEB to participate in the Syndicated Loan.

7.77 We note that an important element in the evaluation and assessment of this piece of evidence by the EC was the fact that this letter and other information concerning the Economic Ministers' meeting was withheld from the investigating authority by the government. As stated in paragraph 30 of the Final Determination:

> "(30) Since the publication of the provisional Regulation, new information of the GOK directing the FSC to raise the legal lending limits of some banks participating in the syndicated loan has been obtained. The Commission's provisional findings as regards this measure should therefore be reassessed in the light of the new information. The interested parties, Hynix and the GOK, were specifically invited to comment on the new information and their comments have been taken into account in the reassessment of this measure."[84]

7.78 We recall that, in the Final Determination, the EC clearly stated that in the appreciation of the facts, it had taken due account of the failure of certain parties to cooperate fully with the investigating authority:

> "(16) When determining the existence of a public body or of government direction, the investigating authority bears the burden of proof when making a positive finding. Such findings must be made on the basis of positive evidence, taking account of the totality of the facts on the record and available to the authority, and weighing these facts in accordance with the considerations above. In appreciating the facts in question, due account must be taken, in accordance with Article 28 of the basic Regulation, of the failure of certain parties to cooperate fully with the investigation, which has in some cases necessitated the use of information from other sources. In this particular case, it has become apparent that the GOK failed to provide a number

[84] Final Determination, para. 30.

> of requested documents on meetings relating to the future of Hynix. The GOK also failed to inform the Commission that such meetings took place, in spite of clear requests being made to this end in the questionnaire and at the on-the-spot verification. The GOK has been made aware of the consequences of non-cooperation in accordance with Article 28(1) and (6) of the basic Regulation. In view of this lack of cooperation, it has been necessary, in addition to taking account of relevant GOK documents submitted by other parties, to use information from secondary sources, including from the Korean press. Such information has been viewed with special circumspection, the GOK and Hynix given the opportunity to comment on it, and, where practicable, it has been cross-checked with other independent sources."[85]

7.79 As we explain in detail in our section dealing with Korea's claims under Article 12.7 of the *SCM Agreement*, we are of the view that the investigating authority was justified in concluding that this information was not provided to it, in spite of clear requests to do so. We do not accept Korea's argument that it did not understand the EC's general request for information to include the provision of this letter and other related information. It was only because Micron, one of the EC DRAMs producers, included this letter in its comments on the Preliminary Determination that the investigating authority became aware of the letter and its enclosure. In other words, we find that Korea failed to cooperate with the EC in this respect, and the EC was thus entitled to make its determination based on the facts available. In this case, the facts thus ultimately became available due to the submission of the information by Micron.

7.80 In our view, it is not unreasonable of an investigating authority to read the information which was withheld from it in light of such non-cooperation. In other words, in case the information is such that it could be read in more than one way, we can accept that the failure to cooperate with the authority is an important element in tilting the balance towards a reading of this information which is less favourable to the interested party that was withholding the information. We recall, in this respect, that the possibility of Article 12.7 of the *SCM Agreement* of resorting to facts available is the only possibility that investigating authorities have to obtain the necessary information in the absence of any subpoena or other powers. This implies that, if this "stick" is to have any meaning in forcing interested parties to provide the necessary information, the failure to provide the information must be accepted as a relevant factor in the evaluation of the evidence, if it is later produced by another party. At the same time, we hasten to add that we are of the view that facts available should not be used as a punishment, and that non-cooperation does not allow an investigating authority to simply use the information available which leads to the worst possible result for the interested party that failed to provide such information. Ultimately, the determination still has to be based on the facts that are available, not on mere inferences. But it is not because facts available should not be used in a punitive manner that the failure to cooperate becomes completely irrelevant in weighing and assessing the information before the authority.

7.81 We recall that our standard of review requires us to examine whether a reasonable investigating authority on the basis of the facts before it could have reached these conclusions and thus whether the EC provided a reasonable and adequate explanation of how the facts support the determination made. We are not to make a *de novo* review of the letter ourselves, nor, however, should we show total deference to the investigating authority.

7.82 In our view, in light of the clear withholding of this information, the fact that the letter required the KEB to request a waiver of the lending limits and informed the KEB that this waiver would be granted, it was not unreasonable of the investigating authority to reach the conclusion that, effectively, the KEB was required to take part in the Syndicated Loan. We find reasonable the conclusion that the government, by requiring the KEB to request that the last hurdle (*i.e.*, the lending limit) to its participation in the loan be lifted, was actually telling this bank that it had no excuse not to

[85] *Id.*, para. 16.

take part in the Syndicated Loan. In other words, this letter can reasonably be read to demonstrate that the government was expecting, and thus directing, the KEB to participate. In this respect, we find relevant the EC's consideration that it would not have been possible under Korean law for the KEB to lend the KRW 100 million to Hynix, as it did under the Syndicated Loan, without the lending limit waiver from the FSC. While, in the absence of any additional facts such as the withholding of information, this would not, in and of itself, necessarily imply that the government actually entrusted or directed the KEB to provide such funds to Hynix, it is clearly a factor to be taken into account when examining and evaluating such direct evidence of government direction as constitutes the letter. All the more so in this case where the letter was withheld from the investigating authority.

7.83 Similarly, we consider relevant the fact that the FSC approved the waiver for public interest reasons. In fact we note that the threshold for lifting the legal lending limits, *i.e.*, when this is "inevitable for industrial development (...) or the stability of national life" appears to be very high, but yet it was considered to have been met in the case of the three banks in question. This, again, clearly shows that the government had taken a particular interest in trying to assist Hynix and that it considered the survival of Hynix to be in Korea's public interest. While it may not be, in and of itself, sufficient evidence to establish that the government entrusted or directed the KEB to participate in the Syndicated Loan, it does, in our view, strengthen the position of the EC that it was reasonable to read the letter as requiring the KEB to participate in the Syndicated Loan. The fact that the letter was withheld from the authority further tilts the balance in favour of the EC's overall conclusion of government direction.

7.84 In sum, and taking into account the circumstances of this case and the clear case of non-cooperation by Korea in producing clearly necessary information, we consider reasonable the EC's conclusion that Korea directed the KEB to participate in the Syndicated Loan. For these reasons, we find that the EC's determination with regard to the existence of a financial contribution by the KEB to Hynix was consistent with Article 1.1(a) of the *SCM Agreement*.

(iii) KEIC Guarantee

7.85 The second action which was found to be a subsidy was the extension of a guarantee by the Korea Export Insurance Corporation ("KEIC") which is the official export credit agency of Korea. The KEIC provides export insurance and guarantees to manage the risk associated with overseas transactions. In January 2001, fourteen Hynix creditor banks increased the ceiling of the export credit facility for D/A's (documents against acceptance) provided to Hynix from USD 800 million to USD 1.4 billion, an increase of USD 600 million. The KEIC granted the short-term export credit insurance for the extended D/A limit as regards the transaction between Hynix and its overseas subsidiaries. In other words, Hynix collects the foreseen payment for the export transaction from the banks concerned, which hold the D/A documents. The affiliated importer in the country of destination then makes the payment for the goods concerned directly to the banks against the D/A. Hynix pays the KEIC a premium for the guarantee and pays interest to the banks concerned for the D/A amounts withdrawn until the importer makes the final payment. The KEIC insurance covers the amounts due to the banks which cannot be collected due to bankruptcy of either the exporter or the importer.

7.86 In its Final Determination, the EC found that the KEIC Guarantee constituted a financial contribution by the government and concluded as follows:

> "(45) Thus the guarantee was given by KEIC due to specific GOK direction in pursuing the public policy goal of alleviating the difficult financial situation of Hynix for reasons of industrial development. Therefore, KEIC, despite being a public body, was specifically directed by the GOK to carry out a function and follow practices normally vested in the GOK. Consequently, the guarantee is a financial contribution by government within the meaning of Articles 2(1)(a)(iv) and (i) of the basic

> Regulation. This guarantee conferred a benefit to Hynix, since without the guarantee Hynix was not able to receive the D/A extension of USD 600 million. At the same time, the GOK's assurance that KEIC would be compensated in case of default showed that the premium paid by Hynix could not cover the risk undertaken by KEIC to guarantee the D/A extension and, therefore constituted a non-commercial act. The GOK effectively underwrote the risk of failure of payment by Hynix without asking for any compensation for it. According to the information on the record, the banks would not have granted the D/A facility without the guarantee. Moreover, there is no information that Hynix could have obtained comparable financing from other sources. This coverage of the guarantee, without any adequate premium being paid, is therefore considered to have conferred a benefit to Hynix within the meaning of Article 2(2) of the basic Regulation. In view of the provisions of Article 6(c) of the basic Regulation, since no comparable commercial loan could have been obtained without the guarantee, the coverage of the D/A extension is effectively a grant. The benefit to Hynix and thereby the amount of the subsidy is the amount of the D/A extension, USD 600 million."

7.87 The EC considered that the KEIC was a public body.[86] It further found that the KEIC provided an export insurance guarantee, which involved a direct or potential direct transfer of funds and thus constituted a financial contribution. Korea does not contest the EC's determination of the KEIC as a public body. Korea only takes issue with the fact that what was countervailed by the EC was the amount of the D/A extension of USD 600 million, and not the guarantee as such. In addition, it notes that the fact that an extension of USD 600 million of the D/A facility was granted by the banks does not necessarily imply that such an amount of USD 600 million was actually provided to Hynix. We are of the view that these arguments relate to benefit and the calculation of the amount of the subsidy rather than to the question of the existence of a financial contribution, which we are addressing here. It is clear from the EC's Final Determination that what was considered by the EC to constitute the financial contribution was the KEIC Guarantee. As the provision of a guarantee of this sort involves a potential direct transfer of funds, we consider that this Guarantee constituted a financial contribution in the sense of Article 1.1(a)(1)(i) of the *SCM Agreement*. Given that the KEIC was found to be a public body, we consider there was no further need for an additional finding of entrustment or direction by government to the KEIC to provide the guarantee. Therefore, we consider that the EC's finding that the KEIC provided a financial contribution to Hynix was not inconsistent with Article 1.1(a) of the *SCM Agreement*.

(iv) KDB Debenture Programme

7.88 A third programme found to constitute a subsidy by Korea was the KDB Debenture Programme to which Hynix was admitted on 4 January 2001. This was a programme which essentially lasted for one year (2001) and was set-up by the government in response to financial instability in Korea caused by the fact that a large amount of bonds issued by a few companies (including Hynix) were due to mature simultaneously. Under this Programme, maturing debt was rolled-over and re-packaged for investors. A participating company repayed on its own 20 per cent of its corporate bonds falling due and the KDB assumed the remaining 80 per cent. This constituted the first phase of the programme. Of the 80 per cent originally assumed by the KDB, 20 per cent of the bonds was then sold to the company's creditor banks in proportion to their debt exposure to the company; 70 per cent was re-packaged for sale to investors as collateralised bond obligations ("CBOs") and/or collateralised loan obligations ("CLOs"), guaranteed by the Korea Credit Guarantee

[86] Final Determination, para. 42; Preliminary Determination, para. 32.

Fund ("KCGF");[87] and the KDB retained the remaining 10 per cent. The participating company had to repurchase at least 3 per cent of any CBOs and 5 per cent of any CLOs.[88]

7.89 We note that companies were placed in the Programme upon nomination by the main creditor bank, and needed the approval by the Creditors Financial Institutions Council ("CFIC"), based on an assessment of the company's financial future. The CFIC consisted of representatives of the KCGF, the KDB and seventeen other creditor banks.[89] The CFIC ultimately decided on participation in the programme. If banks holding 75 per cent of the loans of the company agreed to the participation of the company in the Programme, the CFIC considered the decision unanimous. To be placed in the Programme, companies had to be able to repay 20 per cent of their maturing bonds; normalise business operations through a rescue plan; have credit ratings below A but higher than BB; and agree to any change in majority shareholdings requested by their creditor banks, or to the replacement of management in case of insolvency. Hynix was admitted to the programme on 4 January 2001 with a credit rating of BBB-. In total six companies were admitted; four of which, including Hynix, belonged to the Hyundai group.[90] The EC found that the bond purchase by the KDB as part of this programme constituted a financial contribution by the government which conferred a benefit on Hynix.

7.90 The EC found that the KDB was a public body. It considered that the KDB was not only 100 per cent government-owned, but also entrusted with a specific public policy role which obliged it to carry out policies normally followed by the government, as defined in the KDB Act. Since, under the KDB Debenture Programme, the KDB first purchased all the maturing bonds before refinancing most of them, the EC concluded that this purchase of corporate bonds constituted a financial contribution – direct transfer of funds – by a public body.[91]

7.91 We note that Korea does not contest the EC determination of the KDB as a public body. Nor does it appear to contest that the purchase of corporate bonds constitutes a direct transfer of funds and thus a financial contribution in the sense of Article 1.1(a)(1)(i) of the *SCM Agreement*. However, Korea argues that numerous creditors other than the KDB were also involved and that the EC did not establish entrustment or direction with regard to these creditors.[92] We are of the view that this is not a relevant consideration as it was the public body KDB which first provided a direct transfer of funds to Hynix by purchasing 80 per cent of Hynix corporate bonds. This is the financial contribution that went to Hynix and this is the financial contribution that the EC found to have been provided to Hynix. Whether or not the full cost of this financial contribution was borne by the public body KDB is not relevant in determining the existence of the financial contribution. We therefore consider that there was no need for the EC to establish that other banks that participated in the Programme and that purchased bonds were entrusted or directed by the government to do so.

7.92 Neither do we consider relevant the fact that the programme did not involve the provision of any new funds, but merely a refinancing of existing bonds, as argued by Korea. Article 1.1(a)(1)(i) of the *SCM Agreement* provides that there is a financial contribution where a government practice involves a direct transfer of funds, such as in the case of a grant, loan and equity infusion for example. The purchase of corporate bonds is such a direct transfer of funds, and therefore constitutes a financial contribution. Finally, we are of the view that Korea's argument that the creditors' decision to enrol

[87] The CBO's and CLO's are asset backed securities that are sold to investment trusts.

[88] Preliminary Determination, paras. 47-48.

[89] *Id.*, para. 49.

[90] *Id.*, paras. 49-52. The EC states that the budget for the programme was KRW 6.2 trillion, of which KRW 2.9 trillion was ear-marked for Hynix; eventual expenditure being KRW 2.9 trillion of which KRW 1.2 trillion (41 per cent) for Hynix and 38 per cent was used for the other three Hyundai companies.

[91] *Id.*, para. 59. According to the EC, of the total programme budget of 2.9 KRW trillion, 1.2 trillion (41 per cent) was used for purchasing Hynix bonds, of which Hynix paid back KRW 280.4 billion under the conditions of the programme, thus receiving a financial contribution of KRW 919.6 billion.

[92] Korea First Written Submission, para. 455.

Hynix in the KDB Debenture Programme was based on commercial considerations is not relevant in determining the existence of a financial contribution by a public body in the sense of the *SCM Agreement*.

7.93 In our view, the EC determination that the purchase of corporate bonds by a public body such as the KDB was a financial contribution was consistent with Article 1.1(a) of the *SCM Agreement*.

(v) May 2001 Restructuring Programme

7.94 The fourth programme on which the EC based its subsidy determination is the May 2001 Restructuring and the convertible bonds ("CBs") purchase, in particular. In March 2001, seventeen Hynix creditor banks set up the Creditors Financial Institution Council ("CFIC"), and, in April 2001, Hynix' s financial advisor, SSB, prepared a further recapitalisation plan for Hynix. In May 2001, three measures were agreed: an injection of fresh capital into Hynix through the offering of KRW 1.3 trillion of global depositary receipts ("GDRs"); an extension of the maturities of short and long-term debt (a debt roll-over); and the purchase by the creditor banks of CBs worth KRW 1 trillion. The creditors agreed to support this financial restructuring on the condition that the GDRs offering in the international capital markets would be successful. If not, the roll-over of maturities would be cancelled and the CBs re-purchased by Hynix. In addition, the funds received from the CBs issuance had to be maintained in an escrow account and could only be used for the repayment of corporate bonds maturing in the first half of 2002. In mid-June 2001, Hynix raised USD 1.25 billion in the GDRs offering and, on 20 June 2001, as agreed, the creditor banks purchased the CBs in proportion to their debt exposure on 30 November 2000, and short and long term debt was rolled-over for between 1 to 4 years.[93] The EC countervailed the CBs purchase which it found to be a financial contribution by the government which conferred a benefit on Hynix.

7.95 In the Final Determination, the EC concludes that the creditor banks that participated in the May 2001 Restructuring Programme were directed by the government to buy the bonds, and their CBs purchase thus constituted a financial contribution. In reaching this conclusion, the EC emphasises the importance of the fact that essential information concerning the presence of Financial Supervisory Service ("FSS")[94] and FSC officials at the 10 March Creditors' Council meeting was withheld from the EC authorities in spite of explicit requests to make known any government involvement in the restructuring and any government participation in meetings of the creditor banks. This un-cooperative behaviour, combined with the fact that the official of the FSC was not just anybody but its vice-chairman, led the EC to the conclusion that the creditor banks were directed to participate in the May 2001 Restructuring Programme and to purchase the CBs.[95]

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[93] Preliminary Determination, paras. 40-41.

[94] The FSS is a public agency whose main task is to carry out financial supervision under the FSC's guidance. The EC considered the FSS to be a public body. (Final Determination, para. 40)

[95] In its Final Determination, the EC stated its conclusion in the following manner:

> "(94) Following the disclosure of this information to the interested parties, the parties admitted that an FSS official was present in one meeting and that subsequent contacts between FSC/FSS and the banks took place. It was explained that the FSS official was only present as an observer to act as a witness for the creditors' prior commitments of funding, and not to influence the creditor banks or their decision to extend further credits to Hyundai companies. It was also explained that the "follow-up phone calls" with the FSS/FSC officials and the creditor banks were only conducted in the exercise of the normal prudential supervisory role of the FSC/FSS. However, considering that the parties have been withholding important information until confronted with it and impeding the investigation by instructing other parties not to cooperate, it is difficult to find these explanations fully convincing. In addition, information on the record indicates that the official attending the meeting of 10 March 2001 was the FSC Vice Chairman, i.e. a high-ranking official. In these circumstances, pursuant to Article 28 of the basic Regulation which allows the conclusions to be based on best facts

7.96 The question before us is thus whether the EC drew a reasonable and reasoned conclusion on the basis of the facts before it when it found that the creditor banks that purchased such bonds were directed to do so by the government. The answer to that question will determine whether the EC's finding that the purchase of CBs worth KRW 1 trillion by the creditor banks constituted a financial contribution by the government was consistent with Article 1.1(a) of the *SCM Agreement*. We recall that, in our view, a financial contribution exists in case a direct or potential direct transfer of funds, such as the purchase of CBs, is made by the government or a public body, as well as in the case where this is done by the government entrusting or directing a private body to provide such funds. In so far as there are banks whose status as a public body is not contested and which took part in the May 2001 Restructuring Programme, we are of the view that there would be no need for an additional finding that these banks had been entrusted or directed by the government to participate. However, and with regard to the private banks' participation, an investigating authority will only be able to find a financial contribution by the government if it has established that such private bodies were entrusted or directed by the government to purchase the CBs.

7.97 We note that, in the Preliminary Determination, the EC considered that there was not sufficient evidence to conclude that it was commercially unreasonable for the banks to participate in the May 2001 Restructuring Programme.[96] In the Final Determination, however, the EC considered that this conclusion had to be reconsidered in light of new information from secondary sources, including press articles that contacts had taken place between the banks and government officials of the FSC/FSS. As the EC states in its Final Determination:

> "[t]he parties failed to rebut this new information. In fact, both of them admitted expressly that the FSS representatives were indeed present in the meeting of 10 March 2001 and had contacts with the banks in the context of these measures, as indicated by the new information."[97]

7.98 While the parties argued about the possible role of press reports as evidence, it appears to us, that the facts are not contested: FSS/FSC officials had contact with the banks in March to May 2001, and FSS/FSC officials, among which the FSC vice-chairman, were present during the 10 March creditors' meeting. One press article relied on by the EC concluded that the March meeting was held to get the banks to support the Hyundai group, and that government officials persuaded the reluctant banks to provide support to Hynix. The press reports thus revealed a set of facts which was later confirmed by the parties, and their value as a source of information is thus not an issue. We are of the view that a distinction should be made between the facts described in the press reports and the journalistic colouring of these facts. While we do not reject press reports as a source of evidence, we are of the view that the investigating authority should be very careful about attaching too much weight to unverified statements in press reports. The characterisation of the events by the press reports, without supporting evidence, is in other words not particularly probative in a trade remedy investigation. In our view, while the government officials' presence may show the interest the government took in the survival of Hynix, this is not sufficient to conclude that the government delegated this task of rescuing Hynix to private banks or ordered them to do so.

7.99 It appears that, when the EC confronted the parties with this new information, and with the various press reports, the interested parties to the investigation explained that the FSC/FSS official was present at the meeting as an observer to act as a witness for the creditors' prior commitments of

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> available in cases of non-cooperation by the parties, **it is concluded that the banks were not freely and independently deciding on the issue of the CB purchase on the basis of commercial considerations, but were directed to buy the bonds by the GOK**. The information from the secondary sources referred to above supports this conclusion."(emphasis added)

[96] Preliminary Determination, paras. 42-45.
[97] Final Determination, para. 84.

funding, and not to influence the creditor banks or their decision to extend further credits to Hyundai companies.[98] They further indicated that the follow-up phone calls with the FSC/FSS officials and the creditor banks were only conducted in the exercise of the normal prudential supervisory role of the FSC/FSS.[99] The EC considers that, in light of the fact that this information was withheld from the authorities and that the FSS official present at the meeting was its vice-chairman, this explanation is "hardly convincing". According to the EC, "the banks were not freely and independently deciding on the issue of the CB purchase on the basis of commercial considerations, but were directed to buy the bonds by the GOK."[100]

7.100 The EC considered important, in the evaluation of the evidence concerning the presence of the government officials, the fact that this information was not provided by the parties concerned, but was discovered only through press reports. While it is clear that the investigating authority enjoys a wide discretionary authority in weighing the evidence before it, we consider that an authority cannot, in the absence of other supporting information, simply assume that, in case certain information was not provided, the information is necessarily incriminating or that the investigating authority is justified in reading the information in the most negative light. In our view, there is a clear difference between the situation with regard to the May 2001 Restructuring Programme and the earlier discussed Syndicated Loan. In the Syndicated Loan, we considered that the EC was justified when assessing the letter as a critical piece of evidence to take into account the fact that this letter was withheld form the investigating authority. In the case of the Syndicated Loan, the non-cooperation was an additional element that entitled the authority to read the direct evidence in a certain light. In the case of the May 2001 Restructuring, however, as we will discuss below, we find that the facts on the record do not, as such, seem to support the EC's reading that the government was directing the eighteen creditor banks to purchase the CBs. In such circumstances, the mere fact that the information was not provided when requested, is not sufficient to reach a conclusion which is not sufficiently supported by the facts on the record. This is why in this case we do not find that the non-cooperation was sufficient to tilt the balance in favour of the EC's conclusion of government direction. In this case, the EC rejected the explanation given by Korea and some of the banks involved in the March meeting of the presence of the FSS officials, without any further adequate explanation, mainly because the presence of the government officials was not revealed by Korea, when pertinent questions were put to it by the investigating authority. In our view, the fact that such information was not provided may be a factor in the overall assessment of the evidence but it is not, in our view, sufficient to relieve the authority of demonstrating direction or entrustment where this is required for a finding of a financial contribution by the government.

7.101 Moreover, the fact that an important FSC/FSS official was present at the meeting is certainly relevant, but in our view cannot be considered to be determinative of government entrustment or direction. It may be instructive as to the importance of Hynix or reveal the interest of the Korean government in Hynix, but it is, in our view, insufficient as a basis for the conclusion that this government interest went beyond that and that the government was actually entrusting or directing the private creditors to invest in Hynix.

7.102 As we explained earlier, the terms "entrust or direct" refer to the government using the private bodies as the instrument through which the government is providing a financial contribution, either by giving the private body a command or by delegating a task to the private body which involves a financial contribution. We consider that the maximum one can conclude from this high ranking government official's presence is that the private bodies may have felt that the government was interested in seeing the creditor banks reach agreement to rescue Hynix, and that the government would also be doing what it could to achieve that goal by acting through its public bodies for example. This, however, is not the same as the government *entrusting or directing* the banks to accept the terms

[98] *Id.*, para. 94.
[99] *Ibid.*
[100] *Ibid*.

of the May 2001 Restructuring Programme.[101] In a similar vein, we read the press reports that financial support to Hynix, and acceptance of the CBs by the reluctant banks, became more likely after the request by Hynix's financial advisor Citibank for financial support from the government for Hynix and the positive position expressed by the FSC chairman, as an indication that the general government interest in Hynix may have *facilitated* the restructuring.[102]

7.103 We do not wish to imply that this information is therefore irrelevant, simply that it is not enough, in and of itself. We will therefore now examine the remainder of the evidence the EC relied on in reaching its conclusion that the creditor banks were directed by the government to buy the bonds. On the basis of the Final Determination, we consider that the EC based its conclusion on the following additional arguments.[103] First, the EC argues that the "totality of the facts" reveals that the government had been directing banks and other institutions since November 2000 to take measures in order to alleviate the liquidity problems of Hynix and to promote the electronics industry policy.[104] We found earlier in our Report that with regard to the Syndicated Loan, the KEIC Guarantee and the KDB Debenture Programme, the financial contributions provided, were mainly those provided by *public bodies*, while the May 2001 Restructuring Programme raises the question of alleged *entrustment or direction* by the government of *private bodies*. While we considered consistent with the *SCM Agreement* the EC's determination that the KEB, a private body, had been directed by the government to participate in the Syndicated Loan, we fail to see how evidence relating to what happened in December 2000 can support the specific finding that in May 2001 the creditor banks were directed to buy bonds.

7.104 The EC also relies on the argument that the information on the record shows that creditors had no commercial reasons in June 2001 to purchase KRW 1 trillion worth of CBs from Hynix. According to the EC, the banks acknowledged the inability of Hynix to service its debts already at the beginning of May 2001, in the 7 May 2001 CFIC resolution. According to the EC, several banks also increased their loss provisions with respect to Hynix debt.[105] In addition, the EC points to the sharply declining Hynix stock price between mid-June and 20 June 2001, when the banks purchased the CBs, and the fact that the banks reported certain portions of the acceptance price of Hynix CBs as losses in settling their accounts at the end of June 2001.

7.105 We wish to note that we do not share Korea's view that the commercial reasonableness of a private body's actions is a matter which relates only to the question of benefit and cannot be used as evidence of government entrustment or direction. In our view, entrustment or direction can be demonstrated by all means of evidence as long as the overall conclusion is reasonable and adequately explained. In the absence of a clear and explicit government order, the evidence to be relied on will inevitably be circumstantial. The fact that private parties act in a strange or not commercially reasonable manner can form part of the proof that someone was requiring these private parties to act in this abnormal way. Such evidence of non-commercial behaviour is, however, not enough to establish government entrustment or direction.

7.106 In our view, the information the EC is pointing to certainly reveals the less than rosy state of affairs for Hynix, but it fails to support a finding of entrustment or direction with regard to the private bodies participating in the May 2001 Restructuring Programme. The banks were obviously well-aware that their investment in Hynix was very risky and that it could well go terribly wrong. But we do not consider that the situation was such that one can reasonably conclude from this that the only explanation for the banks' participation was that they were directed by the government to buy Hynix

[101] As we will discuss later, it may have an impact on the use of the creditor banks as market benchmarks in determining the existence of benefit.
[102] Final Determination, para. 91.
[103] *Id.*, paras. 81-98.
[104] *Id.*, para. 86.
[105] *Id.*, paras. 88-89.

bonds in June 2001. Moreover, some of the elements mentioned by the EC are not informative of the situation in May 2001 when the banks committed themselves to purchasing Hynix bonds. For example, of the banks mentioned[106] to have increased their loan loss provisions with respect to Hynix debt, only one bank, Shinhan Bank, had actually done this at the time of the May 2001 Restructuring Programme. We fail to see how a similar action taken by certain banks in late September 2001 and late October 2001 can be relevant in assessing the commercial reasonableness of a decision taken in May 2001. In a similar vein, the fact that stock prices were going down between mid-June and 20 June 2001 when the banks purchased their CBs and that they continued to go down thereafter is hardly informative of the situation in May 2001 when the decision to participate was taken by the banks in question. The purchase of the CBs on 20 June 2001 was only the execution of a commitment taken well before that date.

7.107 In addition, we note that the EC's analysis of the financial situation of the DRAMs industry in the Preliminary Determination seems to contradict the very negative situation it is portraying in the Final Determination. As the EC noted in the Preliminary Determination, DRAMs prices were going up again in March 2001 at the time the SSB report was made, which would become the basis for the May 2001 Restructuring Programme. The SSB forecast indicated that the DRAMs market would recover in the third quarter of 2001 so that the equity infusion and the extension of maturities would be sufficient to help Hynix to overcome its liquidity crisis. It further stated that the credit rating of Hynix at the time of the measures was set at BB+ by Korean rating agencies and B- by international ones.[107] While these are clearly not good ratings, they are not such as to make investment decisions automatically suspicious or extraordinary. Moreover, and this we find particularly relevant, the banks made their participation in the measures conditional upon the success of the GDRs issuance, which was successfully carried out by 15 June 2001. It was only thereafter that the banks executed the remainder of the SSB re-capitalisation plan, and purchased the CBs.[108] In sum, we do not find reasonable the conclusion that the only possible explanation for the banks' participation in the May 2001 Restructuring Programme was government direction.

7.108 Finally, the EC refers in support of its conclusion of direction by Korea of the eighteen banks participating in the May 2001 Restructuring Programme to the press allegations of government pressure exercised on one bank, the KorAm Bank. The press report suggests that the FSS threatened the KorAm Bank into participating, which it finally did.[109] According to the KorAm Bank itself, it was simply waiting for a memorandum to be delivered by Hynix pledging to make its best efforts to reduce its debt. The KorAm Bank went ahead with the CBs purchase as soon as it received this memorandum. In the absence of any additional supporting material and in light of the uncontested fact that the KorAm Bank indeed only participated after having received the memorandum, we consider that allegations in a press article are insufficient as a basis for a conclusion of direction by the government of the KorAm Bank to purchase Hynix bonds. Moreover, and even assuming, *arguendo*, that this press report would demonstrate government direction of the KorAm Bank, we consider that evidence of one bank having been directed to participate does not, without any

[106] These banks are mentioned in footnote 1 to para. 89 of the Final Determination.

[107] Preliminary Determination, para. 43.

[108] In para. 44 of the the Preliminary Determination, the EC came to the following conclusion:

> "[u]nder these circumstances, the behaviour of the banks is considered to be equal to that of other market investors who invested in Hynix GDR's at the same time. However there is some evidence in the records that indicate that the investor's interest to invest in Hynix GDR's at the time might have been influenced by the belief that the GOK would ultimately make sure that Hynix does not default on bonds and loans. The Commission however has no indication that there was an actual GOK guarantee granted for the bonds in question."

[109] According to the press report, the FSS stated that it would not forgive the bank if it did not participate, adding that it would take stern measures against the bank, such as disapproving new financial instruments and subjecting the bank to a tighter audit. (Final Determination, para. 92. Korea Times, 21 June 2001; Dow Jones International News 20 June 2001)

additional supporting evidence, provide sufficient support for a finding that the totality of the CBs purchase in which seventeen other banks participated was a government-directed financial contribution.

7.109 We wish to add, by way of conclusion, that we are not blind to the problems of evidence gathering in countervail investigations, and do not want to be seen as requiring an investigating authority to come up with the smoking gun in the sense of a written order by the government to a private body to provide a financial contribution. We understand that, in most cases, the authority will have to base its decision on a number of arguments and pieces of evidence which perhaps when considered in combination may all point in the direction of government entrustment or direction, especially in cases where the level of cooperation by the interested parties is low. However, practical evidence gathering problems are not an overriding justification for finding that financial contributions by private bodies meet the entrustment or direction standard set by the *SCM Agreement.* Nor should such problems create the impression that an authority is entitled to assume a lot from very little. If the overall picture is such, however, that it is reasonable to conclude that the government entrusted or directed the private body to do something which involves a financial contribution, then its determination is consistent with the *SCM Agreement*. While the May 2001 Restructuring Programme is a close case, we consider that the evidence before the investigating authority was insufficient to reasonably conclude that the government entrusted or directed the private banks to purchase the Hynix CBs.[110]

7.110 In sum, we find that the EC's determination that the creditor banks were directed to participate in the May 2001 Restructuring programme and that their purchase of KRW 1 trillion of CBs as part of that Programme therefore constitutes a financial contribution by the government was not consistent with Article 1.1(a) of the *SCM Agreement*.

(vi) October 2001 Restructuring Programme

7.111 The fifth and final programme considered to constitute a subsidy was the October 2001 Restructuring Programme. On 4 October 2001, a second Hynix CFIC was set up in accordance with the provisions of the Corporate Restructuring Promotion Act ("CRPA"). The CRPA was enacted in August 2001 and its purpose was to facilitate corporate restructuring, which before was based on agreements between creditor banks and the companies concerned. The CFIC consisted of a hundred and ten financial institutions including seventeen banks and fifteen investment trust companies. The decisions of the CFIC were taken by a 75 per cent majority. The votes were allocated in proportion of each institution's exposure to the total loans to Hynix. Any financial institution exercising its dissenter's rights by disagreeing with a CFIC resolution would be excluded from the CFIC permanently. In its second meeting held on 31 October 2001, the CFIC decided on a "second restructuring package" for Hynix. The following measures were proposed:

(a) provision of new loan of KRW 1 trillion to Hynix with an interest rate of 7 per cent;

(b) debt to equity swap by provision of bonds convertible into shares;

(c) extending the maturities of existing loans until 31 December 2004, converting the maturing corporate bonds into corporate bonds with a three year maturity and an

[110] If, for example, evidence on the record demonstrated (akin to the evidence in the Syndicated Loan programme) that the FSC/FSS vice-chairman had essentially pressured the banks to pledge, then non-cooperation by Korea could, in our view, have sufficed to tilt the balance in favour of the reasonableness of the EC's determination as to the May 2001 Restructuring Programme. However, mere speculation that the vice-chairman's presence turned the March meeting into a pledging session does not, in our view, suffice to justify the EC's determination.

interest rate of 6.5 per cent and adjusting the interest rate of the remaining loans in Korean currency to 6 per cent.

7.112 The financial institutions were given three options by the CFIC in the 31 October meeting. The first option was to agree with the proposals by extending new credit and participating in a debt-to-equity swap ("Option 1"). Secondly, the banks which did not want to participate in the new loan were obliged to swap 28.5 per cent of their loans into equity and waive the rest of the Hynix debt ("Option 2"). Thirdly, the CFIC also decided that those banks which objected to the measures and used their dissenter's rights would have their loans purchased back at the liquidation value as established by Arthur Andersen, the firm that was commissioned to conduct a study on the financial situation of Hynix at the time ("Option 3").

7.113 Nevertheless, only six banks agreed to extend new credit, which amounted to KRW 658 billion instead of the planned KRW 1 trillion. These banks swapped a considerable amount of their loans into equity. These so-called Option 1 banks were the KEB, Woori Bank, Chohung Bank, KDB, NACF and Citibank.[111] Eight banks refused to extend new loans, so they swapped approximately one-third of their loans into equity and wrote-off the rest as a loss. The remaining banks objected to the restructuring and elected to receive the liquidation value of their loans, and had to write the remaining debt off as a loss. The loans remaining with the banks of the first category were subject to maturity extensions and interest rate cuts as explained above.[112] The EC considered that the participation by the six Option 1 banks in the October 2001 Restructuring Programme constituted a financial contribution by the government which conferred a benefit on Hynix. The rate of subsidization for this October 2001 Restructuring Programme was calculated to be 19.4 per cent.

7.114 In the Final Determination, the EC determined that the Option 1 banks were either public bodies or entrusted or directed by the government to participate in the October 2001 Restructuring Programme.[113] The EC came to the conclusion that no market investor would have invested in Hynix in October 2001. The EC put particular emphasis on the seriously deteriorating situation of Hynix from June 2001 onwards.[114] From June 2001 to August 2001, 128 megabit DRAMs prices fell on average by 68 per cent and continued to fall by a further 52 per cent by November 2001, with similar developments for 64 megabit DRAMs prices.[115] Hynix stock prices collapsed almost immediately after the 15 June 2001 GDRs issuance, and, by 6 September 2001, the price of GDRs had fallen by 72 per cent resulting in great losses for the purchasers.[116] According to the EC, these developments were recognised by the Hynix creditor banks as they downgraded the credit rating for Hynix and for the semiconductor industry in general during 2001.[117] Standard & Poor downgraded Hynix to CC in September and SD (selective default) in October 2001.[118] In October 2001, the debts of Hynix were six times greater than its equity.[119] Hynix was, according to the EC, virtually bankrupt.[120] Therefore, the EC considered that the six Option 1 banks which extended new loans to Hynix, extended the maturities of the existing loans, and held a great amount of Hynix shares, did not behave in a

[111] Preliminary Determination, para. 77. The KDB did not participate in the new loan of KRW 658 billion.

[112] *Id.*, paras. 69-71.

[113] Final Determination, paras. 120-135; Preliminary Determination, para. 99. Only the financing by the Option 1 banks was treated as a subsidy and, consequently, countervailed. In order to avoid double-counting, where earlier subsidies were effectively subsumed within the October 2001 Restructuring Programme, only one countervailing duty was imposed.

[114] Final Determination, paras. 101-112.

[115] Preliminary Determination, para. 73.

[116] *Id.*, para. 74.

[117] The six Option 1 banks rated Hynix internally from "precautionary" to "doubtful". (Final Determination, para. 104)

[118] Final Determination, para. 103; Preliminary Determination, para. 75.

[119] Final Determination, para. 106.

[120] Preliminary Determination, para. 76.

commercially reasonable manner. The EC went on to examine whether the apparently non-commercial behaviour of the six Option 1 banks was due to the involvement of the government in the banks concerned.[121] Before conducting a bank-by-bank analysis, the EC pointed to the fact that, of the nine banks which stopped financing Hynix in October 2001, seven were private banks, while of the six Option 1 banks, the four largest creditors were either totally or by a large majority owned by the government.[122] It added that one of them was a special bank with a public policy role and that three others were under government control due to the fact that they were themselves under restructuring, had agreements with the government regulating their business operations and received capital injections from the government.[123] The EC further concluded that the KDB was a public body.[124]

7.115 The Final Determination also addresses the argument made by parties that certain banks, in spite of being government-owned, did not take part in Option 1 of the October 2001 Restructuring Programme. Korea argued that this fact contradicts the EC's conclusion, based to a large extent on government shareholding power, that the six Option 1 banks were directed by the Korea to participate. In the Final Determination, the EC explains that, of the four government-owned banks that did not participate in Option 1 (*i.e.*, government-owned Option 3 banks), two – the Kwangju Bank and the Kyongam Bank – were to be merged with Woori Bank that *did* take part. Similarly, a third one – the Seoul Bank – was going to be sold to Hana Bank following the IMF's recommendations. As for the fourth, the Industrial Bank of Korea ("IBK"), the EC considers that to force it to participate again would be such an obvious breach of IBK's mandate as a specialized bank for SME's that it was better not to.[125]

7.116 We recall that, under Article 1.1(a)(1) of the *SCM Agreement*, when a financial contribution is provided by a public body, there is no need for an additional finding of "entrustment or direction" by the government. The EC found the KDB to be a public body and its participation in the October 2001 Restructuring Programme by, *inter alia*, extending new loans was considered to be a financial contribution in the sense of the *SCM Agreement*.[126] Korea does not object to the EC's determination that the KDB is a public body. In this respect, we find that Korea has not made a *prima facie* case that the EC's finding that the KDB provided a financial contribution to Hynix was inconsistent with Article 1.1(a) of the *SCM Agreement*.

7.117 With respect to the five other banks which the EC considered not to be public bodies, we will examine whether the EC made reasonable and reasoned conclusions on the basis of the facts before it that these banks were directed by Korea to carry out the measures in question.[127]

Woori Bank

7.118 In its bank-by-bank analysis, the EC asserts that Woori Bank was aware of the gloomy financial state of Hynix and took part on the basis of public policy considerations, which are not commercial and can only be explained by the government using its 100 per cent shareholder status to influence decisions.[128]

7.119 It is not contested that Woori Bank was 100 per cent government-owned via the Korea Deposit Insurance Corporation ("KDIC") since late 2000. The EC did not consider Woori Bank to be

[121] *Ibid*.
[122] *Id.*, para. 79.
[123] *Ibid*.
[124] Final Determination, para. 120.
[125] *Id.*, paras. 134-135.
[126] *Id.*, para. 120.
[127] *Ibid*.
[128] *Id.*, para. 129; Preliminary Determination, para. 88.

a public body.[129] This implies that, in order for a loan by this bank to be considered a financial contribution in the sense of Article 1.1(a)(1) of the *SCM Agreement*, the EC was required to establish that the government entrusted or directed the bank to provide the financial contribution in question. In our view, even if an investigating authority decides that such 100 per cent government ownership is not sufficient to qualify an entity as a public body, the extent of government ownership still remains a very relevant factor in the evaluation of the evidence concerning possible entrustment or direction by the government. It is clear that, as the sole shareholder, it is easier for the government to direct the bank to act in a certain manner than in a situation of no or only minor government involvement. At the same time, it should be clear that, in our view, government ownership, in and of itself, is not sufficient to establish entrustment or direction under Article 1.1(a)(1) of the *SCM Agreement*. We consider that Article 1.1(a)(1) of the *SCM Agreement* is clear: either a financial contribution is provided by the government or a public body, or it is provided by a private body, in which case it will be covered by the *SCM Agreement* only in case this private body acted under the direction or the entrustment of the government to behave in this manner, in which case the private body's action may be attributed to the government, and the *SCM Agreement* applies.

7.120 In the case of a 100 per cent government-owned bank, such as Woori Bank, it thus needs to be demonstrated that the government *actually exercised* its shareholder power to direct the bank to support to Hynix. In light of our standard of review, we will therefore examine whether on the basis of all the facts before it, the investigating authority made a reasonable and reasoned conclusion when it found that Korea directed Woori Bank to participate in the October 2001 Restructuring Programme.

7.121 The record of the investigation shows that Woori Bank participated as an Option 1 bank in the October 2001 Restructuring Programme, *inter alia*, on the basis of public policy considerations, referring to the impact on the national economy of Hynix going bankrupt. While we agree with Korea that important national banks such as Woori Bank may well take into account the broader picture rather than pursuing a pure strategy of profit maximization, we do not agree that this consideration is irrelevant.

7.122 We further find highly relevant in the assessment of the evidence before the EC, the seriously deteriorated situation of Hynix in October 2001 compared with the situation of Hynix at the time the creditor banks agreed on the May 2001 Restructuring Programme. We recall that the uncontested figures mentioned in the Preliminary and Final Determination show that, between June 2001 and August 2001, 128 megabit DRAMs prices fell on average by 68 per cent and continued to fall by a further 52 per cent by November 2001, with similar developments for 64 megabit DRAMs prices.[130] Hynix stock prices collapsed almost immediately after the 15 June 2001 GDRs issuance, and, by 6 September 2001, the price of GDRs had fallen by 72 per cent resulting in great losses for the purchasers.[131] According to the EC, these developments were recognised also by the Hynix creditor banks as they downgraded the credit rating of Hynix and for the semiconductor industry in general during 2001. Standard & Poor downgraded Hynix to CC in September and SD in October 2001.[132] Korea does not contest the accuracy of this account of events. In our view, these developments are very relevant in evaluating the behaviour of these non-public bodies.

[129] We do not wish to imply that it would not be possible or justified to treat a 100 per cent government owned entity as a public body, depending on the circumstances. Our task, however, is to review the determination actually made by the EC, not to make our own *de novo* interpretation of the facts in this case. Since the EC considered Woori Bank to be a private body, we will examine the question of entrustment or direction by the government with regard to Woori Bank. A similar consideration applies to our discussion and analysis of Chohung Bank and the KEB in which the government of Korea held 80 per cent and 43 per cent of the shares, respectively, at the time of the investigation.

[130] Preliminary Determination, para. 73.

[131] *Id.*, para. 74.

[132] *Id.*, para. 75.

7.123 Another important difference between the May 2001 Restructuring Programme and the October 2001 Restructuring Programme is, in our view, the fact that the second Hynix creditors' council – the CFIC – was set up in October 2001, in accordance with the CRPA. The CRPA was enacted in August 2001 with the purpose of facilitating corporate restructuring through a majority voting procedure. Before, such restructuring was based on individual private agreements between creditor banks and the distressed companies. In our view, this difference indicates that the May 2001 Restructuring Programme took place under an informal approach that allowed small dissenting creditor banks the option of not participating in the re-financing programme. By the time of the October 2001 Restructuring Programme, a government-driven policy considerably circumscribed the options of dissenting creditors.

7.124 Korea argues that the MOU between Woori Bank and the government is irrelevant for October 2001 Restructuring Programme and, in any case, only provided general prudential rules for Woori Bank as the recipient of public funds.[133] We first wish to note that we do not consider that the MOU between Woori Bank and the government formed the basis of the EC's decision of direction by the government with regard to this bank. We note that it is explained in the EC's Preliminary Determination, that in December 2000, Woori Bank concluded an agreement for the implementation of the management improvement plan for the bank in the form of a MOU with the government, which gave the government important powers in case of a failure to implement the plan. A further MOU was entered into with the government in July 2001 to implement a business plan. While these MOUs are not directly relevant to the October 2001 restructuring of Hynix, and did not appear to have formed the basis for the EC's decision, we can see how an investigating authority could reasonably take these MOUs into account as evidence of a possible means for the government to intervene in the daily operations of the bank in question.

7.125 In our view, Korea failed to demonstrate that the EC finding of government direction of Woori Bank in the October 2001 Restructuring Programme was not a reasonable and reasoned conclusion. The EC based its finding on the combination of a 100 per cent government ownership of Woori Bank, the disastrous financial situation of Hynix in October 2001, the recognised public interest considerations in deciding to participate in the Programme, and the fact that the restructuring took place in the framework of a formal government act, the CRPA. We thus reject Korea's claim that the EC finding of a financial contribution with regard to the Woori Bank's participation in the October 2001 Restructuring Programme was inconsistent with Article 1.1(a) of the *SCM Agreement*.

Chohung Bank

7.126 With regard to Chohung Bank, in which the government held 80 per cent of the shares at the time of the investigation, the investigating authority considered that the internal rating did not support the decision to invest in Hynix, and noted that this bank immediately raised its loss reserves after participating in the measures and approved the measures by reference to its MOU with the government. This, in the view of the investigating authority showed that banks under restructuring were restricted in their business decisions to comply with government conditions. According to the EC, it is clear that the government used its 80 per cent shareholder status to influence the decisions.[134] The EC also considered relevant the fact that it found that the government directed Chohung Bank to support Hynix on earlier occasions, in particular in the May 2001 Restructuring Programme.[135]

[133] We note that Korea also argued before us that the EC ignored the fact that in October 2001 there were still two banks (Woori Bank and Peace Bank) which later merged to become Woori Bank and that the EC failed to examine the involvement and alleged government direction of Peace Bank. We consider reasonable the investigating authority's approach in light of the EC's reply that Peace Bank no longer existed at the time of the investigation and that nobody made any arguments about the need to examine Peace Bank at the time of the investigation.

[134] Final Determination, para. 129; Preliminary Determination, para. 89.

[135] Final Determination, para. 129.

7.127 We are of the view that a very similar reasoning as the one developed above with regard to Woori Bank applies to Chohung Bank, in which the government held 80 per cent of the shares.[136] We agree with Korea that shareholding does not equal direction. But, as we stated earlier, it remains a relevant fact which, in combination with other relevant facts, may lead to a conclusion that the power of a majority shareholder may have been used to direct the private body to provide a financial contribution. In this respect, we do not see much of a difference in practical terms between 80 per cent shareholding and 100 per cent shareholding. In both cases, it is clear that, if the government wants to impose a decision on the private bank, its proposed action will not be seriously scrutinized.

7.128 The situation would, of course, be different in case the government, in spite of being a 80 per cent shareholder of a bank would not be able to *de facto* impose its decision on the bank because, for example, a majority of the directors were appointed by the minority shareholders. Korea has argued that Chohung Bank explained to the EC that Korea had no direct or indirect influence on its management activities, and that, in spite of the government ownership of 80 per cent of the shares, it remained a commercial bank that took its decisions on the basis of purely commercial considerations.[137] In particular, Chohung Bank pointed to the fact that all of its directors started their careers in that bank and that Korea thus did not force the Chohung Bank to have directors nominated by the government or any other public body.[138] The career-director argument, however, could equally be cited for the proposition that these were not independent-minded persons, dedicated to the management of Chohung Bank strictly on commercial principles.

7.129 In our view, the amount of shareholding by the government determines the extent to which it can influence the decision-making process set out in company law and the articles of association of the company concerned.[139] Korea has not provided any evidence that the government shareholding power did not allow the government to exercise substantial management power. We thus consider reasonable the conclusion of the EC that this important government shareholding power enabled the government to control and direct the actions of Chohung Bank. As such, this potential direction and control is not, however, sufficient to establish actual direction in the sense of Article 1.1(a)(1)(iv) of the *SCM Agreement*. We therefore examine additional evidence that the EC relied upon in reaching its conclusion.

7.130 The EC refers to the internal rating by Chohung Bank of Hynix as "inappropriate for investment". The EC also notes that the bank immediately raised its loss reserves after participating in the October 2001 Restructuring Programme, and accounted the whole debt-to-equity conversion as a loss. It also refers to the fact that Chohung Bank itself approved the measure by reference to its need to comply with a MOU it signed with the government in November 1999, which was amended in May 2000. Korea argues that the EC ignored the explanations provided by Chohung Bank itself concerning, *inter alia*, the fact that the MOU only concerned the restructuring measures imposed by the government in response to the 1997 financial crisis. Chohung Bank also argued to the investigating authority that, in the Board's meetings held during the POI, there was no mention made of the fact that the government was willing to subsidize Hynix, or that it directed the Chohung Bank to inject funds into Hynix. Rather, Chohung Bank submitted to the investigating authority that the decisions concerning Hynix were taken by three specifically trained teams and following a generally applied procedure.[140] The EC replied to these concerns by simply stating that Chohung Bank did not provide any new evidence in its comments which would alter the Commission's conclusion. It further referred to alleged earlier cases of government direction in respect of the May 2001 Restructuring Programme, the letters to the KEIC and KEB regarding the Syndicated Loan, the FSC lending limit

[136] We refer to our consideration in footnote 129 concerning the nature of this bank as a private body.

[137] Korea First Written Submission, para. 552. Chohung Bank's Comments on the Preliminary Determination of 19 May 2003. (**Exhibit GOK-24**)

[138] Chohung Bank's Comments on the Preliminary Determination of 19 May 2003. (**Exhibit GOK-24**)

[139] Final Determination, para. 121.

[140] Chohung Bank's Comments on the Preliminary Determination of 19 May 2003. (**Exhibit GOK-24**)

waiver and the KEIC Guarantee. We do not consider that such information is highly relevant to the question of possible government direction *of Chohung Bank in October 2001*. As far as the alleged government direction in the May 2001 Restructuring Programme is concerned, we found that there was insufficient evidence to reach a conclusion of direction or entrustment, and thus we also fail to see how that same evidence could somehow confirm or strengthen the EC reasoning with regard to the October 2001 Restructuring Programme.

7.131 What remains, however, is the EC reliance on the disastrous financial state of Hynix at the time the October 2001 Restructuring Programme was agreed on, as explained earlier. In our view, given the deterioration of the situation since May 2001, and taking into account the credit rating for Hynix both from independent sources such as Standard & Poor and internally by Chohung Bank, it seems to us to have been a reasonable conclusion of the EC that the renewed investment in Hynix by Chohung Bank did not correspond with normal commercial behaviour. In combination with the very important amount of government shareholding power, and the absence of any convincing evidence of the commercial reasonableness of such investments, we consider that the EC was acting in a reasonable manner when it concluded that Chohung Bank had been directed by the government to participate in the October 2001 Restructuring Programme of Hynix.

7.132 We therefore reject Korea's claim that the EC's determination of a financial contribution by the Chohung Bank in October 2001 was inconsistent with Article 1.1(a) of the *SCM Agreement*.

KEB

7.133 With respect to the KEB, the EC asserts that the bank's internal rating of Hynix did not justify granting further financing, especially in light of the fact that the KEB was undergoing restructuring itself and should have avoided risky investments. The EC also notes that this bank used to be a specialized government bank and that Korea remained the largest shareholder with 43.17 per cent of the shares. Given the fact that the loans were made available at rates for financially sound companies, and based on the available facts, the EC concluded that Korea must have used its shareholder influence to influence decisions. The EC also refers to the reports disclosing government pressure on the KEB at the time of the Syndicated Loan, supporting the view that as majority shareholder, the government did influence decisions.[141]

7.134 We find relevant the EC's considerations that this bank used to be a specialized government bank and that the government of Korea remains the largest shareholder with 43.17 per cent of the shares.[142] We are of the view, as explained above, that the fact that the government is the largest shareholder of the KEB is an important but not a determinative factor in establishing government direction of private bodies in the sense of Article 1 of the *SCM Agreement*. It is a factor which may be taken into account when assessing all the evidence concerning government direction. The remainder of the evidence relied on by the EC shows that the KEB's internal rating of Hynix was very bad, but that the loans were nevertheless made available at rates for financially sound companies. While Korea argues that Commerzbank, the second largest shareholder of the KEB, controlled the lending practices of the KEB, we find relevant the fact that only four of the twenty directors of the KEB were from Commerzbank, and that the government, as the largest shareholder, was able to influence appointments of the other directors.[143] On this basis, and in light of the particularly negative

[141] Final Determination, para. 126; Preliminary Determination, para. 91.

[142] We refer to our consideration in footnote 129 concerning the nature of this bank as a private body.

[143] The EC also relied on the letters concerning the results of the Ministers meeting of 28 November 2001, which were discovered following the Preliminary Determination and had been withheld by the parties concerned. The EC asserts that, through these letters, the government on this earlier occasion had already directed the KEB to act in a certain manner, which thus confirms its view that Korea was able to use its majority shareholder power to direct the KEB. As we discussed earlier, we do not find unreasonable this conclusion. In any case, and, at the very least, the letter could reasonably be considered as evidence of the government's power to direct the KEB to request a lending limit waiver.

financial state of Hynix in October 2001, we consider reasonable the EC conclusion that the government must have been using its shareholder power to influence decisions.[144] We wish to emphasize that we consider particularly relevant the precarious financial state of Hynix at the time of the October 2001 Restructuring Programme, which was different from the situation that existed at the time of the May 2001 Restructuring Programme. In our view, the combination of important government control and the extremely negative financial state of Hynix justifies, in the absence of strong evidence to the contrary, the reasonable conclusion by the EC of the actual exercise of government control to direct the bank to participate in the October 2001 Restructuring Programme, and to provide a financial contribution.

7.135 We therefore reject Korea's claim that the EC's finding of a financial contribution by the government with regard to the KEB was inconsistent with Article 1.1(a) of the *SCM Agreement*.

NACF

7.136 The EC considered the NACF to be a body which carries out an economic policy of supporting the agricultural sector. It adds that the NACF had an underwriting from the government of the losses incurred resulting from its activities, and that the NACF's internal rating for Hynix did not justify further financing, and certainly not at interest rates below market rates. In sum, according to the EC, there can be no other explanation for the non-commercial behaviour than the government direction.[145]

7.137 We recall that it is not contested that the NACF is a body which carries out an economic policy of supporting the agricultural sector, and is jointly managed by the Ministry of Economy and Finance and the Ministry of Agriculture and Forestry, and has specialized functions as an agricultural policy bank, such as implementation of Korea's agricultural policy. We note that the EC argued before us that, for that reason, the NACF was to be considered as a public body. It seems, however, that at the time of the investigation, the EC did not consider the NACF to have this public body status. While it is clear that the NACF was not acting in its agricultural role when investing in Hynix, we do not agree with Korea that, for that reason, its general public policy orientation is completely irrelevant. We note again that it is uncontested that the bank's own internal credit rating for Hynix was not such as to justify further financing. Once again, in light of the deteriorated situation of Hynix and given Korea's role in the NACF, and its public policy orientation, we consider that it was not unreasonable of the EC to conclude that a *quasi* public body like the NACF was directed by the government to participate in the October 2001 Restructuring Programme. We do not consider, as Korea seems to be arguing, that the EC should have simply accepted the NACF's statement that it had commercial reasons for participating in the October 2001 Restructuring Programme, and was not directed to take part by the government, given the other facts on the record which the EC reasonably explained to have led it to the opposite conclusion.[146]

7.138 We therefore reject Korea's claim that the EC's finding of a financial contribution by the government with regard to the NACF was inconsistent with Article 1.1(a) of the *SCM Agreement*.

Citibank

7.139 In the Final Determination, the EC notes that Citibank had very close relationship with the government, as it was one of the first foreign banks to operate in Korea in 1967. The EC considers

[144] Preliminary Determination, para. 91.

[145] Final Determination, para. 128; Preliminary Determination, para. 97.

[146] We note that Korea only contested the EC determination with respect to the NACF in its First Written Submission and did not further elaborate on this argument in the subsequent submissions or statements before us. In response to a question by the Panel concerning the NACF, Korea merely replied that the EC did not consider the NACF to be a public body at the time of the investigation, and that it was therefore precluded from doing so before the Panel. (Korea response to question 79 of the Panel)

that Citibank failed to cooperate and that its assertions that it was not acting under the direction of the government could therefore not be verified via a proper response to the questionnaire and a verification visit. According to the EC, Citibank failed to explain why it became involved in Hynix only in January 2001, when the situation was already sufficiently bad to deter most private banks, outside the context of special programmes such as the May 2001 Restructuring. By October 2001, Citibank rated Hynix as "D" (doubtful). The EC concludes that Citibank's links with the government were intensified during the financial crisis which made it particularly vulnerable to government direction. The EC considers that Citibank's failure to cooperate suggests that Citibank had something to hide. The EC considers that the bank's internal rating for Hynix did not justify new financing. In light of the failure to cooperate, the EC considers that the only conclusion for such non-commercial behaviour can be government direction.[147]

7.140 In our view, in the case of Citibank, the situation is considerably different in one important respect with regard to the alleged direction by the government of Citibank. The government had no shareholder power in Citibank. While it is correct that Citibank had a close relationship with the government since the late 1960's, and was clearly an important player in assisting Korea's economic recovery after the 1997 financial crisis, this does not necessarily demonstrate that the government had some form of control over Citibank. Hence, the quality of the evidence with regard to Citibank will have to be higher to demonstrate that the government actually directed Citibank to participate in the October 2001 Restructuring Programme. In our view, had Citibank from the outset fully cooperated with the investigating authority the evidence relied on by the EC would not be sufficient to reasonably conclude that the government actually directed Citibank to participate. As with the other banks, we consider relevant the fact that the commercial reasonableness to take part in the October 2001 Restructuring Programme appears doubtful, given Citibank's internal rating of Hynix and the general state of Hynix and the industry at the time. But we do not consider this distress context sufficient to conclude that Citibank had been directed to participate. For the other banks that participated, we are of the view that the important government shareholding position was precisely that bit of additional evidence that could justify a reasonable investigating authority's conclusion of direction. In the case of Citibank, it appears that the non-cooperation by Citibank was considered the additional element that led the EC to the conclusion of government direction. As we conclude elsewhere in our Report, we consider that the EC was entitled to consider that Citibank had failed to respond to the EC questionnaire and, thus, did not provide any specific and verifiable information concerning its involvement in the October 2001 Restructuring Programme.

7.141 We recall that in the Final Determination, the EC reached the following conclusion based on Citibank's failure to cooperate:

> "(133) As for the GOK direction, information on the record indicates that there were considerable links between the GOK, Hynix and Citibank. For the GOK and Citibank these went beyond the loans investigated. Such links can be interpreted in two ways. Firstly, they can be interpreted as indicating that Citibank may well have had commercial reasons for providing financing to Hynix, or as alleged by one of the parties, they could be interpreted as placing Citibank in a vulnerable position with regards to direction by the GOK. Due to the non-cooperation it was not possible to establish whether Citibank acted on coercion or whether this was in accordance with their normal business practice. In this respect, it is recalled that the reason for non-cooperation was to prevent access to Hynix's cost, finance and accounting data. In the absence of any other explanation, this can reasonably be taken as an indication that this data in Citibank's possession contain information revealing that there were no commercial reasons to provide the financing in question, and that the financing was provided due to GOK direction. This reason is also the one suggested in the complaint. In addition, as explained in recital 94 of the provisional Regulation,

[147] Final Determination, paras. 130-133; Preliminary Determination, paras. 93-94.

> Citibank has had an unusually close and symbiotic relationship with the GOK since 1967, when it was authorised to operate in Korea. This close relationship between the GOK and Citibank is witnessed in the role played by Citibank in assisting the GOK to extricate itself from the Korean financial crisis of 1997. Citibank led and successfully completed Korea's bank debt restructuring for a total of USD 21,75 billion in 1998. Moreover, Citibank helped the GOK and government-related institutions to access capital markets during the Korean financial crisis by successfully sponsoring a USD 4 billion global bond offering. All these facts confirm that Citibank has a very close relationship to the GOK. On the basis of these facts, and of the refusal of Citibank to grant access to the information in its possession, and failing any other verifiable evidence being available, the conclusion to be drawn in accordance with Article 28(6) of the basic Regulation is that the GOK was involved and directed Citibank to provide the financing in question." [148]

7.142 As we explain in a separate section of our Report dealing with Korea's claims concerning the application of Article 12.7 of the *SCM Agreement*, we consider that the EC was justified in making its determinations with regard to Citibank based on the facts available, given the fact that information reasonably considered as necessary was not provided. We note that Korea argues that Citibank should not have been considered as an un-cooperative party in light of its good faith efforts to provide the information. In addition, Korea argues that Hynix is not to be blamed for Citibank's failure to provide the information either, and that, therefore, the EC was not allowed to draw any adverse inferences from Citibank's failure to provide the requested information. In other words, Korea argues that it was not Hynix's fault that the information was not provided but that this non-provision was due to Citibank's internal policies. At the same time, it argues that it was not Citibank's fault either as Hynix did not consent to the disclosure of the information and that without such consent Citibank would risk legal liability problems under Korean law. It appears that Korea wants to have its cake and eat it at the same time. In any case, it is clear that necessary information was not provided within a reasonable period and the EC was thus entitled to resort to the use of the facts available under Article 12.7 of the *SCM Agreement*.

7.143 In our view, this non-cooperation by Citibank was that bit of additional evidence that could justify a reasonable authority's conclusion that Citibank had been directed by Korea to participate as an Option 1 bank in the October 2001 Restructuring Programme. As we did when discussing the Syndicated Loan, we wish to emphasise that we do not believe that the non-cooperation, in the absence of any additional supporting evidence, as such would be sufficient to reach the conclusion of government direction. Article 12.7 of the *SCM Agreement* allows an authority to make determinations on the basis of the *facts* available, not on the basis of mere assumptions or inferences. We do not consider that Article 12.7 allows an authority to automatically reach a conclusion which is negative for the un-cooperative party in the absence of additional facts, simply because the information was not provided. We do not consider that Article 12.7 can be interpreted in this punitive manner. However, if there are, as in this case, certain facts on the record which point in a certain direction, then it is not unreasonable of an investigating authority to read these facts in the light of the non-cooperation by the interested party concerned. To deny the authority, when faced with such blatant non-cooperation, the right to take this un-cooperative behaviour into account as an element of relevance in assessing the facts before it would in effect make the "stick" of Article 12.7 meaningless. It would, in our view, mean that an investigating authority, which lacks any significant evidence gathering powers, is deprived of the limited possibility of inducing interested parties to provide the information necessary to make preliminary and final determinations.

7.144 In sum, the complete refusal by Citibank to provide any meaningful and verifiable information requested by the authority, combined with the close relationship between Korea and Citibank, as well as Citibank's role as Hynix's principal financial advisor and the doubtful commercial

[148] Final Determination, para. 133.

reasonableness of participating in the October 2001 Restructuring Programme justify, in our view, the reasonable conclusion by the EC that Citibank was directed by Korea to participate in the October 2001 Restructuring Programme.

7.145 We therefore conclude that the EC determination of a financial contribution by the government through Citibank was consistent with Article 1.1(a) of the *SCM Agreement*.

Conclusion

7.146 For the reasons set forth above, we thus find that the EC finding of the existence of a financial contribution by the government of Korea by the participation in the October 2001 Restructuring Programme of the KDB, Woori Bank, Chohung Bank, KEB, NACF and Citibank is consistent with Article 1.1(a) of the *SCM Agreement*.

2. Claims regarding the EC's determinations of the existence and amount of benefit

(a) Korea

7.147 Korea argues that the EC's finding and measurement of "benefit" was inconsistent with Articles 1.1(b) and 14 of the *SCM Agreement*. According to Korea, under these provisions, as clarified by the Appellate Body in the *Canada – Aircraft* and *US – Lumber IV* cases, the EC was under an obligation in measuring benefit to compare what was received by Hynix with what was available on the market. Instead, the EC ignored the available market benchmarks, and simply considered all loans, loan guarantees, bonds and equity as grants, thereby disregarding the specific obligations contained in Article 14 of the *SCM Agreement* with regard to the determination of benefit.[149]

7.148 In addition, Korea asserts that the EC did not adequately explain why Korean market benchmarks could not be used, nor did it demonstrate why its alternative grant methodology was related or connected with prevailing market conditions in the Korean market, as required by Article 14. Korea is of the view that Article 14 of the *SCM Agreement* clearly establishes a requirement to examine benefit by using the private market in the country under investigation as a benchmark. According to Korea, if this is not possible, the authority should provide a justification for departing from this benchmark and must demonstrate that the alternative benchmark chosen is related to the prevailing market conditions in the country of investigation.[150]

7.149 Korea further argues that in the case of (1) the Syndicated Loan, (2) the KEIC Guarantee, and (3) the May 2001 Restructuring Programme, the change of position of the EC from "no benefit" in the Preliminary Determination to "benefit" in the Final Determination, and this without any explanation, confirms that the EC strove to achieve a pre-ordained outcome from this investigation and provides the context in which Korea invites the Panel to consider the EC's benefit analysis. According to Korea, the argument offered by the EC concerning "new information" about the Economic Ministers' meeting[151] and the presence of government officials at a meeting between the creditors[152] may affect the conclusions on financial contribution and entrustment, but it is unrelated to the question of benefit.

[149] Korea First Written Submission, para. 572. Korea asserts that the EC treated all of the various financial instruments as grants, as it simply assumed, without any positive evidence to support this assumption, that the banks involved in the restructuring process were not counting on seeing their money back. It thus ignored the reality of the instruments used which required the payment of interests and failed to examine the conditions in light of the market benchmarks required by Article 14 of the *SCM Agreement*.

[150] Korea finds support for its argument in the report of the Appellate Body in the *US – Lumber IV* case dealing with Article 14(d) of the *SCM Agreement*.

[151] In so far as it concerns the Syndicated Loan and the KEIC Guarantee Programme.

[152] Where the May 2001 Restructuring Programme is concerned.

Syndicated Loan

7.150 Korea argues that the EC improperly treated the amount of the loans in excess of the waived lending limit as grants. Such loans carried interest payment requirements and the loans extended by the KEB, KFB and the KDB should therefore, according to Korea, have been compared to the loans granted by seven other banks involved in the programme which were not alleged to have been directed or entrusted to grant such loans. Korea submits that the loans extended by these banks provided an adequate market benchmark for the determination of benefit.

KEIC Guarantee

7.151 Korea takes issue with the EC finding that, under this programme, no "adequate premium" was required which, according to the EC, turned what it considered to be a loan guarantee into a grant. According to Korea, under Article 1.1(b), and Article 14 in the context of Item (j) of Annex I of the *SCM Agreement*, the EC should have examined the difference between the actual fee paid by Hynix and the fee that covers the operating costs and losses of the export insurance programme in order to determine the existence of a benefit. Korea submits that the EC failed to even examine what an adequate premium would have been. Second, even if the EC was correct in considering the export insurance programmes as a loan guarantee, Korea submits that Article 14(c) of the *SCM Agreement* then required the EC to examine the difference between the financial alternatives that could be obtained with the guarantee and those obtainable without the guarantee. The EC's general assertion that no alternative financing would have existed without the guarantee is economically unsustainable as an alternative will always exist, albeit at a high interest rate. In any case, Hynix did pay a premium and the EC's analysis of the KEIC Guarantee programme as a grant is thus flawed.

KDB Debenture Programme

7.152 Korea argues that the EC's treatment of the Programme's *bonds* as *grants* was based on the unsubstantiated assumption that the KDB would not recover the money invested. Korea argues that the EC thus failed to make a comparison between the KDB interest rate and available market benchmarks such as those offered by the Syndicated Loan[153] or the GDRs offering, which provided clear evidence that it was commercially reasonable to participate in the KDB Debenture Programme. In addition, Korea argues that the largest part of the Hynix bonds were not ultimately purchased by the KDB but rather by the creditor banks (20 per cent) and private investors (70 per cent), for which the EC simply assumed that their participation also constituted a grant.

May 2001 Restructuring Programme

7.153 Korea takes issue with the treatment of a CBs purchase of KRW 1 trillion as a grant, as the CBs carried clear interest obligations and had the potential of being converted into equity. Korea argues that the EC conclusion that it was obvious that the money invested by the creditors would not be recovered is not supported by the facts.[154] The success of the GDRs issuance disproves the EC's point. According to Korea, the EC should have compared the CBs' interest rates with applicable market interest rates.

[153] Korea submits that this Syndicated Loan provides a viable private market benchmark as it included loans by seven banks not entrusted or directed to provide such loans and as the interest rate charged by the KDB programme was actually higher than that of these Syndicated Loan.

[154] Korea refers to (1) the positive market forecasts for DRAMs, (2) private investor confidence expressed in the GDRs, (3) the fact that the purchase was conditioned on the success of the GDRs, (4) the requirement to hold the money in escrow accounts, and (5) the fact that the type of bonds chosen were convertible which also showed the expectation of future gains.

October 2001 Restructuring Programme

7.154 Korea is of the view that the EC improperly considered the three measures[155] that together formed the October 2001 Restructuring Programme as grants. The new loans granted, under the Programme, were not grants as the EC concluded. Korea argues that they were secured by a priority collateral on the Hynix factory. In addition, neutral third party analysis commissioned by the creditors[156] showed that, by granting new loans, the creditors substantially increased their chances of recovering at least part of their investments made in previous years. Neither was it correct to consider the maturity extensions as debt forgiveness measures, as by extending the maturity the aim of the creditors was precisely to increase the likelihood of recovering their money. Similarly, the debt-to-equity swap was incorrectly considered a debt-forgiveness measure as it constituted a normal, albeit risky, investment decision by creditors hoping to participate in the expected recovery of the company. Korea points out that the prices charged for the swap were similar to, and even a bit lower than the share prices of Hynix on the stock exchange, which implied that the shares obtained in the swap could easily be sold on the stock exchange. In any case, Korea submits, it would not make sense to go through the pains of engaging in a complex swap if all that was going on was simply a form of debt forgiveness. Option 1 banks could then have elected Options 2 or 3.

Additional calculation errors

7.155 Finally, and in case the Panel were to reject Korea's claims on the benefit analysis performed, Korea argues that the EC made several important errors in the actual calculation of benefit. First, Korea asserts that the EC failed to take into account the part of the KDB Debenture Programme bonds which were later swapped into CBs in the May 2001 Restructuring Programme. Korea argues that, similar to the reduction in benefit the EC calculated when considering that part of the CBs of the May 2001 Restructuring Programme were converted into equity in the October 2001 Restructuring Programme, the EC should have reduced the part of the benefit from the KDB Debenture Programme bonds that was changed into CBs in the May 2001 Restructuring Programme. By not doing so, Korea submits that the EC committed a double-counting error.

7.156 In addition, Korea asserts, the EC failed to deduct from the alleged benefit the interest paid by Hynix under the KDB Debenture Programme. Similarly, Korea argues that the EC did not take into account the actual interest payments made to Option 1 banks in the October 2001 Restructuring Programme, in violation of Article 1.1(b) and 14 of the *SCM Agreement*. Finally, Korea is of the view that the EC ignored information from the audited books of Hynix on the actual value of the maturities issued under the October 2001 Restructuring Programme, namely KRW 1.579 trillion, and instead continued to use the incorrect amount of KRW 1.825 trillion. This is a violation of Articles 1.1(b) and 14 of the *SCM Agreement.*

(b) EC

7.157 The EC considers that Article 1 of the *SCM Agreement* does not provide a definition of "benefit". Neither does Article 14 of the *SCM Agreement* contain such a definition as this provision merely sets forth *guidelines* for calculating the amount of a subsidy in terms of benefit to the recipient. Article 14 of the *SCM Agreement* leaves much discretion to the authority in determining the method best suited for establishing and calculating the benefit.[157] According to the EC, the general

[155] The October 2001 Restructuring Programme consisted of the granting of new loans, the extension of the maturity of existing loans, and a debt-to-equity swap.

[156] Korea mentions the Arthur Andersen study, the technology report by Abbie Gregg, and the Monitor Group's report.

[157] According to the EC, paragraph (a) of Article 14 of the *SCM Agreement* sets forth a basic rule concerning benefit in the case of the provision of equity or risk capital, but, unlike paragraphs (b), (c) and (d), it does not contain a precise method for calculating the benefit. The EC asserts that this absence of any express

guiding principle, as expressed by the Appellate Body in the *Canada – Aircraft* case is that the benchmark for determining benefit is the *financing available on the market*, and the extent to which the recipient is better off than it would have been absent the government contribution.[158] In assessing the alternative sources of financing available on the market, the EC considers that this should be assessed on an *ex ante* basis at the time of the provision of the financing, not when the risk has passed. The EC argues that, at a certain point, the risk is such that the market will simply not provide any further financing, even when there is less than 100 per cent certainty that no money will be recovered. Any so-called "loans" granted by the government in such circumstances should then not be compared, as required by paragraph (b) of Article 14, to other comparable loans available on the market, as there are none, but instead can be considered as the provision of risk capital, the full amount of which constitutes the benefit which may be countervailed. In such a situation, the EC argues that an investigating authority can establish benefit based on any reasonable method in accordance with the general guiding principles of Article 14 of the *SCM Agreement*.

7.158 In response to some of the arguments made by Korea, the EC argues that the authorities are not obliged to use a market benchmark if the market in question is so distorted by government influence that participation by so-called market actors is not a sign of viability of the company but rather evidence of the success of government efforts to salvage a company which is "too big to fail". According to the EC, to accept Korea's assertion, would allow the public powers to change the very benchmark by which commercial activity is to be identified.

7.159 The EC further rejects the Korean argument that the benchmark chosen should be related to prevailing market conditions in Korea, as there is no such obligation in the applicable paragraphs (a) to (c) of Article 14 of the *SCM Agreement*. Korean reliance on the *US – Lumber IV* case dealing with Article 14(d) is irrelevant to the factual situation at hand, which does not involve the provision of goods by the government.

7.160 Finally, in response to the Korean argument that the EC failed to consider the investment decisions from the perspective of an inside investor seeking to increase its chances of at least partial recovery of at least part of the money invested, the EC emphasises that it considered this perspective and concluded there was little difference in whether the commercial reasonability of the financing was considered from an inside or outside investor perspective. More importantly, the EC is of the view that, from the point of view of WTO law, this distinction is irrelevant as the benchmark relates to the market in general and not to specific companies already in a relationship with the company receiving a subsidy.

7.161 The EC asserts that the fact that the benefit determination changed from the Preliminary to the Final Determination in the case of the Syndicated Loan, the KEIC Guarantee, and the May 2001 Restructuring Programme is irrelevant. The EC explains that the situation changed between the Preliminary and Final Determination due to the discovery of new facts and evidence showing less than full disclosure from the Korean side and demonstrating the intervention of the government in the market, thereby vitiating the argument that certain market actors were financing Hynix of their own free will.

7.162 The EC considers that Korea failed to demonstrate that the EC determination of a benefit in all five of the programmes found to constitute a financial contribution by the government of Korea to Hynix was inconsistent with Articles 1.1 and 14 of the *SCM Agreement*.

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obligation when it comes to calculating the amount of benefit in a risk scenario indicates that the amount of benefit in the provision of equity capital will depend on future risk which is difficult to assess.

[158] According to the EC, the more insecure a loan is, the more one moves from the paragraph (b) situation concerning loans, to a general risk scenario under paragraph (a) for which the *SCM Agreement* contains no express obligations when it comes to calculating the amount of benefit.

Syndicated Loan

7.163 The EC argues that the information on the record shows that the EC reasonably took the view that Hynix had reached the point where, given the economic environment and the precarious financial situation of the company, the market would make no further capital available, absent the intervention of the government. According to the EC, Korea failed to show that there was any loan available from a market undistorted by the government's intervention.[159] Therefore, Korea failed to demonstrate that the method adopted for determining benefit by the EC was inconsistent with the general principle expressed in Article 14 of the *SCM Agreement*.

KEIC Guarantee

7.164 The EC argues that the record indicates that the creditor banks were only willing to extend their loans by USD 600 million due to the KEIC Guarantee which assured payment to the banks in case Hynix would go bankrupt. This, the EC argues, is evident from the disastrous financial situation of Hynix at the time, internal bank documents[160], and the fact that some banks had reached their prudential limits and needed an FSC waiver to extend their loans. There is, moreover, evidence on the record that the KEIC itself only provided the guarantee due to government intervention, and that it was in fact the government that was ultimately underwriting the guarantee. As Hynix would not have obtained the credit extension without the guarantee, it was reasonable for the EC to consider the full amount of the credit as the benefit provided by the KEIC Guarantee.

7.165 The EC considers that it was not obliged to conduct an interest rate comparison as there would not have been an alternative source of funding at any interest rate in the absence of government intervention. The EC thus rejects Korea's allegations that, under Article 14(c), the EC should have examined the terms of the loans obtained on the basis of the guarantee with the terms of loans available without the guarantee, as no such loans were available.[161] The EC also considers the reference by Korea to Item (j) of Annex I of the *SCM Agreement* to be misplaced, as it does not concern a long-term guarantee programme but rather an *ad hoc* guarantee by the government to Hynix through the KEIC.

KDB Debenture Programme

7.166 With regard to the KDB Debenture Programme, whereby the KDB helped roll-over maturing bond obligations and repackaged the debt for investors, the EC considers that the record again showed that Hynix would not have been able to obtain any further financing through the market, and that it was thus reasonable of the authority to consider the full amount of the financing as the benefit conferred. The EC argues that, for all of the reasons discussed above with regard to these loans, the Syndicated Loan is no evidence of the availability on the market of financing for maturing bonds.[162] Even the government in its questionnaire response indicated that only companies rated A+ were able to obtain financing, while already by the end of 2000 Hynix was heavily indebted and was given a very poor credit rating.[163]

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[159] The EC argues that paragraph (b) of Article 14, by referring to the words "commercial" and "market", is a clear reference to a market undistorted by government intervention.

[160] Chohung Bank Questionnaire Response. (**Exhibit EC-15**)

[161] According to the EC, Article 14(c) also refers to the underlying transaction, and it was thus not improper for the EC to look at the amount of the loans otherwise not available as the basis for determining benefit.

[162] If the Syndicated Loan is relevant at all, according to the EC, it is because the amount provided through the Syndicated Loan was far less than requested and needed by Hynix which again shows the reluctance of banks to provide financing to Hynix.

[163] The EC argues that, should the Panel consider the terms of the KDB Debenture Programme relevant, the EC asserts that Hynix was admitted to the programme with a BBB rating and that it was

May 2001 Restructuring Programme

7.167 The EC notes that, by May 2001, Hynix was heavily indebted and its situation could not be characterized as a temporary cash-crunch. The EC argues that the alleged success of the GDRs issuance has to be seen in light of the distorted market due to the long-term commitment of the government. The GDRs offering memorandum put particular emphasis on the government's support for Hynix in order to lure international investors into investing in Hynix.[164] The EC asserts that it considered the inside investor perspective, but that under any circumstances it would not have been commercially reasonable to provide further financing to Hynix at that time.[165]

October 2001 Restructuring Programme

7.168 The EC argues that the benefit determination for this Programme was based on two main grounds: (1) that Hynix would not have been able to obtain the necessary financing on the market; and (2) that, at the time of the financing, it was obvious that the money would not be recovered, therefore justifying the EC consideration of this financing Programme as a grant. The EC emphasises that the record showed that, throughout the summer 2001, Hynix's financial situation continued to worsen and, by 5 October 2001, its credit rating was SD (selective default). In addition, Hynix had a bad history of servicing debts and its stock price had collapsed immediately after the GDRs issuance on 15 June 2001, and there was clearly no proposal of a new GDRs issuance. The interest rates charged in the October 2001 Restructuring Programme were nevertheless those applied to financially sound companies and lower than the rates applied to Hynix in January 2001. The EC argues that the record showed that Hynix's problems were no surprise and existed even during the so-called boom year 2000. According to the EC, the banks made their financing decision without any viability assessment of their own. The two reports relied on, the SSB report and the Monitor Group report, were not viability assessments and, in the case of the Monitor Group report, consisted of only 10 pages describing certain technical and market related issues in a general way. The EC argues that it was reasonable of the authority to conclude in these circumstances that the decision of the six Option 1 banks to participate in the October 2001 Restructuring Programme was not the decision of commercially reasonable actors. With regard to the Arthur Andersen report which allegedly did contain a viability study, the EC recalls that only one page was provided to the investigating authority which was clearly insufficient to take this report into consideration, and that this report had in any case not been available to the Option 1 banks at the time they made their decision.

7.169 With regard to the fixed priority collateral provided by Hynix, the EC argues that the collateral was considered, but that it was irrelevant as it could never have been sufficient to convince the Option 1 banks to give money to a SD rated company, and in fact none of the Option 1 banks mentioned the collateral as the reason for investing. The EC notes that even Hynix did not consider it important during the investigation. As to Korea's argument that the bonds could be traded, the EC emphasises that, by the time the convertible bonds could be converted, *i.e.*, 1 June 2002, their value had plummeted from 3,100 in October 2001 to 708. In any case, it is evident that no reasonable person would have actually bought shares of a SD rated company in October 2001, whether they could be traded or not. Finally, the EC points out that for Hynix there was a clear tax advantage in

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subsequently downgraded such that, by August 2001, it was disqualified from the programme with a CCC+ rating. Moreover, the EC emphasises that the interest rate under the KDB Debenture Programme was lower than those under the Syndicated Loan, and this in spite of the fact that Hynix never serviced its interest obligations under the Syndicated Loan and that interest arrears were turned into equity in the October 2001 Restructuring Programme.

[164] According to the EC, international investors have a less profound insight into the situation of the company than inside investors which should have known the real situation of Hynix better. Between mid-June and 20 June 2001, stock prices plummeted and still the banks purchased Hynix bonds.

[165] The EC also fails to see how the fact that amounts had to be placed on an escrow account are at all relevant with regard to the banks' existing debts and that this would clearly not enable them to recover their money more easily.

having the operation in the form of a debt-to-equity swap rather than a simple write-off of debt. A simple write-off would put an end to the liabilities but would give rise to an extraordinary – and taxable – gain.

Additional calculation errors

7.170 The EC also rejects Korea's claim of any errors in the calculation of the benefit. With regard to the KDB Debenture Programme, the EC refers to the explanation provided in the Final Determination.[166] The EC emphasises that Hynix never argued at the time of the investigation that the amount allegedly double-counted was included both in the KDB Debenture Programme and in the May 2001 Restructuring Programme, and that it never claimed that any interest paid should have been deducted.

7.171 With regard to the October 2001 Restructuring Programme, the EC argues that there is no obligation in Article 14 of the *SCM Agreement* to take into account any interest paid once it has been determined that no reasonable investor would have provided the financing. Hynix never claimed such deduction of interest during the investigation. The interest in question was not paid at the time the new "loan" was granted in any case, and whether any interest was actually paid is further irrelevant.

7.172 With regard to the amount of KRW 1.825 trillion, this amount was provided by the main creditor bank of Hynix, the KEB, in Annex 18 of its questionnaire response, and was communicated to Hynix in a letter of 11 July 2003.

(c) Panel Analysis

7.173 Korea's claims relate to the existence and amount of a benefit conferred by the alleged financial contribution. We note that Article 1.1 of the *SCM Agreement* provides that a subsidy can only be deemed to exist if there is a financial contribution by the government *which confers a benefit.* The existence of a financial contribution by the government is thus necessary but not sufficient in order to conclude that a subsidy has been provided. Only when this financial contribution confers a benefit will a subsidy be deemed to exist. The *SCM Agreement* does not provide a definition of what constitutes a benefit. In our view, the ordinary meaning of the term "benefit" is that of an "advantage", something which leaves the recipient "better off".[167] In light of the fact that the notion of a "benefit" appears to us to be a relative notion, it becomes important to establish the benchmark for determining whether the recipient is *better off* thanks to the financial contribution. Article 14 of the *SCM Agreement* entitled "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient" provides in our view highly relevant context for interpreting the term "benefit" of Article 1.1(b) of the *SCM Agreement*.

7.174 Article 14 of the *SCM Agreement* reads as follows:

> "[f]or the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:
>
> > (a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice

[166] In particular, the EC refers to paragraph 79 of the Final Determination.
[167] The equivalent term used in the French version of the *SCM Agreement* is tellingly "avantage".

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

7.175 Article 14 of the *SCM Agreement* thus refers on each occasion to the market place as the appropriate benchmark for determining the existence of a benefit to the recipient of the financial contribution. In other words, only in cases where the financial contribution provides the recipient with an advantage over and above what it could have obtained on the market will the government's financial contribution be considered to have conferred a benefit and will a subsidy thus be deemed to exist. It is clear that the *SCM Agreement* provides for a number of disciplines on government behaviour when a public or publicly directed or entrusted financial contribution might have a trade distorting effect. Without this objective of curtailing trade distortion, it would not make sense to impose these disciplines in an international trade agreement. In our view, if the public or publicly directed financial contribution is provided under the same conditions as a private market player would have provided, then there would be no reason to impose any discipline, simply because the financial contribution was provided by the government. In sum, if the financial contribution is not provided by the government (or directed or entrusted by the government), it is of no concern to us. If the financial contribution is provided (or directed or entrusted) by the government but still does not confer an advantage over what was available on the market, there is no need to discipline such government behaviour which lacks a trade distorting potential.

7.176 We, therefore, agree with this statement of the Appellate Body in the *Canada – Aircraft* case concerning the tem benefit in Article 1.1 of the *SCM Agreement*:

> "[w]e also believe that the word "benefit", as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient "better off" than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been

> "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market."[168]

7.177 We note that the parties as well agree on the principle that the market place is the appropriate basis for comparison. However, Korea is arguing: (1) that the EC failed to use the available market benchmark in Korea to assess whether a benefit was conferred on Hynix and this without any justification; and (2) that the EC ignored the real nature of the financial contributions as loans or loan guarantees and simply treated all alleged financial contributions as grants. The argument of the EC is, in essence, that the record showed that the financial situation of Hynix was such that no reasonable private investor would have been willing to provide funds to this company, whether in the form of a loan, a loan guarantee or an equity infusion, as it was clear that the chances of ever recovering the money invested were minimal. In sum, the market would not have provided the financing to Hynix. In such a situation, the funding provided, in whatever form, is equal to the provision of risk capital for which Article 14(a) of the *SCM Agreement* does not provide a precise method for calculating benefit. It simply states that a benefit is conferred if the investment decision can be regarded as inconsistent with the usual investment practice – including for the provision of risk capital – of private investors in the territory of that Member. According to the EC, the record showed that this was the case. The benefit then consisted of the financing which no reasonable investor would have provided to Hynix, and the alleged subsidy programmes were all, irrespective of their terms and conditions, treated as grants.

7.178 In our view, there are two distinct questions to be addressed. The first relates to the *existence* of a benefit, the second deals with the *calculation* of the amount of the benefit. In other words, a finding that the financial contribution was provided on terms more favourable than what the market place provided for is, in our view, sufficient to find that a benefit existed. Our view is based on our interpretation of the term benefit as it appears in Article 1.1 of the *SCM Agreement* which determines when a subsidy is deemed to *exist*, read in the context of the *SCM Agreement* and Article 14 thereof, in particular. Whether such a finding allows an authority to consider the full amount of the financial contribution as the amount of the benefit and treat it like a grant, is, in our view, a different question which relates to the *calculation* of the amount of the benefit, rather than its existence.[169]

7.179 Both questions are at issue in this case. Whilst the existence of a benefit under Article 1.1(b) is legally and logically distinct from the calculation of the amount of the benefit under Article 14, we will address both of these questions in this section of our Report, and to the extent necessary to resolve this dispute, primarily because this was the way in which the EC's findings with regard to each of the alleged subsidy programmes, as well as each of the parties, handled these two issues.

7.180 We consider it best to address these questions in turn, and to the extent necessary to resolve the dispute, in the specific context of the EC's findings with regard to each of the alleged subsidy programmes. We will first discuss the EC's findings with respect to the existence of a benefit in each of the five programmes.

(i) Existence of a benefit in the sense of Article 1.1(b) of the SCM Agreement

Syndicated Loan

7.181 In its Final Determination, the EC explained that the participation in the Syndicated Loan by the three banks examined, the KDB, KEB and KFB conferred a benefit of the amount by which the

[168] Appellate Body report, *Canada – Aircraft*, para. 157.

[169] We are of the view, however, that it would not be necessary nor appropriate for us to address these questions concerning the *calculation* of the amount of benefit, if we were to conclude that the investigating authority failed to properly establish the *existence* of a benefit in the first place.

legal lending limits were exceeded as this is the amount that Hynix was able to receive only due to the FSC lifting of the lending limits. The EC found that, without the lifting of the limits, these amounts would not have been granted by the banks in question, and considered that there was no evidence of an alternative source of similar financing available to Hynix.[170]

7.182 In a benefit analysis, the question to be answered is whether the financial contribution leaves the recipient better off than it would otherwise have been, absent that contribution, in case it had to turn to the market to be provided the financial contribution in the form of, as in this case, a loan. In our view, the EC partly mixed the financial contribution question with that of benefit to the recipient. The fact that a public body like the KDB was only able to provide the financial contribution due to the lending limit waiver received from another public body reveals the extent to which the government was willing to provide a financial contribution to Hynix, but is uninformative as to the question of benefit to the recipient. We also wish to point out that the question in a subsidy context is whether the specifically identified financial contribution confers a benefit on the recipient, such that it constitutes a subsidy. The EC concluded that the financial contribution in question was the loan extended by the KDB, KEB and KFB in December 2000 to Hynix, not the waiver of the lending limit by another public body, the FSC. The alleged benefit conferred is thus the benefit conferred by the loan, and not the alleged benefit conferred by another government action which was not determined to constitute a financial contribution in the sense of Article 1.1(a) of the *SCM Agreement*. In other words, the benefit analysis is not about the KDB and what it had to do in order to be able to take part in the loan, it is about the recipient of the loan Hynix and whether it obtained the loan from the KDB on more advantageous terms than would have been available on the market.

7.183 In this respect, we find very relevant the fact that in total ten banks participated in the Syndicated Loan and extended loans on similar terms to Hynix. Of these banks, the Final Determination discusses the KDB, KEB and KFB, and leaves unmentioned the seven others. Among the remaining seven banks, a certain number such as, for example, Citibank, the KorAm Bank and Chohung Bank were not considered to be public bodies by the EC in its investigation. We consider that it does not suffice for the EC to simply assert that the seven other banks were not examined and that it may or may not be the case that these banks were directed to take part in the Syndicated Loan to ignore them as possible market benchmarks. If a number of parties provide the same type of financing as the public body, such as in the case of the Syndicated Loan, their participation is an obvious aspect of a benefit analysis.[171]

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[170] Final Determination, para. 37, reads as follows:

> "(37) According to Article 5 of the basic Regulation, the amount of countervailable subsidy shall be calculated in terms of the benefit conferred to the recipient. The participation of the three banks in the Syndicated Loan **confers a benefit to Hynix to the amount by which the legal lending limits have been exceeded, since this is the amount that Hynix was able to receive only due to the lifting of the limits. Without the lifting of the limits these amounts would not have been granted to Hynix by the banks in question.** There was no indication that any other source of similar financing was available to Hynix at the time of the measures. The amounts exceeding the credit limits are therefore considered as subsidies. Since these subsidies are *ad hoc* measures granted to only one company, they are specific pursuant to Article 3 of the basic Regulation and therefore countervailable. It is noted, however, that the shares of KDB and KEB of the syndicated loan are already countervailed as part of the October 2001 measures. Therefore, in order to avoid double counting, these measures are not countervailed in the context of the January 2001 syndicated loan. As regards the KFB share of the loan exceeding the legal lending limit, the information on the record indicates that any benefit resulting from the lifting of the loan limits would be negligible. Therefore, it is not countervailed in this context." (emphasis added)

[171] Again, we emphasise that we do not wish to imply that it is necessarily the end-point of such an analysis, as it will need to be determined whether the behaviour of these market players is so distorted by the

7.184 In our view, this is precisely what Article 14(b) of the *SCM Agreement* provides for, in so far as it refers to the existence of a benefit in the context of a financial contribution in the form of a loan. A loan shall not be considered to confer a benefit unless there is a 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. This requires an authority to first examine whether such a comparable commercial loan could actually be obtained on the market by the recipient of the government loan. The EC ignored the loans provided by seven other banks without examining whether these loans were commercial or whether their provision was so influenced by the alleged government intervention that they did not represent loans that could actually be obtained on the market.

7.185 We consider relevant the fact that, in its Preliminary Determination, the EC examined the participation of all ten banks in the Syndicated Loan and found that there actually was no basis "to conclude that the interest rate of the loan and the maturity periods were not in conformity with market conditions" and for these reasons, it was concluded that "there was no benefit".[172] It appears from the Final Determination that the only new information that was discovered related to the alleged pressure exercised by the government on the KEB to participate in the loan and the fact that FSC would provide a lending limit waiver to enable the KDB, KEB and KFB to participate in the Syndicated Loan. While this information may have been relevant to the question of financial contribution and the alleged government direction of the KEB and KFB, we fail to see how it could also invalidate the market benchmark conclusions the EC had earlier reached itself with regard to the other seven banks involved in the Syndicated Loan.

7.186 We therefore find that the EC failed to establish the existence of a benefit from the financial contribution provided by the KDB and KEB as part of the Syndicated Loan in a manner consistent with Article 1.1(b) of the *SCM Agreement*.

KEIC Guarantee

7.187 In the Final Determination[173], the EC found that the financial contribution by the KEIC in the form of an export credit guarantee conferred a benefit on Hynix. The EC concluded that, without the

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government's intervention that they can no longer serve as the benchmark against which to measure the alleged government distortion.

[172] Preliminary Determination, paras. 30-31.

[173] Final Determination, paras. 45-46, read as follows:

> "(45) Thus the guarantee was given by KEIC due to specific GOK direction in pursuing the public policy goal of alleviating the difficult financial situation of Hynix for reasons of industrial development. Therefore, KEIC, despite being a public body, was specifically directed by the GOK to carry out a function and follow practices normally vested in the GOK. Consequently, the guarantee is a financial contribution by government within the meaning of Articles 2(1)(a)(iv) and (i) of the basic Regulation. **This guarantee conferred a benefit to Hynix, since without the guarantee Hynix was not able to receive the D/A extension of USD 600 million.** At the same time, the GOK's assurance that KEIC would be compensated in case of default showed that the premium paid by Hynix could not cover the risk undertaken by KEIC to guarantee the D/A extension and, therefore constituted a non-commercial act. The GOK effectively underwrote the risk of failure of payment by Hynix without asking for any compensation for it. According to the information on the record, the banks would not have granted the D/A facility without the guarantee. **Moreover, there is no information that Hynix could have obtained comparable financing from other sources. This coverage of the guarantee, without any adequate premium being paid, is therefore considered to have conferred a benefit to Hynix within the meaning of Article 2(2) of the basic Regulation.** In view of the provisions of Article 6(c) of the basic Regulation, since no comparable commercial loan could have been obtained without the guarantee, the coverage of

guarantee, no further financing would have been available for Hynix, and that Hynix never raised such a possibility of alternative financing absent the guarantee. It thus concluded that there existed no benchmark for the cost comparison requested by the parties and considered the benefit for Hynix to be the full amount of the D/A extension of USD 600 million.

7.188 We recall that the standard for determining the existence of a benefit conferred by a financial contribution is whether this financial contribution has left the recipient better off than he would otherwise have been, absent the financial contribution by the government. In this case, the question is thus whether the EC correctly concluded that the KEIC Guarantee gave Hynix an advantage compared to the situation it would have been in had it been required to go to the market.

7.189 We consider that the question of the existence of a benefit in the case of a government guarantee can be examined from more than one angle, depending on the circumstances. Based on our general conclusion that a benefit in the sense of Article 1.1 of the *SCM Agreement* is determined in relation to the market place, it appears to us that one possible approach for examining whether a benefit existed would be to compare the guarantee provided by the government with a comparable guarantee provided by the market. If the government charges less than a market fee for its guarantee in light of the specific circumstances of the case, there would be a benefit to the recipient. We note in this respect, that none of the parties either before the investigating authority or before us in the course of the panel proceedings has argued that a private market operator would have provided an export guarantee similar to the one that was provided by the KEIC so that the fees could be compared. This implies that, if one opts to examine benefit by looking at the difference between the government providing a financial contribution, and the market doing so, then it would be clear that a benefit was provided, as no private market operator was even argued to have been willing to provide such a guarantee. In fact, it appears from the evidence before the investigating authority that even the public body – the KEIC itself – was hesitant to provide the guarantee and needed a governmental assurance. Such a government backing was given by the letter of 10 January 2001 signed by the Minister of Finance and Economy informing the KEIC, FSS and KEB of the results of the Economic Ministers' meeting of 9 January 2001 by which the government promised that support would be provided from a separate source of funding in case the KEIC would found itself confronted with a shortage of reserve payment capacity as a result of the guarantee.[174]

7.190 If, on the other hand, one examines the question of benefit in light of Article 14(c) of the *SCM Agreement* concerning loan guarantees, it appears that the examination is to focus on the difference between the amount paid on a loan guaranteed by the government, compared to the amount that would have to be paid on a comparable commercial loan, absent the government guarantee. In this case

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> the D/A extension is effectively a grant. **The benefit to Hynix and thereby the amount of the subsidy is the amount of the D/A extension, USD 600 million**.
>
> (46) In its comments on the final disclosure the GOK and Hynix argued that KEIC did not provide funds to Hynix, only insurance, and that Hynix paid market interest rates to banks for the D/A financing. Therefore, the benefit conferred on Hynix by the measure should have been the difference in costs between what Hynix paid for the D/A financing and what it would have paid without the KEIC guarantee. It is noted that the benefit to Hynix is the whole amount of the loans which would not have been granted in whole or in part without the KEIC guarantee which was underwritten by the GOK. **There was no indication that an alternative financing without guarantee was available to Hynix at the time, and Hynix never raised such a possibility. Therefore there is no benchmark for the cost comparison requested by the parties. In addition, Hynix paid no extra premium for the complete underwriting of the full amount of the loans by the GOK.** Under these circumstances, the benefit for Hynix is considered to be the full amount of the guarantee underwritten by the GOK." (emphasis added)

[174] GOK Document of 10 January 2001 from the Ministry of Finance and Economy to the KEIC, FSS and KEB. (**Exhibit EC–3(e)**)

there does not seem to have been any evidence on the record, and none has been brought to our attention, to contradict the EC's conclusion that, absent the government guarantee, the banks would not have been willing to agree to the D/A extension by USD 600 million, at all. Korea considers that the amount of benefit should be examined by comparing the costs/interest paid for the D/A financing with the costs/interest that Hynix would have paid without the KEIC Guarantee. We find reasonable, however, the conclusion of the EC that:

> "[t]here was no indication that an alternative financing without guarantee was available to Hynix at the time, and Hynix never raised such a possibility. Therefore there is no benchmark for the cost comparison requested by the parties".[175]

7.191 In addition, Korea argues that Item (j) of Annex I to the *SCM Agreement* requires that in a government export credit guarantee situation, benefit has to be assessed by examining whether the fees paid by the recipient of the guarantee were adequate to cover long-term operating costs and losses. We note that Annex I of the *SCM Agreement* sets forth an illustrative list of export subsidies and Item (j) of Annex I is thus relevant in determining whether a prohibited export subsidy exists, not whether a benefit exists. Item (j) applies a cost-to-government standard rather than a benefit-to-recipient standard, and as such, the test set forth in Item (j) is simply irrelevant, in our view, in determining whether *a benefit* in terms of Article 1.1 of the *SCM Agreement* exists.

7.192 In sum, in so far as the existence of a benefit is concerned, we consider that the EC made a reasonable and reasoned conclusion on the basis of the record before it that the KEIC Guarantee conferred a benefit on Hynix in a manner consistent with Article 1.1(b) of the *SCM Agreement*.

7.193 This does not necessarily mean that we agree with the EC's approach when it comes to calculating the amount of the subsidy under its grant methodology. We will discuss the question of the calculation of the amount of the subsidy and the EC's grant methodology in a separate section following our discussion of the EC's findings in so far as the existence of a benefit is concerned in the remaining programmes.

KDB Debenture Programme

7.194 The Final Determination sets forth the conclusions of the EC concerning the existence of a benefit conferred by the KDB Debenture Programme in the following manner:

> "(63) Considering the explanations in recitals 50 to 62, the KDB programme can be seen to have **conferred a benefit to Hynix also bearing in mind that no comparable financing was available to it in the market**. Hynix was not able to finance its maturing bonds through bank loans, since it had exhausted its possibilities of receiving loans due to its already high exposure in its creditor banks and its weak financial situation which did not allow further credit to be granted to it by any other bank. **Refinancing of the bonds in the bond market was not possible due to its weak credit rating which did not allow the market to accept its maturing bonds**, as admitted by the GOK in its questionnaire response. For these reasons, the conclusions on the point of existence of benefit and thereby the existence of a subsidy, in recital 61 of the provisional Regulation are hereby confirmed."[176] (emphasis added)

7.195 We recall that the KDB Debenture Programme was set-up by the government in response to financial instability in Korea caused by the fact that a large amount of bonds issued by a few companies (including Hynix) were due to mature simultaneously. Under the programme, maturing

[175] Final Determination, para. 46.
[176] *Id.*, para. 63.

debt was to be rolled-over and re-packaged for investors. Participating companies had to pay 20 per cent of the due debt, 80 per cent being assumed by the KDB.[177] In other words, the purpose of the programme was to provide financing for those companies for which the market would not be willing to provide such financing. Indeed, as confirmed by the government during the investigation, the Korean bond market applied extremely strict conditions in 2001 and companies with moderate credit ratings were not able to refinance their bonds in the market. As explained by the government in its questionnaire response:

> "[c]ompanies with moderate grade ratings, that previously could have issued bonds, were not able to do so. Since many of the companies were otherwise viable, the KDB programme sought to provide the liquidity during this period. As a practical matter, if companies had a credit rating above A-, they could issue bonds through the normal bond market. If companies had credit ratings of either BBB+, BBB, BBB-, BB+ or BB and otherwise met the eligibility requirements they could participate in the KDB programme."[178]

7.196 The record shows that, by January 2001, Hynix's credit rating was BB+[179], which implies that under the government's own admission Hynix would not have been able to issue bonds on the market. It is therefore clear to us that the KDB purchase of Hynix bonds as part of the KDB Debenture Programme, provided an advantage to Hynix compared to what it would have been able to obtain on the market. We find further relevant the fact that none of the parties at any time presented evidence that Hynix could have re-financed its bonds in a foreign market, and as the EC noted in its Final Determination, the speculative rating B given to Hynix by the international rating agency Standard & Poor's in January 2001 did not support such a possibility either.[180]

7.197 Korea argues that the successful GDRs offering is proof of the viability of Hynix and of the existence of a market for Hynix bonds. Korea also refers to the participation of the creditor banks in the refinancing of the 80 per cent of Hynix bonds purchased by the KDB, and the fact that other private investors also purchased bonds through the CBOs/CLOs programme on the same terms as other participating companies. We note that the same arguments were made before the investigating authority, which in the Final Determination responded to such arguments in the following manner:

> "(56) As regards the GDR issuance, it is accepted that Hynix raised money in the capital market through this instrument in June 2001. However, by that time 80 per cent of its bonds financed via the KDB programme had already matured and they had been taken over by KDB before that date. The GDR issuance was therefore not helpful as regards these bonds and another way had to be found for their financing, already as from January 2001. As such, the GDR issuance is not, therefore, an indication that Hynix would have had access to the capital markets in January 2001. Furthermore, without the KDB programme Hynix would already have been bankrupt due to failure to pay these bonds by the time of the GDR issuance. It is also noted that as explained under recitals 73 to 76 of the provisional Regulation, the Hynix stock price collapsed almost immediately after the issuance in June 2001 and the investors who bought Hynix stocks suffered considerable losses. Therefore its

[177] As we explained earlier, 20 per cent of the 80 per cent was taken on by the company's creditor banks in proportion to their current debt exposure to the company; 70 per cent was re-packaged for sale to investors as CBOs and/or CLOs, guaranteed by the KCGF; and 10 per cent was retained by the KDB. The participating company, in this case, Hynix, had to repurchase at least 3 per cent of any CBOs and 5 per cent of any CLOs.

[178] Response of Korea to the EC Questionnaire, p. 37-38. (**Exhibit GOK–6**)

[179] Final Determination, para. 51.

[180] *Id*., para. 52.

possibilities to raise money in such a way were ruled out, in particular considering that its total liabilities still reached KRW 7,2 trillion in July 2001.

(57) Indeed, the timing of the measures is an important factor. It needs to be stressed that the decision of the investors to buy Hynix GDR in June might have been influenced by the very fact that most of Hynix's maturing liabilities were abolished by the GOK-inspired KDB programme between January and June 2001. The KDB programme was well known and attracted a great deal of public comment. The Hynix GDR offering memorandum also refers to the "KRW 2,9 trillion anticipated continued availability under the KDB Programme to provide refinancing for maturing bonds in 2001". Consequently, the investors' decision to invest in Hynix in June 2001 might well have been influenced by the belief that the GOK would continue making sure that Hynix did not fail. This point is referred to also in recital 44 of the provisional Regulation. Therefore, the information on the record indicates that the KDB programme might have influenced the decisions of the investors to invest in Hynix in June 2001.

(58) As regards the Hynix argument that its bonds were resold into the CBO/CLO programme on the same terms as other participating companies' bonds, it is noted that the terms of the existing CBO/CLO programme were very different, and were not available to Hynix.

(59) The CBO programme was created in order to increase the bond financing going to relatively small firms with lower credit ratings. The programme could not have been available to Hynix because of its size. In addition, Hynix could not have sold the same amount of bonds to the programme because of the concentration limits, which only allowed a maximum of 10 per cent of the pool of bonds backing any CBO/CLO to be from any one company. It is also noted that KDB bought all Hynix bonds, even those allegedly intended for the CBO programme. Even after the KDB programme ended, KDB still held Hynix bonds designated for sale to CBO funds. KDB also delayed the sale of the bonds into CBO funds and retained control over the bonds in the KDB programme even after they were placed in CBO funds, and directed their roll-over into new long-term bonds when Hynix was unable to pay them upon maturity. The Korea Credit Guarantee Fund ("KCGF") also increased the guarantee level on CBOs from 34 per cent to 53 per cent to account for the inclusion of the KDB programme. Consequently, it cannot be claimed that the normal terms and conditions of the programme were applied to Hynix bonds. Indeed, they were treated very differently.

(60) The way the KDB programme was carried out is also very different from the way comparable transactions would have been carried out in the market. According to the KDB programme, KDB bought all the maturing bonds, converted them to much lower interest rates than that held by the original bonds, placed 20 per cent of them to creditor banks and 70 per cent to CBOs/CLOs. Moreover, the conditions applied differed significantly from those of the CBO/CLO programme, including the application of increased State guarantees. The bonds were not sold by public offering but through private placement to existing creditors. This does not correspond to refinancing of bonds under market terms.

(61) KDB also argued that the KDB programme is not a subsidy since KDB makes its decisions on funding and fund utilisation on a commercial basis and is engaged in profit-earning business focused on corporate finance.

> (62) As regards the KDB argument that the KDB programme is not a subsidy due to the nature of the activities of KDB, it is noted that recitals 55 to 59 of the provisional Regulation set out the reasons why the financing provided by KDB constitutes a financial contribution by a Government within the meaning of Article 2(1)(a)(i) of the basic Regulation. Since KDB has not provided any new evidence in its comments that would alter the assessment made in the provisional Regulation, the conclusions set out in recitals 55 to 59 of the provisional Regulation are hereby confirmed."[181] (footnotes omitted)

7.198 We consider reasonable the explanations provided by the EC on the basis of the facts on the record. In particular, we wish to underline that we consider that the specific circumstances of the GDRs offering, which was concluded on 15 June 2001 (and thus well after the intervention of the KDB), and which may have been profoundly influenced by the intervention of the government through the KDB, render the GDRs offering unsuited as evidence of a market that would be equally willing to invest in Hynix as the government was at the time the KDB purchased the bonds.

7.199 In our view, the EC has drawn a reasonable and reasoned conclusion, based on the facts before it, that the KDB purchase of Hynix bonds under the KDB Debenture Programme conferred a benefit to Hynix. In other words, we find that Korea failed to demonstrate that the EC established the existence of a benefit conferred to Hynix by the KDB Debenture Programme in a manner inconsistent with Article 1.1(b) of the *SCM Agreement*, and therefore we reject Korea's claim in this respect.

7.200 Our ruling does not necessarily imply that we agree with the EC calculation of the amount of the benefit under its grant methodology, a question that will be discussed later in our Report.

May 2001 Restructuring Programme

7.201 We recall that, in the earlier section of our Report concerning the existence of a financial contribution, we concluded that the EC failed to establish that the private bodies which participated in the May 2001 restructuring through a bond purchase of KRW 1 trillion were directed to do so by the government. In the absence of a proper determination of the existence of a financial contribution, the principle of judicial economy suggests that it is not necessary for us to discuss the question of benefit conferred by the private creditor bank's behaviour.

7.202 However, for purposes of implementation and in case of an appeal which would overturn our financial contribution determination, and thus assuming, *arguendo*, that the EC properly determined that all banks that took part in the May 2001 Restructuring Programme were directed by the government to do so, we will now examine whether the EC was justified on the basis of the record evidence to consider that a benefit was conferred by the purchase of the CBs by the creditor banks in May 2001.

7.203 With regard to the existence of a benefit it seems that, in this case, the basis for concluding that the creditor banks were directed to participate in the May 2001 Restructuring Programme was precisely the fact that no reasonable market investor would have purchased Hynix's CBs in May-June 2001. If this conclusion is assumed, *arguendo*, to have been reasonable, it seems difficult to conclude otherwise when it comes to the question of benefit.[182] In sum, and assuming, *arguendo*, that

[181] Final Determination, paras. 56-62.

[182] We wish to point out nevertheless that we do not consider that, in each case of government direction or entrustment of a private body, a benefit will necessarily be conferred on the recipient. In case the government provides a loan, and thus a financial contribution, it may well do this on market terms and thus without conferring a benefit. Similarly, even in a case where a private body has been directed by the government to provide a financial contribution, it may still be the case, albeit a less likely one, that this private body provides the financial contribution on market terms, and thus without conferring a benefit.

the existence of a financial contribution by the purchase of CBs in May 2001 was properly established, we find that the EC's conclusion that a benefit was thereby conferred was consistent with Article 1.1(b) of the *SCM Agreement*. Our ruling does not necessarily imply that we agree with the EC calculation of the amount of the benefit under its grant methodology, a question that will be discussed later in our Report .

October 2001 Restructuring Programme

7.204 The investigating authority concluded that the financial contribution provided by the six Option 1 banks participating in the October 2001 Restructuring Programme conferred a benefit on Hynix as the company was rated "selective default" at the time and therefore no financing was available to it on the commercial markets.[183] We will therefore examine whether the EC conclusion concerning the existence of a benefit was justified by the facts on the record.

7.205 We first recall that, with regard to the existence of a benefit, it seems that in this case the basis for concluding that the creditor banks were directed to participate in the October 2001 Restructuring Programme was precisely the fact that no reasonable market investor would have purchased Hynix CBs in May-June 2001, and that, therefore, the only logical explanation for the participation by the six Option 1 banks was that they had been directed by the government, among other means of persuasion by using its shareholder power. In our view, this conclusion was reasonable, and thus it seems difficult to conclude otherwise when it comes to the question of benefit.[184] In sum, given the reasons why we considered the existence of a financial contribution by the October 2001 Restructuring Programme to have been properly established, we find that the EC's conclusion that a benefit was thereby conferred in a manner was consistent with Article 1.1 of the *SCM Agreement*.

7.206 In this respect, it may be worth recalling some of the evidence on record concerning the existing possibilities, or lack thereof, for Hynix to find comparable financing on the market. It seems uncontested that, by October 2001, the financial situation of Hynix was disastrous. Throughout the summer 2001, Hynix' s financial situation had worsened and by 5 October 2001 its credit rating was selective default. In addition, Hynix had a bad history of servicing its earlier debts. Moreover, its stock prices had collapsed immediately after the GDRs issuance on 15 June 2001, and there was no proposal for a new GDRs issuance. The record indicates that, between June and September 2001, the stock price had fallen by 72 per cent. When the CFIC decided on the second restructuring package on 31 October 2001, the creditor banks were given three options. The large majority of the creditor banks chose Options 2 and 3, and refused to extend further loans to Hynix as did the six Option 1 banks. The eight Option 2 banks swapped 28 per cent of their debt to equity, and waived the rest, while the Option 3 banks simply received the liquidation value of their loans. By contrast, the six Option 1 banks that participated fully in the October 2001 Restructuring Programme granted new loans, extended maturities and agreed to a debt-to-equity swap. Of these six Option 1 banks, five banks are either public bodies (the KDB), totally (Woori bank) or in large part government owned (Chohung Bank (80 per cent) and the KEB (43 per cent) or have, at least, in part a public policy objective (the NACF, in which the government also took an important equity share in 2001).[185] In our

[183] Preliminary Determination, paras. 100-102.

[184] In this respect, we refer to our considerations set forth in footnote 182.

[185] We wish to note that, while we found such government ownership not to be sufficient in and of itself to conclude that the government had actually used its shareholding power to direct these banks to provide the financing, we do believe that it casts serious doubts over their use as a market benchmark. This is all the more so given the *prima facie* non-commercial behaviour of these banks at the time of the October 2001 Restructuring Programme. We note that, in our view, even if we had not accepted as reasonable the EC conclusion that all private banks were directed by the government to participate in the October 2001 Restructuring Programme, we do not consider that these banks could necessarily have been valid benchmarks for the benefit analysis. While it is certainly true that Citibank, and its subsidiary SSB, are not government-owned at all, we consider that the EC sufficiently demonstrated that the close relationship with the government and the specific role as financial advisor to Hynix throughout the restructuring make Citibank particularly inapt

view, the EC determination that the six Option 1 banks were directed to provide a financial contribution to Hynix was reasonable. In addition, by comparison with the choices made by the Option 2 and 3 banks, the participation by the Option 1 banks could reasonably be found to have conferred a benefit on Hynix.

7.207 In addition, we consider that the EC conclusion is supported by the low interest rates of the new loans and the maturity extensions. The new loan for Hynix – a company which we recall was rated selective default – was set at 7 per cent while the Syndicated Loan in January 2001, when Hynix was still rated BBB+, was 13 per cent. The maturity extension of October 2001 led to a decrease of the interest rate by 6 per cent, although the whole reason for the extension was precisely the inability to pay off the debt. As the EC correctly pointed out, one would reasonably expect a commercial bank to have increased the interest rate to reflect the increased risk of loosing the money invested. The fact that the opposite occurred is highly remarkable. All this is uncontested. It is similarly uncontested that the participating banks themselves were raising their loan loss provisions. The record shows that Chohung Bank immediately raised its loss reserves after participating in the measures to cover 80 per cent of the Hynix debt and accounted the whole debt-to-equity conversion as a loss. Woori Bank referred to public interest considerations as a reason for participating.

7.208 The only real argument of Korea in support of the commercial reasonableness of the Option 1 banks' participation in the October 2001 Restructuring Programme is that the banks invested in Hynix because they believed the going concern value of Hynix was greater than its liquidation value. For that reason, their decision to provide further financing made commercial sense from an inside investor perspective. As the EC points out, the banks do not seem to have based this conclusion on independent assessment studies, as could be expected given the situation of Hynix. The reports referred to – the SSB report, the Monitor Group August and November reports, or the Abbie Gregg report – were not viability assessments on which a decision to further invest in Hynix might reasonably be considered to have been based. As the EC stated, the Monitor Group report, for example, consisted of only 10 pages describing certain technical and market related issues in a general way. Only the Arthur Andersen report was a viability study which actually examined the liquidation value of Hynix. It did this, it seems, mainly for the purpose of the Option 3 banks which would have their loans purchased back at the liquidation value, as established by Arthur Andersen. However, as we discuss elsewhere in our Report, this Arthur Andersen report was effectively withheld from the investigating authority for reasons of confidentiality. In our view, it was reasonable for the investigating authority to refuse to take this report into consideration as only one page of a more than 200 page long document had been provided. Moreover, it appears that this Arthur Andersen report was only finalized in December 2001 and, like the Monitor Group report of November 2001 cannot have been the basis for the decision of the banks in October 2001. In sum, it appears from the record that the reports allegedly supporting the insider investor argument were either not provided to the authorities, or were not informative of the decision-making process by the Option 1 banks.

7.209 For all of the above reasons, we consider reasonable the conclusion of the EC that none of the six Option 1 banks involved in the October 2001 Restructuring Programme acted in a commercially reasonable manner. Neither at the time of the investigation, nor before us, has it been argued that Hynix could have obtained similar funding in October 2001 from another source. As the EC points out in the Final Determination:

> "(110) (...) The largest creditor of Hynix at the time of the measures was KDB, which held 44 per cent of the total of Hynix loans in December 2001.

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to serve as an appropriate market benchmark for assessing whether the government's financial contribution was in line with normal market conditions, or whether it, on the contrary, conferred a benefit to Hynix. This is especially so given the very small participation in Hynix by Citibank whose share of the total Hynix loans in October 2001 was 1.3 per cent. (Preliminary Determination, para. 93)

> (111) Prior to 1998, Hynix had received loans from French and Japanese banks, including the Bank of Tokyo, Société Générale and Credit Lyonnaise. Since then, however, none of these banks has participated in the restructuring of Hynix. The outstanding loans from foreign banks, including those from Citibank Seoul, accounted for only 5 per cent of the total Hynix loans in 2000 to 2001. It is noted that the assessment of the role of Citibank is explained in recitals 130 to 133.
>
> (112) The lack of participation of foreign banks suggests that further investment in Hynix was not considered to be rational and economically justified. It is noted that the outstanding amount of KRW 37,5 billion of the Syndicated Loan from foreign borrowers granted in 1996 and led by Société Générale was declared for default and cross default in 2001." (footnotes omitted)

7.210 The facts and figures used in these paragraphs of the Final Determination were not contested. For all the above reasons, we find that the EC determination concerning the existence of a benefit was consistent with Article 1.1(b) of the *SCM Agreement*.

(ii) Calculation of the amount of the benefit – The EC's grant methodology

7.211 We recall that, in essence, the investigating authority found that the record showed that the financial situation of Hynix was such that no reasonable private investor would have been willing to provide funds to this company, whether in the form of a loan, a loan guarantee or an equity infusion, as it was clear that the chances of ever recovering the money invested were minimal. In sum, the EC considered that the market would not have provided the financing to Hynix. In such a situation, the funding provided, in whatever form, is equal to the provision of risk capital for which Article 14(a) of the *SCM Agreement* does not provide a precise method for calculating benefit. It simply states that a benefit is conferred if the investment decision can be regarded as inconsistent with the usual investment practice – including for the provision of risk capital – of private investors in the territory of that Member. According to the EC, the record showed that this was the case. The benefit then consisted of the financing which no reasonable investor would have provided to Hynix, and the alleged subsidy programmes were all, irrespective of their terms and conditions, treated as grants.

7.212 In our view, there is a basic problem with the EC's grant methodology, and that is, simply put that a loan, a loan guarantee, a debt-to-equity swap that requires the recipient to repay the money or to surrender an ownership share in the company is not the same as a grant and can not reasonably be considered to have conferred the same benefit as the provision of funds without any such obligation. For the recipient, a loan clearly has a different value than a grant as it involves a debt that is owed to someone and will appear as such in a company's balance sheet. It is thus obviously less beneficial for a company to be given a loan than it is to be given a grant. Similarly, the issuance of new equity, directly or through a debt-to-equity swap dilutes the ownership claims of existing shareholders. We note that, in a benefit analysis, it is the perspective of the recipient that is important, not that of the provider of the financial contribution. In that sense, we find erroneous the starting point of the EC's calculation of the amount of benefit, which focuses on the expectation of the provider of the funds to see his money back. The question of benefit is not about the cost to the provider of the financial contribution, it is about the benefit to the recipient.

7.213 We realize that it may be difficult to directly apply Article 14 of the *SCM Agreement* which contains guidelines for the calculation of the subsidy in terms of the amount of the benefit. In the absence of a comparable commercial loan, it may well be difficult to apply for example Article 14(b) dealing with loans and referring the investigating authority to a comparable commercial loan that could actually be obtained on the market. Article 14(c) refers to a comparable commercial loan, which may well be difficult to find. In light of these problems dealing with the prescribed methodology for calculating benefit in Article 14 of the *SCM Agreement*, we consider that an investigating authority is entitled to considerable leeway in adopting a reasonable methodology. As

we stated earlier, we do not consider that the EC's grant methodology passes this basic reasonableness test. Any methodology used must, in our view, reflect the fact that the situation of Hynix is less favourable in case it has to repay the money provided, or dilute the ownership of existing shareholders, compared to the situation that it could keep the money provided in the form of a grant.[186]

7.214 In light of our findings in this respect, we see no need to address Korea's alternative claims of errors – such as the alleged double-counting as discussed in paras. 7.155-7.156, *supra* – made by the EC in calculating the amount of the subsidy.

7.215 In sum, and for the above reasons, we find that the EC's calculation of the amount of benefit conferred by each of the financial contributions was inconsistent with Articles 1.1(b) and 14 of the *SCM Agreement*.

3. Claim regarding the EC's determinations on specificity

(a) Korea

7.216 Korea asserts that the EC made a determination of *de facto* specificity of the alleged subsidies under the KDB Debenture Programme based on (1) the limited number of users of the subsidies and (2) the predominant use of the subsidy programmes by Hynix, without providing any positive evidence to substantiate such conclusions.

7.217 Korea argues that the KDB Debenture Programme was not a free ticket and the circumstances of each enrolment depended upon the very specific considerations of the company and its creditors who could file the application for enrolment of the company. The more relevant question, and one the EC does not provide any insight on, is whether firms that fulfilled the eligibility criteria and sought participation were prevented from doing so. The EC's conclusion that the programme was specific because of the limited number of users is thus purely speculative. Moreover, Korea asserts, the fact that Hynix used up almost 41 per cent of the funds does not necessarily mean that it was the predominant user of the alleged subsidies, as such data needs to be considered in light of the importance of the DRAM sector in Korea.[187] Finally, Korea argues that the EC failed to take account of the extent of diversification of the Korean economy and the length of time the programme had been in operation as explicitly required by Article 2.1(c) of the *SCM Agreement*.

7.218 In any case, Korea submits, 70 per cent of the KDB bonds were repackaged in the May 2001 CBOs/CLOs programme, and, as this programme was not specific, such bonds should have been excluded. Korea argues that the EC's allegation that the bonds were sold via the CBOs under different conditions is simply incorrect and unsupported by evidence.[188]

7.219 With regard to the May and October 2001 Restructuring Programmes, Korea argues that the EC's specificity analysis is not clearly substantiated or based on positive evidence and failed to take into account the overall context in which these restructuring efforts took place. According to Korea, all the transactions were executed under the broader framework intended to bring creditors together to

[186] In our view, the EC must base its calculation of benefit on alternative benchmarks, in Korea or elsewhere, and such an alternative methodology could, for example, include the investment practices related to "junk bonds" and "vulture funds".

[187] Korea asserts that the six companies involved in the KDB Debenture Programme were different in size, different in industry, and different in terms of their financial circumstances, and that these differences constitute the qualitative distinctions by which any quantitative measure of specificity must be tempered.

[188] According to Korea, the 10 per cent concentration limit did apply to bonds sold by Hynix via the CBOs/CLOs programme, there was no delay in the sale of the bonds by the KDB, and there is no evidence that the guarantee level associated with the CBOs/CLOs programme was increased due to the inclusion of Hynix in the KDB Debenture Programme.

work out debt of troubled but viable companies, in a manner recommended by the IMF and based on the so-called "London approach". To find specificity in this context, Korea submits, is like saying that a country's bankruptcy laws are company specific.

7.220 In sum, Korea submits that the EC violated Articles 1.2 and 2 of the *SCM Agreement* because the EC made an erroneous finding of *de facto* specificity with respect to the KDB Debenture Programme and failed to clearly substantiate, on the basis of positive evidence, the existence of specificity with respect to the May and October 2001 Restructuring Programmes.[189]

(b) EC

7.221 With regard to the KDB Debenture Programme, the EC argues that there was ample reason to believe that it was in fact specific, as only six companies made use of the Programme and, of these few, Hynix was the dominant user. The EC asserts that the authority considered all the factors mentioned in Article 2.1 of the *SCM Agreement* and took into account the extent of diversification of the Korean economy and the length of time the Programme had been in operation. The EC considers that the specificity of the measures is to be examined by looking at the scope of the measures *vis-à-vis* the beneficiaries. In addition, the EC argues that the number of eligible companies is not relevant, what matters is the limited actual use by the companies of the Programme.

7.222 With regard to the May and October 2001 Restructuring Programmes, the EC emphasises that Korea admits that the transactions were unique, and that it is therefore disingenuous to argue that these Programmes are equivalent to the normal application of generally applicable bankruptcy laws.

(c) Panel Analysis

7.223 The EC concluded that the KDB Debenture Programme constituted a *de facto* specific subsidy to Hynix based on the limited use of the programme by a small number of companies – six out of a potential of more than 200 eligible companies – and the disproportionate use of the funds under the programme by Hynix – which used up to 41 per cent of the total funds under this programme. In the Final Determination, the EC found as follows:

> "(65) As explained under recitals 62 to 64 of the provisional Regulation, it was concluded that, whilst the KDB programme was not specific in law under Article 3(2)(a) of the basic Regulation, it was nevertheless de facto specific under Article 3(2)(c) of the basic Regulation, since three of the four criteria of that provision were fulfilled: the use of the programme by a limited number of companies, predominant use by certain companies and the granting of disproportionately large amounts of subsidy to certain companies. Since specificity in law was not claimed, further analysis of the terms and conditions of the programme is not relevant. However, the number of firms potentially eligible under such criteria is relevant. Regarding de facto specificity, it is concluded that the programme was only used by six companies, four of which belonged to Hyundai Group, and that Hynix used 41 per cent of the funds of the programme. It is noted that the information on the record indicates that more than 200 companies in Korea would have fulfilled the selection criteria of the programme. Against the background of this group of potential recipients, the large proportion of Hyundai Group of companies in the participants and the predominant use by Hynix of the total funding of the programme clearly fulfils the specificity criteria under Article 3(2)(c) of the basic Regulation."

[189] Korea also submits that the EC acted inconsistently with Articles 1.2 and 2 because, *inter alia*, the EC disregarded the fact that many Korean companies underwent debt restructuring similar to that undergone by Hynix, and, therefore, the EC did not establish that all of the alleged subsidies were specific on the basis of positive evidence. (Korea First Written Submission, para. 676).

7.224 We understand Korea's argument with regard to the KDB Debenture Programme to be that it does not suffice in order to find specificity in the sense of Article 2 of the *SCM Agreement* to simply note that the programmes were only used by a limited number of companies if, for example, the eligibility criteria are broad enough and the restricted use of the programme depends on the extent of the commitments companies are willing to make rather than on any government behaviour.

7.225 Article 1.2 of the *SCM Agreement* provides that a subsidy is only countervailable if "such a subsidy is specific in accordance with the provisions of Article 2". Article 2 of the *SCM Agreement* provides, in relevant part, as follows:

> 2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:
>
> > (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
> >
> > (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[2] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
> >
> > (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[3] In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.
>
> (...)
>
> 2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

[2] Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

> [3] In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered. (emphasis added)

7.226 We are of the view that an authority when it has reasons to believe that the subsidy is *de facto* specific in the sense of Article 2.1(c) of the *SCM Agreement* may consider such other factors as the use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. The EC determined that (1) the subsidy programme was used by a very limited number of companies, as only six out of an eligible two hundred companies used the programme; (2) that it was predominantly used by the Hyundai group companies among which Hynix[190]; and (3) that a disproportionate 41 per cent of the total subsidy amount of KRW 2.9 trillion was granted to Hynix. These figures are uncontested and clearly constitute "positive evidence".[191] In addition, the EC pointed out that, after the participants to the programmes had been announced, there was a lot of criticism within Korea from companies in similarly difficult situations complaining about the lack of transparency and the eligibility criteria. These criticisms indicate that the EC also considered the manner in which discretion was exercised in admitting companies to the KDB Debenture Programme.[192]

7.227 In sum, the EC's conclusion is based on the disproportionate use of the Programme's funds for Hynix, which led it to the reasonable conclusion that the KDB Debenture Programme, as applied, constituted a *de facto* specific subsidy to Hynix.

7.228 We do not consider that the fact that the bonds, once purchased by the KDB, were subsequently sold via the CBOs/CLOs programme has any bearing on the specificity analysis. The subsidy that is countervailed consists of the financial contribution through the purchase of a bond and thus the granting of a loan by the KDB – a public body – to Hynix. The fact that the KDB later resells the bonds via the CBOs/CLOs programmes, together with bonds of other participating companies, is not relevant in this respect.

7.229 As to Korea's argument that the EC failed to take account of the economic diversification of the Korean economy and the length of time the programme has been in place, we consider that Korea has failed to provide any supporting evidence to this effect. In our view, the record does not indicate that the parties ever raised the issue that the disproportionate use of the Programme's funds for Hynix was somehow to be explained by the lack of diversification of the Korean economy or the length of time the programme had been in operation. We therefore do not find it unreasonable that the EC did not include in the Final Determination any explicit statement regarding these matters.

7.230 In our view, having considered all four factors mentioned in Article 2.1 of the *SCM Agreement* for *de facto* specificity, and having reasonably concluded that under all four factors the KDB Debenture Programme was *de facto* specific for Hynix, we consider that the EC determination of specificity with regard to the KDB Debenture Programme was consistent with Article 1.2 and Article 2.1 of the *SCM Agreement*.

7.231 With respect to the May and October 2001 Restructuring Programmes, we fail to see the relevance of Korea's arguments, as the EC determination did not relate to the CRA or the CRPA as such, but rather to the specific restructuring operations undertaken under this general framework. The

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[190] 79 per cent of the total expenditure under the programme went to Hyundai group companies. (Preliminary Determination, para. 64)

[191] We agree with the Appellate Body's view concerning the term "positive evidence", as set forth in its report in the *US – Hot-Rolled Steel* case. (See para. 7.272, *infra*)

[192] Final Determination, para. 69.

EC never made any findings with respect to the CRA or the CRPA as such, but its determination related to the unique bail-out operation for Hynix. These restructuring operations were not simply the application of a generally available support programme. Rather, the CRA and the CRPA provide merely a procedural framework for restructuring and do not themselves involve any financial contributions. What is relevant is that the EC found that, under the May and October 2001 Restructuring Programmes, and taking into account our earlier findings concerning financial contribution and benefit, a specific restructuring exercise was undertaken *for Hynix*. Hynix received financial contributions which were specifically given *to Hynix* as the banks granted new loans or rolled-over debt and swapped debt-to-equity *of Hynix*. In our view, and given the arguments made by Korea, the EC determinations of specificity with regard to the specific contributions *to Hynix* in the May and October 2001 Restructuring Programmes are consistent with the Articles 1.2 and 2 of the *SCM Agreement*.[193]

7.232 We therefore find that the EC did not act in a manner inconsistent with Articles 1.2 and 2 of the *SCM Agreement* and reject Korea's claims with respect to specificity.

4. Claim regarding Articles 19.4 of the *SCM Agreement* and VI:3 of the *GATT 1994*

(a) Korea

7.233 Korea submits that the EC violated Article 19.4 of the *SCM Agreement* and Article VI:3 of the *GATT 1994* because of the EC's failure to measure the benefit in accordance with the principles of Article 14 of the *SCM Agreement*, and its failure to utilize Hynix's consolidated turnover in the denominator of its margin calculation. According to Korea, the EC confuses the scope of the investigation with the question which product and which companies benefit from the alleged subsidies, which is the relevant question for the calculation of the subsidy amount. As the alleged subsidies were not specifically given to the production of DRAMs, Korea argues that the denominator to be used should not only be the unconsolidated sales of Hynix, the DRAMs producing mother company, but also include all of its consolidated subsidiaries, as they all benefited from the alleged subsidies. This failure inevitably led to a duty being imposed in excess of the subsidy found to exist, in violation of Article 19.4 of the *SCM Agreement*.

(b) EC

7.234 The EC argues that, as the countervail proceedings covered imports of DRAMs from Korea, the relevant denominator consisted of the sales of the Korean DRAMs producer found to have received subsidies. The EC explains that the investigating authority allocated such subsidies over time and distinguished between the export subsidies which were allocated over Hynix's exports and the untied subsidies which were allocated over Hynix total sales. According to the EC, all of Hynix subsidiaries are separate legal entities with separate accounting. There is no reason to assume that such subsidiaries benefited from the programmes. The EC asserts that, while the results of the subsidiaries affect the parent company, the opposite is clearly not necessarily the case. The EC argues that the clear assumption in the *SCM Agreement* is that the recipient of the subsidy, in this case Hynix, is also the legal person benefiting from the subsidy. As the scope of the investigation was limited to DRAMs from Korea, the EC concludes that it was only normal not to include the sales of non examined subsidiaries.

[193] We note that our ruling deals with the arguments made by Korea in respect of "specificity" and has to be read in light of our earlier findings with regard to the financial contribution and benefit determinations made by the EC with respect to these programmes.

(c) Panel Analysis

7.235 In light of our earlier findings concerning the flaws in the determination of the existence and amount of a subsidy, we consider that it would be neither necessary nor appropriate for us to make any findings on the claims concerning the calculation of a subsidy we find was not properly established by the EC. We, therefore, do not make any ruling in respect of this claim.

5. Claim regarding the EC's application of "facts available"

(a) Korea

7.236 Korea argues that on four occasions the EC resorted to the use of facts available in a manner inconsistent with Article 12.7 of the *SCM Agreement*. Korea submits that the EC ignored relevant information duly submitted and drew adverse inferences from an alleged failure to cooperate in a manner which can only be considered as punitive. In particular, Korea rejects the EC's use of facts available in two cases of alleged failure to cooperate by Korea with regard to the Economic Ministers' meetings (of 28 November 2000 and 9 January 2001) and the attendance of an FSS official at the creditors meeting of 10 March 2001. In addition, Korea argues that the EC acted in a manner which is inconsistent with Article 12.7 of the *SCM Agreement* in the case of Hynix's alleged refusal to allow Citibank to cooperate and in respect of Hynix's alleged failure to provide the Arthur Andersen report which formed the basis for the banks to participate in the October 2001 Restructuring Programme.

7.237 With regard to the Korea's failure to provide information concerning the Economic Ministers' meetings and the attendance of the FSS official, Korea explains that this was simply due to a misunderstanding which was a consequence of the very general and vague nature of the EC's questions during the investigation. Korea submits that it replied to all the questions to the best of its abilities, explaining that it had not been involved in negotiating or coordinating the Hynix restructuring process. In addition, Korea asserts that, when notified of the EC's specific inquiry about the Economic Ministers' meetings and related documents, Korea promptly submitted its comments in its 30 May 2003 submission explaining, in detail, the nature of the meetings, the situation surrounding the meetings held in late 2000 and early 2001, and the reasons why relevant information was not included in the questionnaire response or examined during verification. Korea asserts that if the information and explanation promptly provided by Korea was deemed to have been somehow unsatisfactory or deficient, the EC should have requested Korea to provide further information and explanation. In the view of Korea, this is exactly the two-way communication the WTO jurisprudence requires. Korea thus takes issue with the EC using the misunderstanding over the information with respect to the Economic Ministers' meetings and the attendance by an official of the FSS of a creditors' meeting as an excuse to ignore the information submitted. In the view of Korea, this form of punishment has absolutely no basis in the *SCM Agreement*. In sum, Korea argues that the EC's resort to the use of facts available under Article 12.7 of the *SCM Agreement* was unjustified and its application disproportionate to the alleged non-cooperation.[194]

7.238 With respect to the two cases of alleged failure to cooperate by Hynix, Korea submits that the EC refused to use information that was provided within a reasonable period of time, thereby acting in a manner which is inconsistent with Article 12.7 of the *SCM Agreement*. First, with regard to the Arthur Andersen report, Korea takes issue with the EC's contention that Hynix refused to provide a copy of the report prepared by this consulting firm, which was highly relevant to the question of alleged direction by Korea, as it demonstrated the commercial reasonableness of the investment

[194] In this respect, Korea argues that Article 12.7 of the *SCM Agreement* differs from its counterpart in the *AD Agreement*, as it relates to interested Members as well as interested private parties. In addition, the absence of an Annex II to the *AD Agreement* in the *SCM Agreement*, according to Korea, supports its view that investigating authorities should be more careful when applying the facts available *vis-à-vis* interested Members' governments.

decisions of the creditor banks. Korea asserts that initially Hynix had submitted a copy of the report but that, at a later stage, it asked the EC to remove it from the file, for reasons of confidentiality due to the contractual relationship between Hynix and the consultant firm that authored the report. However, Korea asserts that Hynix invited the EC to consult the report in the course of the verification visit. Moreover, at a later stage in the investigation, and responding to a question from the EC, Hynix enclosed a translation of the relevant page of the report establishing the liquidation and going concern value of Hynix. Korea states that Hynix made a number of references to the report at different stages of the investigation. Korea is of the view that the EC was not justified in completely disregarding the report and its conclusions. Moreover, the EC applied facts available and drew adverse inferences from the alleged failure to provide the report in a manner which was disproportionate and punitive.

7.239 Secondly, with regard to Citibank's alleged non-cooperation, Korea argues that the EC's finding that Hynix prevented Citibank from cooperating with the investigation thereby "seriously impeding" the investigation is not correct. Korea asserts that Citibank duly replied to the original questionnaire. Although Citibank was not able to provide certain information requested by the EC in its deficiency letter, Korea asserts that Citibank continued to try to cooperate. In particular, Korea refers to the submission of an affidavit in May 2003 setting out Citibank's reasons for lending to Hynix. Korea asserts that Hynix and Citibank explained the reasons why the latter could not disclose certain information requested by the EC in its deficiency letter. Korea asserts that there is no evidence on the record that Hynix requested or instructed Citibank to refuse cooperation with the EC's investigation. Finally, Korea takes issue with the EC's conclusion that Citibank's lack of cooperation could be taken as an indication that it had participated in debt restructuring at the direction of the government of Korea.

(b) EC

7.240 The EC submits that Article 12.7 of the *SCM Agreement* allows an investigating authority to use the facts available in case necessary information is not provided with a reasonable period of time or in case interested parties refuse access to such necessary information or significantly impede the investigation. The EC is of the view that, in the four instances referred to by Korea, the investigating authority was entitled to use the facts available and did not use these in a punitive manner. The EC considers that Article 12.7 of the *SCM Agreement* would not be of much use if it would not entitle an authority to take the non-cooperation into account when weighing the evidence. The EC asserts that the essential point of a provision like Article 12.7 is, and can only be, the possibility of drawing adverse inferences.[195]

7.241 With regard to the Economic Ministers' meetings and the meeting that was attended by an FSS official, the EC asserts that the facts concerning these meetings are actually not contested by Korea.[196] The EC considers that the documents which revealed these facts were not provided by either Korea, or any of the interested Korean parties, in spite of the fact that they were obviously relevant and had clearly been requested by the investigating authority. This non-provision of such information legitimately cast a shadow over the conduct of the parties being investigated and it means that the investigating authority has some flexibility when it comes to assessing the facts available to it. Since the information ultimately provided was used by the authority, the EC is of the view that Article 12.7 of the *SCM Agreement* is actually irrelevant to the way the EC used this information, which is purely a question of weighing the evidence. The EC takes issue with Korea's assertion that it did not "reasonably believe" that the fact of the ministerial meeting, the subject matter of the Ministers' discussions, and the various outcomes and associated documents might be considered germane to the investigation.

[195] EC First Written Submission, para. 197.
[196] *Id.*, paras. 206 and 217.

7.242 Regarding the Arthur Andersen report, the EC asserts that neither Korea nor Hynix ever provided the investigating authority with a copy of the report. A sixteen page summary in Korean which was first submitted was later withdrawn for confidentiality reasons.[197] In the end, what was provided in response to a deficiency letter, was one page of the report which sets forth the conclusions on the average pay-back ratios in case Hynix is treated as a going concern and in case Hynix is liquidated. Such a one page excerpt of the report is clearly insufficient in order to be able to make an informed decision about the implications of the report, as it does not enable the authority to analyze how the authors of the report arrived at the final figures and whether their assessment was correct and justified. The EC also takes issue with Korea's argument that the EC never indicated any concern or problem about the report, as it was clear from the Preliminary Determination that the authority had not taken account of the report or its alleged findings. In any case, the EC notes that the importance of the report should not be overestimated as it was only finalized in December 2001 and could thus not have been the basis for the creditors' decision in October 2001 regarding the October 2001 Restructuring Programme.

7.243 Finally, with respect to Citibank, the EC asserts that Hynix's refusal to give consent to Citibank to supply the requested information and documents to the investigating authority constituted a clear failure to provide necessary information and significantly impeded the investigation. The investigating authority was, therefore, entitled under Article 12.7 of the *SCM Agreement* to base its determination with regard to Citibank on the facts available, which included, in so far as relevant, the evidence submitted by Citibank in the form of an affidavit. The EC asserts that it is undisputed that the reason for Citibank's non-cooperation was Hynix's refusal to give its consent, and that the authority was justified in taking this refusal into account when reviewing and weighing all information concerning Citibank.

(c) Panel Analysis

7.244 Korea's claims concern the use of facts available by an investigating authority under Article 12.7 of the *SCM Agreement*, which provides as follows:

> [i]n cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

7.245 Article 12.7 thus allows an authority to make determinations on the basis of the facts available in case certain necessary information is not provided within a reasonable period, or if access to such information is refused, or in case an interested party or interested Member significantly impedes the investigation. Article 12.7 thus enables an authority to continue with the investigation and make determinations based on the facts that are available in case the information necessary to make such determinations is not provided by the interested parties, or, for example, verification of the accuracy of the information submitted is not allowed by an interested party, thereby significantly impeding the investigation. In other words, Article 12.7 identifies the circumstances in which investigating authorities may overcome a lack of information, in the response of the interested parties, by using "facts" which are otherwise "available" to the investigating authority.[198]

[197] The EC notes that Hynix did submit a copy of the report to US Department of Commerce in a parallel investigation carried out against DRAMs from Korea, in spite of Hynix's explanation to the EC that, due the contractual relationship in force between Hynix and the author of the report, Hynix was not allowed to copy in full or in part the report.

[198] We note that the Appellate Body was also of this view, when examining Article 6.8 of the *AD Agreement* dealing with facts available in the context of anti-dumping investigations. (Appellate Body report, *US – Hot-Rolled Steel*, para. 77)

7.246 Korea argues that, on four occasions, the EC resorted to the use of facts available in a manner inconsistent with Article 12.7 of the *SCM Agreement*. We examine each of Korea's claims in turn.

(i) Economic Ministers' meetings / Attendance by an FSS official at a creditors' meeting

7.247 We recall that, following the Preliminary Determination, the EC discovered, through press reports, a couple of documents of Korea and letters reporting the results of meetings of the Economic Ministers that took place on 28 November 2000 and 9 January 2001 which relate to Hynix's restructuring process. In addition, it was discovered that a high ranking FSS official attended an important meeting of the Creditors Council on 10 March 2001. Korea recognizes the veracity of these documents and confirmed the presence of this public official at that meeting.

7.248 The EC relied on these documents when making its determination of the existence of a financial contribution by the government, in particular in respect of the Syndicated Loan and the KEIC Guarantee, as well as the May 2001 Restructuring Programme. The EC also considered that the fact that the letters of Korea, and the public official's presence at the meeting, were not disclosed by Korea, when requested, allowed the authority to use other sources of information as well, such as press reports.

7.249 We do not understand Korea to be arguing that the EC should not have relied on these documents or should have used other information that it provided instead. Rather, Korea appears to be arguing that the EC gave undue weight to the documents and that its reading of these documents was improperly coloured by the alleged failure of Korea to provide these documents itself. That, in our view, is not a matter of relevance to the use of Article 12.7 of the *SCM Agreement* which deals with a situation in which information is not provided, or cannot be used and other secondary source information is used instead. The weighing of the information and the evidence before it, is part of the discretionary authority of the investigating authority. Under our standard of review, we will examine whether the investigating authority came to reasonable conclusions on the basis of all of the evidence properly before it. There is no rule in the *SCM Agreement* that stops the investigating authority from taking into account information from all sources, including press reports. In this particular case, we do not consider that the EC should have necessarily accepted at face value the interpretation of the letters and explanation of the course of events offered by Korea. Whether, in the end, the EC had a sufficient basis for making a determination of the existence of a financial contribution in the case of the Syndicated Loan, the KEIC Guarantee and the May 2001 Restructuring Programme is a question which can only be answered by looking at all the evidence before the authority. We conducted this review earlier in our Report.

7.250 In any case, and even if one would want to examine the facts in the light of Article 12.7 of the *SCM Agreement*, we are of the view that it was not unreasonable of the EC to reach the conclusion that necessary information had been requested but not provided by Korea. In the questionnaire that was sent to Korea, the EC requested the following:

> "[e]xplain the role of government or public officials in negotiating or co-ordinating this [Syndicated Loan] process, including details of their participation in relevant meetings and the nature of their involvement with Hynix and/or the banks concerned."[199]

7.251 And with regard to the KEIC Guarantee, the following question was asked:

[199] Response of Korea to the EC questionnaire, question 1, p. 30. (**Exhibit GOK-6**) For a complete list of questions posed by the EC in this respect see EC response to question 58 of the Panel, paras. 143-154.

> "[g]ive details of the involvement of government or public officials in this process [KEIC Guarantee] including details of their participation in relevant meetings."[200]

7.252 In the response by Korea, no mention was made of the Economic Ministers' meetings or the letters that were sent to the KEB and KEIC following those meetings. Similarly, with regard to the May 2001 Restructuring Programme, the EC asked the following:

> "[p]lease describe the involvement of government or public officials in the above process, including their participation in relevant meetings, and explain what functions and powers they had in decisions."[201]

7.253 In response to this question, Korea replied

> "complying with the relevant statutes, no government or public officials attended the relevant meetings or were involved in the above process."[202]

7.254 In our view, the EC reasonably concluded that its questions were specific enough to have informed Korea that it was to provide information concerning any meetings of the kind documented in the letters relating to the 28 November 2000 and the 9 January 2001 meetings. As is acknowledged by Korea, the ministers of three ministries dealing with economic matters met to discuss, *inter alia*, ways for "alleviating the cash crunch of Hyunday Electronics [Hynix]".[203] We do not find unreasonable the EC's conclusion that Korea was sufficiently informed that these were precisely the kind of documents that the EC was asking about. Similarly, with regard to the presence of the FSS official, we consider that the question of the EC made it clear that any presence of a government or public official at the Creditors Council meeting of 10 March 2001, in which further Hynix restructuring was discussed, was to be reported in answer to the EC's questions. The fact that the FSS official in question was the vice-chairman, and that there were subsequent contacts between the FSS/FSC and the creditor banks, are further support for the EC's conclusion that Korea's answer was not a simple misunderstanding or a minor oversight, but rather a deliberate, less than full, disclosure by Korea.

7.255 The information contained in the discovered documents and the fact that a high ranking FSS official was present at a meeting of the Creditors' Council is obviously relevant to establishing the existence of a financial contribution by the government and the question of government entrustment or direction of private bodies in particular. We therefore conclude that, in so far as this is a question of the use of facts available, the EC was not acting in a manner inconsistent with Article 12.7 of the *SCM Agreement* by considering that necessary information had not been provided and by resorting to certain information from secondary sources such as press reports as part of its subsidy determination.

(ii) The Arthur Andersen report

7.256 With regard to the Arthur Andersen report, the EC concluded the following in the Final Determination:

> "KEB, Woori Bank, CHB, NACF and Citibank Seoul all argued that they participated in the October 2001 package since they wanted to maximise their recovery rate for the loans already granted to Hynix. They considered that the value of Hynix as a going concern was higher than the immediate liquidation value. They argued that

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[200] Response of Korea to the EC questionnaire, p. 35. (**Exhibit GOK-6**)
[201] *Id.*, p. 46.
[202] *Ibid.*
[203] Document of 28 November 2000, Results of Discussions at the Economic Ministers' Meeting. (**Exhibit EC-3**)

> their participation in the October 2001 package was determined on the basis of their credit evaluation of Hynix, supported by analysis from outside consultants. It should be noted, however, that Hynix has refused to provide a copy of the analysis determining the liquidation value on the basis that it was confidential. Consequently, it has not been possible to assess its merits and, therefore, final findings in this regard have been determined in accordance with Article 28 of the basic Regulation."[204]

7.257 Korea argues that the Arthur Andersen report was evidence of the commercial reasonableness of the creditor banks' decision to participate in the October 2001 Restructuring Programme, as it allegedly demonstrated that the going concern value of Hynix was higher than its liquidation value. The EC did not take this report into account for a number of reasons, the most important one being that it had not been provided to the investigating authority.

7.258 It appears that a sixteen page executive summary of the report in Korean was attached to Hynix's questionnaire response, but that one week later Hynix requested the EC to remove the report from the record as "the contractual relationship in force between Hynix and the author of the report attached to the injury submission as Annex 17 does not allow Hynix to copy in full or in part the report".[205] Hynix added that the EC could, nevertheless, have access to the report at the time of the verification visit. Following a deficiency letter from the EC on 8 November 2002 in which the EC asked for the Arthur Andersen report to be provided, Hynix enclosed in its reply of 21 November 2002, a translation of one page of the report setting forth the conclusions on the average pay-back ratios in case Hynix is treated as a going concern and in case Hynix is liquidated. The EC never verified the report as it considered it was under no obligation to do so as the report had not been properly provided in the first place.

7.259 We are of the view that the EC was justified in considering that Hynix failed to provide the necessary information by providing only one page of a report of more than two hundred pages. It appears that Hynix itself considered the report to be relevant and necessary; otherwise, it would not have submitted the report in the first place. Hynix then withdrew the report without sufficient justification. As the investigating authority pointed out in a letter to Hynix, if there was any confidentiality concern, this could be taken care of through the normal confidentiality procedures. Hynix never even asked for the report to be treated in a confidential manner. Neither is there anything on the record, and no argument has been made before us, that Hynix ever tried to obtain the approval of Arthur Andersen to submit the report, if it considered it needed such approval.[206]

7.260 Korea argues that Hynix was under the impression that, by submitting the one page conclusion of the report, the EC was satisfied. Korea argues that, by not informing Hynix that it would not be able to rely on the report unless the full report was submitted, the EC failed to respect the "two-way" communication that is essential to a proper application of Article 12.7 of the *SCM Agreement*. First of all, we consider that the EC requested the information, and after the report had been removed from the record at the request of Hynix, sent a deficiency letter to Hynix again asking for the report to be submitted. Even assuming that such a basic due process requirement of informing a party concerned that certain information is considered not to have been properly provided to the authority is inherent in a proper application of Article 12.7 of the *SCM Agreement*, we consider that the EC complied with its procedural obligation. It requested the information to be provided on two

[204] Final Determination, para. 136.

[205] Hynix's letter to the European Commission Regarding the Monitor Group and Arthur Andersen reports (26 September 2002). (**Exhibit GOK-28**)

[206] In fact, we note that Hynix's argument that the contractual relationship between the consultant and Hynix prevented the latter from submitting the report in full or in part, seems to be contradicted by the facts. In the end, part of the report (one page) was submitted to the EC, in apparent breach of the alleged contractual obligations of Hynix. Moreover, in a parallel investigation by the United States, Hynix submitted a larger excerpt from the report to the US Department of Commerce, apparently because it was told by its American advisors that the US would never accept a mere one page excerpt as sufficient.

occasions and recalled that any confidentiality concerns could be taken care of through its confidential information procedures. In the absence of any specific procedural requirements in the *SCM Agreement* with regard to the application of Article 12.7 of the *SCM Agreement*, we consider that the EC was justified in considering that the report was not provided within a reasonable period and basing its determination on the remainder of the facts available.

7.261 We therefore reject Korea's claim that by disregarding the Arthur Andersen report the EC acted in a manner inconsistent with Article 12.7 of the *SCM Agreement*.

(iii) Citibank

7.262 We recall that Citibank was Hynix's financial advisor at the time of the 2001 restructuring. As a non-government owned bank, Citibank's role, particularly in the October 2001 Restructuring Programme was considered important in determining the commercial reasonableness of the creditor banks in participating in the restructuring process.

7.263 In the Final Determination, the EC reached the following conclusions:

> "(131) In terms of its role as a lender in this investigation it should be noted that the non-cooperation of Citibank prevented any reliable information being obtained on the precise functions and practices of Citibank in relation to the financial package given to Hynix. Thus, Citibank's assertions that it was not acting under GOK direction could not be verified via a proper response to a questionnaire and a subsequent verification visit. The same applies to the lending practices of Citibank. It should also be noted that the failure of Citibank to cooperate significantly impeded the investigation, not just in terms of identifying Citibank's precise functions in relation to its role as a lender, but also in respect to its role as the financial adviser to Hynix. Due to the non-cooperation the true status of Citibank as regards Hynix and the nature and intensity of its overall relationship to the GOK remain unknown. The importance of cooperation and verification visits is demonstrated by the fact that as regards some of the other banks involved in the case, it was proper cooperation and verification that was instrumental in allowing definitive conclusions to be drawn as regards the relations between them, Hynix and the GOK. What the investigation has, however, shown, due to information given by other parties, is that Citibank was a central figure in discussions between the GOK, Hynix and other parties involved in this case. Indeed, Hynix stated that Citibank should not cooperate in the investigation because "such disclosure may divulge information relating to Hynix's cost, finance or accounting". It is recalled that Hynix was majority-owned by the GOK via the banks at the time of this intervention.
>
> (132) In these circumstances, the final findings had to be based on the facts available with regard to whether Citibank as a lender acted under GOK direction and whether the benefit to Hynix equated to the full financial contribution made by Citibank to Hynix. In this respect, it is uncontested that unlike the other participants in these measures, Citibank's first intervention as a creditor bank of Hynix was in January 2001 when the financial situation of Hynix was already sufficiently bad to deter any other new bank from getting financially involved. Citibank's own rating for Hynix in October 2001 was D "doubtful". Nevertheless, Citibank provided financing to Hynix. Citibank was requested to explain their general lending policy and whether it was normal to provide financing to doubtful companies. As already explained, Citibank did not provide any details which would have explained their motivation in participating in the measures investigated.

> (133) As for the GOK direction, information on the record indicates that there were considerable links between the GOK, Hynix and Citibank. For the GOK and Citibank these went beyond the loans investigated. Such links can be interpreted in two ways. Firstly, they can be interpreted as indicating that Citibank may well have had commercial reasons for providing financing to Hynix, or as alleged by one of the parties, they could be interpreted as placing Citibank in a vulnerable position with regards to direction by the GOK. Due to the non-cooperation it was not possible to establish whether Citibank acted on coercion or whether this was in accordance with their normal business practice. In this respect, it is recalled that the reason for non-cooperation was to prevent access to Hynix's cost, finance and accounting data. In the absence of any other explanation, this can reasonably be taken as an indication that this data in Citibank's possession contain information revealing that there were no commercial reasons to provide the financing in question, and that the financing was provided due to GOK direction. This reason is also the one suggested in the complaint. In addition, as explained in recital 94 of the provisional Regulation, Citibank has had an unusually close and symbiotic relationship with the GOK since 1967, when it was authorised to operate in Korea. This close relationship between the GOK and Citibank is witnessed in the role played by Citibank in assisting the GOK to extricate itself from the Korean financial crisis of 1997. Citibank led and successfully completed Korea's bank debt restructuring for a total of USD 21,75 billion in 1998. Moreover, Citibank helped the GOK and government-related institutions to access capital markets during the Korean financial crisis by successfully sponsoring a USD 4 billion global bond offering. All these facts confirm that Citibank has a very close relationship to the GOK. On the basis of these facts, and of the refusal of Citibank to grant access to the information in its possession, and failing any other verifiable evidence being available, the conclusion to be drawn in accordance with Article 28(6) of the basic Regulation is that the GOK was involved and directed Citibank to provide the financing in question."

7.264 We note that it seems undisputed that Citibank did not provide certain information requested by the EC in its follow-up questions of 8 November 2002.[207] It appears that the reason for this was the fact that, under Korean law, banks operating in Korea are prohibited from disclosing to third parties any information concerning banking relationships with other companies except with the prior written consent of those companies. Citibank requested Hynix to give its consent to disclosing the information the EC was requesting. Hynix considered that such information was highly confidential and that Citibank's reply may divulge information relating to Hynix's cost, finance or accounting.[208] Hynix thus refused to provide such consent without examining first Citibank's files, something Citibank refused to accept as it would have violated long-standing Citibank policy prohibiting disclosure of such internal analysis to the customer.[209] The record shows that, in a letter dated 26 November 2002, the EC reminded Citibank of the possibility of submitting the information in a confidential manner such that the information would receive proper protection. Citibank replied that this would not solve its legal liability problem under Korean law. Further written exchange between the EC and Citibank of 29 November and 2 December 2002 merely repeated these same points. While Korea argues that Citibank "invited the EC for a verification visit"[210], it appears that all that was offered by Citibank was to meet with an EC official during the official's verification visit to Korea.[211]

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[207] Hynix's Comments of 4 July 2003. (**Exhibit GOK-37**)

[208] Hynix's letter to Citibank in annex to Hynix's Comments of 4 July 2003, referred to in note 207, *supra*.

[209] Citibank's Affidavit, para. 6. (**Exhibit GOK-15**)

[210] Korea First Written Submission, para. 388.

[211] Citibank Affidavit, para. 6, referred to in note 209, *supra*.

7.265 Korea does not contest that the information requested was necessary information, nor that it was not provided to the investigating authority. Korea's argument is that Citibank did provide some information in an affidavit of 14 May 2003 and that the EC should have based its decision on this information, rather than on information obtained from other sources. In our view, the EC was justified in making its determinations on the basis of the facts available given the fact that information reasonably considered as necessary was not provided. The fact that an affidavit was submitted which contains certain general information that could be verified by the investigating authority does not alter that conclusion. We do not consider that the affidavit can be considered to have replaced the actual data and information requested. Especially, in light of the fact that an authority is to satisfy itself as to the accuracy of the information submitted, we do not consider that the EC should have accepted at face value the response of Citibank contained in the affidavit.

7.266 We note that Korea argues that Citibank should not have been considered as an un-cooperative party in light of its good faith efforts to provide the information. In addition, Korea argues that Hynix is not to be blamed for Citibank's failure to provide the information either. As we stated earlier, Korea argues that it was not Hynix's fault that the information was not provided, but that this non-provision was due to Citibank's internal policies. At the same time, Korea argues that it was not Citibank's fault either as Hynix did not consent to the disclosure of the information and that without such consent Citibank would risk legal liability problems under Korean law. Whomever is to blame, it is clear that necessary information was not provided within a reasonable period. There is no dispute that the EC clearly requested this information and informed Citibank of the consequences of non-cooperation. Neither Citibank nor Hynix for that matter ever made any serious attempt at finding a solution to the alleged problem that they had with providing the information. We thus conclude that the EC was entitled to resort to the use of the facts available under Article 12.7 of the *SCM Agreement*. On the other hand, whether the investigating authority made reasonable conclusions based on the facts before it and assigned the appropriate weight to the information provided, is a matter we deal with as part of our substantive review of the measures taken.

7.267 In sum, we reject Korea's claim that the EC acted in a manner inconsistent with Article 12.7 of the *SCM Agreement* by relying on the facts available with regard to Citibank.

C. CLAIMS CONCERNING THE EC'S INJURY AND CAUSALITY DETERMINATIONS

1. Claim concerning Article 15.1 of the *SCM Agreement*

(a) Korea

7.268 Korea submits that the EC acted inconsistently with Article 15.1 of the *SCM Agreement* because, *inter alia*, the EC determinations on injury and causation were not based on positive evidence and an objective assessment of the effects of the allegedly subsidized imports. Korea is of the view that Article 15.1 of the *SCM Agreement* is a fundamental and overarching provision such that all the obligations expressed in Articles 15.2-15.5 of the *SCM Agreement* have to be read in the light of the requirement to base the determination on positive evidence and to conduct an objective examination. Korea asserts that this implies that the evidence be "affirmative, objective, verifiable, and unbiased" and that the injury investigation process be "unbiased".[212] Korea argues that the EC's injury determination is inconsistent with the obligations found in Articles 15.2, 15.4 and 15.5 of the *SCM Agreement* and that each of these specific inconsistencies is necessarily an inconsistency under Article 15.1 of the *SCM Agreement*.

7.269 In the view of Korea, any assessment of whether an investigating authority acted inconsistently with, for example, Article 15.2 of the *SCM Agreement* necessarily requires an

[212] Korea First Written Submission, para. 75. Korea refers to Appellate Body report, *US – Hot-Rolled Steel*, paras. 192-193.

examination of whether the conclusions reached by the investigating authority under Article 15.2 of the *SCM Agreement* meet the positive evidence and objective examination requirements of Article 15.1 of the *SCM Agreement.* However, Korea adds, even if the Panel does not agree with this interpretation of the inter-relationship between Article 15.1 and the rest of Article 15 of the *SCM Agreement*, the Panel must still assess whether Article 15.1 itself imposes such an obligation, and whether the EC actions in this case meet that independent obligation under Article 15.1 of the *SCM Agreement*.[213]

(b) EC

7.270 The EC agrees with Korea that Article 15.1 of the *SCM Agreement* contains both an overarching obligation that informs the rest of Article 15 and an independent obligation of its own right. The EC considers that the investigating authority did not act inconsistently with the obligations contained in Article 15 of the *SCM Agreement*. The EC asserts that its injury determination was based on positive evidence and involved an objective examination.

(c) Panel Analysis

7.271 Article 15.1 of the *SCM Agreement* reads as follows:

> [a] determination of injury for purposes of Article VI of *GATT 1994* shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and *(b)* the consequent impact of these imports on the domestic producers of such products. (footnote omitted)

7.272 Accordingly, an investigating authority must ensure that its determination of injury, and more specifically, its findings under Articles 15.2, 15.4, and 15.5 of the *SCM Agreement*, are made on the basis of "positive evidence" and involve an "objective examination." In this regard, we note that the Appellate Body has interpreted "positive evidence" as follows:

> "[t]he term "positive evidence" relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination. The word "positive" means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible."[214]

7.273 We also note that the Appellate Body has defined an "objective examination":

> "[t]he term "objective examination" aims at a different aspect of the investigating authorities' determination. While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, the term "objective examination" is concerned with the investigative process itself. The word "examination" relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word "objective", which qualifies the word "examination", indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness."[215] (footnote omitted)

[213] Korea Second Written Submission, paras. 53-54.
[214] Appellate Body report, *US – Hot-Rolled Steel*, para. 192.
[215] *Id*., para. 193.

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

> "...an "objective examination" requires that the domestic industry, and the effects of [subsidized] imports be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process."[216]

7.275 We also note that the Appellate Body in *Thailand – H-Beams* confirmed the fundamental nature of a provision analogous to Article 15.1 and its importance as a guiding principle underlying all aspects of an injury determination. Thus, in respect of Article 3.1 of the *AD Agreement*, the Appellate Body stated:

> "Article 3 as a whole deals with obligations of Members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs. These obligations concern the determination of the volume of dumped imports, and their effect on prices (Article 3.2), investigations of imports from more than one country (Article 3.3), the impact of dumped imports on the domestic industry (Article 3.4), causality between dumped imports and injury (Article 3.5), the assessment of the domestic production of the like product (Article 3.6), and the determination of the threat of material injury (Articles 3.7 and 3.8). The focus of Article 3 is thus on *substantive* obligations that a Member must fulfil in making an injury determination."[217] (emphasis in original)

7.276 Like the parties, we are also of the view that Article 15.1 of the *SCM Agreement* is an overarching provision which informs the more detailed obligations set forth in the remainder of Article 15 of the *SCM Agreement*. This implies that we can only reach a conclusion that the authority acted in a manner that is consistent with the specific obligations of, *inter alia*, Articles 15.2, 15.4 and 15.5 of the *SCM Agreement* if it based its determination of injury on positive evidence and conducted an objective examination of the various injury elements as required by these more specific provisions. On the question of whether we will separately examine the question of consistency of the same measures with Article 15.1, we will not do so because Korea did not advance any arguments that raised a *prima facie* case of violation by the EC of Article 15.1 on its own. Rather, Korea's arguments were invariably focussed on the specific obligations of Articles 15.2, 15.4 and 15.5 of the *SCM Agreement*, and any arguments that it raised in relation Article 15.1 were not of a substantive nature.[218]

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[216] *Ibid*.

[217] Appellate Body report, *Thailand – H-Beams*, para. 106.

[218] This is not to say that we consider that Article 15.1 of the *SCM Agreement* does not impose any independent obligations in its own right. Indeed, we agree with Korea that, if an investigating authority lacks positive evidence and has not examined the evidence before it objectively, then the investigating authority would have acted inconsistently with Article 15.1, regardless of any conclusions that might be reached about the other – more specific – obligations under Article 15. In this case, however, we were not presented with any *prima facie* arguments that this had occurred. In addition, we are also inclined to believe that it is more appropriate for a panel to start its analysis by examining the consistency of a measure with the more specific obligation read in light of the general obligation, rather than the other way around.

2. Claim concerning the EC's determination regarding the volume of the subsidized imports

(a) Korea

7.277 Korea asserts that the EC analysis of the alleged increase in imports of DRAMs is flawed and gives a distorted picture of the actual situation. According to Korea, the EC's finding of a significant increase in Hynix imports was not based on an objective examination of positive evidence and is therefore inconsistent with Articles 15.1 and 15.2 of the *SCM Agreement*.

7.278 First, Korea argues that Article 15.2 of the *SCM Agreement* requires an investigating authority to determine that there has been a significant increase of *subsidized* imports. According to Korea, the EC examined whether imports from Korea *as a whole* increased, instead of focusing on subsidized imports alone, as required by Article 15.2 of the *SCM Agreement*. Korea is of the view that, although the EC determination provides some discussion on imports from Hynix alone, the focus is on imports from Korea as a whole – including imports from Samsung which were found not to have been subsidized – and its determination is thus inconsistent with Article 15.2 of the *SCM Agreement*.

7.279 Second, Korea argues that the EC failed to take into account the merger that took place in 1999 between Hyundai Electronics Industries ("HEI") and LG Semiconductors ("LGS"), which later led to the formation of a new company called Hynix. Korea asserts that the EC should have joined the volume of imports of HEI and LGS for the first year and a half of the injury POI (1998–July 1999) in its examination of the volume of imports from Hynix. By considering Hynix to be the successor only of HEI and by thus ignoring the volume of imports and the market share held by LGS prior to the merger in 1999, the EC conducted a result-oriented analysis as it was inevitable that the volume of imports of Hynix at the end of the injury POI was going to be higher than the volume of imports of just one of the two companies that constituted Hynix prior to the merger, at the beginning of the injury POI. According to Korea, had the EC combined the data for the two companies (HEI and LGS) prior to the merger, it would have found that market share had actually decreased during the injury POI.

7.280 Korea rejects the reasons invoked by the EC for ignoring the effect of the merger. According to Korea, the petitioners mentioned the merger and so did Hynix in its first submission to the investigating authority as well as during the injury presentation prior to the Preliminary Determination. According to Korea, the EC as a reasonable investigating authority should have further inquired about the relevance of this merger and should have requested more ample data, if such was necessary. Korea is of the view that the EC is improperly hiding behind the fact that none of the interested parties provided sales data for LGS for 1998–1999, since the EC never asked for such information to be submitted.[219]

7.281 Korea also rejects the EC argument that the merger with LGS was no more than a new acquisition by HEI increasing its capacity with no retroactive effect. To view the merger as a simple investment by Hynix ignores market reality as the obvious effect of the merger was that LGS' previous presence in the EC market disappeared and its sales were incorporated into Hynix's sales figures. In addition Korea argues, the EC itself in investigating the existence of a subsidy for Hynix, considered the merger as obviously relevant as it took into account the inheritance of the LGS debt by Hynix and countervailed all the loans granted to LGS.[220] According to Korea, if the EC desired to countervail the LGS loans before the merger, as it did in its Final Determination, it should also have properly considered the full effect of the HEI–LGS merger in its injury analysis.

[219] Korea thus refutes the EC assertion that the combined data for LGS and HEI constituted "new information" which could not be accepted for the Final Determination as it was submitted only after the Preliminary Determination and well after the verifications took place.

[220] Korea also considers that the EC was acting in contradiction with its own treatment in the Preliminary Determination of Micron's acquisition of a competitor, Texas Instruments.

7.282 Third, Korea is of the view that the EC failed to put the volume data in its proper context, as required to determine the "significance" of the alleged increase. Korea asserts that volume data of DRAMs imports measured in megabits will always increase, given the nature of the industry and the product. Consequently, Korea argues that the EC should have focused on the market share of Hynix which, if properly calculated by taking into account the merger between HEI and LGS, showed that Hynix was losing market share throughout the POI, as the increase in EC consumption was much higher than the increase in imports by Hynix.[221] Korea submits that, by ignoring this important context in which to assess the significance of the alleged increase in imports, the EC failed to make an objective determination based on positive evidence.

(b) EC

7.283 The EC argues that Article 15.2 of the *SCM Agreement* requires an investigating authority only to *consider* whether there has been a significant increase in subsidized imports and provides that such increase may be considered in absolute *or* relative terms. The EC asserts that the authority fully complied with this requirement by finding that imports of DRAMs from Hynix increased significantly, both in absolute and in relative terms. The EC rejects Korea's arguments to the contrary.

7.284 First, the EC argues that its determination is based on a separate examination regarding volume, price and market share of *subsidized* imports, *i.e.*, imports from Hynix**,** but that imports from Korea as a whole were also examined due to the scope of the investigation into imports of DRAMs from Korea. The simultaneous examination of the existence of a subsidy and of injury implied that it became clear only during the investigation that not all imports from Korea could be considered to have been subsidized.

7.285 Second, the EC considers that it did not act inconsistently with Article 15.2 of the *SCM Agreement* by not adding the volume of imports and the market share held by LGS prior to its merger with HEI in July 1999 to the 1998 – 2001 data for Hynix. The EC is of the view that the acquisition of LGS increased Hynix's production for the future but did not have any retroactive effect. The EC considers that the merger is comparable to the purchase of assets from a former competitor in order to increase a firm's capacity. Moreover, in the absence of any information concerning subsidization of LGS, which no longer existed at the time the subsidies were provided, it would have been incorrect to consider such imports from LGS during 1998–1999 as subsidized imports. The EC does not consider that there is any inconsistency in the fact that the investigating authority in the subsidy analysis added LGS' debts to those of Hynix, as this is in line with its approach that the purchase of the company increased production capacity for the future but also implied that its debts for the future increased.[222]

7.286 In any case, and alternatively, if the Panel were to find that the EC's treatment of the LGS merger was inconsistent with Article 15.2 of the *SCM Agreement*, the EC argues that Hynix failed to supply the necessary data concerning LGS sales for the years 1998 and 1999 in a proper and timely fashion. The EC asserts that only at the 19 May 2003 meeting of the investigating authority with Hynix was it clearly stated by Hynix that the data it had provided in the questionnaire response did not include LGS data. In its 27 May 2003 letter, Hynix provided only summarized data for LGS. The

[221] Korea asserts that EC consumption increased by 316 per cent during the injury POI, while imports from HEI and LGS, which together formed Hynix, increased by only 155 per cent, inevitably leading to a loss in market share by Hynix. (Korea First Written Submission, para. 126)

[222] The EC rejects the allegation that its treatment of Hynix was different from its approach concerning the take-over of Texas Instruments by a European producer, as it did not include the volume or market share data of the period before the acquisition to the data for the purchasing company either. The EC also rejects the Korean argument concerning the alleged inconsistency between the subsidy and the injury analysis, as the inheritance of the debts from LGS played no role in calculating the amount of the subsidy, nor in the injury analysis.

data provided four months after verification visits took place and in summarized form were therefore not verifiable and thus could not be used.

7.287 Third, the EC asserts that the investigating authority found a "significant" increase in subsidized imports, as indicated in the Preliminary and Final Determinations. The EC asserts that the various import figures were carefully analysed and explained, and their significance in the overall assessment of injury were discussed at length.

7.288 In sum, the EC is of the view that Korea has failed to demonstrate that the EC determination concerning the increased volume of subsidized imports of DRAMs from Korea was inconsistent with Articles 15.1 and 15.2 of the *SCM Agreement*.

(c) Panel Analysis

7.289 Korea claims that the EC's determination regarding the volume of imports was not consistent with Articles 15.1 and 15.2 of the *SCM Agreement*. Article 15.1 has already been cited in para. 7.271, *supra*. Article 15.2 reads in relevant part as follows:

> [w]ith regard to the volume of the subsidized imports, the investigating authorities shall *consider* whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. (...) No one or several of these factors can necessarily give decisive guidance. (emphasis added)

7.290 We have set forth our understanding of the obligations imposed by Article 15.1 in paragraphs 7.272-7.276, *supra*. Article 15.2 of the *SCM Agreement* elaborates on this requirement and sets forth the specific obligation with regard to the volume of subsidized imports. Article 15.2 requires an investigating authority to consider whether there has been a significant increase in subsidized imports. It is clear to us that this specific obligation has to be read in light of the general requirement of Article 15.1 of the *SCM Agreement*; hence, the investigating authority's consideration of the volume of subsidized imports should be objective and based on positive evidence. Finally, we note that Article 15.2 is part of the overall injury and causation analysis set forth in Article 15 of the *SCM Agreement*. The consideration of the volume of subsidized imports under Article 15.2 is not alone determinative in an injury determination. Rather, it forms part of the overall assessment of injury to the domestic industry and is conducted so as to provide guidance to the investigating authority in the context of this assessment of injury and causation.[223]

7.291 We wish to emphasise that our task is not to perform a *de novo* review of the information and evidence before the investigating authority, nor to substitute our judgment for that of the EC investigating authority. Rather, we examine the evidence on which the investigating authority based its determination and review whether the determination made was the result of an objective determination based on positive evidence. With the above in mind, we now examine the various aspects of Korea's claim.

(i) Was the consideration based on data regarding subsidized imports?

7.292 Korea argues that the EC based its determination of a significant increase in subsidized imports on data of both subsidized and non-subsidized imports from Korea as a whole in a manner inconsistent with Article 15.2 of the *SCM Agreement*. According to Korea, by including data from Samsung (the Korean producer found not to have been subsidized), the EC failed to conduct an objective examination of volume of subsidized imports from Hynix as required by Articles 15.1 and 15.2 of the *SCM Agreement*.

[223] In the same vein, Panel report, *EC – Tube or Pipe Fittings*, para. 7.278.

7.293 We note that the Final Determination provides the following discussion of the volume of subsidized imports in absolute terms:

> "(176) The volume of imports from Korea as described in recital 118 of the provisional Regulation was established on the basis of the aggregation of duly verified import data provided by Samsung and Hynix in their respective questionnaire responses. The volume of imports from Korea thus established increased by 331 per cent during the period under consideration. It is confirmed that imports from Hynix increased faster, i.e. by 361 per cent during the period under consideration.
>
> (177) Even if import data of LG Semicon Co., Ltd for 1998 and 1999 as provided *ad hoc* by Hynix and the GOK, and which could not be verified, were taken into account, they should be added to the volume of imports from Korea and not to the volume of imports from Hynix. The volume of imports from Korea would then have increased by 219 per cent during the period under consideration."

Imports	1998	1999	2000	2001 [POI]
Index Korea	100	128	185	319
of which:				
Index Samsung	100	110	181	414
Index Hynix	100	194	372	461
Index LG Semicon (data not verified)	100	90	0	0

7.294 In our view, the EC's examination of the volume of imports in absolute terms, thus covered both subsidized Hynix imports and non-subsidized Samsung imports. Similarly, when examining the volume of imports in relative terms, the EC examined data concerning both Hynix imports alone and Hynix imports together with Samsung imports. As the following excerpt from the Final Determination clearly shows, the focus of the EC was on imports from Hynix:

> "(183) Hynix, supported by the GOK, claimed that contrary to the upward trend of its market share as described in recital 124 of the provisional Regulation its market share decreased during the period under consideration. This claim is not warranted since the market share figures provided by Hynix to justify its claim were initially based on the total sales of its subsidiaries in the Community of the product concerned to unrelated customers in the Community during the period under consideration and not on the volume of its imports of DRAMs produced in Korea. After it was clarified to Hynix that its market share as described in recital 124 of the provisional Regulation was calculated on the basis of duly verified import data which it had itself reported in its questionnaire response, Hynix indicated that in establishing the trend of its market share during the period under consideration, imports from LG Semicon Co., Ltd that occurred before the date of the merger of this company with Hyundai Electronics Industries Co., Ltd should have been included in its import data. Hynix and the GOK provided certain *ad hoc* data in this respect.
>
> (184) For the reasons set out in recital 175 this claim is rejected and the provisional findings concerning market shares as described in recital 124 of the provisional Regulation are confirmed.
>
> (185) Even if import data of LG Semicon Co., Ltd for 1998 and 1999 as provided *ad hoc* by Hynix and the GOK, and which could not be verified, were taken into account, they should be added to the market share of imports from Korea and not to

the market share of imports from Hynix. The market share of imports from Korea would then have decreased by 21 per cent during the period under consideration."

Market shares	1998	1999	2000	2001 (IP)
Index Korea of which:	100	73	68	79
Index Samsung	100	63	65	100
Index Hynix	100	111	136	120
Index LG Semicon (data not verified)	100	52	0	0

7.295 In the Preliminary Determination as well, Hynix imports and imports from Korea as a whole are discussed side-by-side, with a particular focus on Hynix:

"(124) Korea increased its market share over the period considered. There was a significant drop in the Korean market share between 1998 and 1999, but the market share was more than recovered by the end of the [POI], when the Korean market share was almost 7 per cent more than the 1998 level. In the case of Hynix, its market share rose faster, i.e. by 20 per cent over the period. It is also reasonable to assume that the Hynix market share, in terms of Mbit, was somewhat constrained by its relative delay in moving from production of 64 Mbit to the 128 Mbit DRAMs."[224]

Market shares	1998	1999	2000	2001 (IP)
Index Korea	100	80	91	107
Index Hynix	100	111	136	120

7.296 After having considered and examined these data, the EC draws the following conclusions regarding the volume of the subsidised imports in paragraph 191 of its Final Determination:

"[a]s set out in recitals 176 and 177 [of the Final Determination], subsidised imports from Hynix increased during the period under consideration even at a higher pace than the Community consumption. Over the same period, the development of their market share followed the same trend, i.e. increased (see recitals 184 and 185 [of the Final Determination]) and reached a very substantial level during the [POI]. Even if the alleged volume of imports from LG Semicon Co., Ltd was to be added to that of Hynix for the years 1998 and 1999, such an imports trend towards the [POI] would still be increasing (increase of 155 per cent between 1998 and the [POI])."

7.297 In our view, the EC's findings with regard to the volume of subsidized imports are based on, and relate only, to the volume of imports from Hynix. In other words, the EC thus drew conclusions with regard to subsidized Hynix imports, after an examination which included data concerning both Hynix and the other Korean producer Samsung, which were discussed both separately and in combination. In sum, the determination concerning the volume effects clearly focussed on imports

[224] In addition to the above, we also point to the following statement contained in para. 115 of the Preliminary Determination:

"[g]iven that for one exporting producer (Samsung) the subsidy provisionally established is *de minimis*, certain injury indicators have been analysed with regard to the other exporting producer only (Hynix). As far as imports from Korea are concerned, the injury and causal link analysis focused on those from Hynix. This is due to the fact that there are only two Korean exporters, i.e. Hynix and Samsung, with more or less similar export shares and that only Hynix's exports were heavily subsidised."

from Hynix and its conclusions are based on data for Hynix. We therefore reject Korea's assertion that "the discussion [in the EC's Determination] focuses on imports from all of Korea."[225]

7.298 It is certainly correct that, in the sections dealing with the consideration of the volume of imports on absolute terms and relative to consumption[226], there are references not only to the volume of imports of DRAMs exported or produced by Hynix, but also to Korea as a whole. The EC does not deny that data for Korea include imports from Samsung, a company for which a *de minimis* margin of subsidization was found.[227] This is explained by the fact that that the investigation was initiated against Korea and not against Hynix only. Therefore, we do not find that the mere fact of referring to the development of imports from Korea as a whole necessarily implies that the EC should be found to have acted inconsistently with Article 15.2. What matters, in our view, is the use made by the EC of those data. In the case before us, we are persuaded that the consideration required by Article 15.2, *i.e.* whether there has been a significant increase in subsidized imports, was made by the EC based on data regarding Hynix alone.

(ii) Should data on imports of DRAMs produced or exported by LGS have been combined with that of Hynix for the purpose of carrying out the consideration required under Article 15.2?

7.299 The undisputed facts are that Hynix and LG Semiconductors ("LGS") were two of the Korean producers/exporters of DRAMs at the beginning of the injury POI, *i.e.* 1998. On 7 July 1999, Hyundai Electronics Industries ("HEI") purchased LGS from LG Electronics. Hence, LG Electronics ceased from that moment to be a producer/exporter of DRAMs. LGS was then renamed Hyundai Micro Electronics ("HME"). On 13 October 1999, HME merged with HEI. This company was renamed Hynix on 29 March 2001. The issue before us regards the treatment of LGS' imports of DRAMs between 1 January 1998 and 7 July 1999 for the purpose of Article 15.2's volume consideration.

7.300 Hynix, supported by Korea, argued during the course of the investigation that the EC should combine imports of LGS with Hynix's, for the purpose of undertaking the consideration under Article 15.2. The EC viewed the acquisition of LGS as a new investment made by HEI, without any retroactive effects on its position on the market, for the reasons set out in paragraph 175 of its Final Determination.[228] In essence, the EC rejected Hynix's claim because LGS was a separate legal entity

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[225] See, *inter alia*, Korea First Written Submission, paras. 92, 95 and 97.

[226] See excerpts cited in paras. 7.293 and 7.294, *supra*.

[227] The EC does not dispute the fact that, when undertaking the consideration set forth in Article 15.2 of the *SCM Agreement*, imports from those "exporters for which no subsidy margin above *de minimis* was found may not be considered to form part of the "subsidized imports"." We note that this is in line with the view expressed by panels and the Appellate Body when examining the provision parallel to Article 15.2 of the *SCM Agreement* in the *AD Agreement* – Article 3.2 thereof. (See, for example, Panel report, *EC – Bed Linen*, para. 6.138, and Appellate Body report, *EC – Bed Linen (Article 21.5 – India)*, para. 113)

[228] Relevant paras. of the EC's Final Determination read as follows:

> "(174) Hynix, supported by the GOK, also argued that, in establishing the trend of its imports into the Community over the period under consideration, the imports of the product concerned into the Community from LG Semicon Co., Ltd that occurred before the date of the merger of this company with Hyundai Electronics Industries Co., Ltd (Hynix since 29 March 2001) should have been included in its import data. Hynix and the GOK provided certain *ad hoc* data in this respect, i.e. two figures concerning imports in Mbits from LG Semicon Co., Ltd in 1998 and 1999. Otherwise, it was claimed that imports form Hynix should be considered for injury purposes only following the date of its merger with LG Semicon Co., Ltd in 1999.
>
> (175) However, LG Semicon Co., Ltd was a distinct legal entity before Hyundai Electronics Industries Co., Ltd acquired it from LG Electronics Inc. and its related companies on 7 July 1999. After the acquisition, LG Semicon Co., Ltd was renamed Hyundai Micro Electronics Co., Ltd and this company merged with Hyundai Electronics Industries Co., Ltd on 13 October 1999. The acquisition of LG Semicon Co., Ltd was therefore a new investment

from Hynix during the time when Hynix claims that the volume of imports of both companies should be combined, *i.e.*, between 1 January 1998 and 7 July 1999. Korea argues before us that the EC's treatment is purely legalistic and defies economic logic. In the view of Korea, the EC should have looked at all the imports from the *production facilities* that were under Hynix's control in 2001, even if they were not under Hynix's control in the earlier years.

7.301 Article 15.2 of the *SCM Agreement* sets forth no specific rules concerning the treatment of imports from companies which merged in the course of the period of investigation, thereby forming the company found to have been subsidized. In light of our standard of review, the question under Article 15.2 of the *SCM Agreement* is whether the EC reached a reasonable conclusion that, in determining the volume of imports from Hynix, it could ignore the amount of imports from LGS that entered the EC prior to LGS' merger with HEI.

7.302 In our view, Korea failed to establish that the EC's treatment of the merger as part of its overall volume analysis of subsidized imports was unreasonable or inconsistent with its obligation to conduct an objective examination based on positive evidence. The EC considered that HEI was the predecessor of Hynix, the company found to have been subsidized. It examined import volume data from HEI for a period of three years, from 1998–2001. During that period it considered that HEI had increased its production capacity by purchasing LGS but that this acquisition did not have any retroactive effects on HEI's position on the market. We do not find this to be unreasonable. Actually, from the record, we conclude that Hynix itself considered this an appropriate way of dealing with the merger as it did not include any LGS data in its questionnaire response.[229] We consider it important to recall in this respect that the term "subsidized imports" in Article 15.2 of the *SCM Agreement*, in our view, refers to imports from a source found to have been subsidized. In other words, it is not about an increase in the total volume of imports from Korea into the EC, it is about imports from a particular source. In this case, the EC determined that during the year 2001 HEI/Hynix received subsidies from Korea. In its injury analysis, the EC thus examined the volume of imports from this source as part of its consideration of whether the imports from this source had increased significantly. The EC decided to examine import data from HEI/Hynix sales during a period of three years, including the year in which it was determined that the subsidies had been provided to HEI/Hynix. The EC noted that, in the course of the second year of the injury POI, HEI acquired additional production facilities through the purchase of LGS. In this light, we do not find that it was unreasonable of the EC to conclude that imports of DRAMs from LGS during 1998 and 1999 did not have to be added to, or combined with, those made by Hynix (or its predecessor, HEI) during those two years for the purposes of considering whether there had been a significant increase of subsidized imports either in absolute terms or relative to consumption or production in the EC.[230]

> for Hyundai Electronics Industries Co., Ltd without any retroactive effects on its position on the market. In other words, Hyundai Electronics Industries Co., Ltd, predecessor of Hynix, which was the only company found to have benefited from subsidies, increased its production capacity. Furthermore, no party, including Hynix, has reported any imports from LG Semicon Co., Ltd for 1998 and 1999 in its questionnaire response or any other submission and as such were not verified by the Commission. LG Semicon Co., Ltd data cannot constitute part of Hynix's subsidised imports. For the reasons set out above, the claim made by Hynix and the GOK is rejected."

[229] As Hynix itself acknowledged in a submission to the EC, no such LGS data were provided because "[i]n 1998 and until 13 October 1999, Hynix Semiconductor Inc. (formerly Hyundai Electronic Industries) and LG Semicon were two legally distinct entities". (Hynix Letter to EC dated 27 May 2003 (**Exhibit GOK-35**))

[230] We note that, in any case, the text of Article 15.2 of the *SCM Agreement* requires that the volume of subsidized imports need to be considered but does not require a particular finding in this respect. Nor is it so that in the absence of a significant increase in the volume of subsidized imports, these imports could not be found to be causing injury. (In support of our view, see Appellate Body report, *EC – Tube or Pipe Fittings*, para. 111, note 114). Article 15.2 of the *SCM Agreement* is part of the overall injury analysis.

7.303 In terms of economic causation, it may well be true that the subsidies in question had no effect on the measured change in the volume of imports. Consider the following scenario. Firms A and B each export 100 units to the EC in years 2000 and 2001. Firm A is subsidized to the extent of USD 100 million in 2001, and in a totally separate transaction acquires Firm B in 2001. Firm A does not alter its exports on account of the subsidies. Firm A's acquisition of Firm B was not facilitated by the subsidies. However, following the EC's methodology, Firm A's exports increase from 100 in 2000 to 200 in 2001. In this scenario, the increase in imports bears no relation to the subsidies. However, Article 15.2 of the *SCM Agreement* imposes no obligation on the investigating authority to distinguish a false association between increased imports and subsidies – as illustrated on our own scenario – and a true association which would, for example, be the case if Firm's A acquisition of Firm B was financed by the subsidies. The distinction between true and false associations is, in our view, to be made in the context of Article 15.5, not in the context of Article 15.2. If Members wish to impose the additional – and heavy – analytic burden on investigating authorities of distinguishing between true and false associations in the context of Article 15.2, they can do so by amending the Article 15 *SCM Agreement*. This is not, however, a matter for the Panel to decide by interpretation.

7.304 While not particularly relevant to the question before us, we find that there is no lack of consistency between the EC's treatment of the LGS–HEI/Hynix merger question in the subsidy part of the investigation compared with the injury part. As the EC points out, the Final Determination merely states an uncontested fact, *i.e.* that the acquisition of Hynix increased Hynix's debt. We do not see how this is inconsistent with its treatment of the merger in the injury context, as in both cases, the EC acknowledges the future effects of the merger, an increase in production capacity but also an inheritance of of debt. It appears that Hynix's inheritance of LGS' debts did not play a role in the determination of the amount of subsidization.[231]

7.305 In any event, we note that even after rejecting Korea's contentions regarding the need to add LGS' import volumes to those of HEI/Hynix, the EC did calculate the combined volume of these two exporters/producers and considered whether there was a significant increase of subsidized imports. Based on this, it is stated in the Final Determination that there had been a 155 per cent increase of subsidized imports, in absolute terms, during the injury POI.[232] This figure is not disputed by Korea.

(iii) Does the EC determination properly conclude that the increase was "significant" in terms of Article 15.2?

7.306 Korea argues that the EC failed to place the volume data in the proper DRAMs context in order to assess the significance of the alleged increase in imports, thereby violating Articles 15.1 and 15.2 of the *SCM Agreement*. We note that Korea's argument concerning the alleged failure to properly consider the volume data to show a significant increase is based on two premises. The first is that it does not make sense to consider an absolute increase in imports in megabits, since due to the inherent characteristics of the DRAMs market, imports in absolute megabit terms will always be on the rise. Rather the relevant parameter for examining the significance of any increase is the increase in relative terms, and market share in particular. Secondly, when examining the relevant market share, the EC failed to explain how, in light of a decreasing Hynix market share, it could reasonably have concluded that there was a significant increase in the volume of Hynix imports.

7.307 We note that the latter argument of a decreasing market share is based on Korea's understanding of the role of the merger between LGS and HEI/Hynix. Indeed, the EC examined the

[231] Concerning the alleged inconsistent treatment of the mergers of HEI/LGS, on the one hand, and Micron/Texas Instruments, on the other, we agree with the EC that in both cases the investigating authority took account of the respective acquisition once it had occurred; and, in both cases, the investigating authority did not add the acquired company's volume and market share relating to the period prior to the acquisition to the acquirer's volume and market share.

[232] See para. 191 of the EC's Final Determination.

market share and found that Hynix's market share actually increased. In light of our earlier finding that the EC's approach of the merger was not unreasonable, and in light of the wide latitude Article 15.2 permits for investigating authorities, we conclude that Korea's argument must fail. Even assuming, *arguendo*, that given the specific characteristics of the DRAMs market it would not be reasonable from an economic perspective of an investigating authority to reach conclusions about a significant increase based on an increase in absolute terms, the language of Article 15.2 confers considerable latitude on an investigating authority. Article 15.2 allows an investigating authority to consider a significant increase, either in absolute terms or relative to production or consumption. And Article 15.2 goes on to state that no one or several of the factors considered can necessarily give decisive guidance. It is up to WTO Members, if they so choose, by amending the *SCM Agreement* to narrow this provision. It is not a matter for the Panel to circumscribe the investigating authority. Moreover, in this case, the record shows that the EC evaluated the volume of Hynix imports both in absolute and relative terms and concluded that, in both cases, imports increased, by 361 per cent and 20 per cent, respectively. We consider that these increases, as calculated under the EC's methodology, can reasonably be considered to have been significant. The ordinary meaning of "significant" encompasses "important", "notable", "major", as well as "consequential",[233] which all suggest something that is more than just a nominal or marginal movement. In our view, the increases identified by the EC's methodology (361 per cent and 20 per cent, respectively) can be categorised as "important", "notable", "consequential" and, most importantly, "significant".

7.308 In so concluding, we have taken into account the uncontested fact that Hynix's imports, as properly determined by the investigating authority, increased in absolute terms at a higher pace than domestic EC consumption.[234] We also deemed the fact that Hynix's market share increased over the injury POI, as found by the investigating authority, to be relevant in determining that the volume increase was significant.[235] Finally, in our view, the fact that the DRAMs market is highly transparent, and thus susceptible to rapid transmission of price shocks, a finding not contested by Korea, constitutes a factor that also pleads to the significance of the increases determined by the investigating authority, both in absolute terms and relative to consumption in the EC.

(d) Conclusion

7.309 In sum, we find that Korea failed to establish that the EC acted in a manner inconsistent with Article 15.2 of the *SCM Agreement*, read in light of Article 15.1 of the *SCM Agreement*, when considering the volume effects of subsidized imports.

3. Claim regarding the EC's determination concerning the effect of the subsidized imports on prices

(a) Korea

7.310 Korea argues that the EC acted inconsistently with Article 15.2 of the *SCM Agreement* by improperly assessing the significance of the price effects of Hynix imports. According to Korea, Articles 15.1 and 15.2 contain specific obligations on an investigating authority to find that the price effects found to exist were significant and to explain why it considers this to be the case. Korea submits that the EC determination which simply found price undercutting failed to comply with this requirement.

7.311 According to Korea, the EC finding that Hynix affected the market prices for DRAMs in the EC (1) defies economic logic; (2) defies the EC's own logic as expressed in the Preliminary Determination; (3) was based on an inappropriate price comparison analysis; (4) ignored the evidence

[233] The New Shorter Oxford English Dictionary, Third Edition, p. 2861.
[234] Final Determination, para. 191, referring back to its findings in paras. 172 and 177 thereof.
[235] *Id.*, para. 191, referring back to its finding in para. 185 thereof.

concerning other factors that were affecting DRAMs prices; and (5) was not based on the most recent data available. In sum, according to Korea, no reasonable investigating authority would have concluded on the basis of the facts on record that the alleged price effects of Hynix imports were significant.

7.312 First, Korea argues that economic logic provides that if it is price competition which determines market share in the DRAMs industry, and considering that the data show that Hynix was losing market share, any price undercutting found cannot have been "significant"; otherwise, Hynix would not be losing market share. Moreover, according to Korea, it is highly unlikely that a middle-cost producer like Hynix would have been able to lead prices down in a "bust" period like the year 2001 where low-cost producers are normally determining prices. In any case, Korea argues, the global nature of DRAMs pricing argues against the conclusion that one supplier would be able to determine prices in one particular market.

7.313 Secondly, Korea argues that the EC itself acknowledged in its Preliminary Determination that it is difficult to establish a price leader in the industry, a finding which corresponds with the evidence that Hynix was losing market share, in contrast to what would happen to a price leader in a price competitive market.

7.314 Thirdly, although Korea recognizes that Article 15.2 does not prescribe any particular methodology to assess price undercutting, it asserts that Article 15 imposes obligations that must be met with regards to the assessment of the price effects. In particular, Korea asserts that Article 15.1 requires an "objective examination" with respect to price effects. Any methodology that skews the analysis to favour one side fails to meet this obligation. Korea argues that the EC's factual determination of price undercutting by Hynix was based on a flawed price comparison which compared average monthly prices of Hynix with individual daily prices for EC producers. Two other comparisons performed by the EC, including its customary methodology of making a comparison based on weighted averages, did not lead to a positive finding on price undercutting by Hynix. Korea argues that such a distorted and result-oriented analysis is not an objective examination. Korea is of the view that by deviating from its usual methodology, the EC had an obligation to justify its approach.

7.315 Fourthly, Korea submits that the EC ignored abundant evidence on the record that factors other than Hynix prices were affecting DRAMs prices. Korea argues that Article 15.2 of the *SCM Agreement* does not permit an investigating authority to consider the alleged undercutting in the abstract, and argues that the EC should have tried to distinguish between price declines due to the inherent nature of the DRAMs market and declines caused by subsidized imports. Korea asserts that the declining market share of Hynix, as well as the serious drop by 77 per cent in prices worldwide in 2001 due to the cyclical nature of the DRAMs industry, are important factors which should have been included in the EC's analysis of the significance of the price effects of Hynix imports.

7.316 Finally, Korea argues that Article 15.2 of the *SCM Agreement* requires that a pricing analysis include the most recent period prior to initiation.[236] The EC did not consider pricing data for the first half of 2002, which, especially in light of the fact that 2001 was generally considered to be the worst year for the industry in decades, to be suspicious and does not correspond with the requirement to conduct an objective examination based on positive evidence.

[236] Korea argues that the language used in Article 15.2 of the *SCM Agreement* ("has been") clearly suggests a focus on the most recent past. Korea also refers to a recommendation by the WTO Committee on Anti-Dumping Practices adopted in the context of a similar obligation in Article 3.2 of the *AD Agreement*, as well as the views expressed by the *US – Line Pipe* panel which, in the safeguards context, found that an investigation should cover the recent past.

(b) EC

7.317 The EC argues that Article 15.2 of the *SCM Agreement* merely requires an authority to "consider" whether there has been a significant price undercutting, price depression or price suppression. The final sentence of Article 15.2 of the *SCM Agreement* moreover clearly states that no one factor provides final decisive guidance. In light of the broad latitude envisaged for an investigating authority in Article 15.2 of the *SCM Agreement*, the EC asserts that Korea fails to demonstrate that the EC determination of significant price undercutting by imports from Hynix was inconsistent with paragraphs 1 and 2 of Article 15 of the *SCM Agreement*. The EC rejects all five of Korea's arguments in this respect.

7.318 Regarding Korea's argument of economic logic, the EC asserts that it is not for the Panel to address Korea's abstract elaborations on economic theory and recalls that the issue before the investigating authority at the time of the investigation was whether or not Hynix's prices undercut or depressed or prevented price increases *vis-à-vis* domestic prices. In any event, the EC disagrees with Korea's premise, *i.e.* that Hynix's market share decreased during the injury POI. In addition, the EC does not agree that a company with a declining market share cannot be engaged in price undercutting. In addition, the EC does not agree that the capacity, whether limited or not, for individual companies to influence market prices means that individual companies cannot be the source of subsidized, price undercutting, imports.

7.319 Second, the EC considers that it is irrelevant for the purpose of Article 15.2 of the *SCM Agreement* that Hynix was not a price leader, as there is no need to be a price leader for a company to be able to engage in price undercutting.

7.320 Third, the EC takes issue with Korea's presentation of the EC's analysis of the existence of price undercutting. The EC underlines that it did take into account the characteristics of the DRAMs market: first, that competition takes place largely on price; second, that there is great price flexibility; and third, that there is great price transparency. The EC argues that it did not try out those three methodologies and simply pick the one that showed price undercutting. The EC explains that the third methodology, based on daily data was applied at the explicit request of Hynix and in fact, once the non-comparable transactions are eliminated, confirmed the price undercutting found through the second methodology, comparing weighted average prices of Hynix to individual transactions on a monthly basis. The EC emphasises that the *SCM Agreement* does not prescribe a particular methodology, and that the methodology chosen by the EC was reasonable and objective. The EC refers to its Final Determination which explains in detail why, in light of the particular characteristics of the DRAMs market, it was decided not to use a weighted-average to weighted-average comparison in this case.

7.321 Fourth, the EC considers that its determination of significant undercutting was justified in light of the circumstances of the case. It further rejects Korea's arguments concerning other factors driving prices down as a question of causation, irrelevant to the actual price undercutting examined under Article 15.2 of the *SCM Agreement*. Nor does the EC consider the arguments concerning absence of market leadership or the cost-neutral pricing practice in the industry to be relevant factors in this examination.

7.322 Fifth, the EC considers that the choice of the injury POI was not unreasonable, and there were no objective reasons why a different injury POI should have been chosen.[237] Therefore, and in the absence of any clear obligations in this respect in Article 15.2 of the *SCM Agreement*, the EC is of the view that Korea failed to demonstrate that by having the POI for the injury analysis ending at the

[237] The EC explains that its internal regulations require the simultaneous investigation of subsidy and injury and require that a subsidy analysis be based on the data for the most recent completed accounting year, which in this case was year 2001. The EC notes that Korea did not challenge this EC regulation.

same time as the POI for the subsidy analysis, the EC acted inconsistently with paragraphs 1 and 2 of Article 15 of the *SCM Agreement*. [238]

(c) Panel Analysis

7.323 Korea claims that the EC did not comply with its obligations under paragraphs 1 and 2 of Article 15 of the *SCM Agreement* when the investigating authority assessed the price effects of the subsidized imports.

7.324 The relevant provisions are paragraph 1, which is cited in para. 7.271, *supra*, of this Report and paragraph 2 of Article 15, which in relevant part reads as follows:

> [w]ith regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

7.325 Article 15.2 of the *SCM Agreement* provides that, with regard to the examination of price effects of the subsidized imports, an investigating authority is to consider whether there has been (1) a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is (2) otherwise to depress prices to a significant degree or (3) to prevent price increases, which otherwise would have occurred, to a significant degree. In any event, no one or several of these factors can necessarily give decisive guidance. As we explained earlier, we consider that Article 15.2 has to be read in light of the overarching requirement set forth in Article 15.1 of conducting an objective examination based on positive evidence.[239]

7.326 With the above in mind, we shall proceed with the various arguments of Korea in support of its claim.

(i) Impossibility to reconcile market dynamics with the EC's conclusion that Hynix's imports had an effect on domestic prices

7.327 Korea asserts that it defies economic logic to conclude that Hynix's imports had an effect on domestic prices given the fact that it was losing market share. Korea argues that bearing in mind the situation of the EC DRAMs market and the fact that Hynix was a mid-cost producer, the EC's determination that Hynix was responsible for the decline in prices in 2001 could not be correct. Korea contends that an objective investigating authority would, in light of the above considerations, have "viewed skeptically" other evidence suggesting Hynix's price undercutting was significant.

7.328 We are of the view that the EC examined the price undercutting by Hynix and reached certain conclusions which as a matter of fact are not contested by Korea. Korea's argument is rather that the price undercutting was purely coincidental, as an exporter who is losing market share, according to

[238] The EC rejects Korea's reliance on a non-binding recommendation of the WTO Committee on Anti-Dumping Practices which relates to the obligations contained in the *AD Agreement*, not the *SCM Agreement*. Neither does the EC consider relevant the reliance on Appellate Body reports in the context of the *Safeguards Agreement*, with its different requirements for imposition of a measure compared to the *SCM Agreement*, and its different language. The EC emphasises that, while the *Safeguards Agreement* refers to increased imports in the present tense ("*being imported*"), the *SCM Agreement* uses the present perfect ("*has been"* a significant price undercutting).

[239] See our discussion of Article 15.1, in paras. 7.272-7.276, *supra*, of this Report.

Korea's economic logic, can never be the cause of such price effects. In our view, Article 15.2 of the *SCM Agreement* requires an investigating authority to consider whether there has been any significant price undercutting by the subsidized imports. Article 15.2 does not require an investigating authority to establish what caused the price undercutting.[240] Again, Article 15.2 confers wide latitude on the investigating authority. A scenario can certainly be constructed in which a subsidized company is both losing market share and causes price undercutting.[241] Moreover, we note that the EC found that Hynix's market share actually increased. For all these reasons, we conclude that the EC did not act in an unreasonable manner when it established significant price undercutting.

(ii) Absence of a "price leader" in the DRAMs market

7.329 Korea asserts that the EC's finding that there is no price leader in the DRAMs market calls into serious doubt the EC's determination that Hynix's price undercutting was significant.

7.330 In our view, there is nothing in the text of Article 15.2 of the *SCM Agreement* precluding an investigating authority from concluding that the price undercutting is significant in the absence of a concurrent finding that the producer/exporter in question is a price leader. Nor do we agree with Korea's point from an economic point of view. Leaving aside the question of what is exactly meant by price leadership and how one should determine such price leadership, we fail to see why only a price leader could be engaged in price undercutting, thereby driving prices down. Indeed, we agree with the EC that precisely in a situation where there is no one price leader, all competitors on such a highly price sensitive market as the DRAMs market may cause prices to go down. In our view, even from an economic point of view Korea's argument therefore fails, as we do not consider that a finding of no-price leader would somehow be inconsistent with a finding of significant price undercutting.

(iii) Whether the EC's methodology complied with the requirements in paragraphs 1 and 2 of Article 15

7.331 While acknowledging that Article 15.2 does not impose any particular methodology to consider whether there has been a significant price undercutting, price suppression or price depression, Korea asserts that the particular methodology used by the EC made it more likely to find price undercutting. For this reason, Korea asserts that the methodology used by the EC was "biased and therefore does not represent an "objective examination" of whether there is "significant" price undercutting."[242]

7.332 The relevant paragraphs of the EC's Final Determination read as follows:

> "(179) With regard to the provisional findings on price undercutting as described in recital 122 of the provisional Regulation, Hynix and the GOK claimed that the reference to the fact that price undercutting took place for some transactions is irrelevant since price undercutting, in accordance with usual practice, is determined on a weighted average basis. Hynix further argued that in order to conclude whether its prices undercut a number of specific transactions of the [domestic] industry, either a transaction-by-transaction comparison should be made or a daily comparison taking also into account, where possible, the time within the day.

[240] This does not mean that the considerations raised by Korea can be disregarded by the investigating authority. In our view, if there are other producers/exporters which are selling at prices lower than Hynix's, because the way the market operates, their cost structures, or any other reason, then the injurious effects of these factors should not be attributed to the subsidized imports from Hynix. Thus, this information is highly relevant to a proper causality assessment under Article 15.5 of the *SCM Agreement*.

[241] For example, distressed Firm A may temporarily sell its goods at bargain prices to raise cash and pay off creditors. Later, Firm A may return to its normal price structure. Firm A's distress sales may well undercut market prices for a time, but over the course of a year, Firm A's market share could still fall.

[242] Korea response to question 38 of the Panel.

(180) However, there is no provision in the basic Regulation which stipulates that price undercutting should be calculated on a weighted average or any other specific basis. According to Article 8(3) of the basic Regulation it should be considered, when assessing the effect of subsidised imports on prices, whether price undercutting has been "significant". It does not set out any requirement relating to the calculation of the margin of undercutting, nor does it provide for a particular methodology to be followed in this respect. Moreover, according to the same Article, price undercutting is not alone determinative in an injury determination, rather it forms part of the overall assessment of injury to the [domestic] industry and is conducted so as to provide guidance in the context of the assessment of injury and causation.

(181) Furthermore, it is noted that the DRAM market is very transparent and characterised by substantial price competition. Indeed fixed costs are very high. Suppliers need to develop sufficient economies of scale and strive to maintain market shares. Price undercutting will occur in specific competitive situations with specific customers. But, if one supplier offers a price to a Community customer that undercuts the price of a DRAM sold by a Community producer, competitive pressure quickly eliminates such undercutting. Thus, in such markets, big customers can force competing suppliers to meet any lower price offering. It is therefore difficult to establish price undercutting over a given period. Such price depressing situations prevented the Community producers from increasing prices, something which would otherwise have occurred.

(182) Nevertheless, the Commission established significant price undercutting ranging from 12 per cent to 32 per cent for the different DRAM densities on a substantial portion (41 per cent) of the Community producers transactions, representing 32 per cent of their sales value. In order to eliminate the effect of the sharp drop in prices during the [POI], the calculation was based on the monthly average Hynix prices to independent customers by product type. Even if the daily average Hynix prices (by product type) were used, and taking account of the fact that the number of comparable transactions would be substantially reduced (by 38 per cent), there would be significant undercutting within the range set out above on 29 per cent of the total Community producers transactions. It is also noted that irrespective of whether the monthly or daily average of Hynix prices was used in the calculation, the proportion of the Community producers undercut transactions in relation to the total comparable transactions remained the same, i.e. around 47 per cent. (...) In the absence of further comments on price undercutting, the provisional findings as set out in recitals 119 to 123 of the provisional Regulation are hereby confirmed."[243]

[243] A cross-reference is made to the relevant paragraphs of the EC's Preliminary Determination:

"(120) For the determination of price undercutting, the Commission analysed price data in the [POI]. The relevant sales prices of the [domestic] industry are prices to the first unrelated customer after deduction of discounts and rebates, i.e. net prices. During the [POI], all sales of Korean imports were made via related companies. Therefore, the relevant sales prices compared are net resale prices to the first independent customer in the Community after deduction of discounts and rebates.

(121) Different product families of the product concerned could be defined for comparison purposes based on the following criteria: product type (i.e. dies, components, modules), density, quality, DRAM type, performance (speed) and packaging.

(122) The [domestic] industry's sales prices and the resale prices of Korean imports of the like product were compared at the same level of trade, namely independent users within the

7.333 The record shows that the EC examined the question of price undercutting using three different methodologies. Under the first methodology, the weighted average Community price was compared to the weighted average Hynix price, *by product type*. As a result of this methodology, on *an overall basis*, i.e. taking into account all product types, no price undercutting was found.[244] Under the second methodology, the calculation was based on the monthly average Hynix prices to independent customers by product type, as explained in para. 182 of the Final Determination. Those monthly averages were compared to the domestic industry's individual transactions, *by product type*. As a result of the application of this methodology, a price undercutting of 16.2 per cent was found.[245] Under the third methodology, the EC compared the daily average Hynix prices with individual transaction prices of the Community producers, *by product type*. Using this methodology, it is stated in para. 182 of the EC's Final Determination that "there would be significant undercutting within the range set out above on 29 per cent of the total Community producers transactions.".[246,247] It is therefore clear from the EC's Final Determination that the EC established significant price undercutting under two of the three methodologies.

7.334 In our view, Article 15.2 of the *SCM Agreement* does not set forth any particular methodology for examining price undercutting, as long as the methodology chosen is reasonable and objective.[248] In our view, Korea has not been able to establish the contrary. We find no basis for Korea's assertion that the EC kept trying alternative methodologies until it found one that showed some undercutting. The EC clearly explained why it considered that a weighted-average to weighted-average comparison was inappropriate in this context.[249] It then explained that, in order to eliminate the effect of the sharp drop in prices during the injury POI, the calculation was to be based on the monthly average Hynix prices to independent customers by product type. As Hynix and Korea claimed that prices should be compared on a daily average basis, the EC also calculated the margin based on Hynix's daily average prices. The EC concluded that:

> "irrespective of whether the monthly or daily average of Hynix prices was used in the calculation, the proportion of the [domestic] producers undercut transactions in

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> Community market, and for the same time period on the basis of weighted average prices per product family. On this basis, it was found that price undercutting on an overall weighted average basis was not taking place. However, price undercutting was found to be taking place on a substantial proportion of transactions, namely 41 per cent of the transactions representing 32 per cent of the value of Hynix sales. This price undercutting, expressed as a percentage of the [domestic] industry's prices, averaged 16.2 per cent.
>
> (123) It was also found in the case of Hynix that this undercutting was predominantly taking place on sales of the higher density DRAMs (the 128 Mbit and 256 Mbit DRAMs). These are the technologically more advanced DRAMs the comparatively higher sales returns of which are used to finance the next generation products."

[244] EC's Preliminary Determination, para. 122.

[245] The last sentence of para. 122 of the EC's Preliminary Determination asserts that "[t]his price undercutting, expressed as a percentage of the [domestic] industry's prices, averaged 16.2 per cent." The EC also disclosed the price undercutting for the different DRAMs densities. This ranged from 12 per cent to 32 per cent, as stated in para. 182 of the EC's Final Determination.

[246] Thus, we disagree with Korea's argument that, under the third methodology, no price undercutting was found.

[247] The actual ranges calculated for each product type by the EC under the third methodology are found in a table provided to Hynix. (**Exhibit EC-31**)

[248] We consider that Article 15.2 of the *SCM Agreement* does not limit the number of methodologies used in analyzing the price effects of subsidized imports. We do not find anything in this provision that would preclude an investigating authority from considering different methodologies in order to determine which is the most appropriate one in view of the facts of a given case, as long as the overall injury determination involves an objective examination in accordance with Article 15.1. In our view, in certain circumstances, it would might be problematic to consider whether there is a significant price undercutting under just one methodology.

[249] EC's Final Determination, para. 181.

> relation to the total comparable transactions remained the same, i.e. around 47 per cent."[250]

7.335 We thus consider there is no basis in the facts on the record to accept Korea's assertion that the EC strove to find a pre-ordained outcome. Paragraph 181 of the EC's Final Determination contains the reasons why the EC considers that, in this particular case, the first methodology was not appropriate to examine the effects of subsidized imports on domestic prices. In this regard, we note that the EC took into account the dynamics of the DRAMs market (transparency; substantial price competition; high fixed costs; need to develop economies of scale; etc.). Because of these dynamics the EC found that "if one supplier offers a price to a Community customer that undercuts the price of a DRAM sold by a Community producer, competitive pressure quickly eliminates such undercutting. Thus, in such markets, big customers can force competing suppliers to meet any lower price offering. It is therefore difficult to establish price undercutting over a given period." We do not understand Korea to dispute these facts; Korea simply asserts that "this rationale is unpersuasive" because the features identified by the EC apply to all suppliers, and are not unique to Hynix.[251] We do not share the view of Korea that an unbiased and objective investigating authority would have only moved away from the first to the second or the third methodologies where the facts justifying that decision were unique to Hynix. We do not find any basis for such a position in the *SCM Agreement*. Having carefully examined the reasons set forth in para. 181 of the Final Determination, we consider that the explanation given by the EC is reasonable.

7.336 We do not consider that Korea has been able to demonstrate why the EC's choice of methodology was inherently biased and therefore would not represent an "objective examination" of whether there is "significant" price undercutting.[252] Korea argues that a transaction-to-transaction comparison should have been made, or a daily comparison taking also into account the time within the day. In our view, while such methodologies could also have been used under Article 15.2, this does not imply that the other methodology on which the EC based itself is necessarily biased. It appears to us that every methodology has its strengths and weaknesses, but that, in the absence of any prescribed methodology in the *SCM Agreement*, as long as the methodology used is not unreasonable, the Panel cannot find against it. The shortcomings of the methodology of the EC are a consequence of the use of averages, but the transaction-to-transaction methodology preferred by Korea will also inevitably lead to certain transactions being included while others are not. In sum, in the absence of any specific requirements in the *SCM Agreement*, and given the reasonable explanation provided by the EC for its choice of methodology, we consider that the EC did not act in a manner inconsistent with Article 15.2 of the *SCM Agreement* when establishing significant price undercutting.

(iv) Other factors that affect DRAMs prices

7.337 Korea asserts that it was known to the EC that there were a number of factors which affected DRAMs prices. These included (1) the general economic downturn and decrease in demand, which caused an "inventory burn"; (2) excess capacity; and (3) imports from other suppliers. Information on these factors was on the record. However, the EC failed to take them into account. In so doing, Korea asserts that EC's price undercutting analysis did not involve an objective examination and the EC's conclusion was not based on positive evidence.

7.338 In our view, Article 15.2 of the *SCM Agreement* does not, as such, require an investigating authority to establish a causal link between the subsidized imports and the domestic prices which would require it to examine all other factors affecting domestic prices at the same time. Again, if Members wish to impose a heavier burden on investigating authorities, they can do so by amending

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[250] *Id.*, para. 182.

[251] Korea First Written Submission, para. 159.

[252] Korea has presented certain numerical examples to show that this is the case. (See, for instance, Korea First Written Submission, para. 156 or First Oral Statement (Opening), para. 27)

the *SCM Agreement*. As written, Article 15.2 focuses on the effect of the subsidized imports on prices. The EC examined the effect of the subsidized imports on domestic prices and thus, in our view, complied with Article 15.2. We note that Article 15.5 of the *SCM Agreement*, on the other hand, does require that the effects found, including those with regard to price, must be put in context by examining all other known factors affecting the industry at the same time. In our view, Korea's arguments are thus properly part of the question of causation, an issue discussed later in our Report.

7.339 In light of the above, we dismiss Korea's argument that, in not taking the above factors into account when examining the effect of the subsidized imports on domestic prices, the EC acted inconsistently with Article 15.2 of the *SCM Agreement* read in light of Article 15.1 of the *SCM Agreement*.

(v) Refusal to extend the injury POI

7.340 We recall that Korea argues that Article 15.2 of the *SCM Agreement* requires that a pricing analysis include the most recent period prior to initiation. Korea asserts that the EC did not consider pricing data for the first half of 2002, which, especially in light of the fact that 2001 was generally considered to be the worst year for the industry in decades, is suspicious and does not correspond with the requirement to conduct an objective examination based on positive evidence.

7.341 In our view, there simply is no basis for reading such a requirement into the text of Articles 15.1 or 15.2 of the *SCM Agreement*. Article 15.2 does not contain any express obligations with regard to the period of data collection. While an argument could certainly be made that the data on which the injury analysis is based should be sufficiently recent in order for this data to be relevant and probative such as to constitute positive evidence of injury caused by subsidized imports, we do not consider that it was unreasonable or not objective of the EC to refuse to extend the period of investigation for injury purposes beyond the period used to establish subsidization in this case. The EC gathered data which covered three years, including the last full year for accounting purposes prior to the initiation, and its analysis was therefore clearly based on the recent past.

7.342 As contextual support for its argument, Korea asserts that the interpretation given by panels to provisions in the *Safeguards Agreement* and the recommendation of the WTO Committee on Anti-Dumping Practices focus on the most recent period. This, Korea asserts, constitutes contextual support for its argument. We disagree. As the EC has noted, the WTO Committee on Subsidies and Countervailing Measures has not adopted a parallel recommendation. Moreover, we seriously doubt that the *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*[253] would support Korea's case. That Recommendation states, *inter alia*, that the period of data collection for dumping investigations normally should be twelve months, and in any case no less than six months, ending as close to the date of initiation as is *practicable*; and that the period of data collection for injury investigations normally should be at least three years. It also states that "[i]n establishing the specific periods of data collection in a particular investigation, investigating authorities may, if possible, consider practices of firms from which data will be sought concerning financial reporting and the effect this may have on the availability of accounting data." The EC stated that the most recent accounting year for Hynix was the year 2001. Korea has not challenged this. Bearing this in mind, we do not consider it unreasonable for the investigating authority to have established December 2001 as the end of the period of collection of data for the purposes of the injury and subsidization investigations.

7.343 As for Korea's reference to certain findings of panels and the Appellate Body in the safeguards context, we do not consider them relevant to our examination. In this regard, we note that the wording in the *Safeguards Agreement*, particularly in Articles 2.1 and 4.2(b) is significantly different from that to be found in Article 15.2 of the *SCM Agreement*. Leaving aside the question of

[253] G/ADP/6, adopted 5 May 2000 by the WTO Committee on Anti-Dumping Practices.

whether those reports actually support the Korean argument, something we very much doubt, we wish to note that safeguard measures are emergency measures which explains the particular emphasis on the relevance of the recent past by panels and the Appellate Body interpreting those provisions of the *Safeguards Agreement*.

7.344 In sum, we do not find that the EC has acted inconsistently with Article 15.2 of the *SCM Agreement* by rejecting Hynix's request that the EC extend its analysis of the effect of subsidized imports on prices to the first half of 2002, *i.e.*, beyond the injury and subsidy POI selected by the investigating authority.

(d) Conclusion

7.345 For these reasons, we do not find that the EC has acted inconsistently with its obligation under Article 15.2 of the *SCM Agreement*, read in light of Article 15.1 of the *SCM Agreement*, with respect to its examination of the impact of the subsidized imports on the domestic prices.

4. Claim regarding the EC's determination on the condition of the domestic industry

(a) Korea

7.346 Korea asserts that the EC's evaluation of the condition of the domestic industry was not consistent with paras. 1 and 4 of Article 15 of the *SCM Agreement*.

7.347 First, Korea argues that the economic downturn/business cycle is the single most important factor in the DRAMs market. Korea asserts that this industry has endured a continuing history of "boom/bust" cycles. Korea asserts that between 2000 and 2001 this industry had gone from the top of the boom period, to the trough of the bust. In spite of all the evidence and comments submitted by Hynix during the investigation, Korea asserts that, nowhere in its determinations did the EC address this downturn alone, or as a context in understanding the factors enumerated in Article 15.4. While acknowledging that the EC had examined the economic downturn in its non-attribution determination under Article 15.5, Korea asserts that Article 15.4 contains a separate obligation to examine this factor as a "relevant economic factor".

7.348 Second, Korea argues that some findings made by the EC in the context of its injury determination are inconsistent with certain statements made by an important EC producer, Infineon, relating to its cash flows, ability to invest in new equipment and technology, ability to sell at prices sufficient to cover costs, market shares and future prospects.[254] In the view of Korea, the EC failed to consider the domestic EC industry's own choice of factors that describe success in the EC DRAMs market and the domestic producers' own description of the state of the industry.

7.349 Third, Korea asserts that the EC failed to examine one of the factors listed in Article 15.4, "wages". Korea recalls that established WTO jurisprudence regarding Article 3.4 of the *AD Agreement* – a provision which is substantially identical to Article 15.4 of the *SCM Agreement* – requires that each of the factors and indices listed therein must be evaluated by an investigating authority. In addition, Korea is of the view that another factor, "export performance" of the domestic industry, should have been considered by the authority as a relevant economic factor having a bearing on the state of the domestic industry, even though it is not explicitly listed in Article 15.4. Korea asserts that the fact that the EC evaluated this factor when carrying out the Article 15.5 causation

[254] Korea First Written Submission, para. 194. Some of these statements were made by the Infineon's CEO, one of the two EC producers that cooperated in the investigation, in a November 2002 investor conference. Others were included in Infineon's 2002 SEC Form 20-F.

determination is irrelevant to assess the EC's compliance with Article 15.4, as a separate obligation to evaluate "export performance" as a relevant factor exists under this provision.[255]

7.350 Fourth, Korea argues that only three out of 13 factors examined showed a negative trend during the injury POI: average sales price, cash flow and capacity utilization. Korea asserts that the EC acted inconsistently with paragraphs 4 and 1 of Article 15 because it did not explain adequately why just 3 of 13 factors should compel its conclusion that the domestic industry was suffering material injury.

(b) EC

7.351 The EC rejects all of Korea's arguments and asserts that its injury analysis was consistent with Articles 15.4 and 15.1 of the *SCM Agreement*. With respect to Korea's arguments concerning the failure to examine the "boom/bust" cycle and the economic downturn, the EC argues that it examined this factor as part of its causation analysis. The EC considers that it was therefore not necessary to examine this factor as part of its assessment of the condition of the domestic industry as well. Hence, this question falls under the Article 15.5 of the *SCM Agreement*, rather than Article 15.4.

7.352 The EC asserts that the statements of Infineon's CEO were made outside the injury POI, *i.e.*, in 2002. According to the EC, those statements were not suited to demonstrate a contradiction with an injury determination that covered the period 1998-2001. In any case, the EC submits, financial advertisement statements aimed at potential investors are of limited value for the assessment of the real state of a business.

7.353 The EC asserts that it examined all relevant factors having a bearing on the state of the industry as required by Article 15.4 of the *SCM Agreement*. The EC argues that it considered "output" or "production" in its Preliminary Determination, and that those findings were confirmed in the Final Determination. The EC further asserts that Article 15.4 does not require an investigating authority to examine "export sales" when examining the state of the domestic industry. In accordance with the *SCM Agreement*, the EC asserts that it examined "export sales" when it considered the influence of other factors, under Article 15.5. With regard to the "wages" factor, the EC argues that (1) the questionnaire responses from the domestic industry contained information on wages and that (2) the investigating authority examined that information and concluded that the "wages" factor was irrelevant for the injury assessment in the present case. The EC acknowledges that the "wages" factor was not discussed in the Preliminary and Final Determinations. The EC gives four explanations for the non-inclusion of "wages" in those determinations. First, wages were a minor factor for the cost of production of DRAMs. Second, the wages in the Community were stable throughout the injury POI due to the stability pact preceding the introduction of the Euro. Third, the injury findings would have remained identical, irrespective of the development of wages. Finally, during the whole investigation, neither the Government of Korea nor Hynix had raised the issue of "wages". In the view of the EC, Korea must *prove* that the EC failed to *examine* or *evaluate* a relevant factor. According to the EC, Korea has not done so.

7.354 On the issue of the overall evaluation of the situation of the domestic industry, the EC argues that Article 15.4 imposes an obligation on Members to *examine* and *evaluate* all the relevant economic factors and indices, but indicates at the same time that no one or several of those factors necessarily gives decisive guidance. Regarding the substance of the injury determination, the EC submits that for each factor the EC included available relevant data in the determination, and in each case the EC included an analysis or assessment in relation to such data. The EC then drew overall conclusions. The EC disagrees with Korea's assertion that it only found negative indicators for 3 factors. The EC asserts that it also determined and took into account 3 other negative or partially

[255] Korea asserts that there was information on the file pointing to a positive development of the domestic industry's export performance.

negative factors (losses in 2001; the magnitude of the subsidy amount and the volume of subsidized imports). In sum, the EC considers that its determination of material injury was based on a proper overall examination and evaluation of all relevant factors having a bearing on the state of the industry.

(c) Panel Analysis

7.355 This claim concerns the consistency of the EC's injury analysis with Articles 15.1 and 15.4 of the *SCM Agreement*. The latter provision read as follows:[256]

> [t]he examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

7.356 In light of the overarching obligation set forth in Article 15.1 of the *SCM Agreement*, we consider that Article 15.4 thus requires an objective examination and evaluation of all relevant factors having a bearing on the state of the industry, based on positive evidence. Article 15.4 of the *SCM Agreement* lists a number of these factors which are to be included in such an examination. We agree with the view expressed by the Appellate Body, when interpreting an almost identical provision in the *AD Agreement*, that the factors listed are deemed to be relevant in every investigation and must always be evaluated by the investigating authorities. However, the obligation of evaluation imposed by Article 15.4 is not confined to the listed factors, but extends to all relevant economic factors.[257]

7.357 With the above remarks in mind, we shall examine whether the EC properly evaluated all relevant factors, as mandated by Article 15.4, and whether the EC conducted an objective examination based on positive evidence of the impact of the imports on the domestic industry, consistently with Articles 15.1 and 15.4 of the *SCM Agreement*. Korea puts forth several main arguments in support of these allegations. One set of arguments relate to the proposition that, in the view of Korea, the EC should have evaluated a number of factors – the economic downturn, the domestic industry's export performance and wages – when examining the state of the domestic industry. Second, Korea points to some inconsistent statements made by one of the two EC producers and the EC's findings in respect of the state of the domestic industry. Finally, Korea takes issue with the EC's overall assessment of the state of the domestic industry.

(i) Evaluation of certain economic factors: Economic downturn/Business cycle, Export performance and Wages

7.358 Korea argues that one factor which is explicitly mentioned in Article 15.4 of the *SCM Agreement* – "wages" – was not examined. Moreover, Korea argues that "export performance" and the "boom/bust" cycle are two factors which are not explicitly listed in Article 15.4 but are clearly relevant factors having a bearing on the state of the domestic industry which should therefore have been examined by the EC as part of the injury analysis under Article 15.4.

[256] Article 15.1 is already cited in para. 7.271, *supra*.

[257] See, Appellate Body reports, *Thailand – H-Beams* and *US – Hot-Rolled Steel*, paras. 128 and 194, respectively.

Wages

7.359 Article 15.4 requires a mandatory evaluation of all individual factors listed in that Article, including "wages".[258] The EC agrees with this and argues that the investigating authority examined information on wages and concluded that this factor was irrelevant for the injury assessment in this case, which explains why the "wages" factor is not discussed in the Preliminary and Final Determinations.[259] In response to a question from the Panel, the EC states that "[n]aturally, the investigating authority would have gone through and considered all of the factors listed in the *SCM Agreement*. However, there is no record of those considerations with regard to wages."[260]

7.360 We consider that, in the context of trade remedies investigations, which are subject to multilateral rules and multilateral review, a Member is placed in a difficult position in rebutting a *prima facie* case that an evaluation of a given factor has not taken place if it is unable to direct the attention of a Panel to some contemporaneous written record of that process. In the particular case before us, if – as acknowledged by the EC – there is no such written record of how the "wages" factor has been interpreted or appreciated by the investigating authority during the course of the investigation, there is *no* basis in our view on which the EC can now rebut a *prima facie* case that its "evaluation" of that factor under Article 15.4 did not take place at all. In addition, and bearing in mind the standard of review set forth in Article 11 of the *DSU*[261], without a written record of the analytical process undertaken by the investigating authority to evaluate "wages", we cannot examine whether an adequate and reasoned explanation has been provided of how the facts support the injury determination made by the EC and, consequently, whether that determination was consistent with Article 15.4. Without that written record, we would be forced to embark on *post hoc* speculation about the thought process by which the investigating authority arrived at its ultimate conclusions. We consider that the standard of review in Article 11 of the *DSU* prevents us from embarking upon this exercise.

7.361 The EC has argued that this factor was actually irrelevant in this case. In the absence of any similar indication in the record, we have to consider this to be an *ex post* rationalisation. The fact that the exporter or Korea had not commented on this matter at the time of investigation is not legally relevant in light of the clear obligation imposed on the investigating authority by Article 15.4 to examine and evaluate this factor. [262]

7.362 In light of the above, we conclude that the EC acted inconsistently with Article 15.4 of the *SCM Agreement* in not evaluating the "wages" factor when examining the impact of the subsidized imports on the state of the domestic industry.[263] We would also note that the EC's omission in this instance is somewhat surprising because this is not the first occasion in which an EC injury determination has been reviewed by a WTO panel, based on similar grounds.[264] The EC should have therefore been aware when it examined the state of the domestic industry that it had to evaluate *all* relevant economic factors and indices bearing on the state of the domestic industry, including any

[258] However, we are of the view that, in a given case, certain factors may be more relevant than others. The weight to be attributed to any given factor may therefore vary from case to case.

[259] EC First Written Submission, para. 146.

[260] EC response to question 86 of the Panel.

[261] For a discussion of the standard of review applicable, see para. 7.4, *supra*.

[262] Neither does the fact that an argument was not raised in the context of the underlying investigation by the exporter concerned or the authorities of the exporting Member preclude a party from being able to raise it at a later stage in a WTO panel proceeding. This was also the view held by the Panel in the *Argentina – Poultry* case. (Panel report, *Argentina – Poultry*, para. 7.146 and note 123)

[263] In reaching this conclusion, we note that neither has the EC argued that analysis of "wages" is implicit in the analysis of other factors listed in Article 15.4, nor do we have any indication of record that that was the case.

[264] See, *inter alia*, Panel report, *EC – Bed Linen*, para. 6.153 *et seq*.

actual or potential decline in wages and that evidence of that evaluation should be part of the record in order to allow for a meaningful review of its determination.

Other factors

7.363 With regard to Korea's arguments in respect of other factors that should have been examined by the EC as part of its injury analysis, we note that neither economic downturn/business cycle nor export performance are factors which are expressly listed in Article 15.4 of the *SCM Agreement*. We consider that this provision imposes a clear obligation on authorities to examine *all relevant economic factors and indices* having a bearing on the state of the domestic industry. Whether an economic factor is relevant depends, *inter alia*, on the nature of the industry being investigated. In our view, and different from the situation addressed earlier in which a factor expressly listed in Article 15.4 is not evaluated, it will be for the complaining party to demonstrate two things: (1) that a certain factor which was relevant in assessing the impact of the subsidized imports on the state of the domestic industry was not examined; and (2) that the question of evaluation was raised during the investigation.

7.364 In our view, the factors listed in Article 15.4 clarify that what is required under this provision is that the investigating authority examines and evaluates those factors and indices that provide it with a full and objective picture of the state of the domestic industry. Together with the results from the analysis performed under Article 15.2 of the volume and price effects of the subsidized imports, this may lead the investigating authority to a conclusion of material injury. Forces that may have caused certain negative or positive developments are to be considered by the investigating authority as part of its causation analysis, in respect of which Article 15.5 of the *SCM Agreement* contains specific rules.[265]

7.365 In our view, the economic downturn in the market ("boom/bust cycle") and the export performance of an industry are precisely the kind of causal factors that will need to be addressed by an investigating authority when establishing whether the subsidized imports caused the injurious state of the domestic industry. The record clearly shows that the EC examined and evaluated the economic downturn and the export performance as part of its causation analysis[266] and we will examine whether

[265] We find support for our reading in the report of the panel in *Egypt – Steel Rebar* (paras. 7.62-7.64) dealing with the similar provision in the anti-dumping context, Article 3.4 of the *AD Agreement*, which stated that:

> "the term "having a bearing on" can mean *relevant to* or *having to do with* the state of the industry, and this meaning is consistent with the fact that many of the factors listed in Article 3.4 are descriptors or indicators *of* the state of the industry, rather than being factors *having an effect* thereon. For example, sales levels, profits, output, etc. are not in themselves *causes* of an industry's condition. They are, rather, among the factual indicators by which that condition can be judged and assessed as injured or not. Put another way, taken as a whole, these factors are more in the nature of *effects* than *causes*.
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> This reading of "having a bearing on" finds contextual support in the wording of the last group of factors in Article 3.4, namely "actual and potential negative *effects on* cash flow, inventories, …" (emphasis added). Further contextual support is found in the cross-reference to Article 3.4 contained in the first sentence of Article 3.5: "… the *effects* of dumping as set forth in paragraph[] 4 [of Article 3]".
>
> We note in addition that if Turkey were correct that the full causation analysis, including non-attribution, were required by Article 3.4, this would effectively render redundant Article 3.5, which explicitly addresses causation, including non-attribution. Such an outcome would not be in keeping with the relevant principles of international treaty law interpretation, or with consistent practice in WTO dispute settlement." (Panel report, *Egypt – Steel Rebar*, paras. 7.62-7.64)
>
> In the same vein, Panel report, *EC – Tube or Pipe Fittings*, paras. 7.335 and 7.344.

[266] EC's Final Determination, paras. 193 and 195.

it did so in a manner which is consistent with Article 15.5 of the *SCM Agreement* when discussing Korea's claims under that provision. We do not consider that the EC was somehow required to include an additional, separate discussion or evaluation of these factors in its injury analysis under Article 15.4.[267]

7.366 In view of the above, we therefore find that the EC has acted consistently with its obligations under paragraphs 1 and 4 of Article 15 of the *SCM Agreement* in not evaluating the economic downturn/business cycle and the export performance of the domestic industry when examining the state of the domestic industry.

(ii) Infineon statements

7.367 Korea argues that contradictory statements were made by the CEO of Infineon, one of the two EC producers that cooperated in the investigation, in a November 2002 investor conference and in Infineon's 2002 SEC Form 20-F. These statements allegedly contradicted some of the findings of the investigating authority concerning the state of the domestic industry.

7.368 It is not disputed by Korea that the investigating authority made its findings based on data received from the domestic industry. Korea does not challenge the correctness of those data, which as stated in the EC's determinations were duly verified by the investigating authority, but merely points to some alleged inconsistencies between statements made by the CEO of Infineon, one of the two domestic producers, in the context of the countervail investigation with other statements made before the financial community on matters relating to some of the factors listed in Article 15.4. Leaving aside the question of whether the statements were relevant or not to the injury period of investigation, we consider that a distinction must be made between positive evidence, on the one hand, and unverified statements made in a context unrelated to the investigation, on the other.[268] We recall that Article 15.1 requires that an injury determination be based on positive evidence, *i.e.*, evidence of an affirmative, objective and verifiable character. Korea has not argued that any of the data gathered by the EC were not credible or not objective. Given the fact that the accuracy of the data on which the EC based itself to make its determination is not contested, we fail to see how statements made by one of the two domestic producers for the financial community should have been preferred over such objective, verifiable and verified data. For these reasons, we reject Korea's argument.

(iii) Overall assessment of the state of the domestic industry

7.369 Korea asserts that the EC failed to properly evaluate all the injury factors examined as required by Article 15.4 of the *SCM Agreement*. In particular, Korea argues that the EC failed to adequately explain why just three out of 13 factors examined, *i.e.*, average sales price, cash flow and capacity utilization, should compel its conclusion that the domestic injury was suffering material injury. According to Korea, this shortcoming evidences a lack of objective examination. The EC asserts that it made its assessment on the basis of an overall evaluation of all relevant factors having a bearing on the state of the industry, and points in particular to three additional negative or partially negative factors (losses in 2001; the magnitude of the subsidy amount, and the volume of subsidized imports).

[267] In its First Written Submission, Korea asserted that the EC had failed to examine output. This argument, however, was not included in its subsequent submissions. In any event, even if Korea had maintained its argument, we would have rejected it. It is clear to us that the EC evaluated the "output" factor, or as the EC refers to it, "production". The evaluation of this factor can be found in para. 126, and its related table, of the Preliminary Determination. In addition, we note that, in its response to question 87 of the Panel, the EC confirmed that the "production" figure reported therein was inclusive of production for domestic and export markets. (See also EC's response to question 42 of the Panel)

[268] We recall that Article 12.5 requires investigating authorities to satisfy themselves as to the accuracy of the information supplied by interested parties. We consider that this provision does not allow those authorities to make their determinations on the basis of bare assertions made by interested parties.

7.370 We recall that Article 15.4 lists a number of factors which must be examined in all cases in order to examine the impact of subsidized imports on the state of the domestic industry. It also emphasises that no one or several of these factors can necessarily give decisive guidance. From the Final Determination, we conclude that the EC first examined and evaluated various factors individually,[269] before making an overall assessment of the state of the industry on the basis of the data gathered:

> "(187) Following the publication of the provisional Regulation, Hynix and the GOK claimed that most of the injury indicators show that the situation of the [domestic] industry is improving. Therefore, no material injury could have been suffered by the [domestic] industry.
>
> (188) However, no arguments which could alter the conclusions as set out in recitals 139 to 141 of the provisional Regulation were made. In accordance with the provisions of Article 8(5) of the basic Regulation, these conclusions were based on the evaluation of all relevant economic factors and indices having a bearing on the state of the [domestic] industry. The details are set out in recitals 125 to 138 of the provisional Regulation and they have not been challenged. Though the position of the [domestic] industry improved in certain respects during the period under consideration because of the growing market for DRAMs, this was more than offset by the very substantial injury caused by the drastic drop in sales prices and the consequent heavy losses suffered by the Community producers during the [POI]. These losses had a negative effect on their return on investments and their cash flow. Consequently, taking into account all the factors, the conclusions reached in recitals 139 to 141 of the provisional Regulation that the [domestic] industry has suffered material injury within the meaning of Article 8 of the basic Regulation are hereby confirmed."

7.371 Paragraphs 139 to 141 of the Preliminary Determination, which are incorporated by reference, read as follows:

> "(139) Due to technological developments in the DRAM industry, demand in Mbit terms, has risen each year as the user industry changed over to higher density DRAMs to increase system performance. This growth of demand in Mbit terms explains why, during the period considered the [domestic] industry benefited from the favourable evolution of the Community consumption of the product concerned in terms of sales volume and market share. In addition, it increased its market share. However, almost half the increase was the result of one Community producer replacing its share of imports from the United States, prior to 1998, with actual Community production thereafter.
>
> (140) In addition, the apparently higher increase of the market share of the Community industry can be explained to a certain extent by the fact that the sales volume measured in Mbits reflects the generally more advanced technological stage of the Community industry as compared with that of Korean exporters. That is, the [domestic] industry moved more swiftly from production of 64 Mbit DRAMs to production of 128 Mbit DRAMs than at least one of the their Korean counterparts. This results in a considerable leap in capacity, and thereafter sales (which are measured in Mbits), given that each unit produced and sold is twice the previous size in terms of Mbits.

[269] Paragraphs 187-188 of the EC's Final Determination incorporating by reference paras. 125-141 of the Preliminary Determination.

> (141) The sales prices of the [domestic] industry, however, fell dramatically between the year 2000 and the [POI], i.e. by 77 per cent and this fall had immediate and very serious consequences for the [domestic] industry. The impact of the massive fall in prices during the [POI] was quickly reflected in negative effects on cash flow, profitability and return on investment of the [domestic] industry and hence the ability to raise capital. The effect on profitability was huge since during the [POI], every unit was sold with heavy losses which on average amounted to 96 per cent. Although investments of the [domestic] industry as well as productivity and employment grew in absolute terms during the period considered, the levels fell well short of what is normal for this industry to remain competitive, to maintain the state of art facilities, to continue with a high level of investments on research and development and to keep abreast with leading-edge technology."

7.372 In our view, the EC examined and evaluated all factors both individually and in an overall context. In our view, the EC did not consider each factor in isolation, as Korea is claiming. While acknowledging certain positive developments, we are of the view that the EC provided an adequate explanation as to how the facts supported the determination made. We consider that the EC conducted an overall evaluation of the data in context. The EC acknowledged, for example, that investments of the domestic industry as well as productivity and employment grew in absolute terms during the period considered, but explained that it considered that the levels fell well short of what is normal for this industry to remain competitive, to maintain the state of art facilities, to continue with a high level of investments on research and development and to keep abreast with leading-edge technology. It is therefore clear to us that the assessment of the state of the domestic industry, and the conclusion that it was materially injured, did *not* just rest on the negative development of the three factors mentioned by Korea, but took into account other factors such as the *negative* effects on cash flow, profitability and return on investment and hence, the ability to raise capital.[270] In sum, we are of the view that the record does not support Korea's claim that the EC examined the various factors only in isolation. We therefore reject Korea's claim in this respect.[271]

7.373 In light of the above, we consider that Korea failed to demonstrate that an unbiased and objective investigating authority, based on the information that was before the EC at the time of determination, could not have reached a conclusion that the domestic industry was suffering material injury. For the foregoing reasons, we reject Korea's claim.

(d) Conclusion

7.374 In sum, we find that the EC acted inconsistently with Article 15.4 of the *SCM Agreement* in not evaluating the "wages" factor. For the remainder, we reject Korea's arguments that the EC evaluation of the state of the domestic industry was inconsistent with Article 15.4 of the *SCM Agreement*.

[270] It seems that the difference between the EC and Korea's analyses is that, while Korea makes a static end-point-to-end-point comparison, comparing data for 1998 to data for 2001 (with the exception of cash flow, for which the investigating authority only had data for 2000 and 2001), the EC took into account the intervening changes in circumstances and conditions which the DRAMs industry faced during the injury POI. We consider that a proper evaluation of the impact of the subsidized imports on the domestic industry is dynamic in nature and should take account of changes in the market that determine the current state of the industry.

[271] We do not understand Korea to be arguing that no reasonable investigating authority could have reached the conclusion of material injury that the EC reached, but merely that the EC evaluated these factors in isolation. There is, therefore, no need for us to examine the EC's overall analysis in further detail.

5. Claim regarding the EC's causation determination

(a) Korea

7.375 Korea argues that the EC failed to comply with the two important obligations set forth in Article 15.5 of the *SCM Agreement*. First, Korea submits that the EC failed to establish the existence of a causal link between the investigated imports and any material injury to the domestic industry. Second, Korea argues that the EC failed to ensure that injury caused by other factors was not being attributed to the investigated imports.

(i) Causation determination

7.376 Korea contends that Members seeking to impose countervailing duties must demonstrate, in accordance with Article 15.5, an explicit "causal relationship" between the subsidized imports and any material injury suffered by the domestic industry. Korea argues that the first and second sentence of Article 15.5 serve to connect the examination required under Article 15.2 with respect to import trends, including volume and price effects, and the examination under Article 15.4, with respect to indicia of domestic industry performance. A correlation should be established between import trends on the one hand, and industry performance on the other, if a "causal relationship" is to be proved. Korea asserts that, although the presence of a correlation may not be dispositive as there may be other more significant factors that are causing material injury, the absence of a positive correlation between the subsidized imports and material injury strongly suggests that the subsidized imports are not the cause of the material injury.[272]

7.377 Korea asserts that evidence before the EC demonstrated that there was no correlation between the trends in Hynix imports and either the domestic industry's market share or the domestic industry's financial performance. Thus, with respect to market shares, data show that Hynix was losing market share while Micron and Infineon – the complainants – gained market share. As far as profitability is concerned, data show that, after the "boom" year of 2000, Micron and Infineon faced increased losses even as Hynix suffered eroding market share.

(ii) Non-attribution/Examination of "any known factors other than the subsidized imports"

7.378 Korea asserts that in order to act consistently with Article 15.5, it is insufficient to establish a mere correlation between subsidized imports and injury. Article 15.5 also requires an investigating authority not to impute to subsidized imports any injury caused by other factors. Korea asserts that an investigating authority must "separate" and "distinguish" the injurious effects of factors other than subsidized imports to ensure they are not attributed to the subsidized imports.[273] Korea recalls that the Appellate Body in *US – Line Pipe* stated that an investigating authority must also "establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports." Moreover, as with all the provisions of Article 15, Korea recalls that the non-attribution analysis must also be based on positive evidence and on an objective examination, as required under Article 15.1. Korea considers that the EC failed to comply

[272] In support of its understanding, Korea refers to the Appellate Body's determination in *US – Line Pipe*, interpreting the causal relationship requirement under Article 4.2(b) of the *Safeguards Agreement*. Korea also refers to the *Argentina – Footwear (EC)* Panel report, which in a finding endorsed by the Appellate Body stated that: "[w]hile (...) a coincidence [between an increase in imports with a decline in the relevant injury factors] by itself cannot *prove* causation (…), its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation is still present." (emphasis in original)

[273] Korea cites in support various findings made by the Appellate Body examining claims under Articles 4.2(b) and 3.5 of the *Safeguards* and *Anti-Dumping Agreements*, respectively. (Appellate Body reports in *US – Wheat Gluten*, *US – Lamb*, *US – Line Pipe*, and *US – Hot-Rolled Steel*, and Panel report in *US – Steel Safeguards*)

with this non-attribution requirement with respect to a number of factors which the EC acknowledged were also contributing to the injury found to exist.

Treatment of the drop in demand

7.379 Korea asserts that the EC improperly dismissed the effects of the unprecedented drop in the underlying demand for computer and telecom equipment and the fact that 2001 was the worst year in decades for these industries and the DRAMs industry.

7.380 Korea asserts that the demand for DRAMs is a derived demand; that is, it is based solely on the downstream demand for products that use DRAMs, such as personal computers and telecommunications equipment. Factors affecting the demand for these downstream products thus affect demand for DRAMs. In support of its allegations, Korea submits a table regarding the DRAMs demand growth.[274] The data in that table shows that rate of growth in DRAMs consumption during 2001 had fallen from its historical average. Over the 1995-1999 period, the average growth rate had been 80 per cent annually. In 2001, however, this rate had dropped sharply to only 49 per cent. Korea explains that the primary reason for the drop in demand growth for DRAMs was the unprecedented drop in demand for the major users of DRAMs. The evidence before the EC demonstrated that 2001 was the *first year in history* in which the level of demand for PCs was actually negative. Korea asserts that even the domestic industry admitted the deleterious effects of weaker demand on its operations. Korea notes that the EC concluded in para. 193 of its Final Determination that "the general economic downturn of the PC and telecommunication markets in 2001 may have had some downward effect on prices." However, Korea asserts the EC never explained *what* that "downward effect" was, or *how* that "downward effect" differed from the impact of the subsidized imports.

"Inventory burn"

7.381 Korea asserts that, in the DRAMs market, slow demand leads to "inventory burn" which in turn affects market prices in a negative way. Korea argues that the EC's position, that there was no basis to assume the existence of an "inventory burn" – as no company would build up stocks when the prices were high and release stock when prices are low – is completely at odds with the dynamics of the DRAMs market. Korea asserts that there was considerable evidence on the record regarding the effects of an "inventory burn" which was ignored by the EC.

Changes in relative capacity

7.382 Korea argues that the EC failed to properly take into account the role played by capacity increases of companies other than Hynix. Korea asserts that the evidence before the EC demonstrated that Hynix played a relatively trivial role in capacity expansions that occurred during the period examined, while other suppliers – most notably, Micron, Infineon, and Samsung – had been the most aggressive in expanding total DRAMs output. Korea contends that this evidence was ignored by the investigating authority in its analysis of other known factors that affected the condition of the domestic industry during the period examined. Korea submits that this failure demonstrates that the EC did not comply with the requirements of Article 15.5, namely that an investigating authority separate and distinguish injury caused by other factors so as not to attribute that injury to the subsidized imports.

The volume of unsubsidized imports/Samsung's imports

7.383 Korea asserts that the EC failed to properly take into account the adverse effects of the increasing volume of imports from other suppliers. Korea asserts that Hynix's market share decreased

[274] Korea First Written Submission, para. 235.

while the market share of other imports increased substantially and was larger than Hynix's. Korea submitted a table that compiled information on market share provided in Infineon's application, which, Korea asserts, demonstrates that non-subsidized import market share was 58 per cent in 2001, against a 15 per cent market share held by Hynix. Korea asserts that the relative market shares mean that other imports had at least three times the competitive impact as Hynix's.

7.384 Korea argues that this table also showed that suppliers from Chinese Taipei dramatically increased their share of the EC market. Korea submits that a logical hypothesis is that, for a commodity product, the primary means by which supplies from Chinese Taipei achieved such market share gains was by offering prices below the competitors. In spite of this evidence, Korea asserts that the EC did not conduct any analysis of suppliers from Chinese Taipei.

7.385 Korea submits that the EC's statement that Samsung's imports have also increased, but at a lower pace than Hynix's imports, is not supported by the evidence. According to Korea, the data demonstrates that Samsung increased its market share; whereas Hynix lost market share. Indeed, at the same time that Hynix was losing 6.2 percentage points of market share, Samsung was gaining 2 percentage points of market share. In addition, Korea asserts that the EC's finding that Samsung's prices were on average higher than those of Hynix is irrelevant to the issue of the price impact of other imports. A proper analysis would have compared Samsung's prices to those of the domestic producers. Korea asserts that it is entirely possible that Samsung's prices could be higher than Hynix's prices *but* lower than the prices offered by domestic producers. If so, then Samsung's prices might have depressed prices or prevented price increases. And, if true, since Samsung's volume was so much larger than Hynix's, Samsung's shipments might well have had a much larger adverse impact on prices than Hynix's.

(b) EC

7.386 The EC asserts that the investigating authority complied fully with Article 15.5 of the *SCM Agreement* when establishing the existence of a causal link between the subsidized imports and material injury to the domestic industry. The EC submits that the investigating authority first established that there was a causal link between the subsidy granted by Korea to Hynix and material injury to the domestic industry. Next, the investigating authority separated and distinguished each of the other potential factors that might have contributed to causing the material injury experienced by the domestic industry, and in each case considered that the causal link between the subsidized imports and the material injury had not been broken. The investigating authority addressed in detail all "other known factors", including those raised by Hynix – that is, the general/cyclical economic downturn during the investigation period, non-subject imports and capacity increases. The investigating authority found that these factors may have caused injury, however, not to an extent that would break the causal link between the subsidized imports and the injury caused by the subsidized imports.

(i) Causation determination

7.387 The EC asserts that the premise of Korea's allegations in respect of the EC's causation analysis is incorrect, since the investigating authority properly established – on the basis of an approach that correctly and reasonably assessed Hynix's acquisition of LGS's in 1999 – that Hynix's market share increased during the injury POI. Korea's elaborations on a causation analysis, based on the addition of LGS's import figures to Hynix's figures, are therefore entirely hypothetical. In any event, the EC contends that the "correlations" that Korea asserts exist (market share of the domestic industry *versus* market share of Hynix and market share of Hynix *versus* profitability of Infineon) would not have any particular value for the causation analysis, since the investigating authority needs to "look at the whole picture". Market share, or the volume of subsidized imports, is only one piece of the overall picture. The EC concludes that Korea's graphs are misleading, and their one-dimensional approach is incapable of establishing any inconsistency with the *SCM Agreement*.

7.388 The EC rejects Korea's argument based on the importance to be attached to the correlation of the volume and price effects and the injury factors. The EC is of the view that Korea's argument is based on a number of panel and Appellate Body reports in the safeguards context, in which increased imports play an entirely different role as a condition for the imposition of a measure. The EC points out that in a countervailing duty context, the volume and price effects of imports are merely factors to be considered and taken into account when making an overall assessment of injury and causation. In any case, the EC notes that during the injury POI, Hynix's imports increased by 155 per cent in absolute terms, even when accepting, *arguendo*, the Korean argument with regard to the treatment of the merger between HEI and LGS in 1999.

(ii) Non-attribution/Examination of "any known factors other than the subsidized imports"

7.389 The EC asserts that the investigating authority properly separated and distinguished the relevant other factors that were affecting the domestic industry at the same time as the subject imports and thus ensured that injury caused by such other factors was not attributed to the subsidized imports, as required by Article 15.5 of the *SCM Agreement*.

Treatment of the drop in demand

7.390 The EC asserts that the investigating authority recognized the potential for some downward price effect in 2001 caused by a general economic downturn of the PC and telecommunications markets. The impact was held to be limited however, in comparison to the impact of the subsidized imports. Moreover, the EC asserts that, while market growth slowed, it remained around 59 per cent measured in megabits. The investigating authority found that the impact of economic conditions on prices, and thus on the state of the domestic industry in 2001, was modest in comparison to the sharp and sudden price decline triggered by the market's reaction to the billions of dollars of support provided to Hynix the same year.

"Inventory burn"

7.391 The EC asserts that the investigating authority found that this argument was unsupported by any factual evidence and was, in any event, rebutted by distributor testimony.

Changes in relative capacity

7.392 The EC asserts first that Korea's reference to relative increases is irrelevant to the question of who caused overcapacity. Overcapacity concerns the relationship between total capacity and total consumption. In this respect, the EC notes that the domestic industry's capacity did not even cover the EC's consumption during the injury POI while Hynix's production accounts for 17 per cent of worldwide production and its capacity was higher than both the domestic industry's capacity use and the overall EC's consumption. As the capacity of the domestic industry was insufficient to meet domestic consumption, it is clear that no self-inflicted injury due to overcapacity can be attributed to the domestic industry, as Hynix had alleged at the time of the investigation. The EC asserts that the investigating authority acknowledged that structural, worldwide overcapacity was present throughout the injury POI, but also determined that overcapacity was due in substantial part to the subsidies granted by Korea to Hynix. As to the impact of overcapacity on prices, the EC recognizes that global capacity conditions affect pricing for DRAMs. However, the EC observes that global capacity was surplus to demand at different times, and not just the period considered. Unprecedented price declines in 2001 cannot, therefore, be explained simply by overcapacity.

The volume of unsubsidized imports/Samsung's imports

7.393 The EC explains that the authority considered separately the volume of imports from Samsung, and the volume of imports from all other sources. Regarding the latter, the EC asserts that

the investigation showed that Hynix imports increased each year (361 per cent overall) from 1998 to 2001 (and by 24 per cent from 2000 to 2001), and that the Hynix import market share in 2001 was 20 per cent higher than in 1998. By contrast, DRAMs imports from other countries declined by 4.2 per cent from 2000 to 2001; and their EC market share fell from 41 per cent to 20 per cent during 1998-2001, and fell from 31.4 per cent in 2000 to 20 per cent in 2001. Given these trends, the EC concludes that any injury caused by non-subject imports could not be – and was not – attributed to Hynix imports.

7.394 The EC contends that the investigation showed that Samsung's imports, although significant, increased at a lower rate than Hynix imports, and slower than the increase in domestic consumption. Furthermore, it was found that Samsung's prices were on average higher than those of Hynix. Therefore, the investigating authority concluded, although Samsung's imports may have caused some injury to the domestic industry, that effect was not strong enough to break the causal link between Hynix's subsidized imports and the material injury suffered by the domestic industry.

(c) Panel Analysis

7.395 Korea claims that the EC acted inconsistently with paragraphs 1 and 5 of Article 15 of the *SCM Agreement* when it concluded that Hynix's imports caused material injury to the domestic industry. Korea argues that the EC failed to show that a causal relationship existed between subsidized imports and any material injury suffered by the domestic industry, and that the EC failed to properly separate and distinguish the injurious effects of certain other factors from the injurious effects of the subsidized imports.

7.396 Article 15.5 of the *SCM Agreement* provides as follows:[275]

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

7.397 Article 15.5 imposes two basic obligations on investigating authorities. First, it requires a demonstration that the subsidized imports are, through the effects of subsidies as set forth in Articles 15.2 and 15.4, causing injury within the meaning of the *SCM Agreement*. This demonstration must be based on an examination of all relevant evidence before the investigating authority. Second, it mandates investigating authorities to examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and requires that the injuries caused by these other factors not be attributed to the subsidized imports. Each of these obligations will be examined more in detail when we examine Korea's claims and arguments.

[275] Article 15.1 is already quoted in para. 7.271, *supra*. We recall that the Appellate Body has found in the anti-dumping context that Article 3.1 sets forth an overarching obligation that covers all of Article 3 of the *AD Agreement*, the provision parallel to Article 15 of the *SCM Agreement*. Our analysis of Article 15.5 of the *SCM Agreement* is thus based on our understanding that a causation analysis can only be consistent with Article 15.5 of the *SCM Agreement* if it involved an objective examination based on positive evidence.

(i) Whether the EC properly demonstrated the existence of a causal relationship between subsidized imports and injury

7.398 Korea argues that evidence before the EC demonstrated that there was no correlation or coincidence between the trends in Hynix imports and either the domestic industry's market share or the domestic industry's financial performance. Korea relies on the following panel finding, confirmed by the Appellate Body, in *Argentina – Footwear (EC)*: "[w]hile (...) a coincidence [between the increase in imports with a decline in the relevant injury factors] by itself cannot *prove* causation (...), its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation is still present."[276] (emphasis in original) The EC asserts that Korea's assumption that Hynix's market share in the EC declines hinges on the assumption that the investigating authority was wrong in not adding the volume of imports of LGS to Hynix's. According to the EC, this argument should be dismissed. Moreover, the EC argues that the investigating authority must look at the "overall picture", including the increase in absolute volume of Hynix imports alone, rather than to the discrete correlations proposed by Korea.

7.399 We note that the *Argentina – Footwear (EC)* case concerned the causation standard under Article 4.2(b) of the *Safeguards Agreement*. While the parties have made additional arguments concerning the relevance of findings by various panels and the Appellate Body in respect of safeguard cases to disputes involving countervailing duties, we do not consider it necessary to resolve this issue.[277] This is because, in any event, Korea has failed to establish that there was an absence of coincidence between absolute import volume and the injury to the domestic industry, whatever might be said about the relative volume and market share.

7.400 Korea argues that there was no correlation between a rising market share of subsidized imports and a falling market share and profitability of domestic producers. Korea asserts that the market share of subsidized imports was decreasing at the same time that (1) the market share of the domestic industry was increasing and (2) profitability of Infineon was decreasing.[278]

7.401 We note that, in its tables showing correlations between Hynix's market share and the EC producers' market share, on the one hand, and between Hynix's market share and Infineon's profitability, on the other[279], Korea used information from the application rather than information relied on by the investigating authority in its determinations.[280] In our view, correlations could have been prepared based on data which the investigating authority had determined to be accurate for the

[276] Appellate Body report, *Argentina – Footwear (EC)*, paras. 144-145, referring to Panel report, *Argentina –Footwear (EC)*, para. 8.238.

[277] We note that while a finding of increased imports is a necessary condition for the imposition of a safeguard measure, this appears not to be the case for countervail investigations since Article 15.2 of the *SCM Agreement* provides that "[n]o one or several of these [volume and price effect] factors can necessarily give decisive guidance." This provision suggests that a countervailing measure may be imposed even in the absence of a significant increase in the volume of subsidized imports, provided the requisite price effects exist. This seems to be the interpretation of the Appellate Body, in the anti-dumping context. (Appellate Body report, *EC – Tube or Pipe Fittings*, para. 111, note 114.) We concur with the opinion expressed by the panel in the parallel challenge against the US countervailing measures on Korean DRAMs (DS296) that, since there is no need to demonstrate some measure of increased imports in all cases, it follows that there is no generalized requirement to establish a temporal correlation between increased imports and injury in the context of a countervail investigation. (Panel report, *US – Countervailing duty on DRAMs*, para. 7.320, note 283.) This interpretation appears consistent with the quoted language on "decisive guidance". The absence of a temporal correlation certainly raises a flag, but it is not an absolute barrier to a finding of injury.

[278] This assertion reflects the development of market share and profitability between years 2000 and 2001, not the whole of the injury POI, which we recall runs from January 1998 to December 2001.

[279] Korea First Written Submission, tables in paras. 214 and 217.

[280] *Id.*, para. 214, note 178 – concerning developments of the domestic industry's market share *vs.* Hynix's market share – and para. 216, note 179 (page 17 of **Exhibit GOK-31-(b)**) – on Hynix's market share *vs.* profitability of Infineon.

purposes of making its Final Determination. This data was available to Korea, at least in indexed form. For this reason alone, we consider that we could dismiss Korea's argument. However, even if, *arguendo*, Korea had used that data from the EC's Final Determination – or, for that matter, from the application – we would also have rejected it because those data would show a decrease in Hynix's market share only if LGS's data had been combined with Hynix/HEI's prior to their merger. We have examined this argument in section VII.C.2(c), *supra*, and rejected it, in the context of the Article 15.2 claim, for the reasons set out in paras. 7.299-7.305, *supra*. Nevertheless, suppose, *arguendo*, that Korea is correct in asserting that LGS's import data should have been combined with Hynix's import data for the purposes of Article 15.5 "[demonstrating] that the subsidized imports are, through the effects of subsidies, causing injury within the meaning of this Agreement." In para. 7.303, *supra*, we illustrated a scenario in which a false association may be created between rising imports of a merged firm – by comparison with pre-merger imports of the surviving merger partner – and subsidies given solely to the surviving merger partner. But that is not the scenario of the LGS/HEI merger, for the simple reason that the combined imports of LGS and HEI/Hynix, before and after the merger, rose in absolute volume during the injury POI. Korea's argument could only prevail if we were persuaded that absolute volume increases must be ignored in the DRAMs context. For the reasons set out in para. 7.328, *supra*, we accept the EC's argument that the absolute volume increases alone could undercut prices. Hence, we are of the view that Korea's arguments, read in the most favourable light, must be rejected.

7.402 Aside from the line of argument that we have rejected, Korea has not identified how, under the facts of the case, as analysed by the investigating authority, the EC's determination that the subsidized imports were, through the effects of subsidies, causing injury to the domestic DRAMs industry should be found to be inconsistent with Article 15.5.

7.403 Therefore, we reject claim that the EC failed to properly demonstrate the requisite causal link between subsidized imports and injury suffered by the domestic industry.

(ii) Whether the EC's causation analysis satisfies the non-attribution requirement

7.404 The second part of Korea's claim is whether the EC's causation analysis satisfies (1) the non-attribution requirement set forth in Article 15.5 the *SCM Agreement* and (2) the overarching principle set forth in Article 15.1, *i.e.*, that a determination under Article 15 must be based on an objective evaluation of positive evidence. We recall that Article 15.5 of the *SCM Agreement* requires an investigating authority to ensure that injury caused by any known factors, other than the subsidized imports, which at the same time are injuring the domestic industry, must not be attributed to the subsidized imports. We note that a parallel obligation in the *AD Agreement* has been interpreted by panels and the Appellate Body to require an investigating authority to separate and distinguish the injury caused by such other known factors.[281] In light of the identical wording and role of the non-

[281] In the *EC – Tube and Pipe Fittings* case, the Appellate Body summarized its interpretation of the non-attribution requirement as follows:

> "[Article 3.5] obligates investigating authorities in their causality determinations not to attribute to dumped imports the injurious effects of other causal factors, so as to ensure that dumped imports are, in fact, "causing injury" to the domestic industry. In *US – Hot-Rolled Steel* we described the non-attribution obligation as follows:
>
> > … In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve *separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports*. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to

attribution requirement in the *SCM Agreement*, we are of the view that Article 15.5 contains a similar requirement to separate and distinguish the injury caused by factors other than subsidized imports. We note that the parties are in agreement with respect to the legal standard that applies, but differ in view as to the question whether the EC complied with this standard in its DRAMs investigation.

7.405 It is clear that Article 15.5 does not impose any particular methodology when conducting the causation analysis set forth therein, provided that an investigating authority does not attribute the injuries of other causal factors to subsidized imports. The Appellate Body has not provided guidance as to how an investigating authority should examine other known factors in order to make sure that the non-attribution requirement is fulfilled. In our view, it does not suffice for an investigating authority merely to "check the box". An investigating authority must do more than simply list other known factors, and then dismiss their role with bare qualitative assertions, such as "the factor did not contribute in any significant way to the injury", or "the factor did not break the causal link between subsidized imports and material injury." In our view, an investigating authority must make a better effort to quantify the impact of other known factors, relative to subsidized imports, preferably using elementary economic constructs or models. At the very least, the non-attribution language of Article 15.5 requires from an investigating authority a satisfactory explanation of the nature *and extent* of the injurious effects of the other factors, as distinguished from the injurious effects of the subsidized imports.[282]

> conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties. (emphasis added)
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> …
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> … [I]n order to comply with the non-attribution language in [Article 3.5], investigating authorities must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors. *This requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports.* (emphasis added)

Non-attribution therefore requires separation and distinguishing of the effects of other causal factors from those of the dumped imports so that injuries caused by the dumped imports and those caused by other factors are not "lumped together" and made "indistinguishable".

We underscored in *US – Hot-Rolled Steel*, however, that the *Anti-Dumping Agreement* does not prescribe the *methodology* by which an investigating authority must avoid attributing the injuries of other causal factors to dumped imports:

> We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the *Anti-Dumping Agreement*. What the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made.

Thus, provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the "causal relationship" between dumped imports and injury." (footnotes omitted) (Appellate Body report, *EC – Tube or Pipe Fittings*, paras. 188-189)

[282] Appellate Body report, *US – Hot-Rolled Steel*, para. 226.

7.406 In its determination, the EC identified certain factors, other than subsidized imports, that were potentially causing injury to the domestic industry including: the general economic downturn during the injury POI; imports of the product concerned from countries other than Korea; export activity of the domestic industry; overcapacity; stocks and Samsung's imports. With respect to each of these factors individually, the EC conducted a separate examination and found that "whilst the economic downturn may have had some downward effect on prices, it can be assumed that, with consumption rising, this effect was not substantial.";[283] that "imports from other countries than Korea have not contributed in any significant way to the injury suffered by the [domestic] industry";[284] that "given the lower volume of exports in relation to the volume of sales in the Community during the [POI], the injury suffered by the [domestic] industry cannot be attributed to its exports.";[285] and that "though Samsung imports may have caused some injury to the Community industry, this was not sufficient to break the causal link between Hynix's subsidised imports and the material injury suffered by the Community industry."[286] In addition, the EC rejected Korea's arguments that "any injury suffered by the [domestic] industry during the [POI] was self-inflicted by its investments made during the period under consideration"[287] and that "another reason for the declining prices of DRAMs during the [POI] was a significant "inventory burn"".[288]

7.407 Having considered each of the above factors separately, the EC arrived in its Final Determination at the following overall conclusion:

> "(202) Factors other than the subsidised imports originating in Korea, such as other imports, the general economic downturn, the export activity of the [domestic] industry and the pre-existing overcapacity in the market, may well have contributed to the injury suffered by the [domestic] industry during the [POI]. However, their injurious effect, both individually and collectively, was considered of some importance but insufficient to undermine the material injury attributable to subsidised imports.
>
> (....)
>
> (205) .... In view of the analysis, which has properly distinguished and separated the effects of all known factors on the situation of the [domestic] industry from the injurious effects of the subsidised imports, it is hereby concluded that these other factors are not such as to break the causal link between subsidisation and injury. Accordingly, it is concluded that these imports have caused material injury to the [domestic] industry within the meaning of Article 8(6) of the basic Regulation."

7.408 In sum, the injurious effect of the factors other than subsidized imports that were examined, both individually and collectively, was considered of some importance but insufficient to undermine the material injury attributable to subsidised imports. In other words, the EC concluded that these other factors were not such as to break the causal link between subsidisation and injury, but did not present any thorough qualitative analysis of the nature and extent of these effects. Neither did it provide any quantitative analysis whatsoever of the relative importance of subsidized imports and other factors.

7.409 Korea argues that the EC failed to comply with its obligation to separate and distinguish injury caused by certain other factors so as not to attribute that injury to the subsidized imports.

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[283] EC's Final Determination, para. 193, read in conjunction with Preliminary Determination, para. 150.
[284] *Id.*, para. 194, read in conjunction with Preliminary Determination, para. 151.
[285] *Id.*, para. 195, read in conjunction with Preliminary Determination, para. 152.
[286] EC's Final Determination, para. 200.
[287] *Id.*, paras. 196-197.
[288] *Id.*, paras. 198-199.

Korea also argues that the EC did not go beyond stating conclusions in its determination. Korea asserts that no reasoning and factual basis supporting that reasoning can, in Korea's view, be found in that determination.

7.410 Bearing the above in mind, we shall examine whether the EC properly separated and distinguished the injurious effects of each of these other factors from the injury caused by alleged subsidized imports.

Economic downturn in the market

7.411 Korea argues that the EC failed to properly examine and distinguish the injury caused by the economic downturn in the market and the decline in demand.

7.412 In the Final Determination, the EC addressed the decline in demand as a intervening causal factor in the following manner:

> "(193) Hynix and the GOK argued that the Commission did not take into account the impact of the cyclicality of the DRAM market. They further argued that worldwide demand for DRAMs grew in 2001 only by 59 per cent whilst the average year on year rate was 75 per cent. It is noted that these alleged worldwide growth rates are highly subjective and contradict other information available on the record. As set out in recital 150 of the provisional Regulation, it is recognised that the general economic downturn of the PC and telecommunication markets in 2001 may have had some downward effect on prices. However, it was found that DRAM consumption in the Community continued its upward trend throughout the period under consideration. The increased consumption in terms of Mbits during the [POI] stemmed to a large degree from the introduction of Microsoft XP, which has much higher Mbit requirements than previous systems, and increased sales of "upgrade" products generated by the low prices. In fact, the consumption in Mbits in the Community increased almost at the same rate between the year 1999 and the good year 2000 (57 per cent) as compared to the increase between the good year 2000 and the bad year 2001 - the [POI] (51 per cent). It is therefore concluded that, whilst the economic downturn may have had some downward effect on prices, it can be assumed that, with consumption rising, this effect was not substantial."

7.413 In sum, the EC recognised that the general economic downturn of the PC and telecommunication markets in 2001 may have had some downward effect on prices.[289] In spite of this, and based on its analysis of the development of consumption in megabits in the EC between 1999-2001, the EC concluded that whilst the general economic downturn of the PC and telecommunication markets in 2001 may have had some downward effect on prices, it could be assumed that, with consumption rising, the injurious effect of the economic downturn was not substantial. By way of conclusion the EC states that the economic downturn may well have contributed to the injury suffered by the domestic industry during the POI through its impact on prices.[290] The record is devoid of even elementary quantitative analysis of the importance of the economic downturn, or a thorough qualitative analysis of the nature and extent of this factor.

7.414 The question before us is whether the effects of this factor were separated and distinguished so that injuries caused by the subsidized imports and those caused by the economic downturn were not lumped together and made indistinguishable. In our view, a satisfactory explanation of the nature

[289] The basis for this conclusion is not stated in the EC's Final Determination.

[290] We recall that the development of prices constitutes one of the main factors on which the EC based its finding of material injury. The central role of the development of sales prices can, *inter alia*, be seen in paras. 188, 192 and 205 of the EC's Final Determination.

and extent of the injurious effects of the factor "decline in demand", as distinguished from the injurious effects of the subsidized imports, is required. We note that, after acknowledging that the economic downturn may well have contributed to the injury suffered by the domestic industry, the EC turns to the examination of the development of consumption in the EC. While the developments in domestic consumption may be a relevant factor to take into consideration, we fail to see to what extent the EC's analysis of domestic consumption is sufficient for separating and distinguishing the injurious effects of the economic downturn, which the EC acknowledged existed, and the injurious effects of the subsidized imports. The EC acknowledged that the downturn in the market had a negative effect on prices but failed to examine the extent of this negative effect. Since we do not find either in the EC's Final Determination or elsewhere on the record before us a satisfactory explanation of the nature and extent of the injurious effects of the economic downturn, as distinguished from the injurious effects of the subsidized imports, we conclude that the EC has acted inconsistently with its obligation under Article 15.5 of the *SCM Agreement* not to attribute to subsidized imports injury caused by other factors.

"Inventory burn"

7.415 With regard to the alleged "inventory burn", which Korea argues always accompanies a decline in demand in the DRAMs market, the relevant EC's findings are contained in paragraphs 198-199 of its Final Determination:

> "[f]ollowing the imposition of provisional measures, Hynix also argued that another reason for the declining prices of DRAMs during the [POI] was a significant "inventory burn". It was argued that during the "near record year" 2000 when DRAM prices increased significantly, many customers (e.g. distributors) built up their DRAM inventory because users feared shortages. During the [POI], when it became clear that the collapse of the PC and telecommunications markets would depress demand, these inventories were disposed of quickly and further exacerbated the already declining prices.
>
> However, first of all this argument is not supported by any factual evidence. Secondly, it is based on a wrong premise: during the [POI] DRAMs consumption continued to increase in the Community. Finally, it is not plausible: no company will build up stocks when the prices are high, in particular when a product like DRAMs has a short life cycle; on the contrary they may build up stocks when the prices are low. In this respect, it is recalled that the stocks of the [domestic] industry as a percentage of production in Mbits declined during the good year 2000 as well as during the bad [POI]. This has been confirmed by the sole cooperating distributor which stated in its response to the questionnaire that "at present manufacturers move to just-in-time ordering". The same distributor indicated during a hearing that its DRAMs stocks are renewed four times a month. Therefore, no link can be made in this regard between stocks and prices, and accordingly, this argument has to be rejected."

7.416 The above paragraphs show clearly that the EC pursued this matter with relevant interested parties and that evidence obtained in the course of the investigation from the sole cooperating distributor did not support Hynix's contention that there was a significant "inventory burn" during 2001. Korea asserts that "there was considerable evidence on the record that the EC refused to address" and which pointed to a significant "inventory burn".[291] We have examined the documents referred to by Korea, which contain statements referring to "inventory burn".[292] However, these

[291] Korea response to question 89 of the Panel, para. 56 and note 23.

[292] We have examined the documents referred to in note 23 to para. 56 of Korea's response to question 89 of the Panel.

statements lacked any factual support and, since Korea has not pointed to any other evidence of record in support thereof, we are of the view that it was reasonable of the investigating authority to conclude, based on evidence from the sole cooperating distributor, that there was no factual basis supporting Korea's argument that the "inventory burn" contributed to the injury suffered by the domestic industry.

7.417 In light of the above, we reject Korea's argument that the EC failed to take into account the "inventory burn" when analyzing other factors affecting the domestic industry.

Overcapacity

7.418 Korea argues that the EC failed to properly take into account the injury caused by excess capacity. In paras. 196-197 of the EC's Final Determination, the following analysis of overcapacity as a possible cause of injury is provided:

> "[f]ollowing the imposition of provisional measures, Hynix and the GOK claimed that any injury suffered by the [domestic] industry during the [POI] was self-inflicted by its investments made during the period under consideration. They further claimed that these investments have largely contributed to the overcapacity during the [POI].
>
> As set out in recital 153 of the provisional Regulation, the worldwide DRAMs market still suffered during the [POI] from structural overcapacity resulting from the expectations of the late 1990s that the market would continue its rapid growth. This overcapacity can be said to have contributed to the severity of the current downturn from which this industry is suffering. However, it is noted that the capacity of the [domestic] industry in Mbit terms did not reach the consumption in the Community during the [POI]. Furthermore, it is generally recognised that the DRAMs industry constantly needs a high level of investment, in particular in research and development, to keep abreast with leading-edge technology. The investments of the [domestic] industry during the period under consideration can therefore be viewed as reasonable and were undertaken in order to maintain its competitiveness in a growing market. In this respect, it is noted that both Korean producers made significant investments during the period under consideration. In fact, the worldwide investments of the [domestic] industry were less than half the investments of the two Korean producers during that period. It is therefore reasonable to assume that any overcapacity was not created by the [domestic] industry alone. On the contrary, it was the Korean industry which has mainly contributed to such overcapacity worldwide. It is also reasonable to assume that, had the Korean government not intervened with the subsidies, the situation in both the Community and worldwide as regards overcapacity would not have been so pronounced."[293]

[293] The EC also refers us to its finding in para. 153 of the Preliminary Determination. This reads as follows:

> "[t]he worldwide DRAM market still suffers from structural over-capacity resulting from the expectations of the late 1990s that the market would continue its rapid growth. This over-capacity can be said to have contributed to the severity of the current downturn from which this industry is suffering. As is the case with all downturns, it is reasonable to assume that this one had downward effect on prices. However, it is also reasonable to assume, that had the Korean government not intervened with the subsidies, the situation in both Community and worldwide as regards overcapacity would not have been so pronounced. It should be noted that during the [POI], Hynix was the third biggest DRAM producer in the world (around 17 per cent of world production) after Samsung and Micron. Furthermore, the over-capacity existed, albeit to varying degrees, throughout the period considered, but only during the [POI]

7.419 We also find the following finding in paragraph 204 of the EC's Final Determination to be relevant:

> "[a]s far as overcapacity is concerned, this worldwide situation existed during a number of years including the period under consideration. Therefore, this overcapacity cannot be considered alone as the cause of the very significant sudden drop in prices that led to the injury suffered by the [domestic] industry. Furthermore, subsidised imports are themselves a substantial cause of oversupply."

7.420 In sum, the EC examined the factor "overcapacity", both at the Preliminary and Final Determinations, and acknowledged, through its examination of the EC and international markets, that overcapacity indeed existed. The EC determined that "[t]his overcapacity can be said to have contributed to the severity of the current downturn from which this industry is suffering." From these statements, among others, we infer that overcapacity was considered by the EC to have caused injury to the domestic industry. The question before us is again whether the effects of this factor were separated and distinguished so that injuries caused by the subsidized imports and those caused by "overcapacity" were not lumped together and made indistinguishable. We recall that a satisfactory explanation of the nature and extent of the injurious effects of the factor "overcapacity", as distinguished from the injurious effects of the subsidized imports, is required. But, again, the record is devoid of even elementary quantitative analysis, or a more thorough qualitative analysis of the nature and extent of the injury caused by this factor.

7.421 We have carefully examined the EC's determinations and we have not been able to find in them any indication that the investigating authority separated and distinguished the injurious effects of overcapacity from the injurious effects of the subsidized imports, let alone a satisfactory explanation of the nature and extent of the injurious effects of the factor "overcapacity", as distinguished from the injurious effects of the subsidized imports. After acknowledging the existence of overcapacity, the EC's discussion in para. 197 turns to an examination of the domestic industry's investment decisions and subsequently to determine who created the overcapacity worldwide. In our view, who is to be blamed for the overcapacity does not answer the question of the effect this factor may have had on driving prices down and on its role as a cause of the injury found to exist. While this discussion might be relevant to one aspect of the argument – *i.e.*, whether the domestic producers themselves are to blame for the injurious state of the domestic industry due to erroneous capacity decisions – it fails to address the crucial question of separating and distinguishing the effects of this factor, irrespective of who is to blame for the overcapacity. We thus do not find an indication that the effects of this factor were separated and distinguished from the injurious effects of the subsidized imports.

7.422 For the foregoing reasons, we conclude that the EC failed to provide a satisfactory explanation of the nature and extent of the injurious effects of overcapacity as a factor causing injury. We therefore conclude that the EC has acted inconsistently with its obligation under Article 15.5 of the *SCM Agreement* not to attribute to subsidized imports injuries caused by other factors.

Other (non-subsidized) imports

7.423 Korea argues that the EC failed to properly separate and distinguish the injurious effects of imports from other suppliers, both non-subsidized Korean imports and imports from other sources, particularly Chinese Taipei. Paragraph 194 of the Final Determination discusses the effects of imported DRAMs from countries other than Korea in the following manner:

> "[f]ollowing the imposition of provisional measures, no comments were received concerning other imports. However, following final disclosure Hynix argued that, in

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did prices suddenly drop very sharply. Hence, it is considered that the overcapacity as such did not significantly contribute to injury."

> accordance with data in the complaint, imports from other countries than Korea (mainly Taiwan) and imports from Samsung have increased more than Hynix's imports, in particular between 2000 and the [POI], and thus any injury suffered by the [domestic] industry could not have been caused by Hynix's imports. With regard to Samsung's imports see recital 200. With regard to imports from all other countries (including Taiwan), the investigation found that in Mbit terms they decreased between 2000 and the [POI] by 4.2 per cent. In fact, their market share decreased from 31.4 per cent in 2000 to 20 per cent during the [POI]. During the same period Hynix's subsidised imports in Mbit terms increased by 24 per cent. Therefore, the argument is considered groundless and the findings set out in recital 151 of the provisional Regulation that imports from other countries than Korea have not contributed in any significant way to the injury suffered by the [domestic] industry are hereby confirmed."[294]

7.424 We start our examination addressing Korea's comment regarding the development of market shares and the alleged competitive effect of other imports. Both Korea and the EC appear to agree that the relevant analysis, for the purpose of separating and distinguishing other imports, should be conducted in terms of market shares (or, what comes to the same thing, absolute increase in megabits terms from one foreign supplier relative to another foreign supplier or relative to domestic consumption). That agreed, it becomes critical whether LGS imports are added to Hynix imports during the injury POI. When the two are added, the Hynix market share of imports decreases. When they are not, the Hynix market share of imports increases. Thus, Korea asserts that the "non-subject import market share was 58 per cent in 2001, against a 15 per cent market share held by Hynix." By contrast, the EC's Final Determination reports a decrease of the market share of imports from countries other than Korea, from 31.4 per cent in 2000 to 20 per cent during the POI.[295]

7.425 Regarding Korea's argument that Hynix's market share decreased, we recall that we have rejected this argument, for the reasons set forth in paras. 7.299-7.305, *supra*. If, *arguendo*, Korea's argument about LGS imports is accepted, that would reinforce the conclusion we reach in paragraph 7.436, *infra*, regarding the inconsistency of the EC's analysis with respect to its obligation under Article 15.5. In addition, we note that there is a significant discrepancy between the data on imports from other suppliers submitted by the EC and Korea. There appear to be two reasons for this discrepancy. First, while Korea's argument is based on data from the application, the EC's conclusions are based on verified data obtained from the parties during the investigation. Since there is no indication that the data reported in the EC's Final Determination is inaccurate[296], and given that this is the data on which the investigating authority based its determination, our examination must be based on the data contained in the EC's determination rather than on data from the application. Second, Korea seems to include in its "non-subject import market share" data imports from Samsung, the second Korean producer/exporter. We note that the EC decided to examine separately the injurious effect of imports from Samsung, and imports from countries other than Korea. As far as the

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[294] Para. 151 of the Preliminary Determination, which is incorporated by reference to para. 194 of the Final Determination, reads as follows:

> "[t]he imports of the product concerned from other countries (e.g. United States of America, Japan, Taiwan) in market share terms dropped from 41 per cent to 20 per cent during the period considered. This drop of market share reflects the fact that some producers closed down their operations. The lost market share of third countries was to a large extent taken over by the Community industry, though as indicated above the move in market share is somewhat exaggerated both by the Mbit measurement and the faster move to more sophisticated technology by the [domestic] industry. There is no evidence that imports from countries, other than Korea, contributed in any significant way to the injury suffered by the [domestic] industry."

[295] EC's Final Determination, para. 194.

[296] We do not understand Korea to have challenged the accuracy of that information.

treatment of Samsung's imports are concerned, we find that imports from Samsung were examined and duly analysed as a separate factor by the EC.

7.426 The EC determinations jointly examined the impact of imports from Japan, Chinese Taipei and the United States. Korea argues that imports from Chinese Taipei should have been examined separately. Korea's argument is based on the "logical hypothesis (...) that for a commodity product the primary means by which the supplies from Chinese Taipei achieved such market share gains is by offering prices lower than its competitors." We note that Article 15.5 of the *SCM Agreement* provides that non-subsidized imports may be examined as a causal factor but does not require that non-subsidized imports be considered on a country-per-country basis. We therefore do not find unreasonable the investigating authority's treatment of imports from Chinese Taipei, in combination with those from other countries.

7.427 The EC determined that the market share of imports from all countries other than Korea was approximately the same, in 2001, as Hynix's market share (approximately 20 per cent). Korea does not contest this finding. Based on the similarity of market shares, the EC concluded that "imports from countries other than Korea have not contributed in any significant way to the injury suffered by the [domestic] industry." In our view, this conclusory assertion, without any quantitative or thorough qualitative support, does not suffice to separate and distinguish the injury that might have been caused by imports from Hynix. Indeed, a simple-minded evaluation might say that, if imports from two sources are roughly the same proportion of total imports, they are equally responsible for injury suffered by the domestic industry. The EC's analysis does nothing to refute this simple-minded evaluation.

7.428 With regard to imports from Samsung, the EC made the following statement in paragraph 200 of its Final Determination:

> "[d]uring the period under consideration, Samsung's imports have also increased but at a lower pace than Hynix's imports and in any event slower than the increase of Community consumption. It was also found that during the [POI] Samsung's prices were on average higher than those of Hynix. Furthermore, Samsung's prices decreased less than Hynix's prices during the period under consideration. It was therefore concluded that though Samsung imports may have caused some injury to the Community industry, this was not sufficient to break the causal link between Hynix's subsidised imports and the material injury suffered by the Community industry."

7.429 While acknowledging that Samsung's imports may have caused some injury to the domestic industry, the EC concluded that this was not sufficient to break the causal link. The EC reached this conclusion by examining the development of 1) the volume of imports of Samsung as compared to that of Hynix, and 2) Samsung's prices as compared to Hynix's.

7.430 Korea asserts that the EC's finding that Samsung's imports have also increased but at a lower pace than Hynix's imports is not supported by evidence before it. Korea's argument is based on market share developments – rather than the development of imports in absolute terms – and again presupposes that LGS's import volume data should be combined with those of Hynix. However, we recall our conclusion that the EC was not required, for the purposes of its assessment of the development of the volume of imports under Article 15.2, to combine imports from LGS and Hynix. Moreover, we recall our conclusion that the EC, consistent with Article 15.5, could conduct its causal analysis on the basis of an increase in absolute volume. Korea did not refute the possibility, under Article 15.5, of a causal analysis based on an increase in absolute volume from Hynix alone. For the purposes of the non-attribution analysis, however, both the EC and Korea argue in terms of market share (or, what comes to the same thing, absolute increase in megabits terms from one foreign supplier relative to another foreign supplier or relative to domestic consumption), which we believe is

the better approach for ensuring non-attribution. That said, the non-attribution analysis requires more than a simple comparison of levels or changes in market share.

7.431 The following data are provided in the Final Determination regarding developments in imports from Samsung and Hynix:

	1998	**1999**	**2000**	**2001**
Imports:				
Samsung	100	110	181	414
Hynix	100	194	372	461
Market shares:				
Samsung	100	63	65	100
Hynix	100	111	136	120
Consumption:	100	175	276	416

Source: EC's Final Determination, paras. 172, 177 and 185

7.432 We note that the figures for imports (in absolute terms) and market shares are indexed figures in order to preserve confidentiality. Both sets of figures, calculated on the basis of data submitted by the exporters in the underlying investigation and not disputed by Korea, show that the volume of imports and market share of Hynix increased faster than Samsung's during the injury POI. Thus, Samsung's imports increased by 314 per cent, while Hynix's did so by 361 per cent (ignoring imports from LGS in 1998 and 1999). In terms of market share, Samsung's remained stable during the injury POI, while Hynix's increased by 20 percentage points. Imports from Samsung also increased, in an indexed form, at a lower pace than domestic consumption. Consequently, the EC's findings that "Samsung's imports have also increased but at a lower pace than Hynix's imports and in any event slower than the increase of Community consumption" are supported by the evidence before the investigating authority.[297] However, as we have already stated, the non-attribution analysis must go deeper than a simple comparative statement of changes in market share. It is not enough to say that Samsung's imports have increased more slowly than Hynix's imports; therefore, Samsung's imports do not break the causal link between Hynix's imports and material injury.

7.433 Apart from the market share issue, Korea further asserts that the EC did not conduct a proper assessment as it should have compared Samsung's prices to those of the domestic producers rather than Samsung's prices to those of Hynix.

7.434 The record reveals no analysis, by the EC, of the impact of Samsung's prices on the prices charged by domestic producers. We note that, after having compared the pricing and import behaviour of Samsung with that of Hynix, the EC immediately drew the conclusion that, although Samsung's imports may have caused some injury to the domestic industry, this was not sufficient to break the causal link. However, there is nothing in the EC's Determination that would indicate to us that the EC assessed and determined the extent of the injury allegedly caused by Samsung imports. Again, the EC analysis lacks a thorough qualitative analysis or even a rudimentary quantitative evaluation. It is not enough to say that, because firm A's import market share grew less than firm B, injury that may have been caused by firm A's imports can be ignored. However, the Final Determination merely contains a statement acknowledging that Samsung imports may have caused some injury, without saying more. This does not constitute in our view a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the subsidized imports.

7.435 In view of the above, we conclude that the EC failed to provide a satisfactory explanation of the nature and extent of the injurious effects of non-subsidized imports from other countries, or from Samsung, as distinguished from the injurious effects of the subsidized imports. We therefore find that

[297] Actual figures regarding exports by Samsung have not been made available to the Panel. Korea only submitted data regarding Hynix and LGS, but not verified data regarding Samsung.

the EC's treatment of imports was inconsistent with its obligation under Article 15.5 of the *SCM Agreement* not to attribute to subsidized imports injuries caused by other factors.[298]

(d) Conclusion

7.436 In sum, we conclude that the EC has acted inconsistently with its obligation under Article 15.5 not to attribute to subsidized imports injuries caused by the economic downturn in the market, overcapacity, and other non-subsidized imports. For the remainder, we reject Korea's arguments and claims under Article 15.5 of the *SCM Agreement* with respect to the EC's causation analysis.

7.437 Our determination certainly does not preclude that, based on the facts as submitted by the parties on the above "known factors", the EC could properly conclude that a causal relationship exists between subsidized imports and the material injury suffered by the domestic industry, after ensuring that the injury caused by other factors is not attributed to subsidized imports. However, the EC must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and must separate and distinguish the injurious effects of the subsidized imports from the injurious effects of those other factors. This requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, preferably with quantitative analysis, as distinguished from the injurious effects of the subsidized imports.

D. OTHER CLAIMS

1. Claim regarding the requirement of adequate public notice

(a) Korea

7.438 Korea argues that, in its Final Determination, the EC failed to provide, as required by Article 22.3 of the *SCM Agreement*, sufficient detail on issues concerning volume and price effects of the subsidised imports, as well as the existence of a causal relationship between the subsidized imports and injury to the industry.[299]

(b) EC

7.439 The EC asserts that not all of the information/data available in the record of an anti-subsidy proceeding has to appear in the published notices. In the case at stake, the EC points out that the published notices discussed in great detail the facts, and analysed in detail both the subsidy and the injury determinations. The EC argues that the essential question is whether or not Korea and Hynix were in a position to understand the determinations made by the investigating authority, and make their case accordingly. In the view of the EC, this is clear from Korea's First Written Submission.

(c) Panel Analysis

7.440 We note that Korea's Article 22.3 claim is dependent on its claims under Articles 15.1, 15.2 15.4 and 15.5 of the *SCM Agreement*. Thus, to the extent that we reject those claims, and in the absence of any additional independent arguments by Korea, we consider that Korea's claims concerning the procedural requirement to provide sufficient explanation under Article 22.3 of the *SCM Agreement* also fail. With respect to the substantive claims that were upheld, we consider that it would not add anything to our finding to make any ruling on Korea's procedural claims under

[298] In reaching this conclusion, we do not mean to say that the EC should adopt any particular methodology in order to carry out the assessment of the injurious effects of Samsung's imports.

[299] In support of its contention, Korea refers to findings of the *Mexico – Corn Syrup* and *EC – Tube or Pipe Fittings* panels.

Article 22.3 in respect of the same aspects of the EC determination. Since the EC's Final Determination is inconsistent with paragraphs 4 and 5 of Article 15 in respect of part of the EC's injury and non-attribution analysis[300], respectively, the adequacy of the EC's public notice in respect of the relevant portions of the EC's Final Determination is immaterial. We therefore make no ruling with regard to Korea's claim under Article 22.3 of the *SCM Agreement*.

2. Claim regarding Articles 10 and 32.1 of the *SCM Agreement*

(a) Korea

7.441 Korea argues that the EC violated Articles 10 and 32.1 of the *SCM Agreement* because the countervail order imposed by the EC against DRAMs from Korea was not in accordance with the relevant provisions of the *SCM Agreement* or the relevant provisions of the *GATT 1994*.

(b) EC

7.442 In the view of the EC, since the determination was entirely consistent with the obligations contained in the *SCM Agreement*, Korea's consequential claim under Articles 10 and 32 must also fail.

(c) Panel Analysis

7.443 In light of the finding made above concerning the inconsistency of the subsidy determination with Article 1 of the *SCM Agreement*, and in the absence of any independent argumentation by Korea in this respect, we do not find it necessary for the resolution of the dispute to address this Korean claim concerning the inconsistency with Article 10 and 32.1 of the *SCM Agreement*.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In the light of our findings above concerning the EC' s definitive countervailing measure imposed on imports of DRAMs from Korea, we consider that the EC acted in a manner inconsistent with its WTO obligations under:

(a) Article 1.1(a) of the *SCM Agreement* in determining that the May 2001 Restructuring Programme constituted a financial contribution by the government;

(b) Article 1.1(b) of the *SCM Agreement* in its determination of the existence of a benefit in the case of the Syndicated Loan;

(c) Articles 1.1(b) and 14 of the *SCM Agreement* in applying, for the purposes of the calculation of the amount of benefit, its grant methodology to all programmes found to constitute a subsidy;

(d) Article 15.4 of the *SCM Agreement* by not evaluating the factor "wages" as a relevant factor affecting the state of the domestic industry;

(e) Article 15.5 of the *SCM Agreement* by failing to make sure that injury caused by certain other factors (in particular, decline in demand, overcapacity, and other (non-subsidized) imports) was not attributed to the subsidized imports.

[300] The injury determination is considered to be inconsistent because the EC did not evaluate one of the factors listed in Article 15.4, "wages", as determined by us in para. 7.374, *supra*, of this Report. With regard to the non-attribution determination, we recall that the EC did not properly and adequately separate and distinguish the injurious effects of certain factors other than subsidized imports from the effects caused by those subsidized imports. This determination can be found in para. 7.436, *supra*.

8.2 For the reasons set forth in our findings above, we reject Korea's claims that the EC violated:

(a) Article 1.1(a) of the *SCM Agreement* because the EC failed to demonstrate the existence of a financial contribution with respect to the Syndicated Loan, the KEIC Guarantee, the KDB Debenture Programme, and the October 2001 Restructuring Programme;

(b) Articles 1.1(b) of the *SCM Agreement* because the EC failed to demonstrate that a benefit was conferred on the respondent Hynix by the KEIC Guarantee, the KDB Debenture Programme, the May 2001 Restructuring and the October 2001 Restructuring Programmes, given available market benchmarks among Hynix's creditors, including a foreign bank operating in the Korean market;

(c) Articles 1.2 and 2 of the *SCM Agreement* because the EC made an erroneous finding of *de facto* specificity, specifically with respect to the KDB Debenture Programme;

(d) Articles 1.2 and 2 of the *SCM Agreement* because the EC disregarded the fact that many Korean companies underwent debt restructuring similar to that undergone by Hynix in the May and October 2001 Restructuring Programmes, and therefore, the EC did not establish that the alleged subsidies were specific on the basis of positive evidence;

(e) Article 15.2 of the *SCM Agreement* because, the EC determinations improperly assessed the significance of the volume effects of Hynix imports;

(f) Article 15.2 of the *SCM Agreement* because the EC determinations improperly assessed the significance of the price effects of Hynix imports;

(g) Article 15.4 of the *SCM Agreement* because the EC failed to consider all factors relevant to the overall condition of the domestic industry, in so far as Korea's claim does not relate to the factor "wages";

(h) Article 15.5 of the *SCM Agreement* because the EC failed to demonstrate the requisite causal link between Hynix imports and injury, while accepting Korea's claim concerning the non-attribution aspect of the causation analysis, as stated above;

(i) Article 12.7 of the *SCM Agreement* because the EC did not justify its application of "facts available" with respect to its subsidy investigation.

8.3 Having reached the conclusions set forth above,[301] we apply judicial economy and do not rule on Korea's claims that the EC acted in a manner inconsistent with:

(a) Articles 19.4 of the *SCM Agreement* and VI:3 of the *GATT 1994* in levying countervailing duties in excess of the amount allowed under those provisions;

(b) Article 15.1 of the *SCM Agreement* because the EC determinations on injury and causation were not based on positive evidence and an objective assessment of the effects of allegedly subsidized imports;

[301] For ease of understanding, the Panel's conclusions concerning the EC's subsidy and injury determination are summarized in tabular form in Annexes F-2 and F-3 respectively.

(c) Article 22.3 of the *SCM Agreement* because the EC's injury determination did not set forth in sufficient detail the EC's findings and conclusions on all material issues of fact and law;

(d) Articles 10 and 32.1 of the *SCM Agreement* because *inter alia*, the definitive countervailing duty order imposed by the EC against DRAMs from Korea was not in accordance with the relevant provisions of the *SCM Agreement* or the relevant provisions of the *GATT 1994*.

8.4 Under Article 3.8 of the *DSU*, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the EC has acted inconsistently with the provisions of the *SCM Agreement*, it has nullified or impaired benefits accruing to Korea under that Agreement.

8.5 We note that Korea requests the Panel to recommend that the EC terminate the countervailing duty order immediately.[302] Article 19.1 of the *DSU* is explicit concerning the recommendation a panel is to make in the event it determines that a measure is inconsistent with a covered agreement:

> [i]t shall recommend that the Member concerned bring the measure into conformity with that agreement. (footnotes omitted)

Article 19.1 goes on to provides that:

> [i]n addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

8.6 We thus consider that the language of Article 19.1 of the *DSU* permits us to make suggestions regarding implementation of the recommendation that the measure be brought into conformity with the *SCM Agreement*. We have found various violations of the EC's obligations under the *SCM Agreement*, which may necessitate differing responses in order to bring the measure concerned into conformity with the EC's obligations under the *SCM Agreement*. In our view, the modalities of the implementation of our recommendation are, in the first place, for the EC to determine. In this regard, we note Article 21.3 of the *DSU*, which provides:

> [a]t a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. (footnote omitted)

8.7 We therefore recommend that the Dispute Settlement Body request the EC to bring its measure into conformity with its obligations under the *SCM Agreement*, and decline to make the suggestion requested by Korea.

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[302] Korea First Written Submission, para. 676.

ANNEX A

SUBMISSION OF PARTIES AND THIRD PARTIES FOR THE FIRST SUBSTANTIVE MEETING

ANNEX A-1

EXECUTIVE SUMMARY OF THE SUBMISSION OF KOREA

(14 May 2004)

I. EC INJURY INVESTIGATION – CLAIMS OF ERROR

A. OVERVIEW OF THE EC DRAM INDUSTRY

1. The EC DRAM industry has a number of distinctive conditions of competition. First, the DRAM market is highly cyclical, with regular well-known boom and bust periods. Second, the trend has been toward even more extreme boom-bust cycles. Third, DRAM product pricing is extremely volatile based on worldwide, not regional, supply and demand phenomena. The EC incorrectly argued for significant price effects of subsidized imports in the European market and ignored the economic reality that subsidized imports by a single company like Hynix into the European market have at most a very limited ability to have any effect on price, particularly relative to the overall business cycle. Understanding and taking into account these distinctive conditions of competition should have been a critical part of the EC's objective examination required by Article 15. Understanding these features will also be an important part of this Panel's "objective assessment" of the EC determinations in this dispute.

B. ARTICLE 15.1 STANDARDS

2. Article 15.1 requires that the competent authority have "positive evidence," and that evidence receive "objective examination." The Appellate Body has confirmed that evidence supporting a finding of injury must be affirmative, objective, verifiable, and credible and emerge from an unbiased investigation. Further, Article 15.1 is an overarching provision requiring each of the substantive provisions of Article 15 to be read in light of Article 15.1. Thus, all aspects of the injury investigation must be based on positive evidence and an objective examination of the facts.

C. SIGNIFICANT INCREASE IN SUBSIDIZED IMPORTS

3. The EC mechanically cited import indices, but largely ignored any meaningful analysis of the significance of those figures. Given the unique nature of DRAMs, and the ever-increasing total bits supplied and consumed, an actual increase in imports is meaningless. Rather, the authority must examine the increased shipments relative to consumption and relative to other suppliers.

4. Under Articles 15.1 and 15.2, the national authority must prove that there was material injury to the domestic industry caused by subsidized imports, not the imports from the country being investigated as a whole. In this case, however, the EC mistakenly considered the volume and market share of imports from Korea as a whole, even though it itself had already concluded that a portion of those imports were not subsidized. This constitutes a manifest error and is inconsistent with Articles 15.1 and 15.2.

5. The merger that created Hynix is a critically important factor in this case. In 1999 two separate Korean DRAM companies merged. Yet the EC did not take the merger into account in any

meaningful way, and this failure fundamentally distorted its analysis of the volume and market share of allegedly subsidized imports.

6. According to Infineon's own complaint, the data show a significant drop in Hynix market share, from 21.2 per cent in 1999 to 15.5 per cent in 2001. The EC's finding of an "increase" in market share, is based solely on improper manipulation of the data. Specifically, the EC compared the market share of single company (Hynix pre-merger, i.e. Hyundai Electronics) in 1998 with the combined market share of *two* companies (Hynix post merger, i.e. HEI and LGS) in 2001. The EC itself provided market share indices that showed a remarkable decrease by Hynix when the Hynix-LGS merger was appropriately accounted for, falling consistently over the 1998-2001 period from 100 to 61.

7. The market share of Hynix DRAMs fell consistently over the period, while other suppliers expanded their market share over the same period. Market share provides the context in which an objective authority would have analyzed whether particular import volumes were properly considered significant or not. But in this case, rather than analyze the context seriously and objectively, the EC authorities were both too broad and too narrow. The EC authorities cited data and trends for all of Korea, even though the EC had found that Samsung was not subsidized, and thus could not be considered part of the "subsidized imports" being analyzed. The EC authorities also refused to combine Hynix and LGS on a consistent basis, and thus impermissibly narrowed the data to create the illusion of a market share increase for Hynix that simply did not exist.

D. SIGNIFICANT PRICE EFFECTS BY SUBSIDIZED IMPORTS

8. The EC made findings about pricing at odds with the facts of this case, and with basic economic logic. By far the most important specific fact is that *at the height of the alleged subsidization of Hynix in 2001, Hynix was losing market share in the EC market, not gaining share.* If price were truly as important to customers as the EC has stated, and if Hynix were truly the lowest price supplier in the EC market, Hynix would have gained market share in 2001, not lost share. It defies economic logic to blame Hynix pricing, when Hynix was losing market share for a commodity product.

9. The EC also largely ignored its own finding that there really is no such thing as a "price leader" in the DRAM market, which should have called into serious doubt whether Hynix itself could really be the source of "significant" price effects. The absence of a price leader means that broader supply-demand factors are driving prices.

10. The EC undertook *three* different approaches to analyzing price undercutting, but then inexplicably chose to focus on the only method that demonstrated price undercutting without explaining why it jettisoned the two other approaches. It is critical to note that the two other findings demonstrated no significant price undercutting by Hynix. Korea submits that the price comparison approach used by the EC results in a completely distorted analysis.

11. The EC also brushed aside any meaningful discussion of other factors that affect pricing. This evidence before the EC demonstrated that DRAM market prices are affected by: (1) the general economic downturn and decrease of demand, which causes "inventory burn"; (2) excess capacity by other suppliers; and (3) imports from other suppliers. In its discussion of price effects from other factors, the EC dismissed them out of hand by concluding that either they only played some limited role in the market price decline or they are completely irrelevant. The EC thus failed to consider positive evidence on the record that showed other factors than Hynix price caused the significant drop of DRAM prices in 2001. Given the fact that the Hynix market share was indeed decreasing, the EC should have been particularly alert to other causes of the DRAM price decline.

12. If it had an open and objective mind, the EC should have realized that low priced non-subsidized imports that were rapidly gaining market share caused the dominant price effects, and that any remaining effects of subsidized imports could not reasonably be considered "significant." The EC finding was inconsistent with Articles 15.1 and 15.2.

E. CONDITION OF THE DOMESTIC INDUSTRY

13. Article 15.4 requires an evaluation of all relevant economic factors and indices, and recognizes that the relevant economic factors and the weight to be given each of those factors will differ from case to case. Perhaps the single most important economic factor in the DRAM market is the notorious business cycle for DRAM producers. The DRAMs industry has endured a continuing history of "boom/bust" cycles. The evidence demonstrated that the DRAM industry had gone from the top of the boom (in 2000) to the trough of the bust (in 2001) during the period under consideration. Although the EC had to be aware of the existence of the notorious business cycle, it completely ignored the business cycle when analyzing the causes of the deterioration of the domestic industry's financial condition.

14. In analyzing the conditions of the domestic industry, the EC also failed to consider domestic industry's own assessment of factors that describe success in the EC DRAM market and its own description of its relative competitive position in the market. The EC, at least, should have considered these factors in its analysis of domestic industry's condition. The domestic industry was providing different answers to different audiences as it saw fit, and any objective authority would have considered these inconsistencies.

15. There is also no evidence that the EC properly examined "output" and "wages." With regard to these neglected factors, the EC did not make sufficient data available to be able to analyze what a proper analysis of "output" and "wages" would have revealed. It is particularly significant that the EC wrongfully neglected to examine the factor "output," considering its importance in an industry which exports so much.

16. This is not a purely formalistic point. Countervailing duties are only allowed if there has been material injury to the domestic industry caused by subsidized imports. To determine whether injury has been material, the competent authorities are obligated to conduct a thorough analysis of at least the factors enumerated in Article 15.4.

17. Moreover, the EC did not acknowledge that most of the injury factors showed the industry's health. The EC never explained adequately why just three of 13 factors should compel its conclusion that the domestic industry was suffering material injury. The other ten factors showed positive trends. Such failure demonstrates the lack of objective examination.

F. CAUSATION

18. Under Article 15.5, Members must demonstrate an explicit "causal relationship" between the subsidized imports and any material injury suffered by the domestic industry. The evidence before the EC demonstrated that there was no correlation between the trends in subsidized imports and the condition of the domestic industry. Hynix was losing market share while the domestic industry gained market share.

19. Moreover, the non-attribution requirement in the third sentence of Article 15.5 requires the authority not to impute to subsidized imports any injury caused by other factors. According to the plain meaning of Article 15.5 as well as the unambiguous guidance from the Appellate Body, the competent authority must "separate" and "distinguish" the injurious effects of factors other than subsidized imports to ensure they are not attributed to the subsidized imports.

20. The EC authorities ignored the specific evidence on **declining demand**. The EC cited certain data for overall EU consumption, as measured by "Mbits", but ignored the fact that the Mbits consumed are always increasing dramatically. The key issue is whether the rate of growth is consistent with historical trends. Hynix provided the EC authorities with data on both global and EC growth trends. This data shows that rate of growth in DRAM consumption fell sharply in 2001 from its historical average. Indeed, the fall off in growth in the EC market was even sharper than the fall off in global growth. The key legal point is that Hynix imports have virtually nothing to do with the level of demand. Demand either increases or decreases for independent reasons based on the level of demand for items that use DRAMs. Thus, to the extent that DRAM prices rise or fall because of the changing level of demand, those price changes have not been caused by Hynix imports.

21. The EC completely ignored the arguments about changes in **relative capacity** that confirmed the dominant role of other suppliers. Hynix's Korean capacity in wafer starts actually contracted slightly during this period. In contrast, others significantly increased capacity. Taiwanese capacity expansion is by far the largest increase, but several other expansions (including Micron's US expansion) were significant. Hynix played a relatively trivial role in capacity expansions that occurred during the period examined, while other suppliers have been the most aggressive in expanding total DRAM capacity and output.

22. The EC at least tried to address the role of **unsubsidized imports**, but either ignored or distorted the key evidence. The large and growing volume of these unsubsidized imports cannot be so easily dismissed. Non-subsidized import market share was 58 per cent in 2001 compared to 15 per cent of Hynix, or *more than three times* Hynix's market share. Under the EC's own theory of the significance of increased market shares for commodity products, the relative market shares mean that other imports *had three times the competitive effect as did Hynix's imports*. The EC did not conduct any analysis of *other* import suppliers. The data demonstrates that Taiwanese suppliers dramatically increased their share of the EC market, gaining 5.1 percentage points of markets have while Hynix lost 6.2 percentage points. Yet the EC did not conduct any analysis of Taiwanese suppliers, and their rapid growth.

G. THE EC REPORT OF ITS INVESTIGATION

23. As one of the most important procedural obligations, Article 22.3 requires authorities to explain their determination in sufficient detail. In this case, however, the EC failed to provide sufficient detail on several important issues such as volume effects, price effects, and causation, as explained above. This sparse and inadequate discussion by the EC of these key issues triggers two independent violations as recognized and applied by previous WTO panels: one violation of the underlying substantive obligation, and other violation of the procedural obligation to explain the basis of a particular decision. Since the discussion of findings is not directly discernable from the EC decision, the decision is inconsistent with Article 22.3.

II. EC SUBSIDY INVESTIGATION – CLAIMS OF ERROR

A. OVERVIEW OF FINANCIAL RESTRUCTURING

24. The underlying investigation emerged from the commercially-driven financial restructuring of a company, Hynix Semiconductor Inc., in the aftermath of Korea's 1997 financial crisis. The financial crisis triggered extensive and fundamental corporate and financial sector reform within Korea. This structural reform sought to create independence for Korean banks to make their own decisions, and to eliminate government interference in individual lending decisions.

25. Like many Korean companies, Hynix incurred substantial debt during the 1997 financial crisis. As a result, the Hynix management retained Citibank and Salomon Smith Barney (SSB) in

September 2000 to embark on a restructuring process. Hynix's financial restructuring and recapitalization consisted of several separate transactions over 2000-2001 period.

26. The intersection of these two events -- Hynix's financial restructuring on the one hand and Korean corporate and financial reform on the other -- has essentially been misconstrued by the EC as evidence of entrustment or direction by the GOK to save Hynix at any cost. The facts of the case show that nothing could be further from truth. Rather, this case illustrates the wisdom of the demanding standard in Article 1.1 for demonstrating a financial contribution through private bodies, a standard that protects innocent and fundamentally sound commercial conduct from the reach of improper countervailing duty actions.

B. FACTS AVAILABLE

27. The EC has twisted the concept of "facts available" in very disturbing ways. Under the EC approach, whenever a competent authority does not like a particular fact, or does not know how to respond to that fact, the authority may simply fabricate some excuse to invoke "non-cooperation" and then dismiss the adverse fact. The EC has abused the narrow concept of "facts available" to dismiss important pieces of factual information in this case. The text of Article 12.7 and the related jurisprudence both demonstrate that the use of "facts available" should be exceptional and narrow. In this case, however, the EC abused "facts available" to create evidence where none existed and to ignore other evidence when that evidence could not be reconciled to its outcome driven analysis.

28. With respect to the GOK, the EC focused on two rather narrow pieces of evidence, and then proceeded to make sweeping accusations of non-cooperation against the GOK. The EC conclusions about these pieces of evidence are wrong. At most, Korea may have misunderstood the intent of some questions from the EC. In the end, however, Korea answered the specific questions posed fully and completely. Yet the EC still proceeded to use Korea's failure to provide certain information as the excuse to fabricate "evidence" about government direction and entrustment.

29. The EC used the same overbroad approach with respect to Hynix. In a last minute switch, the EC decided to reject all evidence about an Arthur Andersen valuation report because Hynix could not let the EC keep the full text of the report. Hynix provided the relevant excerpts. The EC could and did examine the report during the verification. Yet somehow this was not enough. Similarly, at the last minute the EC created new excuses to reject the extensive evidence submitted by Citibank. The EC seemed determine to expunge from the record any evidence contrary to its theory of the case. To use Article 12.7 to create favourable evidence and to ignore unfavourable evidence is wrong, and impermissible.

C. FINANCIAL CONTRIBUTION

30. Under Article 1.1 (a)(1)(iv), "entrustment" or "direction" can be established only where there is government action so clear and unambiguous that the actions of private bodies can be imputed to the government itself. The text requires that each alleged government delegation or command be examined with respect to each party, and with respect to each task or duty.

31. According to the *US – Export Restraints* case, the acts of entrusting and directing carry with them the following three elements: (i) an explicit and affirmative action, be it delegation or command; (ii) addressed to a particular party; and (iii) the object of which action is a particular task or duty. The panel in *US – Export Restraints* confirms generalized statements of government intent or desire, or even general interventions in the market itself, are insufficient to establish a financial contribution through a private body. It is insufficient to conclude that if *some* connection exists between government, *certain* events and *certain* actors, then financing by *all* lenders to a particular party, no matter when or how it occurs, is the result of entrustment or direction.

32. Yet this is exactly what the EC did in this case. After its 14-month investigation, the EC failed to come up with any single piece of direct evidence to prove GOK "entrustment or direction" of Hynix creditor banks. The EC relied on largely a collection of circumstantial evidence that cannot be corroborated or verified in a judicially reliable and meaningful way. When necessary to bolster its collection of circumstantial evidence, the EC applied "facts available" and substituted adverse inferences for evidence. All such circumstantial evidence can show, at best, is the possible "effects" on the part of the creditors, which may have triggered certain "reaction" on the part of the creditors. Article 1 of the SCM Agreement and *US-Export Restraints* require more than showing of a mere effect or possible reaction of a private body.

33. The EC also relies extensively on the fact that the GOK held ownership interests in certain banks involved in Hynix's restructuring. This fact hardly constitutes evidence of an explicit and affirmative delegation or command by the GOK to entrust or direct credit to Hynix. But even if this shareholding somehow constituted "evidence" for the banks in which the GOK held a controlling stake, it is affirmatively not evidence of an explicit and affirmative delegation or command to *all* banks, particularly banks with little or no GOK ownership.

34. The EC focused too much on what the GOK was doing, and too little on what the various commercial banks were doing. In fact, the Hynix creditors were consistently assessing what made the most commercial sense for them. Each bank made its own assessment at each stage. The commercial banks drew upon an extensive body of data and information to help them make these various assessments. This extensive body of independent outside studies was submitted to the EC during the underlying investigation, but the EC largely ignored these studies.

35. The **December 2000 syndicated loan** rested on purely commercial considerations. Private banks – including Citibank – agreed to lend Hynix money. Given this participation by private banks for their own reasons, the burden of demonstrating any GOK entrustment or direction should be particularly high. The EC did not and cannot meet this strict standard for entrustment or direction. The fact that the FSC granted waivers to some banks allowing their full participation in the syndicated loan does not explain the decisions by these banks actually to participate in the syndicated loan. Likewise, it does not explain the participation of the seven other banks, which did not require waivers, in the syndicated loan.

36. Making available **export insurance**, and Hynix procuring that insurance through payment of the normal premiums, does not explain or describe any explicit and affirmative delegation or command by the GOK to Hynix creditors to extend short-term financing. It does not explain why the financing was made. The EC has again confused facilitating a transaction with directing that transaction.

37. With respect to the **KDB fast track programme** the scope of the EC's financial contribution findings remain unclear. Nothing in the KDB fast track programme required any specific lender to participate. The Korean financial community had great interest in the programme as a means to promote financial reform and restructuring. Since this programme to refinance existing debt would help bring stability to the market and spare creditors the need to struggle with clients in bankruptcy, the lenders all had their own self interest very much in mind. But no specific lender was legally obligated to participate in any specific refinancing. Indeed, the EC erroneously cites the example of KFB. What is truly remarkable about this particular "evidence" of entrustment or direction is that KFB in fact *did not participate* in the fast track programme. The EC weaves a grossly inaccurate tale when it concluded in its *Definitive Regulation* that "KFB gave in to the GOK demands and participated in the measures." This error highlights the dangers of relying on circumstantial evidence, rather than real facts.

38. The **May 2001 financial restructuring** package was proposed to the Hynix creditors at a time when DRAM prices had been rising again. According to the restructuring plan, Hynix would

seek an increase in private capital through global depository receipts ("GDRs"). In doing so, the creditor banks were essentially "market testing" their participation in the restructuring plan. The GDR offering was a success with private investors throughout the world. As a result of over-subscription, Hynix was able to raise more than USD 1.25 billion instead of the originally targeted USD 1 billion. Thus, the May 2001 restructuring occurred at a time of rising DRAM prices and occurred only because Hynix could persuade sophisticated international investors to invest in the company.

39. Against this background, the EC searched for <u>any</u> evidence to support a claim that the GOK was somehow secretly directing the outcome of the May restructuring. But the EC record shows little more than some unsubstantiated newspaper articles, and efforts to extrapolate from other events. The mere fact that an FSS official attended one meeting of the Hynix creditors does not become "evidence" that the GOK forced every creditor bank to participate. Newspaper reports about KorAm Bank, particularly since they were specifically repudiated at the time, should not become the basis to condemn the participation of every other creditor. The mere fact that Hynix needed debt restructuring is not evidence that the GOK must have been doing something behind the scenes. The most remarkable aspect of the EC determination is the willingness to conclude so much from so little.

40. Hynix's **October 2001 restructuring** was carried out under a Korean law of general application. Well over 100 companies were restructured under this framework. Under the terms of the October 2001 restructuring, Hynix's principal creditors agreed on a menu of options they could choose in moving forward (or cutting ties) with respect to Hynix. The very existence of *choices* in the October restructuring contradicts the EC's suggestion that there was "entrustment or direction" by the GOK. The totality of circumstances of the October restructuring confirms the commercial reasonableness of the measure and negates any notion of "entrustment or direction."

41. The EC did not produce a single piece of evidence to demonstrate the constituent elements of "entrustment or direction" in the October restructuring. The EC continued to resort to its prior collection of "circumstantial" evidence to avoid its obligation to prove each constituent element of "entrustment or direction." The EC's evidence of "entrustment or direction" with respect to the Option 1 banks in October restructuring (those lending new money) consists primarily of the GOK shareholding in certain of them. Other than referring to the GOK shareholding, however, the EC did not provide any credible evidence as to each bank's motivations or intentions in participating in Option 1 of the October restructuring. Four banks -- including two 100-per cent GOK owned banks -- chose Option 3 and decided to sever their ties with Hynix completely. These four banks thus exercised appraisal rights on their debt rather than extend new loans to Hynix or convert debt to Hynix equity. This is compelling evidence showing lack of government intervention in the October restructuring. If the EC's allegation were true, the GOK would have easily forced these banks to participate, instead of twisting the arms of noisier private banks or banks with less government ownership. If the GOK could not direct even 100-per cent owned banks, it is hard to imagine direction over *independent* banks with no government ownership.

D. FINDING AND MEASUREMENT OF "BENEFIT"

42. The second requirement for establishing a countervailable subsidy is that the competent authority must demonstrate that a "benefit is thereby conferred." As noted by the Appellate Body in *Canada – Aircraft*, a benefit analysis under Articles 1.1(b) and 14 requires a comparison of what was received by an entity versus what was available on the market. Moreover, the SCM Agreement defines benefit in the context of the experience of private actors in the market of the Member under investigation.

43. After initially finding no "benefit" on many issues, the EC changed its position in its *Definitive Regulation* and suddenly found the existence of "benefit." This was flat wrong. Nothing that could affect the "benefit" analysis could have possibly changed since the *Provisional Regulation*: the market environment, terms of the loans, and credit ratings remained unchanged. In fact, the EC

acknowledged that it changed its decision on the syndicated loan in the *Definitive Regulation* because of new information; i.e., documents with respect to the Economic Ministers' meetings. Even if true, however, all this new information concerned only GOK "entrustment or direction," and had nothing to do with the EC's benefit analysis. As such, the EC's change of analysis for benefit was completely erroneous and unwarranted because it failed to engage in any meaningful discussion as to why it was changing its "no benefit" conclusion from the *Provisional Regulation.*

44. The EC understood that to find a countervailable subsidy from the **syndicated loan**, the EC could not afford to conclude again that there was no benefit. So ignoring its own sequence for the subsidy analysis as expressed in the *Provisional Regulation*, the EC found the benefit without engaging in any detailed discussion to explain or justify its change of position. All it provided as a rationale in this regard was that similar financing was not available at the time, which is preposterous since ten different banks, including a foreign bank, were involved in the particular loan at issue.

45. The EC also avoided a proper "benefit" analysis in examining **export insurance**. The standard as clarified by the Appellate Body in *Canada -- Aircraft* is to measure the difference between *what was received* and what was available on the market. Hynix received KEIC insurance in return for payment of listed premiums. Yet, nowhere does the EC attempt to conduct the appropriate benefit analysis. If anything, the benefit should consist of the difference between the actual fee paid and the fee that covers the operating costs and losses of the export insurance programme. But the EC never really addresses the matter. Instead, the EC mixed subjects, focusing on whether a "comparable commercial loan" could have been obtained by Hynix absent the KEIC insurance. But if the KEIC insurance was truly a loan guarantee, then the applicable measure of benefit would be the difference between the amount the firm receiving the guarantee paid on the loan guaranteed by the government and the amount the firm would pay on a comparable commercial loan absent the government guarantee, consistent with Article 14(c) of the SCM Agreement. This analysis was not performed.

46. The EC also rushed to judgment about the **KDB fast track programme**. The EC cannot substitute its own conclusion for the commercial judgment of Hynix creditors. It was never "evident" that the bonds would not be repaid. First, strict conditions applied to all applicants, including Hynix, such as credit rating, ability for upfront purchase of 20 per cent of the bonds, and long-term viability despite short term liquidity problem. Second, and more importantly, Hynix did obtain financing through loans in the same period in the form of the syndicated loan -- in the EC's own words, "a very similar transaction" to a bond -- and also in the form of the new equity issuance in the similar time period (i.e. in June 2001) on world financial markets. It seems creditors and investors did not agree with the EC's negative assessment.

47. The EC determined in its *Provisional Regulation* that there was no benefit conferred on Hynix from the **May 2001 restructuring** mainly because of the successful new equity offering. The fact that Hynix made a successful equity offering in June 2001 did not change after the *Provisional Regulation*. Nonetheless, the EC did change its "no benefit" conclusion, referring to "new information" obtained after the issuance of the *Provisional Regulation* that Korea submits can only be related to the EC's "entrustment or direction" analysis, not its benefit analysis. That "new information" primarily concerned the presence of FSC and FSS officials at a 10 March 2001 meeting of Hynix creditors, which has nothing to do with the success of the equity offering. Thus, the EC changed its benefit analysis without providing any adequate explanation.

48. The factual record completely undermines the EC's erroneous negative assessment. First, at the time that the convertible bond ("CB") purchase was decided, DRAM market forecasts were again favourable despite Hynix's particular financial difficulties. Second, private investors on the international market showed confidence in Hynix's long-term viability by purchasing the new equity. Third, the purchase of the CB was specifically conditioned upon the successful issuance of new equity. Fourth, the creditor banks' requirement that Hynix maintain the funding received from the CB purchase in escrow shows that the banks' concern that the funding be utilized for specific purposes as

a means of protecting their investment. Fifth, the fact that the banks chose to purchase convertible bonds instead of regular bonds further indicates that they were even hoping to obtain more than just their money back. At a time when the DRAM market was improving again, they wanted the opportunity to potentially participate in the gains resulting from such improvement through Hynix equity. These conditions and terms placed on the May restructuring negate the EC assertion that the creditors did not believe they would be repaid; they in fact took actions to help ensure repayment.

49. The EC made the same errors with respect to the **October 2001 restructuring**. The EC treated all three measures (the new loan, maturity extension, and debt to equity swap) as a disguised measure of debt forgiveness, and thus grants. In fact, the evidence showed that the banks did expect repayment, and required collateral. Moreover, third party objective analyses commissioned by the creditors in the course of October restructuring confirm that they were clearly expecting repayment. The creditor-commissioned Arthur Andersen report, which was provided by Hynix and examined by the EC as previously discussed, established the liquidation value for the Hynix debt at 29.9 per cent and the going concern value at 75.6 per cent. In other words, the likely recovery on debt was more than twice as large for Hynix as a going concern compared to liquidation. To some of the Hynix creditors (i.e. Option 1 creditor banks), it indeed made commercial sense as existing creditors to continue to finance Hynix.

50. If the EC's assertion that the banks did not expect to recover those loans were correct, the question arises why the banks did not simply write-off the loans, as was done with regard to considerable amounts of debt in the context of the October 2001 restructuring anyway. Contrary to the EC's assumption, the truth is that the banks that agreed to the maturity extension expected to recover those loans, in light of Hynix's financial restructuring and the banks' favourable assessment of Hynix's future outlook. Converting debt into equity makes sense for and is often used by creditors in a situation of financial restructuring, because the equity allows full participation in the upside potential of the company in difficulties. We note that the creditor banks had concluded that Hynix's going concern value was considerable and equity allows participation therein. They were clearly contemplating a return from their equities obtained through debt-to-equity swap. Like so many foreign investors that participated in the GDR offering, Citibank and the private Korean banks knew that Hynix stock had a substantial upside potential.

51. Moreover, the EC's analysis ignores the single most critical fact: the market studies prepared by outside consultants were done for existing creditors, not new outside investors. It is only common sense that an existing creditor will be thinking about two things when contemplating a new investment: what are the prospects for the new investment, and how does the new investment affect any existing investment. The EC's analysis allows the existing creditor to consider only one thing: the future prospects of the investment. These studies were numerous and extensive. The EC ignored these studies because it did not want to confront the basic point of all the studies: that further debt restructuring -- including the debt-equity swap -- was the best chance to ensure Hynix's survival and to maximize the recovery of the existing investment. This perspective is completely rationale for an existing creditor.

52. Setting aside the fundamental flaw of the EC's benefit calculation, which treated all allegedly countervailable programmes as a "grant" without regard to the circumstances to the nature of the transaction, the EC also made numerous mistakes in calculating the benefit even under its own methodology.

E. SPECIFICITY

53. Korea submits that the EC finding of specificity is inconsistent with Articles 1.2 and 2 of the SCM Agreement. Under these provisions, a finding of specificity must be "clearly substantiated" on the basis of "positive evidence." The EC specificity findings, on the contrary, do not rise to the level of precision required under the SCM Agreement.

ANNEX A-2

EXECUTIVE SUMMARY OF THE SUBMISSION OF THE EUROPEAN COMMUNITIES

(21 June 2004)

I. INJURY

1. Korea makes much of what it calls the "boom-bust cycle". This is a central pillar of its case. Contrary to what Korea asserts, this aspect was taken into careful consideration by the European Communities, but found not to break the causal link between the subsidized imports and injury to the domestic industry.

2. Korea's argument is, in any event, a very curious one. It may be that in markets such as the DRAM market it is necessary to take a long term view. That does not mean that the market place should not be subject to the disciplines of the *SCM Agreement*. When a player in the DRAM market gets it wrong, and the industry is in a downturn, in the normal course of events that player will have to contract by cutting costs and partially withdrawing from the market – opening up opportunities for others. The legal person might even "go bust" or the business or assets might otherwise be transferred to some other person, at a "distressed" price, or at least at a lower price, reflecting the cash-strapped situation of the original player, and the downturn in the market – once again, opening up opportunities for others. There is competition in a downturn, just as there is when times are good, quite probably even more so.

3. Of course, another alternative is government intervention, designed to enable the original player to "weather the storm" more or less intact and live to fight another day. Naturally, such government intervention effectively shifts the burden of the downturn onto other players in the market. The fact of the downturn does not make the subsidy any less injurious – if anything, the economic context makes the subsidy *even more* injurious. Thus, the simple question is this : must other players in the market be obliged to bear the burden of such subsidies ? Or rather, do the rules in the *SCM Agreement* ensure that, through countervailing measures, the effects of such subsidies can be contained, and not borne by the industry in other Members, but ultimately by the persons on whose behalf the subsidies were granted – namely Korean taxpayers – to whom, in the long term, those who grant the subsidies are accountable ? The correct answer is, without a shadow of doubt, the latter. And the "boom-bust" argument on which Korea relies so heavily has strictly no relevance whatsoever to that basic point.

4. The investigation concerned DRAMs originating in Korea and not DRAMs produced by Hynix. This was the reason why the investigating authorities looked at the development of imports from Korea. However, the subsidy part of the investigation established that, while imports from Hynix were subsidized, imports from Samsung, the only other Korean company which exported to the Community during the IP, were not subsidized. That is why the investigating authorities also separately examined volume, prices, and market share for Hynix's subsidized imports. For the same reason, the investigating authorities also established undercutting exclusively on the basis of the prices of Hynix's imports. The effect of the subsidized imports also concerned Hynix's imports. Thus, Korea is wrong to assert that the European Communities acted inconsistently with the *SCM Agreement* because Regulation 1480/2003 also refers to imports from Korea as a whole.

5. Korea's allegation concerning the merger hinges on the legal question of whether the investigating authorities were obliged by the *SCM Agreement* to add LGS' data to Hynix's data. The investigating authorities did not do that because doing so would have falsified the data for the trend analysis.

6. First, prior to 7 July 1999, Hynix could not control LGS' imports into the Community. Thus, Hynix's/HEI's, acquisition of LGS had no retroactive effect on Hynix's or HEI's import volume and market share in the Community in 1998 and in 1999 (up to 7 July). In other words, Hynix's acquisition of LGS' production capacity led to increased production capacity for the future. It did not retroactively affect Hynix's import volume and market share for 1998 and for 1999 (up to 7 July). Adding LGS's data to Hynix's data would, thus, falsify Hynix's market data for this period.

7. The European Communities would submit that the present situation is comparable to a situation in which a former competitor of the subsidized exporter gives up its business and sells its assets. If the subsidized exporter acquires the production facilities and equipment of the former competitor, it will be in a position to increase its production and acquire at least partially the market share held by the former competitor. Clearly, the former competitor's volume and market share would not play a role for the trend analysis regarding imports by the subsidized exporter. There are no reasons why the investigating authorities should have assessed the present case differently only because the acquisition of LGS was done in the form of a share deal and not an asset deal.

8. Second, Articles 15.1 and 15.2 *SCM Agreement* require the investigating authorities to objectively examine the volume of the subsidized imports. The investigating authorities established that Hynix received subsidies but they did not and could not examine whether LGS received any subsidies because LGS did not exist during the IP. Thus, the investigating authorities could not consider LGS' imports in 1998 and 1999 as "subsidized imports".

9. Third, Korea's suggestion that the approach followed by the investigating authorities with respect to LGS's exports is somehow inconsistent with their approach regarding Micron's acquisition of Texas Instruments is wrong. In both cases the investigating authorities followed exactly the same approach: in both cases, the investigating authorities took account of the respective acquisition once it had occurred; in both cases, the investigating authorities did not add the acquired company's volume and market share relating to the period prior to the acquisition to the acquirer's volume and market share. This, however, would be the consequence of Korea's suggested approach for LGS' volume and market share. Although the investigating authorities could not verify LGS' data due to Hynix's failure to timely and properly present appropriate data, the investigating authorities performed an alternative assessment of volume, market share, and the imports' effects in Regulation 1480/2003. Consequently, the investigating authorities' approach in respect of Micron's acquisition of Texas Instruments is fully in line with the approach pursued for Hynix's acquisition of LGS.

10. Should the Panel, notwithstanding the above observations, find that, by examining and considering the matter in the correct and reasonable manner it did, the European Communities somehow acted inconsistently with Article 15 *SCM Agreement*, then the European Communities submits, in the alternative, that it rightly did not take account of LGS' figures because Hynix did not provide them in a proper and timely manner.

11. As regards Korea's allegations concerning price undercutting, the European Communities submits that it is important to bear in mind the undisputed main characteristics of the DRAM market. First, competition takes place largely on price. The producer offering the lowest price will get the business. Second, there is great price flexibility. This means that prices vary constantly. Third, there is great price transparency. Price transparency enables buyers to immediately compare prices. Thus, if one producer decreases its prices, its competitors must promptly follow because otherwise they will not be able to sell.

12. It follows from the above that Korea is wrong insofar as it suggests that the producer with the largest market share dictates the price. Any producer with a significant production capacity can be the price leader and drive prices down.

13. The European Communities would also submit that it is important to take into account Hynix's specific situation. As is apparent from the subsidy discussion, Hynix was desperate for cash during the IP and, thus, desperate to sell as much as possible, irrespective of the price. Also, Hynix's production capacity exceeded the Community producers' capacity and, indeed, the total demand in the Community. Finally, Hynix received unlawful subsidies that enabled it to sell at even lower prices than those dictated by the market downturn.

14. The European Communities also submits that Korea presents the figures regarding the share of undercut and non-undercut transactions in a misleading manner.

15. Thus, paras. 152 to 156 of Korea's first written submission present the sequence of applied methodologies incorrectly. The sequence was : weighted average; monthly; and then daily comparison. The last comparison was performed at the request of Hynix and confirmed the monthly results in view of the share of comparable undercutting transactions. In fact, there were a significant amount of transactions that were not comparable and for which it was thus not possible to determine whether they were undercut or not. The data shows that Hynix's prices were undercutting Community prices in 47.2 per cent of all comparable transactions on a monthly basis and in 46.2 per cent of all comparable transactions on a daily basis.

16. Korea also fails to mention another distinctive feature of Hynix's undercutting strategy : the majority of Hynix's price undercutting occurred for the sales of high value added, advanced DRAMs. The Community industry focused on advanced DRAMs due to the Community industry's more advanced technology and because high value added DRAMs are important to finance next generation products. The daily and monthly comparison data show that Hynix's undercutting focused on the transactions of type 128 and 256 DRAMs. On the basis of a daily comparison, about 80 per cent of the transactions for which undercutting was found concerned high value added DRAMs, and, on the basis of a monthly comparison, about 75 per cent of the transactions for which undercutting was found concerned high value added DRAMs. In short, Hynix' undercutting strategy was particularly damaging for the Community industry.

17. The European Communities performed an objective examination when it compared the weighted average Community price with the weighted average Hynix price by product family, as well as when it compared the weighted average Hynix price to the Community industry's individual transactions by type.

18. The *SCM Agreement* leaves it to the investigating authority's discretion to apply a method objectively suited to establish undercutting, price depression, or prevention of price increases. First, Article 15.2 *SCM Agreement* requires that *"…the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member …*". The *SCM Agreement* does not require that price undercutting be calculated on a weighted average or any other specific basis. This is confirmed by the findings of the Panel in *EC-Tube or Pipe Fittings,* which stated that *"… an investigating authority [enjoys] a degree of discretion in carrying out the price undercutting assessment."* The Panel explained that *"[Article 3.2 of the Anti-Dumping Agreement]… does not set out any specific requirement relating to the calculation of a margin of undercutting, or provide a particular methodology to be followed in this consideration."* Consequently, the comparison of weighted averages and individual transactions lies within the investigating authorities' discretion and cannot be non-objective as such.

19. The fact that in the present case the investigating authorities did not resort to their usual practice is also no indication that their method was not objective. The investigating authorities provided ample explanations for their approach to compare the weighted average Hynix price with individual transactions of the Community industry. Indeed, it is hardly possible to establish price undercutting on a weighted average basis in a market characterized by price transparency and flexibility because the competitors whose prices are undercut are obliged to quickly follow the lower price. These effects of price depression or the prevention of price increases, together with price undercutting, are expressly provided for in Article 15.2 *SCM Agreement* – consideration of any one of them would have been sufficient. The European Communities considered all three.

20. The investigating authorities also were not obliged to additionally consider undercutting with variations over the day or to compare on a transaction-by-transaction basis. First, the present case is an example of an especially detailed undercutting analysis. The investigating authorities compared weighted averages with weighted averages, and weighted averages with individual transactions on both a monthly and a daily basis. The investigating authorities also presented the undercutting margin as an overall weighted average (16.2 per cent) and as an undercutting range (12 to 32 per cent). Second, the European Communities is not aware that transactions can be determined at all by the hour. Third, it would have been impossible to find comparable transactions for three different points of time per day, still less for individual transactions on a transaction-by-transaction basis. The European Communities recalls that already for the daily comparison 38.2 per cent of the transactions were not comparable as opposed to 13 per cent in the case of a monthly comparison. This figure would likely have increased dramatically in the case of a comparison at three different points of time per day or in the case of a transaction-by-transaction comparison and, thus, rendered such comparison meaningless.

21. Finally, Hynix's undercutting qualifies as "significant undercutting". The *SCM Agreement* does not define the term "significant undercutting", and there is also no relevant case-law. In the European Communities' submission, it is also not possible to provide an abstract definition of the term because it depends on the specific circumstances of a case whether the undercutting is significant. Relevant facts include the margin of undercutting, the percent and type of transaction for which undercutting was found, and the price sensitivity of the market at issue. In the present case, the undercutting margin amounted to 16.2 per cent overall within an undercutting range of 12 to 32 per cent and about 47 per cent of all comparable transaction were undercut. Moreover, the vast majority of undercut transactions related to high value added DRAMs, which were crucial for the Community industry. Finally, the DRAM market is very transparent and characterized by substantial price competition. Thus, the European Communities correctly found that there was "significant undercutting".

22. Korea asserts that there are other factors that allegedly disprove the substantial correlation between the subsidization and the low price levels in the Community. The European Communities has the following observations.

23. First, Korea refers to the fact that DRAM prices dropped world-wide in the year 2001. This argument relates to the economic downturn and is dealt with in the context of causation.

24. Second, Korea asserts that larger importers, like Samsung, also practiced low prices and that Hynix could not be a price leader due to its smaller market share. The European Communities submits that Korea misses the point with its price leadership argument. To begin with, Hynix's market share amounted to 16.8 per cent and not to 15 per cent. Furthermore, competing suppliers were forced to meet any lower price offering irrespective of their market share. Finally, the investigating authorities assessed in detail the influence of other imports in recital 151 of Regulation 708/2003 and recitals 194 and 200 of Regulation 1480/2003. As the European Communities considers the reasoning in these recitals to be sufficiently clear, it will not repeat it here.

25. Third, there is no basis for Korea's allegation that the magnitude of the price drop in comparison to the subsidization level would disprove a substantial correlation. The magnitude of the price drop in comparison to the subsidization level merely suggests that the economic downturn might also have possibly caused some injury. It does not disprove the finding that Hynix's subsidized imports caused injury in the magnitude of the subsidization amount. The investigating authorities addressed both elements : they established that other factors might also have possibly caused some injury and that the injury elimination level was higher than the subsidization level.

26. Fourth, the finding that Hynix priced irrespective of cost is an important insight. It may be that pricing irrespective of cost is common behaviour in a cyclical industry. Hynix, however, was not pricing irrespective of cost due to the business cycle, but due to its desperate need for cash resulting from its financial situation. Hynix's prices during the boom year 2000 support the conclusion that its prices were not dictated by the business cycle : in comparison to 1998, the prices of other Korean importers had decreased by only 1 per cent and the Community prices by only 7 per cent, whilst Hynix's prices had already decreased by 23 per cent.

27. As regards the investigation period, there is nothing in Article 15.2 *SCM Agreement* on the fixing of the period of investigation. In any event, the European Communities submits that it was fixed objectively, and that the period of time that in fact elapsed in this case was reasonable and does not disclose any inconsistency.

28. As regards output, the European Communities agrees that "output" is a relevant factor for the injury assessment. The Oxford English Dictionary defines "output" as "the quantity or amount produced; production". The Commission assessed "production" in Regulation 708/2003 in recitals 125 and 126 and the preceding table. These findings were confirmed in recital 186 of Regulation 1480/2003. Korea's allegation that the European Communities failed to assess "output" is, thus, totally without merit.

29. As regards wages, the domestic producers' questionnaire responses contained information on wages. The investigating authorities examined this information and concluded that the factor "wages" was irrelevant for the injury assessment in the present case. Moreover, none of the parties, including Korea and Hynix, ever raised the issue of "wages". This is why the factor "wages" is not discussed in Regulation 708/2003 and Regulation 1480/2003.

30. In its assessment of the state of the domestic industry the European Communities did far more than just list the factors set out in Article 15.4 *SCM Agreement*. Rather, for each factor, the European Communities included in the Regulations available relevant data. And in each case the European Communities included an analysis or assessment in relation to such data, generally indicating that the factor was either a positive indicator, or a negative indicator, and drawing overall conclusions for the reasons set out in the Regulations. That constitutes an examination and evaluation. There is therefore no basis for any finding of inconsistency with Article 15.4 *SCM Agreement*.

31. Korea's elaborations on a causation analysis based on the addition of LGS' figures to Hynix's figures are entirely hypothetical, since the investigating authorities acted objectively when they examined imports on the basis of an approach that correctly and reasonably assessed Hynix's acquisition of LGS' in 1999 (see above). In any event, the "correlations" that Korea asserts exist (market share of the Community Industry *versus* market share of Hynix and market share of Hynix *versus* profitability of Infineon) would not have any particular value for the causation analysis, since the investigating authority needs to look at the whole picture. Market share, or the volume of subsidized imports, is only one piece of the overall picture – which also includes price effects and the state of the domestic industry. Thus, Korea's graphs are misleading, and its one-dimensional approach is incapable of establishing any inconsistency with the *SCM Agreement*.

32. Moreover, the European Communities submits that the conclusions on injury and causation would not differ, even if LGS' data were to be added to Hynix's data. First, even if LGS' data were to be added to Hynix's data, there would be a 155 per cent volume increase in absolute terms and this constitutes a significant increase in absolute terms within the meaning of Article 15.2 *SCM Agreement*. Second, Hynix's 16.8 per cent market share during the IP is sufficiently significant to justify the finding that Hynix's imports affected the domestic market and the domestic industry prices. Third, Korea's allegations in paras. 213 to 218 of its first written submission miss the point, since the European Communities based neither the injury nor the causation assessment on market share. Furthermore, market share tables lend no support to Korea's volume related reasoning.

II. SUBSIDY

33. The European Communities acted at all times and in all respects consistently with Article 12.7 *SCM Agreement*.

34. Article 1.1(a)(1) *SCM Agreement* refers to a financial contribution by a government *or* any public body. The concept of a "public body" is to be juxtaposed to the concept of a "private body", referred to in Article 1.1(a)(1)(iv) *SCM Agreement*. Thus, in determining whether or not an entity is a public body, it is relevant to consider whether or not it is controlled, one way or another, in the long term or in the short term, by the state.

35. As regards the phrase "entrusts or directs", the European Communities would have the following observations. First, the text uses the word "direct", not, for example, the word "order". Whilst capable of including the notion of command, the word "direct" also has a wider connotation. That meaning includes "to regulate, conduct or control affairs"; "to give commands or orders with authority"; "to aim point or cause to move towards a goal". Thus, an indication – or as Korea puts it - a "nudge", as well as a command, is also a direction. Second, the word "entrusts" is different from the word "directs". It might include the sense of delegation, insofar as that indicates that the entrusted entity will be held responsible if the desired result is not achieved, but it also has a wider connotation. The concept of trust or entrust precisely indicates a particularly light control, or a certain distance on the part of the controlling authority. It includes the notions of "investing or charging", as well as the notion of putting something into the "care or protection" of someone. Thus, the meaning of this phrase "entrusts or directs" is generally wider than the meaning advanced by Korea.

36. In its submissions relating to the phrase "entrusts or directs" Korea confuses questions of fact and questions of evidence. The real issue before this Panel is not a nice legal discussion of what the words "entrust or direct" might mean. The real issue is an evidential one. The *US-Export Restraints* case, on which Korea seeks to rely so heavily, is therefore simply beside the point.

37. On the question of financial contribution, the European Communities relied on the totality of the facts, as set out in the Regulations.

38. With regard to the Syndicated Loan and generally, a substantial government contribution is, in itself, evidence of a long term commitment by government, such as to influence other participants. Time and the type and size of the contributions in relation to the company are important factors. A sufficiently large government commitment in the form of a loan will always persuade some lenders that the company will "weather the storm" and make the re-payments, or at least re-schedule them. All that such other lenders need to be persuaded of is that the company will survive. In this scenario, government participation in the loan is in the nature of a security or guarantee. There is, effectively, no way back for the government. Everyone is in the same, government sponsored, (life) boat. In fact, it makes participation in the loan for the other banks something of a "safe-bet". Thus, in this case, the European Communities did not see the participation of the other banks as evidence that Hynix was in great commercial shape and considered a sound investment by the market – an assertion that the European Communities considered implausible in all the circumstances. Rather, the

European Communities saw the participation of other banks as confirmation of the effectiveness of Korea's intervention in support of Hynix.

39. Korea does not appear to contest the determinations in relation to KDB, insofar as it was found to be a public body within the meaning of Article 1.1(a)(1) *SCM Agreement*. The relevant part of Korea's first written submission is silent on this point. On that basis, the Panel is not called upon to make any findings in this respect, and should refrain from doing so. Korea's bare assertions in relation to all banks are insufficient to rebut the detailed matters of fact referred to in Regulations 1480/2003 and 708/2003. In any event, Korea's assertions are not supported by the findings of the Panel in *US-Export Restraints*. That Panel was dealing with a different provision – Article 1.1(a)(1)(iv) *SCM Agreement*. The European Communities refers on this point rather to Article 1.1(a)(1) *SCM Agreement*. KDB was a "public body" within the meaning of that provision and it made a "financial contribution" – these facts not being seriously disputed by Korea.

40. Similarly, Korea does not contest the European Communities determinations that FSC was a public body within the meaning of Article 1.1(a)(1) *SCM Agreement*; nor that it was entrusted or directed by GOK, within the meaning of Article 1.1(a)(1)(iv) *SCM Agreement*, to grant the waivers.

41. With regard to KFB and KEB, the European Communities determined that the letter dated 28 November 2000 did more than merely "recommend" or "advise". It effectively ordered or "entrusted or directed" KEB to make the application for the extension of the credit ceilings, including on behalf of KFB and KDB. That fact is confirmed by the language of the letter itself.

42. With regard to the KEIC Guarantee, the European Communities recalls that it determined that KEIC was a public body within the meaning of Article 1.1(a)(1) *SCM Agreement*. Korea does not contest that determination. For this reason, the Panel must reject Korea's allegation of inconsistency with Article 1.1(a) *SCM Agreement* in relation to the KEIC guarantee – to do otherwise would be an error of law.

43. The European Communities additionally determined GOK entrustment or direction of KEIC within the meaning of Article 1.1(a)(1)(iv) *SCM Agreement*. Korea also does not contest this determination – even admitting expressly that the KEIC guarantee was made available at the direction of GOK ministers – and confining itself to an observation about benefit – a different point, which will be dealt with in the section of this submission relating to that subject.

44. Korea's submissions with regard to the KDB Debenture Programme are equally confused. Korea states that the determinations of the European Communities on this point are unclear. They are not. The European Communities found – quite clearly - that KDB was a public body making a financial contribution, within the meaning of Article 1.1(a)(1) *SCM Agreement.*

45. As regards the May 2001 Rescue Package, the European Communities invites the Panel to consider all the relevant facts set out in Regulations 708/2003 and 1480/2003. These facts, taken together, form part of an overall puzzle. It may certainly be correct that the investigated parties choose not to provide the investigating authority (or this Panel) with every piece of the puzzle. But the overall picture is clear enough, and justifies the determination of entrustment or direction, on the basis of a reasonable assessment of the totality of the facts.

46. As regards the October 2001 Rescue Package, the European Communities based its findings not on a single piece of evidence but on the totality of the facts and, to a certain extent, on information available. Thus, the European Communities submits that the relevant question is whether Korea has shown that the overall assessment of the evidence reveals any inconsistency with the *SCM Agreement*. Korea, however, never properly addresses this issue but instead deals, in isolation, with the various specific pieces of evidence relied on by the European Communities. The European Communities

submits that this is the wrong approach because it is irrelevant whether a single piece of evidence in itself and taken in isolation is sufficient evidence of government direction**.**

47. On the question of benefit, the European Communities observes that the words "any method" and "any such method" in Article 14 *SCM Agreement* indicate that different methods for assessing the amount of a subsidy, or, for that matter, whether or not there is a benefit, may be consistent with the *SCM Agreement*. That is confirmed by the use of the word "guidelines", again suggesting some latitude in the application of these provisions. Thus, investigating authorities have a certain degree of flexibility. The primary obligation is rather one of transparency and explanation.

48. It is highly significant that Article 14 (a) only indicates a basic rule. Article 14 (a) does not contain a specific calculation method. There is a very good reason for this. It is because the amount of the subsidy or benefit will depend on future risk – something that is problematic to assess.

49. This point is of central importance. The *SCM Agreement* imposes no express obligations on Members when it comes to calculating the amount of subsidy or benefit in a "risk" scenario, that is, one which involves assessing future risk. In accordance with the *Canada-Aircraft* case and the language of Article 14 *SCM Agreement*, the guiding principle should be that a benchmark for calculation should be based on the advantage obtained over finance available on the commercial market – if indeed any such finance is available.

50. In the methodology of the European Communities, one may say that the theoretical graph that relates future risk assumed by government against the amount of subsidy is not uniformly linear. To the extent that future risk could be measured and quantified from zero to 100 (where zero represents no risk of loss of capital and 100 certain loss), the market does not just add, for example, one percentage point of interest for each additional point of risk. Rather, there is a point at which the capital markets simply will not put any further money at risk. Capital usually has alternatives – and it will seek out the best balance between risk and reward. For all practical purposes, that balance will not lie anywhere towards risks approaching the 100 maximum referred to above. This is not really a controversial observation, being largely a question of common sense.

51. The European Communities takes the view that, beyond the point at which the market would no longer risk capital, if the government nevertheless provides capital, especially capital at risk, (whether labelled equity, debt, guarantee, or for that matter grant), the benefit to the company must be measured as being the full amount of the principal. Left to its own resources and the market the company would get nothing. Thanks to the government, the company gets, for example, capital of Euro 10 million. The benefit to the company resulting from government intervention is therefore Euro 10 million, and that is the amount that can be countervailed.

52. The European Communities considers that each of the specific measures assessed conferred a benefit, for all of the reasons set out in the Regulations.

53. Finally, contrary to what Korea asserts, all the relevant measures, including the KDB Debenture Programme, the May 2001 Rescue Package, and the October 2001 Rescue Package, were specific within the meaning of the *SCM Agreement*. There were no errors in the calculation of the subsidy amount, nor in the way in which the countervailing duty was calculated. The European Communities correctly allocated the subsides over Hynix's non-consolidated sales.

ANNEX A-3

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF JAPAN

(25 June 2004)

I. INTRODUCTION

1. The Government of Japan ("Japan") wishes to address crucial systemic issues raised by the Government of the Republic of Korea ("Korea") relating to the material injury determination and the subsidy determination by the European Communities (the "EC"). While Japan does not take any position with respect to the factual aspects of this case, Japan respectfully requests that this Panel carefully review both the legal and factual aspects of this case in light of the following arguments in this submission.

II. ARGUMENT

A. THE INJURY DETERMINATION

1. The EC Appears to Have Failed to Separate and Distinguish Injury Caused by Other Known Factors from That Caused by the Subsidized Imports

2. Korea alleges that the EC conducted insufficient analysis to meet the obligation of the non-attribution rule under Article 15.5 of the SCM Agreement.[1] The EC's analysis appears to have failed to separate and distinguish effects of all other known factors on the domestic industry from effects of subsidization.

3. In *EC – Pipe Fittings*[2], the Appellate Body reconfirmed that the authorities need to separate and distinguish the injury caused by dumped imports from that caused by other factors when determining injury under Article 3.5 of the AD Agreement which is equivalent to Article 15.5 of the SCM Agreement.

4. In this case, the EC based its injury determination on the significant price undercutting by Hynix's subsidized imports and the oversupply of DRAMs.[3] Although EC recognized that the overcapacity might have contributed to the severe downturn from which this industry is suffering[4], it seems to have failed to examine the overcapacity of Samsung, a producer of non-subsidized DRAMs, separately from the overcapacity of Hynix.

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[1] *See First Written Submission by the Republic of Korea* ("*Korea's First Written Submission*"), 7 May 2004, para. 222.

[2] Appellate Body report, *European Communities - Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil ("EC – Pipe Fittings")*, WT/DS219/AB/R, adopted 18 August 2003.

[3] *Council Regulation (EC) No. 1480/2003 of 11 August 2003 Imposing a Definitive Countervailing Duty and Collecting Definitively the Provisional Duty Imposed on Imports of Certain Electronic Microcircuits Known As DRAMs (Dynamic Random Access Memories) Originating in the Republic of Korea*, OJ 2003 L 212 (hereinafter "*Definitive Regulation*"), (**GOK Exhibit 1**), recital 192.

[4] *Id.*, recital 197.

5. Japan respectfully requests that this Panel carefully review whether the EC separated and distinguished injury caused by other known factors from that caused by subsidized imports in its injury determination pursuant to Article 15.5 of the SCM Agreement.

B. THE SUBSIDY DETERMINATION

1. The Panel Should Apply the Correct Evidentiary Standards to Review the Existence and the Extent of Entrustment or Direction by the Government of Korea under Article 1.1(a)(1)(iv) of the SCM Agreement

6. The authorities may find that a subsidy was granted to a recipient only when a financial contribution within the meaning of Article1.1 (a)(1) was made, and a benefit within the meaning of Article 1.1(b) was conferred, to a recipient. Article 1.1(a)(1)(iv) of the SCM Agreement sets forth that the authorities may determine that a privately-controlled bank provided a financial contribution, if the bank provided it in compliance with entrustment or direction by the government.

7. The panel in *US – Export Restraints*[5] analyzed the meaning of terms "entrust or direct" in Article 1.1(a)(1)(iv) that acts of entrusting and directing comprise the following three elements: "(i) an explicit and affirmative action, be it delegation or command; (ii) addressed to a particular party; and (iii) the object of which action is a particular task or duty."[6] Its analysis shows that Article 1.1(a)(1)(iv) provides these elements, which the authorities must find to conclude that the financial contribution was granted through a privately controlled bank. It also clarified that this Article does not require that the government's delegation or command must be so detail to instruct every step that the bank must follow.

8. The existence of these three elements may be shown by direct evidence such as the governmental letter to a commercial bank, or circumstantial or secondary evidence. It would be sufficient for the authorities to find a financial contribution, if the evidence is such that the authorities can reasonably conclude that the government delegated or commanded a privately controlled bank to provide certain financial supports to a specific company.

9. As Korea argues, the standard of review of this Panel is set forth in Article 11 of the Dispute Settlement Understanding.[7] This Article requires that this Panel review whether the EC's subsidy determination was based on "an objective assessment of the matter before it, including an objective assessment of the facts of the case".[8] Thus, this Panel must find that the facts are established consistently with the WTO rules so far as an objective assessment of evidence on the record would reasonably allow this Panel to reach the conclusion that the authorities reached. The evidentiary standards have no further requirements.

10. As such, Japan respectfully requests that this Panel carefully review the existence of entrustment or direction by the Government of Korea in light of the above-discussion.

2. The Panel Should Review the EC's Application of Facts Available in Accordance with the SCM Agreement and the International Law

11. The EC based its subsidy determination on facts from secondary sources, claiming that certain responding parties failed to provide necessary information or refused to accept on-the-spot

[5] Panel report, *United States -- Measures Treating Export Restraints as Subsidies* ("*US – Export Restraints")*, WT/DS194/R, adopted 23 August 2001.

[6] *Id*., para. 8.29.

[7] *Korea's First Written Submission*, paras. 26-32.

[8] Article 11 of the DSU.

verifications.[9] The general principle of good faith under international law and the specific requirements under Articles 12.7 and 12.11 of the SCM Agreement mandate that facts available are the last resort for the authorities.

12. As the Appellate Body has repeatedly recognized, Members are obliged to perform their WTO treaty obligations in good faith.[10] In *US – Hot-Rolled Steel*, for example, the Appellate Body stated that the "organic principle of good faith" is "a general principle of law and a principle of general international law".[11] In *US – Shrimp*[12], the Appellate Body explained that this general principle "prohibits the abusive exercise of a state's rights"[13] and that the exercise of a state's right should be "fair and equitable as between the parties."[14] As such, the basic principle of good faith requires the authorities to act in an even-handed manner that respects fundamental fairness.[15]

13. Article 12.7 provides the authorities with the discretion to base their subsidy determinations on information from secondary sources as facts available. Considering Article 26 of the *Vienna Convention on the Law of Treaties*, any exercise of discretion under treaty provisions in force must be performed in good faith. The Appellate Body in *US – Hot-Rolled Steel* stated that "the discretion must be exercised in an even-handed way that is fair to all parties affected by an anti-dumping investigation."[16]

14. The provision of Article 12.7 sets forth specific obligations of both authorities and responding parties before the authorities resort to facts available. The authorities must use information submitted by the responding party and may not resort to facts available, if the party submitted the information "within a reasonable time" without significantly impeding the investigation. As to "within a reasonable period of time," the Appellate Body explained six factors that investigating authorities should consider.[17]

15. The provisions of Article 12.11 confirm the requirement of the two-way process between the authorities and the responding party. This Article provides that the authorities shall take due account of any difficulties experienced by interested parties in supplying information requested, and shall provide any assistance practicable. The Appellate Body stated that Article 6.13 of the AD Agreement, which is equivalent to the provision of Article 12.11 of the SCM Agreement, underscores that "cooperation" is a two-way process involving joint effort and that it requires investigating authorities to make certain allowances for, or take action to assist, interested parties in supplying information.[18]

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[9] The *Definitive Regulation*, recitals 16-18.

[10] *See, e.g.*, Appellate Body report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("*US – Line Pipe*"), WT/DS202/AB/R, adopted 8 March 2002, para. 110 and n.117; Appellate Body report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, ("US – Hot-Rolled Steel")*, WT/DS184/AB/R, adopted 23 August 2001, para. 101.

[11] Appellate Body report, *US – Hot-Rolled Steel*, para. 101.

[12] Appellate Body report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*US – Shrimp*"), WT/DS58/AB/R, adopted 6 November 1998.

[13] *Id*, para. 158.

[14] *Id*. at n.156, quoting B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chap. 4, page 125 (emphasis added by the Appellate Body).

[15] *See* Appellate Body report, *US – Hot-Rolled Steel*, para. 148 and n.142. *See also* Appellate Body report, *EC Measures Concerning Meat and Meat Products ("EC – Hormones")*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 133.

[16] Appellate Body report, *US – Hot-Rolled Steel*, para. 148 (emphasis in original).

[17] *Id.*, para. 85.

[18] *Id.*, para. 104.

16. The authorities must satisfy the above requirements under Articles 12.7 and 12.11 of the SCM Agreement, and must exercise its discretion to identify facts available in an unbiased, objective, even-handed, and fair manner. Japan respectfully requests that this Panel review whether the EC applied facts available for the case in compliance with these requirements.

III. CONCLUSION

17. For the reasons set forth above, Japan respectfully requests this Panel to carefully review the consistency of the injury determination with Articles 15.5 and the subsidy determination with Articles 1.1(a)(1)(iv), 12.7 and 12.11 of the SCM Agreement.

ANNEX A-4

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF THE UNITED STATES

(25 June 2004)

I. GENERAL ISSUES

1. **Standard of Review:** The Panel's task is to determine whether a reasonable, unbiased person, looking at the same evidentiary record as the EC authorities, could have – not would have – reached the same conclusions as did those authorities. The United States trusts that the Panel will see Korea's arguments for what they are: nothing more than an impermissible request for this Panel to conduct a *de novo* review.

2. **Burden of Proof:** The burden is on Korea to prove that the EC acted in a WTO-inconsistent manner. The burden is not on the EC to prove that it acted in a WTO-consistent manner.

3. **Positive Evidence:** Korea's argument is not really about whether the evidence relied upon by the EC authorities was "positive evidence." Instead, and notwithstanding its repeated protestations to the contrary, what Korea wants is for the Panel to reweigh the evidence relied upon by the EC authorities.

II. ISSUES CONCERNING SUBSIDY IDENTIFICATION AND CALCULATION

4. **The "Entrusts or Directs" Standard:** Korea advocates a special evidentiary standard for "entrustment or direction." According to Korea, government action amounts to entrustment or direction only where it is "clear and unambiguous" or "specific and compelling." Furthermore, discerning whether government action amounts to entrustment or direction demands "increased scrutiny." However, neither Article 1.1(a)(1)(iv) itself nor any other provision of the WTO agreements supports the notion that some sort of special evidentiary standard exists for purposes of determining the existence of entrustment or direction.

5. Korea also argues that the evidence of entrustment or direction must take the form of an "explicit" government command. Korea's use of the term "explicit" suggests that government entrustment or direction may only be evidenced by a formal or official command.

6. The ordinary meaning of entrustment or direction includes, but is not limited to, an order or command. An interpretation of subparagraph (iv) that would rule out automatically, and in all cases, any government direction not expressed in writing would render Article 1.1(a)(1)(iv) virtually meaningless.[1]

[1] Indeed the Appellate Body has cautioned against interpretations that "elevate form over substance and that permit Members to circumvent ... subsidy disciplines ... ." *Canada – Dairy Products*, para. 110. Although the Appellate Body was addressing export subsidy disciplines under the Agreement on Agriculture, its reasoning applies with equal force to the SCM Agreement.

7. Korea also asserts that the evidentiary standard of entrustment or direction under Article 1.1(a)(1)(iv) requires *a* government command to *an* explicitly named private body to take *an* explicitly identified action at *an* explicit point in time. It is obvious from the provision's text that Article 1.1(a)(1)(iv) imposes no such requirement. As a general evidentiary matter, any piece of evidence or fact can be relevant, provided it demonstrates, either individually or in conjunction with other evidence, whether or not a government entrusted or directed private bodies to provide financial contributions. The relative importance of each piece of evidence or fact can only be determined in the context of a particular case, and not on the basis of generalities.

8. Korea cites the use of the singular "a" financial contribution in the text of Article 1.1(a)(1). However, the text of Articles 1 and 2 of the SCM Agreement also use the singular "a" in referring to benefit, subsidy and specificity. If "a" financial contribution were interpreted to mean government direction to "a" particular bank, then specificity would be considered always in the context of, for example, an individual bank's loan to "a" beneficiary. The subsidy, therefore, would always be specific. Thus, Korea's "a"/singular argument would render Article 2 of the SCM Agreement a nullity, and, for that reason alone, should be rejected by the Panel.

9. Korea's "a"/singular argument also overlooks the fact that use of the singular does not rule out a meaning that encompasses the plural of that term. In particular, the definition of the term "body", as used in "a private body" in subparagraph (iv), provides that the term "body" may refer to a single entity or more than one entity. The ordinary meaning of the text of Article 1.1(a)(1)(iv), therefore, does not rule out government entrustment or direction to multiple private creditors as a group.

10. Korea's reliance on *US – Export Restraints* for its bank-by-bank, transaction-by-transaction evidentiary standard also is misplaced. The panel in *US – Export Restraints* addressed a very different issue, and the cited portion of the *US – Export Restraints* report is of limited (if any) relevance to the instant dispute. Even if this Panel should accept the premise that "the act of entrusting and that of directing 'necessarily carry with them the element of an explicit and affirmative action, be it delegation or command'", there is no basis in the SCM Agreement for transforming the general concept of an "element of an explicit and affirmative action" into a "strict" evidentiary standard calling for express proof of formal government action on a bank-by-bank, transaction-by-transaction basis.

11. The United States disagrees with the premise of Korea's argument that the behaviour of private parties is relevant in determining entrustment or direction. The focus of Article 1.1(a)(1), including subparagraph (iv), therefore, is on "the action of the government" in making the "financial contribution," and the existence of a government financial contribution – whether direct or indirect – is determined in reference to the actions of the government.

12. **Facts Available:** Korea's discussion of "facts available" and Article 12.7 of the SCM Agreement reflect several errors of interpretation. In cases where interested Members or interested parties frustrate the proceedings, either by withholding requested information or otherwise significantly impeding the investigation, Article 12.7 of the SCM Agreement provides for the use of the facts available, but does not instruct authorities as to which facts on the record must be relied upon in making determinations, nor how to assess or weigh the evidence on the record. It seems obvious, though, that where a party denies access to information, that fact would be part of the evidentiary record. Based upon a party's denial of access to information, the investigating authority can properly draw inferences concerning the reliability of other information provided by that party. Thus, an investigating authority can draw reasonable inferences from all of the facts on the record, and choose to rely, or place greater weight, upon information provided by other sources.

13. Korea's approach incorrectly assumes that the only facts available to authorities are those provided by the respondent party or government. However, other facts are often on the record, including publicly available information and information provided by domestic interested parties. In addition, Korea's approach improperly allows a respondent to pick and choose the information that an investigating authority must use in making a determination.

14. Concerning Korea's reliance on Annex II of the Antidumping Agreement, Annex II, like every other provision of the WTO agreements, may provide context for purposes of interpreting Article 12.7 of the SCM Agreement, although the conclusions to be drawn from considering Annex II as context can be debated. However, one contextual conclusion is beyond debate; namely, that no comparable annex exists in the SCM Agreement. The Panel, therefore, must give meaning to the express absence of any annex or any textual reference to the requirements contained in Annex II of the AD Agreement. In particular, the Panel should reject Korea's efforts to do what the drafters did not; namely, make select portions of Annex II applicable to determinations under Article 12.7 of the SCM Agreement.

15. Korea provides no support for its assertion that even if an investigating authority's application of facts available is justified under the circumstances, that application should be limited to be "proportionate to the alleged non-cooperation or impediment." Under Article 12.7, the use of facts available depends upon whether "necessary information" is provided. If necessary information is withheld, or an investigating authority is denied access to such information, the authority must draw inferences and reach conclusions using whatever facts are available in order to complete its investigation.

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

17. Subparagraphs (a) and (d) contain territorial limitations on the relevant benchmark; subparagraphs (b) and (c) do not. Nevertheless, Korea argues that it is "implicit" in the use of the term "comparable" in subparagraphs (b) and (c) that "comparisons be made using the experience of private actors *in the market of the Member*, since that experience is necessarily the most comparable" (emphasis added). The Panel should reject Korea's attempt to do read into subparagraphs (b) and (c) words that are not there.

18. Korea's reliance on *Softwood Lumber* is misplaced, because the Appellate Body's findings in that dispute were limited to subparagraph (d) of Article 14, which contains the phrase "in the country of provision or purchase." There is no such territorial limitation language in subparagraphs (b) and (c).

19. **Specificity:** Korea suggests that the EC was required to examine the size and capital of Hynix in relation to the size and capital intensity of all companies undergoing debt restructurings and to consider that debt restructuring aid allocated among participating creditors on a *pro rata* basis, taking into account their existing debt holdings. Article 2.1(c) does not contain *any* requirements regarding how a disproportionate use analysis is to be conducted, much less the specific analytical methods Korea asserts are required. Furthermore, carried to its logical conclusion, Korea's analytical approach would generate the absurd result that the more indebted a company is, the more subsidies it may receive without risking a finding of specificity.

III. ISSUES CONCERNING THE DETERMINATION OF INJURY

20. **Import Volume:** Korea asserts that there was no such significant increase in market share. The United States is not familiar enough with the factual record of the EC's investigation to have a view as to whether there was such a significant increase. From a legal perspective, however, Korea's emphasis on the significance of any increase in market share is not justified by the text of Articles 15.1 and 15.2. For an injury determination, Article 15.1 requires, *inter alia*, an objective examination of "both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products" (footnote omitted). In turn, SCM Agreement Article 15.2 provides, in pertinent part, that:

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

Based upon the clear text of the SCM Agreement, which uses the disjunctive terms "either" and "or," analysis of the volume of subject imports should include consideration of the absolute volume of subsidized subject imports, as well as whether there was a significant increase in the volume of subsidized subject imports in absolute terms, a significant increase in the volume of subsidized subject imports relative to production in the importing Member, or a significant increase in the volume of subsidized subject imports relative to consumption in the importing Member. The last sentence of SCM Agreement Article 15.2 specifies that "no one or several" of the Article 15.2 factors "can necessarily give decisive guidance."

21. Thus, there is no requirement that there be an increase in subsidized import volume, let alone that an investigating authority find a "significant" increase in subsidized import volume relative to consumption. This is logical, because imports can have adverse price effects without gaining market share – for example, if they force the domestic industry to lower its prices in order to retain its share of the market. In a market for a fungible commodity where information is disseminated rapidly and prices can change frequently – as is the case with respect to DRAMs – it is quite possible that low-priced imports can have adverse price effects with little or no gain in market share.

22. **Price Undercutting:** Korea asserts that in this case, the EC departed from its usual approach to analyzing price undercutting without providing adequate explanation for doing so, and implies that even the frequencies of undercutting found by the EC are insufficient. However, other panels have found that it is for the investigating authorities in the first instance to select methodologies to analyze the price effects of subject imports. Articles 15.1 and 15.2 do not specify any particular methodology to be used in making this analysis.

23. Under the disjunctive language of Article 15.2, there is no requirement that the investigating authority find any price undercutting at all. Thus, there is certainly no requirement that subsidized subject imports undercut the domestic industry's prices or did so with a particular frequency or magnitude, let alone that investigating authorities find that subject imports were the lowest-priced product throughout the period examined. The conditions of competition and business cycle distinctive to the industry are factual circumstances specific to an investigation that are relevant in ascertaining the significance of undercutting in a given case, and that an investigating authority will explain in its injury determination the significance of any undercutting in the context of the particular case.

24. **Price Leadership:** Korea asserts that the EC largely ignored its own finding that there is no such thing as a price leader in this market. According to Korea, this finding "should have called into

serious doubt whether Hynix could really be the source of 'significant' price effects." Korea intimates that there was a need for evidence of Hynix's price leadership for an affirmative material injury determination. Notably, however, Korea fails to identify any requirement under Article 15 of the SCM Agreement to find price leadership, because there is no such requirement.

ANNEX B

ORAL STATEMENTS OF PARTIES AND THIRD PARTIES AT THE FIRST SESSION OF THE FIRST SUBSTANTIVE MEETING

ANNEX B-1

EXECUTIVE SUMMARY OF THE STATEMENT OF KOREA

(15 November 2004)

INTRODUCTION

1. At the outset, I would like to comment on a few general issues. First, the EC has misstated the standard of review. As discussed in its First Submission,[1] the EC's attempt to rely on the standard of review set out in Article 17.6 of the Anti-Dumping Agreement. Korea submits that this is flawed, because the SCM Agreement does not contain such a standard of review. The Panel in *US-Hot Rolled Leaded and Bithmus Carbon Steel* (DS138) firmly rejected the argument that this special standard of review should be applied outside the anti-dumping context. Therefore this Panel should simply apply the standard of Article 11 of the DSU.

2. I would also like to clarify some confusion in the EC First Submission about the burden of proof. The EC confuses the burden of proof during the underlying investigation, which is borne by the investigating authorities, and the initial burden of proving inconsistency in the context of the WTO dispute settlement proceedings, which is borne by the complaining party. Korea wishes to reiterate that the investigating authorities can not request a respondent to prove the absence of elements of a subsidy as a condition of a negative determination. Doing so constitutes an impermissible shift of the burden that the authority itself must bear. If there is incomplete or insufficient evidence for one of the elements of a subsidy, then there is no basis for the authority to find a subsidy in the first instance.

EC INJURY INVESTIGATION – CLAIMS OF ERROR

Article 15.1 Standards

3. Article 15.1 requires that the competent authority have "positive evidence," and that evidence must receive "objective examination." The Appellate Body has confirmed that evidence supporting a finding of injury must be affirmative, objective, verifiable, and credible and emerge from an unbiased investigation.[2] Further, Article 15.1 is an overarching provision requiring each of the substantive provisions of Article 15 to be read in light of Article 15.1. Thus, all aspects of the injury investigation must be based on positive evidence and an objective examination of the facts.

4. The EC tries to make light of these obligations. The EC seems to believe that if an authority considers some matter, then its job is finished.[3] Korea believes that an "objective examination" requires more. We agree that panels are not to re-weigh the evidence, and substitute their judgment for that of the authorities. But at the same time, as the Appellate Body has recognized, Panels are not

[1] EC First Submission, paragraph 41.

[2] See US – Hot Rolled Steel (AB), at paras 192-193 (discussing parallel issues in anti-dumping context). Note that we use the same short forms in this oral statement that we used in the Korea's First Submission.

[3] EC First Submission, at paras 41-42.

to "simply *accept* the conclusions of the competent authorities."[4] Rather, panels must carefully and objectively examine the facts, the reasoning provided by the authority, and the logical connection between the two. In this case, the EC reasoning bears so little relationship to the facts that the EC determination failed to meet the requirements of Article 15. If the facts conflict,[5] the authority still must draw reasonable inferences and explain the factual and logical basis for that inference.

Significant Increase in Subsidized Imports

5. We begin with the issue of allegedly increasing imports. The EC mechanically cited import indices in its Definitive Regulation, but largely ignored any meaningful analysis of the significance of those figures. Given the unique nature of the DRAM market, and the ever-increasing total bits supplied and consumed, an increase in the number of bits being imported is meaningless. Rather, based on the facts of this particular case, an objective authority must examine the increased imports relative to consumption on an overall basis, and relative to the market share of the other suppliers. An objective authority would also have considered imports relative to production, which in this case would have confirmed the declining role of the imports. Otherwise, the authority simply cannot make any reasonable and objective assessment of the "significance" of any alleged increase in imports.

6. The EC takes an overly narrow approach in interpreting the alternatives contained in Article 15.2 of the SCM Agreement. By specifically requiring the authorities to make findings of "significant" volume effects, the text of Article 15.2 does not allow the investigating authorities to stress one factor at the expense of others, particularly when the factor being ignored in fact provides a more appropriate basis for comparison. The investigating authorities should conduct volume analysis based on both quantitative and qualitative factors. It is not enough simply to find some increase. It is all the more necessary in the case of DRAMS, where only the relative increase provides a meaningful parameter to analyze volume effects.

7. Under Articles 15.1 and 15.2, the national authority must prove that there was material injury to the domestic industry caused by subsidized imports, not the imports from the country being investigated as a whole. In this case, however, the EC mistakenly considered the volume and market share of imports from Korea as a whole, even though the EC itself had already concluded that a portion of those imports were not subsidized. This constitutes a manifest error and is inconsistent with Articles 15.1 and 15.2.

8. The EC's discussion of Korea as a whole takes on an Orwellian twist when the EC argues that the LG Semiconductor ("LGS") shipments prior to the 1999 merger should be added to non-Hynix imports from Korea.[6] As the merger with LGS took place with Hynix, and not with any other Korean DRAM producer, there is no justification for adding the import data of LGS to the volume of imports from Korea instead of that of Hynix. By doing so, the EC attempts to create the erroneous impression that Hynix imports increased substantially faster than imports from Korea as a whole.

9. The EC argues[7] that Hynix failed to include the information on LGS data, and this information could not be verified. The implication of this argument is that the EC was not aware of the merger issue, which is completely wrong. As Korea has pointed out, Infineon's complaint provided data that raised the issue of the need to collapse Hyundai and LGS when discussing Hynix trends. Korea refrains from going into details, which are provided in paragraph 110 through 121 of its First Submission concerning the EC's treatment of information about LGS imports. It suffices to say that the EC was aware of the relevance of the merger in the context of volume analysis and had in its possession the necessary information. The EC can not ignore the LGS data submitted by Hynix on

[4] US - Lamb Meat (AB), at para 103 (emphasis in original).
[5] EC First Submission at para 41.
[6] See para. 177 of Definitive Regulation.
[7] EC First Submission, at paras 82-83.

the grounds that verification was not possible as the relevant data was already provided by the complainant itself. At a minimum, the LGS data contained in the complaint should have been taken into account. Ignoring the available data is an egregious violation of the objective examination requirement.

10. Perhaps recognizing the weakness of this argument, the EC goes on to argue that it did not have the information in time.[8] We disagree. As Korea's First Submission documents at some length,[9] Hynix raised this issue early and often. Even if the EC was slow to recognize this issue, this late recognition does not excuse the Definitive Regulation persisting in erroneous analysis.

11. This persistent error is particularly baffling, given the petition filed in this case. According to Infineon's own complaint, the data show a significant drop in Hynix market share, from about 20 per cent in 1998 to 15 per cent in 2001. Infineon could admit this reality, since Infineon thought it would be able to include increasing imports from Samsung in the total analysis. Once Samsung was excluded as not being subsidized, the approach had to change to find any significant increase in imports. Thus, the EC's finding of an "increase" in market share rests solely on improper manipulation of the data.

12. Korea reiterates that the fact that Hynix market share fell over the period being investigated explains why the EC had to struggle so hard to find some way to create the appearance of any increase.

Significant Price Effects of Subsidized Imports

13. We now turn to the issue of price effects. The EC made findings about pricing at odds with both the facts of this case, and with basic economic logic. By far the most important specific fact is that at the height of the alleged subsidization of Hynix in 2001, Hynix was losing market share in the EC market, not gaining share. If price were truly as important to customers as the EC has stated, and if Hynix were truly the lowest price supplier in the EC market, Hynix would have gained market share in 2001, not lost share. Therefore, it defies economic logic to blame Hynix pricing, when Hynix was losing market share for a commodity product.

14. The EC tries to brush aside economic logic.[10] In Korea's view, economic logic is a very important context within which authorities and panels can and should evaluate arguments about pricing. The text of Article 15.2 explicitly focuses on the "significance" of price undercutting or other price effects, and thus imposes a higher standard than just finding some price effects. Authorities must consider what is really happening in the market, and then address those realities in a credible and objective manner. It is not enough mechanically to check off some box confirming that there were some price effects. The authorities must instead find and explain "significant" price effects from imports, a much higher standard than simply finding some price effects.

15. The EC undertook three different approaches to analyzing price undercutting, but then inexplicably chose to focus on the only method that demonstrated price undercutting without explaining why it jettisoned the two other approaches. It is critical to note that the two other findings demonstrated no significant price undercutting by Hynix. The EC did not find any price undercutting when it properly compared average prices to average prices. Instead, the EC compared transaction specific prices by EC producers with an average price by Hynix, an approach that virtually ensures price undercutting whenever the two sets of prices are close. Korea submits that the price comparison approach used by the EC results in a completely distorted analysis, i.e., the average to transaction

[8] EC First Submission, at paras 76-85
[9] Korea First Submission, at paras at 111 to 121.
[10] EC First Submission, at para 91.

comparison methodology has an inherent bias against the exporter as shown in Figure 6 of Korea's First Submission.[11]

16. The EC discusses its pricing analysis at some length, and we will respond in our second submission. At this stage, we simply wish to highlight one very interesting admission. The EC argues that the "producer offering the lowest price will get the business,"[12] and calls this feature of the DRAM market "undisputed." Given this feature, the fact that Hynix lost market share thus becomes a powerful fact suggesting that others in the market were offering lower prices and winning market share.

17. The EC also brushed aside any meaningful discussion of other factors that affect pricing. This evidence before the EC demonstrated that DRAM market prices are affected by: (1) the general economic downturn and decrease of demand, which causes "inventory burn"; (2) excess capacity by other suppliers; and (3) imports from other suppliers. In its discussion of price effects from other factors, the EC dismissed them out of hand by concluding that either they only played some limited role in the market price decline or they are completely irrelevant. The EC thus failed to consider positive evidence on the record that showed factors other than Hynix price caused the significant drop of DRAM prices in 2001. Given the fact that the Hynix market share was indeed decreasing, the EC should have been particularly alert to other causes of the DRAM price decline.

18. If they had an open and objective mind, the EC authorities should have realized that low priced non-subsidized imports that were rapidly gaining market share caused the dominant price effects, and that any remaining effects of subsidized imports could not reasonably be considered "significant." Therefore, the EC finding was inconsistent with Articles 15.1 and 15.2.

Condition of the Domestic Industry

19. We turn now to the condition of the domestic industry. Article 15.4 requires an evaluation of all relevant economic factors and indices, and recognizes that the relevant economic factors and the weight to be given to each of those factors will differ from case to case.

20. Perhaps the single most important economic factor in the DRAM market is the notorious business cycle for DRAM producers. The DRAMs industry has endured a continuing history of "boom/bust" cycles. The evidence demonstrated that the DRAM industry had gone from the top of the boom (in 2000) to the trough of the bust (in 2001) during the period under consideration. Although the EC had to be aware of the existence of the notorious business cycle, it completely ignored the business cycle when analyzing the causes of the deterioration of the domestic industry's financial condition.

21. We believe the EC determination glossed over inconsistencies in what the domestic industry said to different audiences, and provided only a superficial examination of the condition of the Community DRAM industry. The EC did not meet the standards of Article 15.4.

Causation

22. We now turn to the particularly important issue of causation. Under Article 15.5, Members must demonstrate an explicit "causal relationship" between the subsidized imports and any material injury suffered by the domestic industry. The evidence before the EC demonstrated that there was no correlation between the trends in subsidized imports and the condition of the domestic industry. Hynix was losing market share while the domestic industry gained market share.

[11] Korea's First Submission, page 41
[12] EC First Submission, at para 101.

23. The EC tries to brush aside the significance of this lack of correlation.[13] But these EC arguments have two serious flaws. First, the EC cites to absolute trends in imports, even though those trends make no sense in the DRAM industry. The number of "bits" of memory is always increasing. Hynix market share -- properly defined -- was declining. Perhaps recognizing the importance of market share, the EC proceeded to rely only on an improperly defined Hynix market share. Second, the EC cites to differences between the SCM Agreement and the Safeguards Agreement. Korea agrees the two agreements are different, but in this particular context the underlying language about "causation" in each agreement is basically identical. Moreover, the Appellate Body in *U.S - Hot Rolled Steel* expressly recognized the value of analogizing the concepts of causation in the two different agreements.[14]

24. Moreover, the non-attribution requirement in the third sentence of Article 15.5 requires the authority not to impute to subsidized imports any injury caused by other factors. According to the plain meaning of Article 15.5 as well as the unambiguous guidance from Appellate Body, the competent authority must "separate" and "distinguish" the injurious effects of factors other than subsidized imports to ensure they are not attributed to the subsidized imports.

EC SUBSIDY INVESTIGATION – CLAIMS OF ERROR

Facts Available

25. Before we turn to the issues of whether the EC properly found a subsidy, there are a number of issues about the EC use of facts available that must be addressed. The EC has twisted the concept of "facts available" in very disturbing ways. Under the EC approach, whenever a competent authority does not like a particular fact, or does not know how to respond to that fact, the authority may simply find some excuse to invoke "non-cooperation" and then dismiss the adverse fact. The EC has abused the narrow concept of "facts available" to dismiss important pieces of factual information in this case. The text of Article 12.7 and the related jurisprudence both demonstrate that the use of "facts available" should be exceptional and narrow. Korea believes that the Appellate Body discussion of "facts available" in the antidumping context provides useful guidance on this issue.[15] In this case, however, the EC abused "facts available" to ignore other evidence when that evidence could not be reconciled to its outcome driven analysis.

Financial Contribution

26. We now turn to the EC arguments about subsidies. In this oral statement, we address the EC failure to show either financial contribution, or benefit. We focus on the more important issues here, but we will address all of the issues and all of the EC arguments in our second submission.

27. Under Article 1.1 (a)(1)(iv), "entrustment" or "direction" can be established only where there is government action so clear and unambiguous that the actions of private bodies can be imputed to the government itself.

28. The panel in *US – Export Restraints*[16]held that the acts of entrusting and directing carry with them the following three elements: (i) an explicit and affirmative action, be it delegation or command; (ii) addressed to a particular party; and (iii) the object of which action is a particular task or duty.

[13] EC First Submission, at paras 167-172.

[14] US - Hot Rolled Steel (AB), at paras 229-234.

[15] US – Hot-Rolled Steel (AB), at paras 82-86. We recognize that the SCM Agreement does not have provisions analogous to Annex II of the AD Agreement. But since Annex II elaborates on Article 6.8 of the AD Agreement, which is nearly identical to Article 12.7 of the SCM Agreement, Korea believes that Annex II provides useful context to understand Article 12.7.

[16] US - Export Restraints, at para 8.29.

This decision confirms that generalized statements of government intent or desire, or even general interventions in the market itself, cannot establish a financial contribution through a private body. Thus, it is required to show that each alleged government delegation or command be examined with respect to each party, and with respect to each task or duty.

29. Yet this is exactly what the EC did in this case. After its 14-month investigation, the EC failed to come up with direct evidence to prove GOK "entrustment or direction" of Hynix creditor banks. The EC relied on largely a collection of circumstantial evidence that cannot be corroborated or verified in a judicially reliable and meaningful way. When necessary to bolster its collection of circumstantial evidence, the EC applied "facts available" and substituted adverse inferences for evidence.

30. Korea believes that this Panel needs to decide the legal standard to apply over the course of this Panel proceeding as applied in *US – Export Restraints*. For now, we simply wish to object to the EC characterization of the GOK admitting that it took actions to push or "nudge" banks into any of the Hynix restructurings.[17] When read in context, the cited portion of the Korea's First Submission makes quite explicit that we disagree with this characterization from the newspaper report. Our point was to highlight how little the EC has actually established. The EC took a newspaper statement about a single bank, and then jumped to conclusions about all banks. Such an approach simply does not comply with the standards of Article 1.1.

31. The EC also relies extensively on the fact that the GOK held ownership interests in certain banks involved in Hynix's restructuring. Mere ownership cannot establish direction or entrustment by the government. Such evidence of ownership simply cannot provide any basis to find an explicit and affirmative delegation or command to *all* banks, particularly banks with little or no GOK ownership. Korea reiterates that the Hynix creditors made their financial decisions under commercial considerations at each stage without any government intervention.

32. For instance, Hynix's October 2001 restructuring was carried out under a Korean law of general application. Well over 100 companies were restructured under this framework. Under the terms of the October 2001 restructuring, Hynix's principal creditors agreed on a menu of options they could choose in moving forward (or cutting ties) with respect to Hynix. The very existence of *choices* in the October restructuring contradicts the EC's suggestion that there was "entrustment or direction" by the GOK. The totality of circumstances of the October restructuring confirms the commercial reasonableness of the measure and negates any notion of "entrustment or direction." Further, the EC did not produce a single piece of evidence to demonstrate the constituent elements of "entrustment or direction" in the October restructuring.

Finding And Measurement Of "Benefit"

33. The second requirement for establishing a countervailable subsidy is that the competent authority must demonstrate that a "benefit is thereby conferred." As noted by the Appellate Body in *Canada – Aircraft*, a benefit analysis under Articles 1.1(b) and 14 requires a comparison of what was received by an entity versus what was available on the market. Moreover, the SCM Agreement defines benefit in the context of the experience of private actors in the market of the Member under investigation.

34. The EC goes on at some length about its approach to future risk, and its view about Article 14(a).[18] We disagree that Article 14(a) does not set forth any specific rules. The text makes explicit that an authority must consider the "usual investment practice" of investors in "the territory of the member." This language provides a quite explicit benchmark for evaluating the existence of a

[17] EC First Submission, at para 276.
[18] EC First Submission, at paras 403-423.

benefit. Thus, contrary to the EC argument, there are explicit obligations that authorities must respect. Authorities do not have carte blanche to impose their own economic views on the investors in a particular WTO member country.

35. After initially finding no "benefit" on many issues in its *Provisional Regulation*, the EC changed its position in its *Definitive Regulation* and suddenly found the existence of "benefit." This change was wrong. Nothing that could affect the "benefit" analysis could have possibly changed since the *Provisional Regulation*: the market environment, terms of the loans, and credit ratings remained unchanged. In fact, the EC acknowledged that it changed its decision on the syndicated loan in the *Definitive Regulation* because of new information; *i.e.*, documents with respect to the Economic Ministers' meetings. Even if true, however, all this new information concerned only GOK "entrustment or direction," and had nothing to do with the EC's benefit analysis. As such, the EC's change of analysis for benefit was completely erroneous and unwarranted because it failed to engage in any meaningful discussion as to why it was changing its "no benefit" conclusion from the *Provisional Regulation.*

36. Setting aside the fundamental flaw of the EC's benefit calculation, which treated all allegedly countervailable programmes as a "grant" without regard to the circumstances to the nature of the transaction, the EC also made numerous mistakes in calculating the benefit even under its own methodology.

ANNEX B-2

EXECUTIVE SUMMARY OF THE STATEMENT OF THE EUROPEAN COMMUNITIES

I. OBLIGATIONS, FACT, EVIDENCE

1. The European Communities considers that, in exercising *judgment*, in *good faith*, pursuant to Article 3 of the DSU, as to whether assertions made before this Panel are even capable of being fruitful, it is helpful from time-to-time to refer back to the specific text of the *SCM Agreement*; to the facts; and to the evidence. It is a matter of considerable regret that Korea does not appear to share this view.

2. Korea has the *burden of proof*, and must adduce *evidence*. Yet its submissions are peppered with *bare assertion* unsupported by any evidence, and with *hypothesis*. For example, Korea repeatedly makes factual allegations about what it alleges to be the "usual method or practice" of the European Communities in relation to various matters,[1] but adduces no evidence in this respect. The European Communities hereby expressly contests and refutes all such bare factual assertions. Korea's casual approach is incapable, as a matter of law, of leading to a resolution of this dispute in Korea's favour – and rightly so.

3. For certain matters, the investigating authority was obliged to rely on the facts available, within the meaning of Article 12.7 of the *SCM Agreement*, and in this respect, the European Communities has two comments.

4. First, Korea states in its first written submission that "the EC alleges that … the GOK lied in its questionnaire response and during verification." The European Communities would like to clarify that it has never expressly made this allegation and does not do so now – that word is chosen by Korea, not by the European Communities. Whether or not a respondent "lies" in an investigation, that is not the legal test provided for in Article 12.7 of the *SCM Agreement*. Pursuant to that provision, the question is rather whether or not the Member or interested party refused access to or otherwise did not provide necessary information within a reasonable period or significantly impeded the investigation. It is abundantly clear that this is precisely what happened in this case.

5. Second, the European Communities wishes to place on record in the strongest terms its view that Korea cannot now place before this panel unverified and unverifiable factual assertions or alleged copies of documents that are not part of the record before the investigating authority. Unlike other types of investigation, in a subsidies investigation the Member itself is also a respondent, and has a full opportunity to participate in the investigation. There are no circumstances, exceptional or otherwise, that could possibly justify Korea attempting to proceed in such a way at this late stage. Should the Panel even entertain such a possibility, a balanced approach would at the very least require the production of the very large number of documents – including documents no doubt highly prejudicial to Korea's case - that remain undisclosed by the Korean respondents.

[1] For example, First written submission of Korea, paras. 153 and 161.

II. SUBSIDY

6. When large subsidies are granted to save a national champion from impending doom, a careful scrutiny of the documents usually reveals that, during the relevant period, the granting Member has been busy singing two songs.

7. The *first*, generally necessary to appease national taxpayers and other national groups opposed to the subsidy, is that the market is in meltdown, the company in dire jeopardy, and the subsidy urgently necessary to avert disaster, for public policy reasons.

8. The *second* refrain, often repeated in a vain attempt to bamboozle investigating and judicial authorities into swallowing a counter-factual and unreal view of the circumstances, is that business is (or will soon be) booming, that the company is mean, lean and fighting fit, and that capital is pouring into the company because investors – including the government – think it's the best thing since sliced bread – a sure thing – **a safe bet**. Assertions of this type have been made with such frequency by the Korean respondents in this file, that I will spare the Panel a further re-iteration.

9. Well, these two tunes do not harmonise. They clash horribly. And they cannot plausibly co-exist, at least in relation to the same time period.

10. As lawyers, or as accustomed to listening to lawyers, we are all accustomed to legal arguments being made in the alternative. And there is nothing wrong with that, even if elements of the *reasoning* in the different legal arguments are, to some extent, in conflict with each other. However, it is *intolerable* to have two different versions of the *facts* underpinning a legal analysis, and no investigating or judicial authority will countenance that.

11. So what are the facts in this case? What was really happening in 2001? Well, you don't need a PhD in rocket science to figure it out. Condemning themselves from their own mouths, the Korean respondents have repeatedly asserted that in this market there was a "perfect storm" in 2001; and Hynix was right in its path, facing annihilation, but for Government intervention, for public policy reasons. *Quod erat demonstrandum*. Let's remind ourselves of some of the basic facts that are not seriously in dispute.

12. Starting in November 2000, the three Economic Ministers of Korea, no less, met repeatedly to decide what to do about Hynix. The Korean Ministers responsible for the national economy, for national industrial policy and for Korea's international competitiveness, for Korean state money. Not surprisingly, this went right to the top.

13. The Ministers *decided* to take *measures*, *initiated* by the Government of Korea, in pursuit of a Government of Korea *coordinated policy* to save Hynix, at all costs, and issued *directions* to that effect, relating to both the Syndicated Loan and the KEIC Guarantee. The detail of the directions, in terms of day-to-day management, is remarkable. Those directions were still being implemented on 9 January 2001, on 10 April 2001, on 30 June 2001, and at least right up until the end of the investigation period, on 31 December 2001.

14. The Government of Korea also put in place, also at least for the whole of the investigation period (1 January to 31 December 2001) the KDB Debenture Programme – another government backed bailout for Hynix (and the Hyundai group generally), which was by far the most important intended and actual beneficiary.

15. On 10 March 2001, the Government of Korea, acting *via* the Vice Commissioner of the Financial Supervisory Service, participated in the critical creditors meeting, precisely in order to

"nudge" – to use Korea's own words – the banks into accepting the arrangements for the May 2001 Rescue Package.

16. In October 2001, as the market and the financial situation of Hynix further dramatically deteriorated, most of the private banks and capital finally "jumped ship". The hard-core that remained to participate in the October 2001 Rescue Package were under the ownership, control, entrustment or direction of the Government of Korea.

17. Thus, if one takes a step back and considers the overall situation during the whole of 2001, a period during which the Government of Korea was heavily intervening to save Hynix, *via* the Syndicated Loan, the KEIC Guarantee and the KDB Debenture Programme, it just defies any reasonable logic that the Government of Korea simply lost interest in the May and October 2001 Rescue Packages. And it is simply impossible to accept, based on the facts, that during this period, in which the Government of Korea was acting urgently to save Hynix from disaster for *public policy* reasons, the banks were, ***at the same time***, throwing good money after bad, based on *purely commercial* considerations. It may well be that, by this time, it had become clear to the continuing participants that Hynix was a "safe bet" – but that was not because of its outstanding condition and performance. It was simply because it had become abundantly clear that the Government of Korea would never abandon Hynix, and was in fact busy pouring public money and support into it. Only the best athletes may, in truth, be considered a safe bet – but not if they flunk the drugs test.

III. INJURY

18. A determination of injury must be based on *positive evidence*. To suggest that it is not is a serious allegation, that comes very close to calling into question the good faith of the investigating authority. This type of allegation is made repeatedly by Korea in this case – and it is utterly without foundation. It is, in any event, an incomprehensible allegation, given that much of the determinative evidence was provided *by the Korean parties themselves*, and the accuracy of the rest has not even been challenged. So just what exactly is Korea now alleging? That the information provided by the Korean parties during the injury investigation was also false or misleading or incomplete? That is hardly likely to advance Korea's case.

19. Essentially, the *specific* obligation on the investigating authority is to *examine, consider* and *evaluate* certain matters, no one or several of which can necessarily give decisive guidance. Manifestly, it results from the text of the measure at issue that this is precisely what the investigating authority did in this case. Repeatedly and counter-factually asserting the contrary cannot change this fact. A mantra is not a legal argument. Korea might disagree with the outcome of the overall assessment, but that is entirely beside the point.

20. What Korea's case boils down to is the nebulous and generalised assertion that, in relation to certain matters on which the *SCM Agreement* is silent, the investigating authorities' determination did not involve an objective examination. In other words, right from the start, it is the most tenuous of cases. Perhaps not surprisingly, Korea's definition of "objective" turns out to be anything that generates a favourable result for Hynix in this case. The briefest scrutiny of Korea's arguments demonstrates that they are in fact built on one false or hypothetical statement after another. There is simply *nothing* in Korea's submissions capable of supporting the assertion that the investigating authority in this case did anything other than make a determination involving an objective examination.

21. Given the global nature of the market and its dire state at the time – points on which Korea itself insists at great length, it would indeed be quite extraordinary and amazing if a subsidy of the magnitude granted to Hynix had no repercussions on other players in the market – like a stone thrown into a pond that mysteriously vanishes below the surface without generating a single ripple. In fact,

the whole purpose of the kind of "survival" subsidy granted by Korea to Hynix is *relative* : it is precisely to improve the relative situation of Hynix *vis a vis* its competitors, and thus enable it to survive. Otherwise, there would be fundamentally no point to it.

ANNEX B-3

THIRD PARTY ORAL STATEMENT OF CHINA

(4 November 2004)

1. Thank you, Mr. Chairman, and Members of the Panel. It is my pleasure to present the views of China in this proceeding.

2. China has noted that the parties in the present dispute disagree with each other on the interpretation and application of Article 12.7 of the SCM Agreement. Among those issues in dispute, China particularly concerns with the EC's assertion that the "essential point" of Article 12.7 "is and can only be the possibility of drawing adverse inference". In this oral presentation, China will only address its views on whether Article 12.7 connotes such asserted possibility.

I. THE EC'S ASSERTION IS OF NO LEGAL BASIS IN THE TEXT OF ARTICLE 12 OF THE SCM AGREEMENT

3. With respect to the EC's above assertion, China fails to see the so-called "essential point" of "drawing adverse inference" contemplated or implied under Article 12.7. China recalls the Appellate Body has observed on various occasions that, in accordance with the customary rules of interpretation of public international law, a proper treaty interpretation is first of all a textual interpretation, and the task of interpreting a treaty provision must begin with the specific words of that provision.[1] Moreover, the interpretive principle is that "an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[2]

4. In this regard, China considers that the interpretation of Article 12.7 should be first of all on the basis of the ordinary meaning of the text, and should also be analysed in the context of Article 12 as well as Part V of the SCM Agreement.

5. With respect to the ordinary meaning of the text, it is evident that Article 12.7 only provides for applying facts available under certain circumstances, and the text of this paragraph contains no explicit provision of drawing adverse inference. In the absence of such express provision, should any interested Members and interested parties fail to provide or refuse access to the required necessary information or significantly impede the investigation, the investigating authority could only base its determinations on objective assessment of the facts available to it.

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[1] *Japan–Taxes on Alcoholic Beverages ("Japan–Alcoholic Beverages II")*, Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, § G. See also *US–Offset Act ("Byrd Amendment")*, Appellate Body Report, para. 281.

[2] *United States–Standards for Reformulated and Conventional Gasoline* ("*US–Gasoline*"), Appellate Body Report, WT/DS2/AB/R, adopted 20 May 1996, §III. B.

II. IN LIGHT OF PERTINENT PROVISIONS IN THE SCM AGREEMENT, THE APPLICATION OF FACTS AVAILABLE DOES NOT DENOTE DRAWING ADVERSE INFERENCE

6. In order to analyses the EC's argument, China would like to present its further considerations in light of the context of certain relevant paragraphs of Annex V of the SCM Agreement.

7. Annex V of the SCM Agreement deals with procedures for developing information about "serious prejudice" in cases involving actionable subsidies under Part III. This Annex does address, in impressive detail, the drawing of adverse inferences under certain circumstances.[3] Paragraph 7 of Annex V provides explicitly that "the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process". Further, China takes special note of the fact that paragraph 6 in the same Annex addresses the issue of the application of best information available. It can be seen that the two distinct paragraphs of Annex V address the application of best information available as well as adverse inference respectively.

8. In China's opinion, it is helpful to analyse the relationship between the application of "best information available" under paragraph 6 and "drawing adverse inference" under paragraph 7 of Annex V. In accordance with the effective treaty interpretation rules, if paragraph 6 were interpreted as empowering the panel to draw adverse inference from any party's non-cooperation, then the provision of paragraph 7 in respect of adverse inference would result in "redundancy or inutility". Obviously, the appropriate reading shall be that the authority to draw adverse inference can not be induced from the provision of best information available.

9. The above understanding is also supported by paragraph 8 of Annex V, which provides "[I]n making a determination to use either best information available or adverse inferences, the panel shall.....". The terms of "either best information available or adverse inferences" connote that, the two methods are different. Applying best information available does not contain the meaning of drawing adverse inference by itself.

III. THE FINDINGS OF THE APPELLATE BODY IN *CANADA-AIRCRAFT* IS IRRELEVANT TO THE PRESENT DISPUTE

10. China notes that the EC's conclusion reading "the essential point of such a provision is and can only be the possibility of drawing adverse inference" is based on the Appellate Body Report in *Canada Aircraft*. However, China considers that paragraphs 181 through 206 of the Appellate Body Report in *Canada-Aircraft* are concerned with the authority of the panel, but not that of the investigating authority to draw adverse inferences under certain circumstances, thus can not provide interpretive guidance for the present issue.

11. It is evident that the issue before the Appellate Body in *Canada-Aircraft* was "[w]hether the *Panel* erred in law to draw adverse inference from Canada's refusal to provide information to the Panel about the EDC's debt financing activities"[4], that is, the *Panel*'s authority to draw adverse inference "in cases that involve prohibited export subsidies for which the adverse effects are presumed".[5] The Appellate Body concluded that "[C]learly, in our view, the *Panel* had the legal authority and the discretion to draw inferences from the facts before it".[6] In addition, Annex V of the

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[3] *Canada--Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R, 2 August 1999 ("*Canada-Aircraft*"), para. 201.

[4] *Canada-Aircraft*, para. 181.

[5] *Id*., para. 202.

[6] *Id*., para. 203.

SCM Agreement invoked by the Appellate Body also concerns with the panel procedures in cases of actionable subsidies, but not relevant to the investigating authority in the underlying investigation.

12. In this regard, China believes that the observations made by the Appellate Body in *Canada-Aircraft* with respect to the authority of the DSB panel are irrelevant to the evidentiary rules to be applied by the investigating authority in the countervailing investigation. Therefore, the EC's reliance on the Appellate Body Report in *Canada-Aircraft* is of no help to its argument.

13. In conclusion, Article 12.7 does not explicitly provide the possibility of "drawing adverse inference" in applying "facts available", and such an understanding is further supported when analyzed together with the context of Annex V of the SCM Agreement. Virtually, the Respondent's reliance on the Appellate Body Report in *Canada-Aircraft* is of no merit in the present dispute.

14. This concludes my presentation. Thank you for your attention.

ANNEX B-4

THIRD PARTY ORAL STATEMENT OF JAPAN

(4 November 2004)

I. INTRODUCTION

1. Mr. Chairman and distinguished Members of the panel, on behalf of the Government of Japan, I thank you for giving this opportunity to express our views on this important matter. This morning, we will focus on certain arguments presented by the parties, which involve systemic issues in the SCM Agreement, and should be addressed further.

II. ARGUMENT

A. NON-ATTRIBUTION RULE UNDER ARTICLE 15.5 OF THE SCM AGREEMENT

2. The EC argues that the investigating authorities correctly found that other known factors "may have caused injury, however not to an extent breaking the causal link between the subsidized imports and the injury caused by the subsidized imports."[1] It appears that the EC misunderstood the non-attribution rule under Article 15.5. The question to be addressed for the non-attribution rule is whether the authorities examined the causation between the subsidized imports and the injury after separating and distinguishing injury caused by other known factors. As discussed in our third party submission, upon separating the injury caused by other known factors, the authorities are required to examine whether the injury caused solely by the subsidized imports was material or not.

3. Article 15.5 provides that the authorities "shall also examine any known factors other than the subsidized imports," and "injuries caused by these other factors must not be attributed to the subsidized imports."[2] The word "also" clarifies that the authorities are obliged to analyze the causal link between any known factors and injury in addition to the causal link between the subsidized imports and the injury. The phrase "must not be attributed" in Article 15.5 further clarifies that investigating authorities are required to separate and distinguish injury caused by other known factors from injury caused by the subsidized imports. As we explained in details in our third party submission, the Appellate Body repeatedly has explained this non-attribution requirement in the context of analysis of the meaning of Article 3.5 of the AD Agreement, which is equivalent to Article 15.5 of the SCM Agreement.

4. It appears that the EC's causation analysis did not separate and distinguish injury caused by the subsidized imports from injury by other known factors. As such, the EC's causation analysis in this dispute appears insufficient. Japan thus respectfully requests that this Panel carefully review whether the EC separated and distinguished injury caused by other known factors from the injury

[1] The First Written Submission by the European Communities ("EC First Written Submission"), dated 11 June 2004, para. 180 (footnote and emphasis in original omitted).

[2] Article 15.5 of the SCM Agreement (emphasis added).

caused by subsidized imports in its injury determination consistently with Article 15.5 of the SCM Agreement.

B. ENTRUSTMENT OR DIRECTION BY THE GOVERNMENT UNDER ARTICLE 1.1(A)(1)(IV)

5. We agree with the EC that the entrustment or direction by a government does not have to be in a particular form or on a transaction-specific basis.[3] The panel in *US – Export Restraints* interpreted the government's entrustment or direction to mean an explicit and affirmative action prompting a particular party to perform a particular task or duty.[4] Article 1.1(a)(1)(iv), however, does not specify any particular methodology for determining whether a government's action was entrustment or direction. The government's entrustment or direction, thus, does not have to be a publicly announced command, or a command instructing a private bank in every detail of financial supports. In this connection, the EC correctly argues that "[t]here is, for example, nothing in Article 1.1 *SCM Agreement* that would preclude an oral entrustment or direction."[5] It is sufficient under Article 1.1(a)(1)(iv) if the government's action were such that a private bank were able to understand what the government delegated or commanded.

6. Consequently, the question in this dispute in connection with Article 1.1(a)(1)(iv) is the evidence, on which the investigating authority may be based to find that a government's instruction was an entrustment or direction under this Article. As we discussed in our third party submission, the instruction may be shown through circumstantial evidence. The evidentiary standard applicable to this Article is found in Article 11 of the DSU. Article 11 requires the Panel to review an investigating authorities' determination, based on "an objective assessment". Further, Article 11 directs panels to make an objective assessment of the facts of the case. We also could consider that this obligation of an objective assessment applies equally to the investigating authorities' assessment, because panels are required to review the investigating authorities' evaluation of facts in accordance with that standard. Article 11 thus requires, in this case, that the investigating authorities base its determination on evidence sufficient to allow the authorities to reasonably conclude that the government delegated or commanded a private bank to provide certain financial support to a specific company. There are no further requirements for the evidentiary standards applicable to Article 1.1 of the SCM Agreement. As such, we respectfully request that this Panel carefully review the investigating authorities' determination on entrustment and direction in light of this evidential standard.

C. APPLICATION OF FACTS AVAILABLE UNDER ARTICLE 12.7

7. In replying to the argument by Korea that the EC incorrectly applied facts available, the EC has argued that "[t]he questions repeatedly posed by the European Communities were sufficiently precise, and of sufficient scope, to catch matters such as the ministerial meeting and related documents."[6]

8. As discussed in our third party submission, an investigation requires two-way communication between the investigating authorities and the responding parties. The investigating authorities are required to effectively communicate to responding parties the information that the authorities would like to receive before the authorities decide to apply facts available. Article 12.1 clarifies this initial obligation of the authorities, providing "[i]nterested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities

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[3] See EC First Written Submission, para. 284.

[4] Panel Report, United States -- Measures Treating Export Restraints as Subsidies ("US – Export Restraints"), WT/DS194/R, adopted 23 August 2001, para. 8.29.

[5] EC First Written Submission, para. 272.

[6] *Id.*, para. 214.

require." Indeed, without knowing what information the authorities consider to be "necessary," the responding parties cannot refuse to access to, or otherwise do not provide, necessary information.[7]

9. The authorities' request, however, would be sufficient if it was specific enough that a responding party was able to understand what type of information the authorities requested. The authorities' request does not have to identify a specific name of the document. In fact, the authorities would not be aware of what specific information is available to responding parties at the initial stage of an investigation. If the responding party has difficulties to identify or understand the scope of the requested information, the SCM Agreement requires that the responding party communicate the difficulties to the authorities. Article 12.11 provides "[t]he authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable." In order for the authorities to take due account of a responding party's difficulties, the authorities have to be informed of the difficulties. The responding party may not keep silent, waiting for the authorities' additional inquiries.

10. When the investigating authorities effectively communicated what information the authorities would like to receive from a responding party, but the responding party did not respond to the request, then the authorities may consider that the respondent "otherwise" did "not provide necessary information",[8] and apply the facts available. As the panel in *Argentina – Floor Tiles* states, the authorities "may not fault an interested party for not providing information it was not clearly requested to submit."[9] In this connection, we disagree with the EC's interpretation that the words "or otherwise" in Article 12.7 refer to "a situation in which no such request has been made."[10] The facts available is allowed to apply when the responding party did not submit the information although it was clearly requested to do so. While Japan does not take any position on the factual aspects of this dispute, the investigating authorities, as unbiased and objective triers of facts, may assess the fact of the non-submission, taking into account other evidence that the authorities also collected.

III. CONCLUSION

11. For the reasons set forth above and in our written submission, Japan respectfully requests that this Panel carefully review the consistency of the EC's injury determination with Articles 15.5 and the subsidy determination with Articles 1.1(a)(1)(iv) and 12.7 of the SCM Agreement.

[7] *See*, Article 12.7 of the SCM Agreement.
[8] Article 12.7 of the SCM Agreement.
[9] Argentina - Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy ("Argentina – Floor Tiles"), WT/DS189/R, adopted 5 November 2001, para. 6.54.
[10] EC's First Written Submission, para. 199.

ANNEX B-5

THIRD PARTY STATEMENT OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

(4 November 2004)

Mr. Chairman, Members of the Panel and parties to the dispute, thank you for giving us the opportunity to express our views.

I. INTRODUCTION

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu makes this third party oral statement because of its trade and systemic concerns regarding the correct interpretation of the Agreement on Subsidies and Countervailing Measures (ASCM).

2. In this oral statement, we will briefly comment on the following:

- The interpretation of the words "entrusts or directs",
- The methodology used in determining "benefit", and
- Non-attribution analysis in the determination of injury.

II. THE DETERMINATION OF SUBSIDY

A. THE INTERPRETATION OF THE WORDS "ENTRUSTS OR DIRECTS"

3. In our view, the Panel in *US – Export Restraints*[1], by deriving its interpretation of the terms "entrust" and "direct" from ordinary meaning of the words in the context of Article 1.1(a)(1)(iv), adequately clarifies their meanings. We see no reason why the interpretation in that case cannot be applied here. Under that Panel's interpretation, the conditions upon which a government can be considered to have "entrusted or directed" a private body under Article 1.1(a)(1)(iv) are: (i) an explicit and affirmative action, be it delegation or command; (ii) addressed to a particular party; and (iii) the object of which is a particular task or duty.[2] In other words, the mere fact of influence or intervention in the market by a government, which it might undertake at different levels for different purposes, is not in itself sufficient proof of entrustment or direction.

4. An investigating authority must base its determination on positive evidence showing that the above three conditions exist in order to find government entrustment or direction. We would therefore respectfully request the Panel to carefully determine whether the EC has addressed the three conditions above in its investigation.

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[1] United States – Measures Treating Exports Restraints as Subsidies (US – Export Restraints), Panel Report, WT/DS194/R.

[2] *US-Export Restraints*, WT/DS194/R., para. 8.29.

B. THE METHODOLOGY USED IN DETERMINING "BENEFIT"

5. With regard to the methodology adopted by the investigating authority to calculate the amount of a subsidy in terms of benefit to the recipient, Article 14 of the ASCM sets forth relevant guidelines relating to equity investments, loans, loan guarantees, the provision of goods or services by a government, and the purchase of goods by a government. The Appellate Body pointed out in the *Canada – Aircraft* case that the word "benefit" used in Article 1.1(b) implies some kind of comparison. A "benefit" arises under each of the guidelines provided under Article 14 if the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.[3] We share the view of Korea, expressed in paragraphs 572–573 of its first written submission, that in order to conduct a proper "benefit" analysis under Article 14, the investigating authority is under an obligation in measuring benefit to compare what firms received with what was available on the market.

6. In addition, in our view, Article 14 provides for a preference for domestic market of the Member under investigation as the benchmark. It seems illogical to use the commercial market of some other territory as the benchmark, when a benchmark to measure benefit can be found within the territory of the Member against which a financial contribution has allegedly been conferred. Only when the domestic market of that Member is distorted should the investigating authority be permitted to use another market as a benchmark. Otherwise, an investigating authority would be able to arbitrarily choose any market, which could result in the use of the highest CVD margin as its benchmark.

III. THE DETERMINATION OF INJURY

7. We agree with Korea that Article 15.5 of the SCM Agreement requires a "non-attribution" analysis.[4] The third sentence of Article 15.5 of the SCM Agreement requires that "the authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports."

8. The Anti-Dumping Agreement and the SCM Agreement are widely recognized as being related, as both agreements are derived from GATT Article VI. The provisions of these two Agreements often employ a similar language and interpretations of corresponding provisions have been used interchangeably by panels and the Appellate Body in cases such as *US – Continued Dumping and Subsidy Offset Act*[5] and *US – Softwood Lumber Investigation.*[6]

9. The two provisions in this case, Article 15.5 of the SCM Agreement and Article 3.5 of the Anti-Dumping Agreement employ substantially the same language in the same context, namely, in the examination of injury to domestic industry. The jurisprudence for Article 3.5 of the Anti-Dumping Agreement clearly requires the investigating authorities to separate and distinguish "the injurious

[3] *Canada -- Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R, 2 August 1999, at para. 157-58.

[4] First written submission of Korea, para. 221-232

[5] Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, with regard to Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement.

[6] Panel Report, United States – Investigation of the International Trade Commission in Softwood Lumber from Canada, WT/DS277/R, para. 7.129.

effects of the other factors from the injurious effects of the dumped imports".[7] This requirement also applies to Article 15.5 of the SCM Agreement. The Panel in the softwood lumber case mentioned above specifically made this point.

10. Based on the above, we ask the Panel to examine whether the EC has met the non-attribution obligation required by Article 15.5 of the SCM Agreement.

IV. CONCLUSION

11. In light of the above-mentioned comments, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu respectfully requests the Panel to take the above views into account when making its findings in this case.

[7] Appellate Body Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, para. 223.

ANNEX B-6

THIRD PARTY ORAL STATEMENT OF THE UNITED STATES

(10 November 2004)

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, it is my privilege to appear here today to present the views of the United States concerning certain issues in this dispute. In our written submission, we already commented on the submissions of the European Communities ("EC") and Korea. Therefore, the principal focus of my comments today will be on the third-party written submission of Japan.

2. At the outset, however, I would like to make a couple of general observations. First, with respect to the issue of directed lending by the Government of Korea ("GOK"), as we explained in our written submission, "the issue before the Panel is whether a reasonable, unbiased person looking at the totality of the evidence before the EC authorities could have reached the same conclusion as did those authorities; namely, that the GOK entrusted and directed private financial institutions to bail out the financially distraught Hynix."[1] In our view, this issue is not even a close call. There can be no serious question that a reasonable, unbiased person could have reached the same conclusion as the EC authorities.

3. Second, with respect to the question of material injury, the United States is not in a position to comment on the details of the EC's injury determination. However, it appears to the United States that Korea would have this Panel believe that the GOK's intervention in the market to artificially sustain the existence of the number three producer of DRAMs in the world had no adverse consequences on Hynix's competitors. While the consequences of Korea's subsidization of Hynix likely varied from market to market, we strongly disagree with Korea's suggestion that the subsidization of Hynix had no adverse consequences whatsoever.

4. Having made these general observations, I now would like to comment on certain aspects of the third-party submission of Japan.

The Evidentiary Standard for Entrustment or Direction

5. The United States agrees with most of Japan's discussion regarding the evidentiary standard applicable to questions of entrustment or direction under Article 1.1(a)(1)(iv) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").[2] The United States agrees that there is no special evidentiary standard for government entrustment or direction. The United States also agrees that subparagraph (iv) does not require that a government's delegation or command be so detailed as to instruct every step that the bank must follow. Finally, the United States agrees that the

[1] *Third Party Submission of the United States of America*, 16 June 2004, para. 31 [hereinafter "US Submission"].

[2] *Third Party Submission of the Government of Japan*, 16 June 2004, paras. 7-13 [hereinafter "Japan Submission"]; *see also* US Submission, paras. 16-31.

elements of entrustment or direction may be found on the basis of circumstantial evidence or by evidence from secondary sources. Indeed, the United States would go further and submit that circumstantial and secondary evidence takes on particular importance in situations where, as in the case of the Hynix bailout, a government acts behind the scenes and takes advantage of its ownership stakes in banks to direct their behaviour.

6. The one exception the United States would take to Japan's discussion of evidentiary standards for entrustment or direction involves the heading to Section II.B.1 of its submission. There, Japan states that "[t]he Panel should apply the correct evidentiary standards to review the existence and the extent of entrustment or direction ... ." The Panel's task is not to determine *de novo* whether entrustment or direction existed, but instead is to review *the EC's* determination. Therefore, it is more accurate to say that the Panel's task is to determine whether *the EC* applied the correct evidentiary standard.

The EC's Injury Determination

7. Turning to the EC's injury determination, Japan criticizes the EC for failing to separate and distinguish the injurious effects of other known factors to the domestic industry from the effects of subsidized imports.[3] More specifically, Japan asserts that the EC did not address subsidized imports and non-subsidized imports separately in its overcapacity analysis. In addition, Japan asserts that the EC, after acknowledging the harmful effects of non-subsidized imports, failed to adequately separate the injurious effects of subsidized imports from non-subsidized imports.

8. In the view of the United States, these assertions suggest a standard of analysis that is beyond what the SCM Agreement actually requires. In this regard, the United States would note that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of unfair imports from the injurious effects of the other known causal factors are not prescribed by the WTO agreements. The Appellate Body has reached this same conclusion consistently. For example, the Appellate Body has stated as follows: "Thus, provided that the investigating authority does not attribute the injuries of other causal factors to [unfair] imports, it is free to choose the methodology it will use in examining the 'causal relationship' between [unfair] imports and injury."[4]

9. Similarly, there is no requirement in the plain text of the SCM Agreement that an investigating authority "isolate" subject imports or the effects of the subject imports and other known factors on the domestic industry. Neither in *US - Hot-Rolled Steel* nor in subsequent reports has the Appellate Body found any requirement for the investigating authority to "isolate" the injurious effects of the unfair imports. Instead, the standard articulated has been whether the investigating authorities provided a satisfactory explanation of the nature and extent of the injurious effects of those other factors, as distinguished from the injurious effects of the unfair imports.

10. Second, Article 15 of the SCM Agreement does not require that the subject imports alone, in and of themselves, be the cause of material injury. Even in the context of reviewing safeguards determinations, the Appellate Body has stated that Article 4.2(b) of the *Agreement on Safeguards* does not require that increased imports alone be the cause of serious injury.[5] In *Wheat Gluten*, the

[3] Japan Submission, para. 6.

[4] *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, Report of the Appellate Body adopted 18 August 2003, para. 189, relying on *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, Report of the Appellate Body adopted 23 August 2001 [hereinafter "*US - Hot-Rolled Steel*"].

[5] *See, e.g. United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, Report of the Appellate Body adopted 19 January 2001, paras. 70,

Appellate Body found that the causation requirement of the *Agreement on Safeguards* can be met where serious injury is caused by the interplay of increased imports and other factors.[6]

The EC's Use of Facts Available

11. Moving on to the EC's use of facts available in connection with its subsidy determination, the United States in its written submission addressed Korea's arguments concerning the facts available. Today, I would like to comment briefly on Japan's arguments regarding this topic.

12. Japan asserts that "the general principle of good faith under international law and the specific requirements under Articles 12.7 and 12.11 mandate that facts available are the last resort for the authorities."[7] The United States has several problems with this statement.

13. First, with respect to Japan's reference to "good faith," there is no basis for using a principle of "good faith" to depart from the text of the agreements – including the SCM Agreement – as negotiated. There is also no basis or justification in the WTO Agreement for a WTO dispute settlement panel to enforce a principle of "good faith" as a substantive obligation agreed to by WTO Members.

14. Dispute settlement panels have clear and unequivocal terms of reference: they are to examine the matter before them "in the light of the relevant provisions in ... the covered agreements cited by the parties to the dispute ... ."[8] Nowhere in Appendix 1 to the DSU, which defines the "covered agreements" for purposes of the DSU, is there listed an international law principle of good faith.

15. Second, there is no basis for Japan's assertion that Articles 12.7 and 12.11 of the SCM Agreement "mandate" that facts available be used only as a "last resort." The text of Article 12.7 describes the prerequisites for using facts available. That text does not include the phrase "last resort" or any similar concept, nor does the text of Article 12.11.

16. Thus, the task for the Panel is to determine whether the EC reasonably determined whether the prerequisites existed under the relevant provisions of the SCM Agreement for relying on facts available. The Panel's task is not to rewrite those provisions so as to incorporate an undefined notion of good faith.

17. Finally, the United States would not take issue with Japan's observation that cooperation in a countervailing duty investigation is a two-way process.[9] However, the United States would emphasize that the process is, indeed, two-way, and requires cooperation from the investigated parties as well as from the investigating authorities. In the report cited by Japan – which, it must be noted, involved the interpretation of provisions not found in the SCM Agreement – the Appellate Body emphasized that "the level of cooperation required of interested parties is a high one ... ."[10] Can Korea's extremely narrow interpretation of the EC's questions and its withholding of information regarding the meetings of Economic Ministers be regarded as a "high level" of cooperation? Can Hynix's submission of one page of the Arthur Andersen report to the EC authorities, even though it submitted the entire report to US authorities in their countervailing duty investigation, be regarded as

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79 [hereinafter "*Wheat Gluten*"];*United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, Report of the Appellate Body adopted 16 May 2001, paras. 165-170.

[6] *Wheat Gluten*, paras. 67-68.

[7] Japan Submission, para. 14.

[8] DSU Article 7.1.

[9] Japan Submission, para. 18.

[10] *US - Hot-Rolled Steel*, para. 100.

a "high level" of cooperation? Can Hynix's refusal to give consent to Citibank to provide EC authorities with documents pertaining to Citibank's role in the Hynix bailout be regarded as a "high level" of cooperation? To merely pose these questions is to answer them.

Conclusion

18. Mr. Chairman, members of the Panel, that concludes the third-party statement of the United States. Thank you for your attention.

ANNEX C

REBUTTAL SUBMISSIONS OF PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF KOREA'S REBUTTAL SUBMISSION

(4 December 2004)

INTRODUCTION

1. Although this case involves a complex and extensive factual record, at its core this case is about assessing the WTO consistency of the actions by the EC authorities. Korea believes that the EC has imposed a punitive countervailing duty that does not comply with EC obligations under the *SCM Agreement*.

I. INJURY ISSUES

A. THE EC MISINTERPRETS ARTICLES 15.1 AND 15.2 OF THE *SCM AGREEMENT* AND THE STANDARD OF REVIEW

2. The EC argues that the *only* obligation set forth under Articles 15.1 and 15.2 is that the national authority "examine" and "consider" the evidence. To the contrary, to satisfy the obligations of Article 15.1 and 15.2, the investigating authority must demonstrate that its determination is, in fact, based on *positive evidence* and reflects *objective examination*. Moreover, the Panel must be allowed to examine whether the evidence on which a determination is based is credible. Verifiable facts are not necessarily positive evidence of injury, and an examination of incomplete or inadequate facts does not make an examination objective.

B. THE EC'S FINDINGS ARE INADEQUATE UNDER BOTH ARTICLES 15.1 AND 15.2

1. The EC's finding of a significant increase in imports is not supported by positive evidence or objective examination

3. The EC argues that because the EC did not make a specific finding that LGS received subsidies, it could not take into account LGS' EC shipments during 1998 and 1999. The EC's proposed justification makes absolutely no sense. The issue is whether the volume of subsidized imports increased over time. The proper way to analyze the volume of subsidized imports from Hynix over a time period that pre-dates the merger of Hyundai Electronics and LGS and the existence of Hynix is to combine the imports of Hyundai Electronics and LGS in the time period before Hynix. Otherwise, there can be no proper "apples-to-apples" comparison. The EC had LGS data, it just declined to undertake an objective analysis.

4. The EC also provides no rationale why a finding of an *absolute* increase in imports would constitute positive evidence of a "significant increase" within the meaning of Article 15.2 when even the EC understood that a key characteristic of the DRAM is that the number of bits supplied by all producers dramatically increases every year. What is important when analzying the volume of DRAMs shipments is to examine the increased shipments *relative* to consumption and relative to other suppliers. An absolute increase, by itself, says very little.

5. The evidence before the EC demonstrates unequivocally that, when analyzed properly, Hynix' market share ***did not increase at all***, but rather decreased over the period examined. Moreover, based on an objective examination, the increase of value and units was also not significant even if the merger effects with LGS were not properly considered. Finally, even if the EC's analysis of the volume of subsidized imports somehow complied with Article 15.2, the lack of positive evidence and objective examination means that the EC has still violated Article 15.1.

2. The EC's finding of significant price undercutting is not supported by positive evidence or objective examination

6. The EC found competition in the DRAM market takes place largely on price. Yet, the evidence showed that Hynix steadily lost market share in the EC market from 1999 through 2001, the years prior to and including the year in which Hynix allegedly benefited from subsidies. This steady loss of market share cannot be reconciled with the EC's own observations regarding price undercutting. Although the EC claims that "it is quite *possible* for a company to be price undercutting, but losing market share for other reasons," it never provides any examples of such "other reasons". More importantly, the EC does not point to any record evidence that such "other reasons" were, in fact, behind Hynix' decreased market share. Such speculation does not satisfy the obligations of Article 15.1 and Article 15.2.

7. The EC defends its flawed price comparison methodology – comparing Hynix' monthly average prices with individual daily prices for Community producers – with a truism that Article 15.2 does not specify any particular methodology to be used to analyze underselling and price effects. But the EC must demonstrate why its approach is correct, and the Panel must determine whether the EC's conclusion of significant price undercutting is based on positive evidence.

8. Finally, even if the Panel believes that the EC somehow complied with Article 15.2 in its pricing analysis, it must still assess whether the EC pricing analysis in this case meets the independent obligation under Article 15.1. For the reasons stated above, Korea submits that the EC did not meet that obligation.

C. THE EC DID NOT ADEQUATELY CONSIDER THE CONDITION OF THE DOMESTIC INDUSTRY

9. Article 15.4 of the *SCM Agreement* establishes that the national authority must examine all of the enumerated injury factors. But the EC did not address wages, a specific factor under Article 15.4, and it did not make sufficient data available to be able to analyze what a proper analysis of "wages" would have produced. The EC also effectively states it does not have to consider statements of its own domestic industry that have a direct bearing on the Article 15.4 factors. Korea finds this position problematic, as it provides for no accountability.

10. Contrary to EC claims that the "economic downturn" in the DRAM market is "a question of causation rather than assessing the condition of the domestic industry," the DRAM business cycle is an overarching consideration that should inform an objective assessment of more discrete economic factors. Yet, nowhere does the EC actually address this cycle alone, or as context in understanding other economic factors.

11. Finally, Korea reiterates that the EC has not explained adequately why just three of 13 enumerated factors should compel its conclusion that the domestic industry was suffering material injury. While an objective examination of the facts and a reasoned explanation of the analysis would include such consideration, we find nothing in the EC's determination to this end. It is inadequate under Article 15.4.

D. THE EC FAILS TO EXPLAIN HOW ITS DETERMINATION SATISFIES THE LEGAL REQUIREMENT TO ESTABLISH A CAUSAL RELATIONSHIP AND TO SEPARATE AND DISTINGUISH OTHER FACTORS

1. The EC has failed to show a causal relationship

12. The EC injury analysis is premised in large part on an erroneous and inappropriate finding of an absolute increase in subject imports, with or without including LGS. Even if this approach complies with Article 15.2, this approach does not comply with Article 15.5 read in light of Article 15.1. And even if Article 15.5 were read so narrowly as to permit a finding of causal relationship in this situation, the analysis is still not objective, and would at the very least represent another aspect of the EC determination's that is inconsistent with Article 15.1.

13. The evidence before the EC demonstrated that there was no correlation between the trends in Hynix's market share and either the domestic industry's market share or the domestic industry's financial performance. The EC has therefore not demonstrated the requisite causal relationship required by Article 15.5.

2. The EC did not properly separate and distinguish causes

14. The EC's *Definitive Regulation* was inconsistent with the requirements of Article 15.5 because the EC did not separate and distinguish the injurious effects of other factors. The EC erroneously dismissed the role of the drop in demand for 2001, ignoring compelling evidence by every industry observer that the drop in demand, along with the accompanying "inventory burn," were critical factors for understanding the domestic worldwide drop in prices in 2001. The EC ignored evidence on changes in relative capacity that confirmed the dominant role of other suppliers who increased their capacity much more than Hynix. Although the EC tried to address the role of unsubsidized imports, it either ignored or distorted the key evidence.

15. The standard imposed by Article 15.5 does not allow the EC simply to assert its conclusions. The EC was required to explain how it ensured that the injurious effects of the dramatically slowing of demand were not included in the assessment of the injury ascribed to subsidized imports. Because the EC's determination does not do this, the determination is inconsistent with Article 15.5 of the *SCM Agreement*.

II. SUBSIDY ISSUES

A. THE EC'S INTERPRETATION AND APPLICATION OF "FACTS AVAILABLE" IS INCONSISTENT WITH ARTICLE 12.7

1. A responding party does not bear the burden and potential consequences of an investigating member's ambiguity

16. The EC believes facts available are warranted in situations where a responding Member failed to anticipate what the investigating Member considered to be "necessary information". This approach is untenable. The investigating Member must define the "necessary information" and adequately communicate its expectations to the responding Member. To find otherwise would force a responding Member to bear the burden and potential consequences of an investigating Member's ambiguity or failure to request what it considers to be "necessary information".

2. Article 12.7 is a gap filler, not a punitive measure, nor a substitute for the facts on the record

17. The EC provides no textual basis for concluding that the purpose of Article 12.7 can only be for the purpose of drawing adverse inferences. Indeed, the Agreement text supports just the opposite conclusion. In this regard, Annex V of the *SCM Agreement* provides important context for the interpretation of Article 12.7, consistent with Article 3.2 of the DSU. Specifically, paragraph 7 of Annex V explicitly contemplates the use of adverse inferences, but Article 12.7 is silent. Moreover, paragraph 6 of Annex V distinguishes "evidence available" to a Member from the application of adverse inferences, which remains the purview of the panel. It would follow, therefore, that "facts available" is also distinct from adverse inferences, since Article 12 of the *SCM Agreement* does not otherwise provide for the application of adverse inferences.

3. The EC does not justify either the application or extent of application of "facts available"

18. The EC wrongly applied facts available in a number of instances. With respect to the Economic Ministers' documents, the EC's presumption that the documents prove entrustment or direction colours its perspective with respect to whether the Government of Korea ("GOK") withheld these documents. But a decision to apply facts available should not be driven by the EC's self-serving interpretation of "entrusts or directs". The EC must consider whether the request for information could be interpreted differently. Even assuming the EC was entitled to apply facts available and adverse inferences, the documents should not become an excuse to impugn all financing to Hynix. Yet that is precisely what happened in this case.

19. Similarly, with respect to the 10 March attendance of an FSS official at a Hynix creditor council meeting, the EC chose to penalize the GOK based on its own self-interested view of the weight to be accorded that attendance in terms of entrustment or direction, rather than looking objectively at the circumstances of its request for information and/or balancing the interests of Korea. It should not be the basis for the EC's application of facts available, particularly in a punitive manner. Here again, the EC authorities drew overbroad inferences, using the attendance as an excuse to attack financing completely unrelated to the meeting.

20. The EC also distorts the facts surrounding the Arthur Andersen report. The EC never indicated that Hynix was not cooperating with respect to the report, never asked for a more extensive excerpt from the report, and never sought to avail itself of the opportunity to review the contents of the report while at verification. Only in the Final Disclosure Document did the EC raise the issue. The EC's actions were unreasonable, punitive, and inconsistent with its obligation under Article 12.7 to rely on "facts," not arbitrary adverse inferences.

21. Finally, the EC misstates the facts with respect to Citibank. It was the EC, not Citibank or Hynix, that failed to act in good faith. Given all the efforts by Citibank to provide requested information while remaining in compliance with its own internal regulations, Citibank cannot reasonably be held as non-cooperative. Again, the only rationale the EC offers for applying facts available in this instance is that Citibank's assertions could not be verified. This self-serving description of the facts does not begin to detail what really happened. The EC's conduct was neither objective nor reasonable.

B. ARTICLE 1.1(A)(1)(IV) IMPOSES AFFIRMATIVE LIMITS ON THE SCOPE OF "ENTRUSTS OR DIRECTS"

1. The meaning of "entrusts or directs" imposes legal limits

22. The Agreement text is the foundation of every Member's obligations; it is not to be given effect only when it suits a Member's purpose. Yet, the EC chooses to ignore the core meaning of "entrusts" and "directs" as provided in Article 1.1(a)(1)(iv). The core meaning of "entrusts" requires that there be something to be entrusted. When a bank makes a loan or forgives a debt that is not pursuant to some government programme, there is nothing to be entrusted. Similarly, the core meaning of "directs" is the concept of requiring something, or giving an order. Any doubts the EC attempts to raise through alternative English definitions of these terms, can be resolved by referring to the French and Spanish texts of the same provision, both of which use a word that translates into English as "order".

23. The EC tries to downplay the relevance of *US-Export Restraints*, which provided a careful analysis of the "entrusts or directs" standard, by arguing that the panel in that case considered a different factual context. But this effort to distinguish *Export Restraints* fails on two levels. First, the panel in that case was clearly offering its own reading of the specific text at issue here. The factual context may have been different, and so the application of the standard to those facts may differ. But the panel first developed its textual interpretation of the meaning of "entrusts or directs". Second, that panel also wisely explained the problems with an overbroad reading of "entrusts or directs". The panel noted that "governments intervene in markets in various ways," and distinguished carefully between such interventions and actions that by their nature rise to the level of "entrusts or directs".

2. December 2000 Syndicated Loan

24. The EC claims that the GOK ordered KEB, KFB and KDB to participate in the December 2000 Syndicated Loan. At the same time, the EC brushes aside the fact that a number of other private bodies were also involved that did not require any lending limit waivers. Their participation reflects a choice to lend money to Hynix. Choice is effectively the antithesis of entrustment or direction. Moreover, nothing in the EC record reflects a government command or even a suggestion that KEB, KDB and KFB *lend* money to Hynix. Rather, the means were provided, as contemplated under Korean law, for those banks *to lend* to Hynix.

25. The EC seeks to remedy its argument with the notion that the FSC conferred a valuable right on KEB and KFB through the waivers it granted, not unlike the stumpage rights considered by the Appellate Body in *US – Softwood Lumber*. But the facts are very different. The Appellate Body in that case found that by granting a right to harvest standing timber (which the government owns), a government provided that standing timber to timber harvesters. However, it is simply not the same to state that by removing a lending restriction on a bank, a government provides a loan. The government does <u>not</u> provide the loan. Indeed, it never even owned the funds that comprise the loan. <u>The bank provides the loan</u>. The loan would only be a financial contribution if the government issued a command to the bank to provide the loan.

3. KEIC insurance

26. If the EC intends to treat the KEIC insurance as a grant in the total value of the D/A credit line, as opposed to the methodology prescribed in Annex I(j) of the *SCM Agreement*, the EC must demonstrate that Hynix' creditors were entrusted or directed to provide the D/A financing. But the EC merely states that the banks provided the financing because of the KEIC insurance. The existence of the KEIC insurance does not amount to entrustment or direction of the banks. Nor does it matter whether KEIC is a public body. KEIC provided insurance, not D/A financing. The <u>banks</u> provided D/A financing. At most, the EC has identified some <u>effect</u>, not any evidence of entrustment or

direction. The panel in *US-Export Restraints* rejected an "effects test" for entrustment or direction, and so should this Panel.

4. KDB programme

27. The EC takes the position that it may countervail the entire amount of bonds refinanced under the KDB as a grant provided by a public body. This position is illogical in light of the nature of the programme, including the burden sharing explicitly contemplated by the programme. The mechanics of the programme required KDB to be the initial underwriter of the refinanced bonds, but many other creditors were immediately involved through their own financial commitments and it was understood that they would be immediately involved, along with other investors in the CBO/CLO programme. Thus, whatever the EC's position with respect to KDB, given the facts of the programme the EC was required to show that these other creditors and investors were entrusted or directed by the GOK. The EC did not meet its evidentiary burden. For these reasons, the EC determination with respect to the KDB programme was inconsistent with its obligations under Article 1.1(a)(1)(iv).

5. The May 2001 restructuring package

28. The EC's findings with respect to the May restructuring are premised largely on the alleged non-cooperation of the GOK, Hynix and Hynix's creditors. It brushes aside fairly decisive evidence of Hynix' creditors making rational decisions and protecting their decisions through the financing they formulated. In particular, nowhere does the EC mention the GDR when it addresses financial contribution and the May 2001 restructuring package. Instead, the EC argues the absence of financing, when the GDR provided such financing.

29. The EC's only real "evidence" of entrustment or direction is little more than the fact that an FSS official's attendance at a March 2001 meeting of creditors and the fact that the GOK holds ownership in some of the banks involved. But, Korea does not consider the fact that an FSS official attended a meeting of creditors at their request to witness prior commitments made by the creditors to be evidence of entrustment or direction. Likewise, government ownership is not a substitute for entrustment or direction. The mere fact that the GOK may own some or all of a particular bank does not, itself, demonstrate that the bank was entrusted or directed by the GOK to provide financing to Hynix. For these reasons, the EC has failed to show entrustment or direction of the May restructuring package, inconsistent with its obligations under Article 1.1(a)(1)(iv).

6. The October 2001 restructuring package

30. With respect to the October 2001 restructuring, the EC stresses the degree of government ownership of the banks. Again, such evidence simply cannot establish entrustment of direction. The EC also turns to other insufficient evidence to establish entrustment or direction. First, it cites to banks taking into account public policy considerations. This approach reflects a flawed understanding of the legal standard. There is nothing unusual about banks taking into account a wide range of factors when making a loan. Second, the EC also alleges a "pattern of continuous involvement," but in doing so misstates the facts. Since entrustment or direction requires some affirmative government action, the analysis must focus on specific transactions, not some generalized "involvement". Third, the EC makes much of the statement by the Korean Deputy Prime Minister, but again misinterprets the evidence. At most, this statement represents an effort to influence, and does not provide evidence of entrustment or direction. Finally, the EC then turns to an analysis of evidence for several specific banks. This discussion of "evidence," however, never provides any credible basis to find entrustment or direction. For these reasons, the EC's findings with respect to the October 2001 restructuring are inconsistent with Article 1.1(a)(1)(iv).

C. THE EC'S BENEFIT DETERMINATION IS INCONSISTENT WITH ARTICLE 1.1 AND ARTICLE 14

1. The EC's benefit analysis must fail where it has not shown financial contribution

31. As a legal matter, if the EC's findings on financial contribution are found inconsistent with the *SCM Agreement*, then the EC findings on benefit must also fail. A countervailable subsidy requires a financial contribution, a benefit conferred, and a benefit that is specific. Although it may be possible to identify a financial contribution in the absence of benefit or specificity, where a financial contribution is not found, it is not possible under the construction of the Agreement to find either benefit or specificity.

2. The EC advances an incorrect interpretation of the relationship between Articles 1.1 and 14

32. Korea has properly challenged both the finding and measurement of benefit under Articles 1.1(b) and 14 of the *SCM Agreement*. The EC claims that no definition of "benefit" exists within the *SCM Agreement*, and that Article 14 is limited to the calculation of the amount of a subsidy. The EC overlooks the fact that "benefit" is itself a definitional term under Article 1.1 and an essential part of finding a subsidy. Thus, read in light of Article 1.1, Article 14 provides very clear guidance on what a subsidy is not. Under Article 1.1, no subsidy exists if a benefit is not conferred. Paragraphs (a)-(d) of Article 14 each describe specific instances where particular conduct "shall not be considered as conferring a benefit". In other words, Article 14 is not just about calculating the amount of benefit, but serves an important role in defining whether a subsidy even exists, consistent with the requirement provided under Article 1.1.

3. A member's methodology for calculating benefit must be consistent with the principles set forth in Article 14

33. Article 14 applies very concrete terms focused on the "usual" or "prevailing" conduct in the market under investigation, or "comparable" conduct. With respect to the amount of benefit, Article 14(b) and (c), in particular, state that the amount of benefit conferred "shall be the difference" in the costs of the instruments compared. With respect to the provision of goods, Article 14(d) requires a comparison of the goods or services provided versus the adequate remuneration for such goods or services, which "shall be determined in relation to prevailing market conditions".

34. In *US – Softwood Lumber*, the Appellate Body found that "the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is *very limited*". An authority may do so only when "it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods". Moreover, having established the issue of market distortion, an authority must still validate an alternative benchmark.

35. The EC claims that the Appellate Body's holding in *US – Softwood Lumber* is distinguished by the fact that it only dealt with the language of Article 14(d), and must be restricted to Article 14(d) on that basis. But such a reading completely ignores the clear preference for primary benchmarks (i.e., those present in the market under investigation) found in the other paragraphs of Article 14. The EC cannot read out of the Agreement text words like "comparable" and "usual investment practice of private investors in the territory".

4. The EC did not and has not justified its benefit findings with respect to the individual transactions at issue in this dispute

(a) Syndicated loan

36. With respect to the Syndicated Loan, the EC failed to benchmark the KFB, KEB and KDB loans against the loans of the other seven banks involved. Moreover, it is clear in comparing the EC's provisional and definitive regulation that the EC simply confused the distinction between financial contribution and benefit. When a provisional assessment provides an analysis of benefit that demonstrates no benefit, and the authority changes that determination solely on the basis of allegations related to entrustment or direction, there is an obvious problem. Even if KEB, KDB, and KFB were actually ordered to participate in the Syndicated Loan, that fact does not answer the question of whether the participation of seven other banks can serve as a benchmark. Thus, the EC failed to measure what was received by Hynix and what was available to Hynix on the market, inconsistent with its obligations under Articles 1.1(b) and 14(b).

(b) KEIC insurance

37. The EC found that KEIC insurance was an export subsidy. As an export subsidy, that insurance would be governed by Annex I of the *SCM Agreement*, and namely paragraph (j). The measure of benefit as prescribed by paragraph (j) is the difference between the premium paid and the premium required to cover the long-term operating costs and losses of the programme. The EC did not measure benefit on that basis. The EC has also not responded to a more fundamental calculation issue that relates to the nature of D/A financing. In short, it is a credit facility allowing for short-term financing (typically 90 days) for export transactions. It never constituted a loan for USD600 million, which was the credit ceiling of the facility. In any case, the EC has not appropriately measured what was received with what was available on the market.

(c) KDB programme

38. The EC goes to great lengths to discredit potential benchmarks for and other evidence suggesting the commercial basis of participation in the KDB programme by Hynix creditors and investors. But the EC does not even attempt to take on the June 2001 USD 1.25 billion GDR and the reality that international investors were willing to commit significant capital to Hynix, not unlike the commitment made by Hynix creditors and investors through the KDB programme and related CBO/CLO programme. Ultimately, the EC should not have found that the KDB programme constituted a grant in the amount of the bonds refinanced under the programme. Capital was available to Hynix such that benchmarks could have been utilized, consistent with the obligation to measure what was received against what was available on the market under Articles 1.1(b) and 14.

(d) May 2001 restructuring

39. The EC's treatment of the May 2001 restructuring suffers from the same fatal flaw as its treatment of the syndicated loan, and namely the use of evidence concerning financial contribution as a substitute for benefit. In a proper analysis, The EC should have compared the convertible bond interest rates with applicable market interest rates, consistent with Articles 1.1(b) and 14 of the *SCM Agreement* and *Canada – Aircraft*. By treating the alleged convertible bond purchase benefit as a grant and thus failing to conduct the appropriate comparison of what was received versus what was available on the market, the EC failed to meet its obligations under the Agreement.

(e) October 2001 restructuring

40. The EC's benefit analysis of the October restructuring applies rigid profit maximization assumptions without any objective consideration of the underlying facts. It considered Hynix'

financial condition in a vacuum without considering the DRAM market in which Hynix operated or the circumstances surrounding its existing investors. In sum, the EC did not develop any appropriate benchmark for the October restructuring, and instead improperly assumed a grant. It justified neither action, inconsistent with its obligations under Articles 1.1(b) and 14 to measure what was received with what was available on the market, as further elaborated by the Appellate Body in *US – Softwood Lumber.*

D. THE EC HAS NOT JUSTIFIED MAINTAINING ITS CALCULATION ERRORS

41. The EC does not justify its calculation errors. With respect to the KDB programme, the EC argues that Hynix never raised the fact that the EC was effectively double counting benefit from the KDB Programme bonds by not deducting those bonds swapped for convertible bonds as part of the May 2001 restructuring. This is incorrect. The record plainly shows that Hynix specifically warned the EC about this error in its 30 June 2003 comments on the EC's Final Disclosure. The EC's failure to correct the error plainly identified by Hynix is inconsistent with Articles 1.1(b) and 14.

42. Another fundamental error in the EC's approach to the KDB programme was its treatment of interest-bearing instruments as grants. The EC now places all the burden on Korea, arguing that Hynix never claimed that interest should be deducted from the KDB debenture calculation. But Hynix's argument was that the grant methodology should have never been applied in the first place. The EC should have at least considered the matter and deducted the interest paid.

43. The EC also refuses to acknowledge the problems inherent in its grant methodology when it comes to the October 2002 restructuring programme, determining that loans, with interest terms and interest paid, are grants. Because the EC never took the interest payments into account, it did not accurately establish the alleged benefit to Hynix, inconsistent with Articles 1.1(b) and 14 of the *SCM Agreement*.

44. The EC's position on its use of an erroneous value with respect to the amount of debt rolled over as part of the October 2001 restructuring is perhaps its most indefensible argument. Hynix alerted the EC to the error in the total amount being used. The EC's only apparent defence is that Hynix should not have been surprised because it responded to Hynix' comments and informed Hynix what value was being used. That statement is not a defence to the error.

E. THE EC SPECIFICITY ARGUMENTS ARE INADEQUATE

45. As a legal matter, to the extent that the EC's findings on financial contribution are found inconsistent with the *SCM Agreement*, then its findings on specificity must also fail. Even if financial contribution is presumed, its specificity findings are inconsistent with Articles 1.2 and 2.

46. With respect to the KDB Programme, the EC suggests that it considered all the factors outlined in Article 2, but this is not obvious in the lone paragraph cited from its *Provisional Regulation*. For these reasons Korea, reiterates its claim that the EC acted inconsistently with its obligations under Article 1.2 and 2 in finding the KDB Programme specific.

47. The EC's arguments in support of its specificity findings with respect to the May and October restructuring packages are so narrow as to render the specificity requirement virtually meaningless. Many companies had debt restructured under the same "work-out" framework used by Hynix and its creditors. The EC ignores these facts. Its findings with respect to the transactions involved in the May and October restructuring packages are therefore inconsistent with Articles 1.2 and 2 of the *SCM Agreement*.

F. THE EC'S DETERMINATION IS INCONSISTENT WITH ARTICLES 19.4, 10 AND 32.1 OF THE *SCM AGREEMENT* AND ARTICLE VI:3 OF GATT 1994

48. In choosing to use Hynix' unconsolidated sales, the EC confuses the scope of the investigation (DRAMs) with the question of which product and entity benefited from the alleged subsidies. It is not because the EC investigated the DRAMs market that subsidies granted to Hynix can automatically be viewed as benefiting only Hynix as a parent entity and only with regard to DRAMs. By taking this approach, the CVD duties imposed by the EC exceed the limits imposed by Article 19.4 of the *SCM Agreement* and Article VI:3 of GATT 1994.

49. Moreover, every violation of the specific provisions of the *SCM Agreement* identified above triggers a parallel violation of Articles 10 and 32.1 once the decision to impose duties was made.

III. CONCLUSION

50. For all of these reasons, we respectfully request the Panel to make the findings set forth in paragraph 676 of Korea's First Submission.

ANNEX C-2

EXECUTIVE SUMMARY OF THE EUROPEAN COMMUNITIES' REBUTTAL SUBMISSION

I. FACTS, EVIDENCE, BURDEN OF PROOF

1. The EC would like to re-iterate the following points.

2. The burden of proof in these Panel proceedings is on Korea.

3. The investigating authority relied on the totality of the facts and evidence available.

4. The facts are as set out in the regulations, which have been summarised by the EC in its pleadings.

5. Hardly any of the facts are contested by Korea. There is no basis for this Panel to make any findings in relation to uncontested facts. There is no basis for this Panel to enquire into the evidence on which the investigating authority relied in order to substantiate uncontested facts.

6. Where Korea does contest facts, it generally does so on the basis of bare assertions. It does not adduce any evidence to support its assertions. In this scenario, Korea's assertions must be rejected; there is no basis for this Panel to make any findings in relation to such facts; and there is no basis for this Panel to enquire into the evidence on which the investigating authority relied when establishing such facts.

7. In short, the starting place for this Panel's considerations is not the evidence relied on by the investigating authority, it is the evidence relied on by Korea in these proceedings, if any. Absent any such evidence, Korea has failed to make out any case at all, and that is an end of the matter.

8. If Korea does adduce evidence merely equivalent to the evidence on which the investigating authority relied, this Panel must still find in favour of the EC. To succeed, Korea must adduce evidence that establishes a *prima facie* case, that is not rebutted by the record evidence relied on by the EC investigating authority.

II. THE WHOLE IS MORE THAN THE SUM OF THE PARTS

9. The views that Korea continues to peddle reflect basic and alarming egregious legal errors. The moment has probably come to take a step back from the thicket of facts, to reflect on, and to get straight, a couple of basic matters.

10. Articles 1 and 14 of the *SCM Agreement* refer to a subsidy, a financial contribution, a benefit. All in the singular.

11. The *SCM Agreement* contains no express rule about the investigation period, and the choice of the year 2001 in this case, selected because it coincides with the most recent financial year in Korea prior to initiation, is not seriously contested by Korea.

12. Having decided what the investigation period will be, an investigating authority goes about gathering the evidence and facts on the basis of which it will make its determination. Typically, as in the present case, the investigating authority will gather hundreds or even thousands of facts.

13. Having gathered the facts, an investigating authority will decide how to structure and characterise them. Nothing in the *SCM Agreement* would prevent an investigating authority from considering, in the same investigation, more than one subsidy, more than one financial contribution, more than one benefit. And the investigating authority can, if it wishes, *analyse the facts* in this *compartmentalised* way. But nothing in the *SCM Agreement* obliges an investigating authority to proceed in that way. Articles 1 and 14 are drafted in the singular. If an investigating authority proceeds on the basis that there is one subsidy, one financial contribution and one benefit, *even if broken down into different elements*, neither a complainant nor a Panel can simply assume that, in doing so, the investigating authority acts inconsistently with Articles 1 and 14 of the *SCM Agreement*. There is simply no basis for such an assumption, and to assert that there is a breach of the *SCM Agreement* solely on that basis would certainly be legally erroneous.

14. In the context of the *Anti-Dumping Agreement* (which Korea has agreed may be relevant context), the Appellate Body has made it clear, in the *EC-Bed Linen* case and other cases, that an investigating authority makes a (singular) finding of dumping in relation to a (singular) product concerning a (singular) domestic industry.

15. What did the investigating authority do in this case? Evidently, it broke down the hundreds of facts it had gathered during the investigation into a number of elements, in order to facilitate its task. In doing this, it examined, on their merits, the facts relating to individual programmes and banks. However, <u>at the same time</u>, the investigating authority repeatedly stated that it based its determination on the *totality of the evidence and facts available*. The investigating authority made this statement with such frequency that it simply cannot be ignored by this Panel. What does it mean?

16. It means that, in effect, the investigating authority *also* <u>considered the whole picture</u>. One big picture. In the singular. That also explains why the EC eventually imposed one countervailing duty – not five. This is why the investigating authority considered that all the facts and evidence that go, for example, to the question of financial contribution were equally or almost equally relevant in relation to all the elements of the subsidy - from the Syndicated Loan through to the October 2001 Rescue Package. This Panel must not allow itself to be mislead by Korea's attempts, based on certain aspects of the mere form of the measure at issue, to deconstruct the investigating authority's determination into something it is not (several legally *compartmentalised* determinations). This Panel must look beyond the form of the measure at issue, and judge what the investigating authority actually did – i.e. in addition to an examination of the facts relating to individual programmes and banks *also* an examination and reliance on the totality of the facts and evidence available.

17. Thus, there is a major legal problem when Korea invites this Panel to make its findings by considering, for example, whether a certain limited category of facts and evidence – limited by Korea – supports the investigating authority's determination, *vis a vis* one element of the subsidy. **<u>That simply does not take into account everything that the investigating authority did</u>**. This Panel must consider what the investigating authority actually did.

18. To put the matter another way. Korea would have this Panel, without any consideration of the relevant legal issues, impose on the facts gathered by the investigating authority a sort of compartmentalised template; to view them from a perspective different from that used by the investigating authority; to apply a methodology different from that applied by the investigating authority. In short, Korea invites this Panel to re-do the assessment, based on Korea's own methods and approaches, different from those used by the EC, without any further explanation. This Panel is not empowered to do that, and it would constitute a grave legal error.

19. A threshold legal question before this Panel is therefore this : was the investigating authority entitled to rely on the totality of the facts and evidence available? If the answer to this question is yes (and the EC is certain that the answer is yes), then all or almost all of Korea's claims and arguments may be dismissed forthwith, because they simply relate to something quite different from what the investigating authority actually did.

20. The first and most obvious point is : why not? What provision of the *SCM Agreement* obliges an investigating authority to proceed otherwise? Korea cites none because there is none. In many respects, that observation is sufficient to dispose of the case.

21. If, contrary to what an investigating authority actually did, a complainant in DSU proceedings or for that matter a Panel begins to deconstruct and atomise the totality of the facts and evidence available to the investigating authority, where does this process stop? Especially in a case such as the present one, which involves such extraordinary factual detail and complexity.

A. DOWN TO THE LAST WON

22. Let us first consider the problem in documentary or material or substantive terms. Take, for example, something like the KEIC Guarantee. The investigating authority viewed this as one element of the subsidy to Hynix. Korea essentially invites this Panel to assess it as if it were in a separate and isolated legal compartment from the other elements of the subsidy. Korea even goes further, and tries to get the Panel to assess it in relation to each bank (although this reflects a basic misunderstanding of the analysis conducted by the investigating authority). But why stop there? Why not deconstruct the facts even further and look at every single transaction that benefited from the KEIC Guarantee in a legally isolated compartment? Then presumably Korea would argue that the investigating authority was obliged to show GOK direction in relation to each specific export transaction (no doubt there are hundreds or even thousands of them). Why not down to each last won? Indeed, to follow Korea's logic would be to raise the evidential threshold so high as to render circumvention of the *SCM Agreement* a simple matter. There is simply no basis in the *SCM Agreement* for Korea, or for that matter this Panel, to impose its view about what single approach must, in all cases, be the correct one.

B. THE TIME IS NOW

23. One may also consider the matter from a temporal perspective. Korea assumes that a fact more generally associated with an earlier part of the investigation must be considered irrelevant to a later part of the investigation. Why? What provision of the *SCM Agreement* does Korea refer to? It is perfectly possible, for example, that a subsidy is granted at the beginning of the investigation period, whilst material injury only emerges towards the end of the investigation period. Nothing in the *SCM Agreement* prevents an investigating authority from relating these facts to each other – or indeed from finding a *causal link* between them. Why should the situation be any different for other facts, such as those relating to financial contribution?

24. Under the *Anti-Dumping Agreement* (which Korea has agreed may be relevant context), all other things being equal, domestic transactions, on the basis of which normal value is established, might be situated towards the beginning of an investigation period, and export transactions towards the end – there is no problem. Article 2.4 of the *Anti-Dumping Agreement* requires an investigating authority to make the comparison "at as nearly as possible the same time" – and the same time for these purposes, absent problems such as a high inflationary environment or exchange rate issues, may well be the whole year of the investigation period, which for this purpose may be treated as a *time singularity*. The *SCM Agreement* contains no equivalent provision because there is no such comparison under the *SCM Agreement* – but the basic point remains the same : having selected its investigation period (which is not seriously contested by Korea in this case), nothing in the *SCM Agreement* obliges an investigating authority to make the kind of temporal sub-divisions that Korea advocates in this case.

25. In this case there were numerous respects in which the various elements of the subsidy overlapped with each other, as outlined in some detail in the regulations and the EC's first written submission, and as otherwise appears from the record.

C. HERDING

26. Similar comments may be made regarding Korea's attempts to persuade this Panel to consider the situation of each bank in an isolated and compartmentalised way. That is not what the investigating authority did, and nothing in the *SCM Agreement* obliges it to proceed in that way.

27. Does a shepherd and his dog direct a herd of sheep? Yes. Does a shepherd entrust his dog with the herding of his sheep? Yes. In this case, the totality of the facts and evidence shows that the GOK did everything it could, through legislation and through its behaviour, to keep the banks together, as one unit, for as long as possible. That no doubt explains the kind of threats issued to banks like KFB and Koram who had the temerity to attempt to step out of line, particular in the early stages. It also no doubt explains why the CFICs were structured in such a way as to keep all the banks in the fold, for as long as possible. In these circumstances, an investigating authority is perfectly entitled to base itself on facts and evidence about entrustment or direction of the herd as a whole. Nothing in the *SCM Agreement* obliges an investigating authority to consider the situation in relation to each animal in the herd in an artificially isolated and compartmentalised way.

28. Indeed, in this respect, the situation is highly reminiscent of the classic cartel situation, in which, for example, it is discovered that the sales directors of a dozen competitors met clandestinely in a hotel. They all protest innocence, but written evidence is found that indicates that more than half of them were engaged in price fixing. There is also a wealth of incriminating evidence suggesting the same was more than likely the case with respect to the others. It is perfectly reasonable that, on the basis of the totality of the facts and evidence available, the remaining companies may also be considered to have participated.

D. AND THE GOVERNMENT SAID ROLL-OVER

29. As the EC has repeatedly explained, in this case the money flowing into Hynix was essentially being continuously rolled over from one element of the subsidy to another, rather like some vast game of pachinko, as summarised in Exhibit EC-38. In this respect, the investigating authority essentially considered that when Hynix's liabilities from earlier on in the investigation period, which were in fact never serviced, were rolled-over into liabilities towards the end of the investigation period, that also constituted good reason to view the whole picture, and make its determination on the basis of the totality of the facts and evidence available. That was an entirely reasonable manner in which to proceed, and there is no basis for any finding that in conducting its analysis in this way the investigating authority failed to comply with any obligation contained in the *SCM Agreement*.

E. THIS PANEL HAS NO BASIS TO CONCLUDE THAT THE INVESTIGATING AUTHORITY DID NOT ACT OBJECTIVELY

30. In the light of these observations, and in the light of the totality of the facts and evidence available, also as determined by the lawful operation of Article 12.7 of the *SCM Agreement*, and the resulting inferences, the EC strongly believes that the investigating authority was fully justified in proceeding as it did. Nothing in Korea's submission is capable of supporting the conclusion that, in acting as it did, in relation to this threshold issue, the EC did not act objectively, or acted inconsistently with any provision of the *SCM Agreement*.

III. THE LG SEMICON MERGER

31. Article 15.2 of the *SCM Agreement* refers to a "significant increase in subsidised imports" (either in absolute terms or relative to production or consumption in the importing Member). To determine whether or not there is an "increase", it is necessary to make a comparison – that is, to make at least two measurements, one before and one after, and to compare them.

32. Evidently, the basic idea behind Article 15.2 of the *SCM Agreement* is to consider whether or not there is any evidence that the subsidy has had an impact on the flow of imports from a particular source. That means that an investigating authority will basically aim to catch a period before the period in which the subsidy occurred, and compare it with the period during which there was subsidisation. In this way it will be able to consider whether or not there is an increase in exports/imports coincident with the subsidy.

33. The *SCM Agreement* contains no rule about the overall time frame to be used by an investigating authority when considering this matter. In this case the investigating authority used the 4 years 1.1.1998 to 31.12.2001, which was perfectly lawful, and which is not seriously contested by Korea.

34. The *SCM Agreement* also contains no rule about how to divide the time frame up for comparison purposes. In this case the investigating authority essentially used annual periods, which was perfectly lawful, and which is not seriously contested by Korea.

35. Similarly, there is no rule in the *SCM Agreement* about the investigation period in respect of subsidy. The investigating authority chose 2001, which was reasonable and perfectly lawful, and which is not seriously contested by Korea.

36. Having established this framework, the investigating authority in this case started by considering the volume of exports/imports from the subsidised company, Hynix, during 2001, the period during which it was determined that there was a subsidy. It then looked back at imports during the preceding 3 years from the same source.

37. At this point, one may say, for the sake of the discussion, that the investigating authority was, at least in theory, faced with a choice about what it would consider "the same source" to be. One option was to look at all the imports during the earlier three year period that came from the firm Hynix (and this is what the investigating authority in fact did). A second option was, according to Korea, to look at all the imports from the *production facilities* that were under Hynix's control in 2001, even if they were not under Hynix's control in the earlier years. This choice is, in fact, fairly typical of the kinds of choices that investigating authorities have to make in economic law investigations.

38. Korea complains that, because the investigating authority chose the first option, it acted inconsistently with Article 15.2 of the *SCM Agreement*. Why? What provision of the *SCM Agreement* imposes any obligation on an investigating authority in this respect? There is simply no such obligation in Article 15.2 of the *SCM Agreement*. All that provision requires is that an investigating authority consider whether or not there has been an increase. If the drafters had wished to impose a particular method, they could easily have done so – but they chose not to. Korea might, in this particular case, assert that, stepping into the shoes of the investigating authority, it would have preferred one method rather than another – and the Panel might or might not agree – but that is entirely beside the point. This Panel cannot re-do the investigation. It cannot add to or diminish the rights and obligations of the Members as provided for in the *SCM Agreement*.

39. The EC takes the view, in this specific context, that great care should be exercised in "piercing the corporate veil" – an enterprise notoriously fraught with difficulty and the potential for

introducing subjectivity. In this context the EC preferred the objective test of looking at the firm Hynix and tracing its behaviour back in time. Article 15.1 of the *SCM Agreement* requires an objective examination, and the approach chosen by the investigating authority was well suited – indeed best suited – to achieving that objective.

40. The very nature of a subsidy is that, in general terms, it is typically given to a firm (such as Hynix), not to a production facility. A subsidy typically passes from the control of government to the control of the firm (in this case, Hynix), and that is the critical moment (change in control over the resource) that really matters. There is often a legal act (decision or grant or contract) between the government and the firm. In case of disagreement with the government any litigation would involve the firm (Hynix), not the production facility. This is so even if the production facility has since been sold on. Furthermore, the ultimate fate of the money depends on the decisions made by the persons then controlling the money, that is, the persons controlling the firm, not the production facility. Often subsidy is a *quid pro quo* – the money is only paid over in return for certain action by the recipient – that is, the firm, not the production facility. Often subsidies are paid to government controlled entities – precisely because in that way governments typically feel more comfortable about their chances of controlling the eventual use of the subsidy, through control of the management mechanisms of the firm.

41. There is nothing artificial or legalistic in focussing on the firm in this sense. Incorporation with limited liability is not just a formal legal concept. Limited liability is a corner stone of the development of modern business. The limited liability company is a centre of imputability in legal terms, but also in economic, accounting, business and other ways (political, financial markets). There is a raft of legislation that has been built up around this concept and it cannot be casually dismissed as "formalistic".

42. A further critical point to take into consideration is that, in relation to the 3 earlier years, we simply do not know whether or not *any* imports were subsidised. There is no finding of subsidy. But also there is no finding of no-subsidy. Actually, if there were subsidies throughout the earlier period, that might mean that no increase in export/import volumes would be found (volume might just have been high and steady throughout the period). The injury investigation period would not have been stretched back far enough. This is a real risk in Members where there is good reason to believe that subsidy is endemic. Especially in the case of national champions that the Member has publicly indicated will not be allowed to go bust, even if they periodically hit bad times.

43. To try to avoid or reduce this risk, the injury investigation period in this case was stretched back to cover 4 years. This reflects normal EC practice. Since, at least according to Korea, companies such as Hynix are generally not subsidised on a continuous basis but only periodically, one can be reasonably sure if one goes back far enough to reach a stage in the company's subsidy cycle when it was not being subsidised. That way, you get a fair trend analysis. Presumably Korea would not contest this. Presumably Korea would not argue that in fact Hynix was subsidised during this entire injury investigation period. The investigating authority can never be certain that it has attained its objective, but it was a reasonable assumption in this case.

44. It is this kind of uncertainty with which an investigating authority is faced when it has to decide whether to follow the firm, or the production facilities back in time. One problem if the investigating authority follows the production facilities is that this increases the uncertainty – it causes the forensic trail of investigation to bifurcate and encompass, at a given moment in time, two entirely different and separate and independent centres of imputability – totally unrelated to each other. This does not help the analysis. There is no guarantee that the other entity would not itself have been in receipt of subsidies – something that might seriously distort the trend analysis. It might well have been at a different stage in its subsidy cycle. In fact, if recently purchased, there is every chance it was in difficulty and thus in receipt of subsidies.

45. Things could get even more needlessly complicated if the tree bifurcates more than once – the investigating authority could find itself looking at several different production facilities all under different and changing control during the relevant period. Since it is simply impossible to be certain about all the circumstances, it is better to stick with the objective approach of following the firm (Hynix).

46. Furthermore, on the basis of Korea's approach, if, going back in time, one would have to follow the "production facilities", that would mean that the investigating authority would have to take account not only of those purchased, but also those disposed of or closed. For example, if Hynix had owned a very large production facility in 1999, with lots of imports to the EC, but sold or closed it in 2000, on Korea's logic, that production facility would have to be taken out of the earlier years of the calculation. We don't hear Korea arguing for that. In addition, the practical problems of getting information from companies that no longer exist and production facilities that have been sold or closed should not be underestimated. The EC finds Korea's approach over-complicated, impractical and unnecessary and rejects it – as it is entitled to do – nothing in the *SCM Agreement* obliges it to do otherwise.

IV. INSIDER OUTSIDER

47. The EC has two comments about insider investor theory.

48. The first comment is that, as outlined in the EC's first written submission, in the context of WTO law, the EC's position is that insider investor theory is wrong, and in any event nothing in the *SCM Agreement* imposed any obligation on the EC investigating authority to apply such a theory in this case. In any event, the point is largely academic, because however one views the actions of the banks, they could not in any circumstances be considered commercial.

49. The second comment is that, by repeatedly asserting that the banks acted on the basis of insider investor thinking in this particular case, Korea actually scores a spectacular own goal. Why? Because what the Korean respondents are saying is that they and Hynix were in a hole, and that all they ever did was what was commercially rational to try and get out of that hole. Leaving aside the fact that there was in reality no way back for the banks (huge losses had to be written off, as was always entirely predictable), this argument immediately begs the follow-up question : how did you get in that hole? One does not, of course, have to look very far to answer that : because of the GOK. In 1999 the GOK forced Hynix to merge with the highly indebted LG Semicon. And the banks' exposure to Hynix in mid-2001 was entirely a function of the GOK financial contributions and entrustment and direction *via* the Syndicated Loan, the KEIC Guarantee and the KDB Debenture Programme. What Korea's argument therefore demonstrates is that there are profound economic links between all the different elements of the subsidy assessed by the investigating authority with respect to 2001. In making this argument Korea is therefore effectively pleading for exactly what the EC has said all along : the need to consider the totality of facts and evidence – which is exactly what the investigating authority did in this case.

V. THE PROVISIONAL REGULATION

A. THE PROVISIONAL REGULATION NO LONGER EXISTS

50. The measure at issue is the Definitive Regulation. The Panel need only refer to the Provisional Regulation insofar as it contains statements of fact, law or analysis that are incorporated by reference, specific or general, express or implied, in the measure at issue, which is the Definitive Regulation.

51. The Provisional Regulation no longer exists. It is no longer in force or effect. It has expired – or been revoked. And there is no prospect of its re-introduction or renewal. It has not existed since

11 August 2003, when the Definitive Regulation was adopted. It did not therefore exist on 23 January 2004, the date on which this Panel was established. This Panel cannot therefore make any findings or recommendations in relation to the Provisional Regulation. Thus, all Korea's claims and arguments in respect of the Provisional Regulation must be dismissed. At the very least, this Panel need not, and should not, make any recommendations in relation to the Provisional Regulation.

52. This view is confirmed by Article 3.3 DSU which states that the basic aim of the dispute settlement system is "the prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements *are being* impaired by measures taken by another Member." (emphasis added). Any recommendations or rulings by the DSB shall therefore "be aimed at achieving a satisfactory settlement of the matter" (Article 3.4 of the DSU) - which cannot be the case if there is no matter to settle (i.e. if the measure does not exist and is not being applied). In the same vein, Article 3.7 of the DSU provides that "before bringing a case a Member shall exercise its judgment as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute."

B. KOREA HAS MADE NO CLAIM PURSUANT TO ARTICLE 17 OF THE SCM AGREEMENT

53. In any event Korea has made no claim pursuant to Article 17 of the *SCM Agreement*. Absent any such claim, the Provisional Regulation must be considered consistent with Article 17 of the *SCM Agreement*, and there is therefore no basis for this Panel to find that the Provisional Regulation is inconsistent with the *SCM Agreement*. This view is confirmed by Article 17.4 of the *Anti-Dumping Agreement* (which Korea has admitted may be relevant context), according to which provisional measures may only be subject to dispute settlement if they are inconsistent with Article 7.1 of the *Anti-Dumping Agreement* (which concerns provisional measures). For this reason also all Korea's claims and arguments in respect of the Provisional Regulation must be dismissed.

ANNEX D

ORAL STATEMENTS OF PARTIES AT THE SECOND SUBSTANTIVE MEETING

ANNEX D-1

EXECUTIVE SUMMARY OF THE STATEMENT OF KOREA

(10 January 2005)

1. The EC repeatedly embraced self-serving methodologies and arguments in this case. Rather than objectively examining the facts, the EC had an outcome in mind and approached the facts from that perspective. That is why the EC ignored the shipment data for LG Semiconductor("LGS"). That is why the EC distorted its price comparison methodology. That is why the EC applied improper and overbroad facts available. That is why the EC tries to cover gaps in its analysis by invoking the "totality" of the evidence.

I. INJURY ISSUES

2. The EC argues that the *only* obligation set forth under Articles 15.1 and 15.2 of the SCM Agreement is that the national authority "examine" and "consider" the evidence. Korea believes that to satisfy the obligations of Article 15.1 and 15.2, the investigating authority must demonstrate that its determination is, in fact, based on *positive evidence* and reflects *objective examination*. Moreover, under Article 11 of the DSU the Panel must be allowed to examine whether the evidence underlying a determination is credible. The EC also asserts that Korea has not raised arguments under Article 15.1. This assertion is wrong. Korea raised this claim in its Request for the Panel Establishment and in its First Submission. In our Second Submission, we elaborated on those arguments.

Volume, Price Effects and the Condition of the Industry

3. On the issue of volume, Korea believes "significant" has both qualitative and quantitative dimensions. By misrepresenting the LG Semiconductor figures, the EC improperly relied upon figures for overall imports, inconsistent with Article 15.2. The inconsistent treatment of shipments by LG Semiconductor and Hyundai Electronics also created a violation of Article 15.1, since the EC approach simply cannot be considered objective examination.

4. Korea further believes that as a matter of law, the EC's indexed figure of a 155 per cent increase in this case cannot be considered "significant" given the nature of the industry. More importantly, the evidence before the EC demonstrates unequivocally that, when analyzed properly to include LG shipments, Hynix's market share *did not increase at all*, but rather decreased over the period examined.

5. With respect to price effects, we are forced to look at the output from the EC's "black box." The EC avoids the heart of the Korean argument – that the methodology was inherently unfair by comparing a transaction price to an average price. The approach taken by the EC is inherently biased and is thus inconsistent with Article 15.2, and is also a separate violation of Article 15.1.

6. The EC also found competition in the DRAM market takes place largely on price. Yet, the evidence showed that Hynix steadily lost its share in the EC market from 1999 through 2001. EC

speculation to remedy the inconsistency in its logic and the facts does not satisfy the obligations of Article 15.2. The EC approach also does not satisfy Article 15.1.

7. With respect to the condition of the domestic industry, Article 15.4 of the *SCM Agreement* establishes that the national authority must examine all of the enumerated injury factors. But the EC did not address wages, a specific factor under Article 15.4, and it did not make sufficient data available to be able to analyze what a proper analysis of "wages" would have produced. The EC also effectively states it does not have to consider statements of its own domestic industry that have a direct bearing on the Article 15.4 factors, throwing out any sense of accountability. Finally, the EC has not explained adequately why just three of 13 enumerated factors under Article 15.4 compel its conclusion that the domestic industry was suffering material injury.

Causation and Non-Attribution

8. The EC injury analysis rests in large part on an erroneous and inappropriate finding of an absolute increase in subject imports, with or without including LGS. Even if this approach somehow complies with Article 15.2, it does not comply with Article 15.5 read in light of Article 15.1. And even if Article 15.5 were read so narrowly as to permit a finding of causal relationship in this situation, the analysis is still not objective, representing another aspect of the EC determination that is inconsistent with Article 15.1.

9. On non-attribution, the EC has yet to explain how it separated and distinguished a number of other causal factors raised in the underlying proceeding. For example, the EC erroneously dismissed the role of the drop in demand for 2001, along with the accompanying "inventory burn." The EC also ignored evidence on changes in relative capacity that confirmed the dominant role of other suppliers who increased their capacity much more than Hynix. Although the EC tried to address the role of unsubsidized imports, it either ignored or distorted the key evidence. The EC's response is merely to assert that it did consider these causal factors and ensured that they were separated and distinguished from subject imports, but mere assertions do not satisfy Article 15.5.

II. SUBSIDY ISSUES

10. The EC argues that this Panel should not consider the evidence relied upon by the authorities. This approach is just wrong. Pursuant to Article 11 of the DSU, this Panel must consider the evidence provided by the EC authorities with respect to each element of a subsidy. The EC also argues that every piece of evidence is relevant to every actor and every transaction. But this Panel has the job of reviewing that evidence, and deciding whether a reasonable and objective authority could have reached the decision that it did.

11. In their determinations, the EC authorities discussed individual transactions and individual banks. The EC now tries to hide behind the "totality" of the facts, in an effort to obscure the reality that the "facts" actually address much less than the authorities would like. The EC tries to avoid the question of which banks were entrusted or directed to do what. The legal standard for entrustment or direction requires the EC authorities to answer these questions; they did not.

12. The EC also tries to defend its use of adverse inferences, but the EC fails to distinguish between inference that may turn out to be adverse, and inferences that are intentionally adverse. Having identified a particular fact, the EC then proceeds to draw inferences with no limits. The EC also tries to blur the distinctions between parties to the investigation and third parties who might have relevant information. In sum, the EC drew intentionally adverse inferences, beyond the permissible scope of Article 12.7.

Financial Contribution

13. Korea would also like to point out that with respect to public bodies, the EC determinations are fixed and cannot now be expanded. With respect to private bodies and the meaning of "entrusts or directs," the EC would like to ignore the core meaning of "entrusts" and "directs" as provided in Article 1.1(a)(1)(iv), but its efforts to distinguish *US -- Export Restraints* from this case simply fail. The factual differences in this case and that case have little relevance to that panel's careful and reasoned articulation of the appropriate legal standard.

14. On a more general level, Korea believes there are fundamental problems in the way the EC has approached the context of this case, the issues creditors confront in a restructuring situation, and the reality that governments can take an interest in restructurings without engaging in entrustment or direction. The EC also continues to blur the distinction between financial contribution and benefit. By doing so, the EC improperly focuses on the effects of alleged entrustment or direction, inconsistent with *US-Export Restraints*.

15. Syndicated Loan. The EC first argues that it need not show any entrustment or direction, because there were some public bodies. But the mere fact that FSC granted a loan waiver in no way establishes that a public body has granted the loans. The EC has improperly blurred the distinction between granting a waiver of a regulatory requirement and providing a loan. It also ignored the decision by seven other banks to lend to Hynix as part of the syndicated loan. Since the EC so regularly invokes the "totality" of the evidence, this approach seems odd.

16. KEIC Insurance. The EC argues that it need not show entrustment or direction. But this argument assumes that the insurance and the loans being insured are one in the same. On the contrary, the KEIC provides the insurance, but the individual banks – not the government -- provide the short-term financing. If the EC intends to treat the KEIC insurance as a grant in the total value of the D/A credit line, as opposed to the methodology prescribed in Annex I(j) of the *SCM Agreement*, the EC must demonstrate that Hynix' creditors were entrusted or directed to provide the D/A financing.

17. KDB Programme. The EC argues that it need not show entrustment or direction. But like it did with the KEIC insurance, the EC is mischaracterizing the programme. The KDB alone did not absorb all of the bonds, holding only a small fraction of them. Yet, the EC takes the position that it may countervail the entire amount of bonds refinanced under the KDB as a grant provided by a public body. This position is illogical in light of the nature of the programme, including the burden sharing explicitly contemplated by the programme.

18. May 2001 Restructuring. The EC implies it need not show entrustment or direction. The fact that two lenders may have been public bodies, however, does not address the numerous other lenders that were not public bodies. For these private bodies, the EC must show entrustment or direction. But the EC instead brushes aside fairly decisive evidence of Hynix' creditors making rational decisions and protecting their decisions through the financing they formulated. In particular, nowhere does the EC mention the GDR when it addresses financial contribution and the May 2001 restructuring package.

19. October 2001 Restructuring. The EC implies it need not show entrustment or direction. The fact that two lenders may have been public bodies, however, does not address the fact that other banks were not public bodies. For these private bodies, the EC must show entrustment or direction. The EC stresses the degree of government ownership of the banks. Again, such evidence simply cannot establish entrustment of direction. The EC also cites to banks taking into account public policy considerations. This approach reflects a flawed understanding of the legal standard. There is nothing unusual about banks taking into account a wide range of factors when making a loan. The EC also alleges a "pattern of continuous involvement," but in doing so misstates the facts. Finally, the EC turns to an analysis of evidence for several specific banks. This discussion of "evidence," however,

never provides any credible basis to find entrustment or direction. It also ignores the key fact with respect to the October restructuring package – the banks had choices.

Benefit

20. With respect to benefit, as a legal matter, if the EC's findings on financial contribution are found inconsistent with the *SCM Agreement*, then the EC findings on benefit must also fail. Korea has also properly challenged both the finding and measurement of benefit under both Articles 1.1(b) and 14 of the *SCM Agreement*.

21. Looking at benchmarks, Article 14 applies very concrete terms focused on the "usual" or "prevailing" conduct in the market under investigation, or "comparable" conduct. With respect to the amount of benefit, Article 14(b) and (c), in particular, state that the amount of benefit conferred "shall be the difference" in the costs of the instruments compared. With respect to the provision of goods, Article 14(d) requires a comparison of the goods or services provided versus the adequate remuneration for such goods or services, which "shall be determined in relation to prevailing market conditions." The EC wants to escape these terms, claiming they are mere guidelines and nothing in Article 14 specifies a particular methodology measuring benefit. But the guidelines are still mandatory; they must still be considered and authorities may not use methodologies inconsistent with these guidelines.

22. In *US – Softwood Lumber*, the Appellate Body found that "the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is *very limited*." An authority may do so only when "it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods." Moreover, even if it establishes market distortion, an authority must still validate an alternative benchmark. The EC claims that the Appellate Body's holding in *US – Softwood Lumber* is distinguished by the fact that it only dealt with the language of Article 14(d), and must be restricted to Article 14(d) on that basis. But such a reading completely ignores the clear preference for primary benchmarks (i.e., those present in the market under investigation) found in the other paragraphs of Article 14.

23. The EC has tried to explain the dramatic changes between the provisional and definitive regulations, but this explanation just underscores the defects in the EC approach. The EC uses the "totality" of the facts to obscure the important distinction between "financial contribution" and "benefit" under the SCM Agreement. Even if one assumes there might have been some basis to reevaluate the determination of financial contribution, the EC has offered not explanation for why it changed its approach to benefit and market benchmarks.

24. The EC also challenges the relevance of considering the perspective of inside investors. The relevant treaty text focuses on the "usual investment practice." When the facts of a particular case show that inside investors took into account their existing stake in a company, then the authority cannot ignore this factual reality. The EC says that it rejects the inside-investor analysis. If this approach is the "usual investment practice" in a particular country – as it was in Korea during these debt restructurings – then it is legal error for the EC to reject this approach.

25. The EC seems to think that perfect "undistorted" commercial markets exist. The reality is that every market is distorted to some extent. Governments exist, and they take actions that influence the market. Nothing in the *SCM Agreement* requires a perfect "undistorted" commercial market to allow for market benchmarks. Moreover, the EC can point to no linkage between an alleged GOK commitment to Hynix and the asserted serious distortion in the Korean capital markets.

26. The EC argument on benefit is reduced to the proposition that Hynix could not raise capital without GOK pressure on lenders. But this EC argument focuses on Hynix' financial condition in

general, and ignores the inconsistent facts about Hynix successfully raising new funds. The EC also obscures the factual context of the Hynix restructuring. Providing new money to Hynix is one issue. But the October restructuring also involved debt-equity swaps and debt forgiveness. The EC seems to think that existing creditors could simply insist on full repayment. That approach ignores the reality of debt restructuring.

27. Finally, the EC would like to obscure the fact that in the presence of legitimate benchmarks, it chose to simplify the equation by effectively treating every financial transaction at issue as a grant. Thus, it offers its long discussion of risk capital and the prospect of not being repaid. However, nothing in the *SCM Agreement* permits a Member to recast a transaction out of hand.

Calculation Errors

28. The EC ignored timely Hynix comments regarding the obvious double counting of alleged benefit from the KDB programme bonds and the overstatement of the debt roll over as part of the October 2001 restructuring. The EC's failure to correct the errors plainly identified by Hynix is inconsistent with Articles 1.1(b) and 14. Another fundamental error in the EC's approach to both the KDB programme and the October 2001 restructuring programme was the treatment of interest-bearing instruments as grants. If the EC was committed to this flawed approach, it should have, at a minimum, deducted interest from any subsidy calculation to remain consistent, at some level, with Article 1.1(b) and 14.

Specificity

29. As a legal matter, to the extent that the EC's findings on financial contribution are found inconsistent with the SCM Agreement, then its findings on specificity must also fail. But even if financial contribution is presumed, the EC's specificity findings are inconsistent with Articles 1.2 and 2. With respect to the KDB Programme, the EC suggests that it considered all the factors outlined in Article 2, but this is not obvious in the lone paragraph cited from its *Provisional Regulation*. With respect to May and October, the EC argues that it does not consider that what happened to Hynix happened was according to the normal application of generally applicable bankruptcy laws. This is correct. What happened to Hynix was according to the normal application of a generally applicable bank "work-out" framework, as an alternative to traditional bankruptcy. But under the EC approach, one would find the application of traditional bankruptcy laws to be no less specific.

Articles 19.4, 10 and 32.1 of the SCM Agreement and Article VI:3 of GATT 1994

30. In choosing to use Hynix' unconsolidated sales, the EC confused the scope of the investigation (DRAMs) with the question of which product and entity benefited from the alleged subsidies. It is not because the EC investigated the DRAMs market that subsidies granted to Hynix can automatically be viewed as benefiting only Hynix as a parent entity and only with regard to DRAMs. By taking this approach, the CVD duties imposed by the EC exceed the limits imposed by Article 19.4 of the SCM Agreement and Article VI:3 of GATT 1994. Moreover, every violation of the specific provisions of the *SCM Agreement* identified above triggers a parallel violation of Articles 10 and 32.1, once the decision to impose duties was made.

ANNEX D-2

EXECUTIVE SUMMARY OF THE STATEMENT OF THE EUROPEAN COMMUNITIES

(9 December 2004)

Mr. Chairman, Members of the Panel,

I. INTRODUCTION

1. In the long run, we are all dead. Very drole. Very *true*. Except in the case of Hynix, apparently. And in one sense that's what this case is all about. If a government "thinks big enough" – that is, thinks "too big to fail" - almost anything is possible - with a little help from the taxpayer and a little flexing of state muscle, of course.

2. With deep enough pockets, you can fix the capital markets the way you want them to achieve your policy objective. A bit like a billionaire playing "double or quits" in a small town casino – which is precisely why there are limits on the maximum bet - as Nick Leeson eventually discovered. It is also precisely one of the reasons why we have the *SCM Agreement* - to regulate the power of government in markets. At least on this point the parties agree.

3. So let's take "government" out of the equation. Given what is known and uncontested about Hynix's *dire* financial state, the *dire* state of the DRAMs market, and the *dire* state of the Korean financial markets, what do *you* think would have happened to Hynix if the GOK had done **nothing** at all? No repeated "requests" from the Economic Ministers of Korea. No Syndicated Loan from KDB, KEB and KFB. No extension of the prudential rules by the FSC. No guarantee from KEIC. No guarantee to KEIC. No KDB Debenture Programme. No implied guarantee that Hynix was too big to fail. No new capital or roll-overs or debt write-offs from public bodies. No massive GOK payments to Citibank/SSB, which was busy "marketing" the GDR issue to unsuspecting and, it turns out, deluded international investors. No CRPA. No high level GOK attendance at creditors' meetings. No menacing statements of intent by the Korean Deputy Prime Minister. No massive GOK capital injections to banks. No Prime Minister's Decree No 408. No Memoranda of Understanding. No interference with the appointment of mangers of banks. No threats to banks. No threats to credit rating agencies … After-all, this is the kind of Stalinist view of history that Korea would have us swallow, isn't it?

4. Assuming these facts, and placing yourself at the end of 2000/beginning of 2001, if you were *forced* to stake your sole family property/life savings/professional reputation *one way or another*, what would you bet? Would you bet that Hynix would have succumbed to the normal judicial bankruptcy procedures? Or would you bet that, miraculously, Hynix would somehow claw its way back from the abyss unaided? Consider the mountain of evidence (the EC has listed some 867 facts) pointing towards bankruptcy before making your choice. I know what I would bet my house on (if forced to bet). There isn't really any choice, is there? We all know that Hynix would have gone bust, just as Daewoo had before it. In fact, Hynix was "technically" bust already. We all know that the GOK, which itself created the situation by forcing through the LG Semicon merger, saved Hynix's skin – essentially unscathed. The GOK achieved its policy objectives.

5. Fortunately, none of us have to make that choice. The investigating authority made it for us. The only thing that we need to discuss in these proceedings is whether or not that choice was so outlandish, so unreasonable, so lacking in objectivity, that it leaves no choice for this Panel – indeed *any* Panel considering the matter – but to intervene and rule against the investigating authority. I must confess that, based on the totality of the facts and evidence available, I simply find it impossible to understand how anyone could reasonably come to that conclusion. I simply cannot accept that the *effect* of everything that the GOK did amounted to **nothing**, when it so obviously rescued Hynix from oblivion. In fact I do not think that, given the evidence, *any* even-handed and objective investigating authority could reasonably do anything other than find that the GOK subsidised Hynix.

II. SUBSIDY

6. With regard to subsidy, Korea again resorts in its rebuttal to repeatedly making various assertions about the alleged "intent" of the investigating authority. Apart from being nonsensical and inappropriate, such assertions will not advance Korea's case. Nor should this Panel be fooled by Korea's attempts to mask the weakness of its case with such rhetoric.

7. The investigating authorities in this case had no "zeal to protect the EC producers".[1] They simply conducted an objective and even-handed investigation. On the contrary, the record facts and evidence overwhelming support the view that the GOK had a policy that Hynix was too big fail, which policy it pursued zealously. Thus, the trade distorting measure in this case is the GOK subsidy, imposed in pursuit of government policy. The countervailing duty is only the remedy, imposed after an objective examination of the totality of the facts and evidence by an objective and even-handed investigating authority.

A. FACTS AVAILABLE

8. This Panel must give due weight to the fact that there was systematic non-cooperation by the Korean respondents in this case, leaving the investigating authority with no alternative but to make its determinations on the basis of the totality of the facts and evidence available, as provided in Article 12.7 of the *SCM Agreement*, where appropriate drawing inferences, which inferences could be adverse.

9. Korea asserts repeatedly and at length that the European Communities' position is that Article 12.7 of the *SCM Agreement* is "punitive" – an assertion of which Korea attempts to make a great deal.[2] However, that assertion is simply false. The European Communities has never made any such statement. Korea is now driven to make the inevitable admission that Article 12.7 of the *SCM Agreement* allows an investigating authority to draw inferences[3], if information is missing. Logically, that must mean that the inference might be adverse (it is impossible to be certain, because the relevant information is missing). This is confirmed by Annex II of the *Anti-Dumping Agreeement*, which both parties have agreed is relevant context. Korea's attempts to draw a distinction with Annex V of the *SCM Agreement* are therefore misplaced.[4] The provisions of Annex V of the *SCM Agreement* do no more than confirm the approach adopted by the investigating authority in this case.

10. The European Communities is absolutely confident that, having read the questions repeatedly posed by the European Communities[5], having read the answers given by Korea, and having reviewed the documents, the Panel will agree that the investigating authority was entitled in this case to rely on

[1] Korea rebuttal, para 118.
[2] See, for example, Korea rebuttal, para 130 and following.
[3] For example, Korea rebuttal, para 139.
[4] Korea rebuttal, paras 131 to 133.
[5] EC replies to questions 58 and 9.

the "facts available". Words are just an abstract representation of reality - so there is always some residual degree of "ambiguity"[6] in all language. That does not entitle respondents in a subsidy investigation to be endlessly disingenuous. The questions posed were sufficiently precise – indeed right on the point, and the answers given fell woefully far short of the requirements of good faith co-operation required by Article 12.7 of the *SCM Agreement*.

11. Korea asserts that the European Communities would leave the application of "facts available" entirely at the discretion of the investigating Member, without any consideration of "the underlying facts".[7] Both of these assertions are simply false. The European Communities has never made any such assertions. On the contrary, the European Communities has explained in detail the kind of criteria an investigating authority will apply when weighing the totality of facts and evidence before it.[8] It has also explained how it took into consideration all the facts and evidence before it in this case.[9] It is Korea, not the European Communities, that seeks to ignore the mountain of facts and evidence about, for example, Hynix's dire financial state, the dire state of the DRAMs market and the dire state of the Korean financial markets.

12. Korea asserts that any inferences drawn on the basis of Article 12.7 of the *SCM Agreement* can only be drawn in relation to a specific "transaction".[10] That assertion is manifestly erroneous as a matter of law. There is no such obligation in Article 12.7 of the *SCM Agreement* or otherwise. The inferences to be drawn will simply depend in each case on the facts and evidence in question.[11] Korea's concept of "transaction" is arbitrary and self-serving, and there is no basis in the *SCM Agreement* for imposing it on investigating authorities[12].

13. Contrary to what Korea asserts, the European Communities took a very balanced and moderate approach to the issue of facts available in this case, affording the Korean respondents repeated and full opportunity to respond. The conduct of the investigating authority was exemplary. The Korean respondents have only themselves to blame for the inevitable consequences of their own actions.

14. Korea continues to assert that the documents relating to the Economic Ministers' meetings, which expressly refer, *inter alia*, to direct subsidies to Hynix (such as the KEIC guarantee), were not germane to the investigation and were not requested by the investigating authority.[13] This entirely counter-factual assertion requires no further comment. It is a fact that the investigating authority repeatedly and expressly requested all information about the attendance of GOK officials at meetings; and it is a fact that the information regarding the 10 March 2001 creditors' meeting was withheld. Furthermore, the record evidence indicates that there were at least two high level officials present. No proper written record of what was said or done by such officials has ever been produced by any of the Korean respondents. A full copy of the Arthur Andersen Report was repeatedly requested but not provided, including at verification. An investigating authority cannot be expected to verify what has not been provided and what is not on the record. Citibank refused to permit a proper verification at its premises. Interested parties are not required to make "overtures"[14] to an investigating authority. They are required to co-operate. They are required to answer questions completely and truthfully. They are required to provide necessary information. They are required not to impede the investigation by refusing access to premises or documents. Absent co-operation, investigating authorities have no

[6] Korea rebuttal, para 123.
[7] Korea rebuttal, para 123.
[8] EC replies to questions 63 and 64.
[9] EC replies to questions 7 and 9.
[10] Korea rebuttal, para 124.
[11] EC reply to question 63.
[12] EC rebuttal, paras 10 to 31.
[13] Korea rebuttal, para 135 and following.
[14] Korea rebuttal, para 151.

choice but to rely on the totality of the facts and evidence available. Korea's continuing efforts to prosper in these Panel proceedings as a result of denying evidence to the investigating authority and eventually this Panel should be rejected.

B. SUBSIDY

15. A great deal has been said about "entrustment or direction". However, this Panel must not forget that where there are direct subsidies, including guarantees from the government, as in this case, it is unnecessary for this Panel to discuss the concept of "entrustment or direction". When a government gives a guarantee, express or implied, *that* is a financial contribution. The benefit or amount of subsidy is the missing market premium that should have been paid by Hynix for the guarantee. At maximum risk, including when the company would otherwise be bankrupt, the premium is at least equivalent to the capital amount covered by the guarantee. Another way of saying essentially the same thing is that the banks, in providing capital to a bankrupt company, had been entrusted or directed to do so. The benefit and the amount of the subsidy are the same, whichever way you look at it. We must not forget that the record categorically proves that all through 2001 the GOK publicly gave Hynix an express guarantee because it was considered too big to fail.

16. Korea continues to assert that this case is only about "entrustment or direction". That assertion is false, and a factual and legal error of monumental proportions. As the European Communities has set out in detail in the regulations and in its submissions to this Panel, this case did not just involve issues of "entrustment or direction", it also involved direct subsidy. Korea having chosen to ignore this fact, and having failed to present any serious evidence or argument in this respect, Korea's submissions on the question of subsidy must inevitably fail.

17. The parties agree that the concepts of subsidy and benefit are legally distinct, but that the same facts and evidence may be relevant to both. However, despite paying lip-service to this general statement, it is Korea, not the European Communities, that continues to run the two legal concepts together. Thus, Korea repeatedly asserts that an investigating authority can only determine that a loan or a guarantee is a "financial contribution" within the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement* if it confers a benefit.[15] That assertion is manifestly false as a matter of law. According to the express terms of the *SCM Agreement*, once it is established that a government (including a public body) has granted a loan or guarantee, that is a financial contribution. Whether or not there is a benefit involved is an entirely different matter.

18. Korea asserts that entrustment or direction by a public body does not fall within Article 1 of the *SCM Agreement.*[16] That assertion is false. Article 1.1 of the *SCM Agreement* defines "government" for the purposes of the entire agreement as "a government **or** any public body within the territory of a Member". Consequently, the word "government" in Article 1.1(a)(1)(iv) of the *SCM Agreement* necessarily encompasses a public body.

19. Korea again asserts that what this Panel must do is re-cast the *SCM Agreement*, testing the measure at issue against only the "core" meaning of the words "entrusts or directs"[17], by which it means the meaning that best serves Korea's interest in this case. That assertion is false. This Panel must, where appropriate, assess the measure at issue against the words "entrusts or directs", giving those words their full ordinary meaning. Last week a stranger stopped me in the street and asked me for directions to the Grand Place, in Brussels. I gave him directions. Did I command him? Certainly not. Did he follow my directions? I haven't a clue. Did I direct him? I most certainly did.

[15] See, for example, Korea rebuttal, para 190 and following; and para 194 and following.
[16] Korea rebuttal, para 168.
[17] Korea rebuttal, para 157.

20. If this Panel does find it necessary to consider the concept of "entrustment or direction", what this Panel must do is relate the facts of this case to that legal rule. This Panel must not substitute the words in the *SCM Agreement* with other words. The *SCM Agreement* does not refer to an "affirmative act". It does not use the words "delegation" or "command". To read these words into the *SCM Agreement* when, manifestly, they are not there, would represent an *ex-post* rationalisation of the negotiation process, and would be a legal error. It is not this Panel's task to legislate.

21. Korea's reliance on the words "a private body" to assert that a bank-by- bank analysis is the only possibility under the *SCM Agreement*[18], and that an investigating authority cannot rely on the totality of the facts and evidence available, may be dismissed with ease. It is self-evident that a government could give a direction addressed to 2 banks, or for that matter any number of banks, in one document, mentioning each by name. Such an event would certainly be capable of being caught by Article 1 of the *SCM Agreement*. The situation is no different if the banks, rather than being identified by name, are identified in some other way, such as all banks that are creditors of the bankrupt company in need of funds. Korea's defence boils down to the assertion that it is impossible for a bank (or a group of banks) to be entrusted or directed to "save" a company. Why, if a government has repeatedly and publicly stated that a company is too big to fail? Such an assertion is simply wrong.

22. Korea asserts that it "goes through the EC evidence, piece by piece".[19] That assertion is false, insofar as Korea ignores the great body of facts and evidence set out in the regulations[20], electing only to discuss certain isolated facts and evidence. What *is* true is that Korea proceeds "piece by piece" – an admission that its entire case simply fails to address what the investigating authority did in this case – that is, consider the totality of facts and evidence before it.

23. This Panel must consider the totality of facts and evidence relied on by the investigating authority. It must also take into account the profound *economic* links, as well as the legal links, between the different elements of the subsidy. Particularly, the inside investor way of looking at the world that the Korean respondents have so often invoked. The GOK put Hynix and the banks on a steep and slippery slide - and then held their hands all the way down.

III. INJURY

24. With regard to injury, Korea's suggestion that the position of the European Communities in this case does not reflect the language of the *SCM Agreement* is entirely contrived from an incomplete, inaccurate and out-of-context quotation.[21] The Panel should not be fooled by such desperate rhetoric. The European Communities has discussed in detail in its submissions all aspects of all the provisions in respect of which Korea has made claims in this case.

25. With regard to LG Semicon, as with most of this case, the simple facts settle the matter in the European Communities' favour. On March 2001 HEI was merely *renamed* Hynix (the underlying legal person remained unchanged). HEI first *acquired* LGS on 7 July 1999. HEI was then re-named HME and *then* merged with HEI effective 13 October 1999.[22] So, tracing backwards in time, the European Communities followed Hynix/HEI (the same legal person, with a different name). It was not required to follow the LGS production facility prior to its acquisition by Hynix/HEI, and there were very good reasons for not doing so.[23] The table and chart (which is not even before the Panel) in

[18] Korea rebuttal, para 167.
[19] Korea rebuttal, para 120.
[20] See, for example, EC replies to questions 7 and 9.
[21] Korea rebuttal, para 14.
[22] EC FWS, para 67.
[23] EC rebuttal, paras 32 to 47.

the complaint to which Korea alludes[24] make no reference to LGS – the investigating authority based itself on the data provided by the Korean respondents, as verified. Finally, Korea's assertion[25] that appropriate data were submitted in a timely manner is false – the true facts are set out in the European Communities first written submission.[26] In any event, a 155 per cent increase in the volume of subsidised imports is, on any view, and certainly in the circumstances of this case, significant.

26. Mr. Chairman, Members of the Panel, if, as Bismark would have it, government or politics is the art of the *possible*, then perhaps law is the art of the *reasonable*, and the *SCM Agreement*, in a sense, a meeting place. The GOK's policy that Hynix was too big to fail, no matter the cost, was made *possible* by throwing vast amounts of taxpayer money at the problem, and by putting the banks into a position where they were entrusted or directed to do the same. The investigating authority came to the only conclusion *reasonably* supported by the totality of the facts and evidence available. There is no lawful reason for this Panel to disturb its findings.

Thank you for your attention.

[24] Korea rebuttal, para 31.
[25] Korea rebuttal, para 33.
[26] EC FWS, paras 74 to 85.

ANNEX E

REQUEST FOR THE ESTABLISHMENT OF A PANEL

ANNEX E-1

REQUEST FOR THE ESTABLISHMENT
OF A PANEL

WORLD TRADE ORGANIZATION

WT/DS299/2
21 November 2003

(03-6240)

Original: English

EUROPEAN COMMUNITIES – COUNTERVAILING MEASURES ON DYNAMIC RANDOM ACCESS MEMORY CHIPS FROM KOREA

Request for the Establishment of a Panel by Korea

The following communication, dated 19 November 2003, from the Delegation of Korea to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 24 April 2003, the European Communities ("EC") imposed provisional countervailing duties on imports of Dynamic Random Access Memories ("DRAMS") from Korea, as announced in Commission Regulation No. 708/2003 published in the *Official Journal* (OJ L 102, 24.4.2003). The European Commission submitted to the Council of the European Union ("European Council") its proposal for imposition of definitive countervailing duties on 24 July 2003, which was adopted by the European Council on 11 August 2003. On 22 August 2003, the EC imposed definitive countervailing duties on imports of DRAMS originating in Korea, as announced in Council Regulation (EC) No 1480/2003 Imposing A Definitive Countervailing Duty and Collecting Definitely The Provisional Duty Imposed On Imports Of Certain Electronic Microcircuits Known As DRAMS (Dynamic Random Access Memories) Originating In the Republic of Korea (OJ L 212, 22.8.2003).

The Government of Korea considers the provisional and definitive countervailing duties imposed by the EC against DRAMS from Korea to be inconsistent with the EC's obligations under the relevant provisions of the GATT 1994, and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). As a result, the Government of Korea requested consultations with the EC regarding these measures pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article 30 of the SCM Agreement, and Article XXII of the GATT 1994. Consultations were requested on 25 July 2003 concerning the provisional countervailing measures of the EC[1], and on 25 August 2003 concerning the definitive countervailing

[1] WT/DS299/1, G/SCM/D56/1, G/L/641.

measures of the EC[2], respectively. The consultations were held with the EC in Geneva on 21 August 2003 and 8 October 2003. These consultations failed to resolve the dispute between the parties.

As a result of the failure to resolve the dispute, the Government of Korea requests the establishment of a panel pursuant to Article 6 of the DSU, Article XXIII of the GATT 1994, and Article 30 of the SCM Agreement regarding the EC's provisional and definitive countervailing measures against DRAMS from Korea. The Government of Korea requests that the panel make findings that the EC has acted inconsistently with its obligations under Articles 1, 2, 10, 12, 14, 15, 19, 22 and 32 of the SCM Agreement, as well as Article VI:3 of the GATT 1994. Specifically, the Government of Korea makes claims under the following:

1. Article 1.1 of the SCM Agreement because, *inter alia*, the EC failed to demonstrate the existence of a financial contribution by the Government of Korea with respect to each distinct financial transaction at issue in its anti-subsidy investigation;

2. Article 1.1 of the SCM Agreement because, *inter alia*, the EC failed to demonstrate that every private financial institution involved in its anti-subsidy investigation was under the direction or entrustment of the Government of Korea;

3. Articles 1.1 and 14 of the SCM Agreement because, *inter alia*, the EC failed to demonstrate that a benefit was conferred on the respondent Hynix Semiconductor, Inc., given available market benchmarks among Hynix's creditors;

4. Articles 1.1 and 14 of the SCM Agreement because, *inter alia*, the credit assessments, assumptions about loan forgiveness and default, and other related financial analyses applied by the EC to determine the nature of alleged benefit to Hynix Semiconductor, Inc. are inconsistent with its obligations under the SCM Agreement;

5. Articles 1 and 2 of the SCM Agreement because, *inter alia*, the EC imposed an improper burden of proof on respondents, namely the Government of Korea and Hynix Semiconductor, Inc., reached conclusions without adequate evidentiary basis, and thereby failed to base its decisions on affirmative, objective, and verifiable evidence;

6. Article 2 of the SCM Agreement because, *inter alia*, the EC did not establish that all of the alleged subsidies were specific to the respondent Hynix Semiconductor, Inc., on the basis of positive evidence;

7. Article 12.7 of the SCM Agreement because, *inter alia*, the EC improperly applied "facts available" instead of considering the information on the record;

8. Articles 14 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 because, *inter alia*, the EC failed to calculate properly the amount of the alleged subsidies in terms of benefit to the respondent Hynix Semiconductor, Inc., by inappropriately treating certain financing and debt restructuring as a grant, by failing to measure the benefit conferred by the provision of export insurance within the parameters of Annex I(j) of the SCM Agreement, and by using an inappropriate sales denominator for determining per unit subsidization. These failures resulted in countervailing duties levied in excess of that permitted under the SCM Agreement and the GATT 1994;

[2] WT/DS299/1/Rev.1/Add.1, G/SCM/D56/1/Rev.1/Add.1, G/L/641/Rev.1/Add.1.

9. Article 15.1 of the SCM Agreement, because, *inter alia* the EC's injury and causation determinations were not based on positive evidence and an objective assessment of the effects of allegedly subsidized imports, and were not based on the most recent evidence available to the EC;

10. Article 15.2 of the SCM Agreement, because, *inter alia*, the EC's injury and causation determinations improperly assessed the significance of the volume and price effects of subject imports, failed to take due account of relevant facts when examining the existence of a significant increase in subject imports, and also failed to properly determine the undercutting margin of subject imports;

11. Article 15.4 of the SCM Agreement, because, *inter alia*, the EC improperly assessed the overall condition of the domestic industry, did not base its injury determination on "all relevant economic factors and indices," and constructed artificial profit margins;

12. Article 15.5 of the SCM Agreement, because, *inter alia*, the EC failed to demonstrate the requisite causal link between subject imports and injury, improperly assessed the role of other factors, and improperly attributed the effect of other factors to the allegedly subsidized imports;

13. Article 22.3 of the SCM Agreement because, *inter alia*, the EC failed to provide all relevant information on the matters of fact and law and reasons for its determinations; and

14. Articles 10 and 32.1 of the SCM Agreement because, *inter alia*, the definitive countervailing duties imposed by the EC against DRAMS originating in Korea were not in accordance with the relevant provisions of the SCM Agreement or the relevant provisions of the GATT 1994.

The Government of Korea requests that the panel be established with the standard terms of reference set forth in Article 7 of the DSU.

The Government of Korea further requests that this request be placed on the agenda for the meeting of the Dispute Settlement Body on 1 December 2003.

ANNEX F

TIMELINE OF EVENTS; SUMMARY OF THE PANEL'S CONCLUSIONS ON SUBSIDIES AND INJURY

ANNEX F-1

TIMELINE OF FINANCIAL PROGRAMMES AND SALIENT EVENTS IN 2000 AND 2001

1997		Korean financial crisis
June 1998		Corporate Restructuring Agreement (**CRA**)
7 July 1999		HEI acquired LGS
13 October 1999		LGS renamed HME and merged with HEI
September 2000		Citibank/SSB retained by Hynix as financial advisor for restructuring
28 November 2000		Economic Ministers' Meeting
		Letter from Minister of Finance & Economy to Presidents of KEIC and KEB
30 November 2000		Letter from Minister of Commerce, Industry & Energy to CEO KEIC
December 2000		Citibank/SSB held meetings with banks to outline plans
		Syndicated Loan of KRW 800 billion
		KEB filed request for extended credit limit
		FSC approves extended credit limit
		KDB Debenture Programme announced
January 2001		BBB- (Korean rating agencies)
		Speculative B (Standard & Poor's)
		KEIC Guarantee for Export Credits USD 600 million increase
4 January 2001		**KDB Debenture Programme** (Hynix admitted)
9 January 2001		Economic Ministers' Meeting
10 January 2001		Letter from Minister of Finance & Economy to Presidents of KEIC and KEB
22 January 2001		Speculative BB+ (Korean rating agencies)
March 2001		B- (Standard & Poor's)
10 March 2001		Meeting with officials from creditor banks, FSC, Hynix and Gov't of Korea
29 March 2001		HEI officially renamed 'Hynix'
April 2001		Creditors Financial Institution Council (**CFIC**) established
10 April 2001		Economic Ministers' Meeting
23 April 2001		Meeting of creditor banks
May 2001		**May Restructuring Programme**
7 May 2001		CFIC recognition that Hynix in default of Syndicated Loan
June 2001		Purchase of CBs by banks
June-August 2001		Hynix stock price collapsed, DRAMs prices continued to fall
August 2001		CCC+ (Standard & Poor's)
		Hynix stopped participating in KDB Debenture Programme
3 August 2001		SSB revised its earlier more optimistic projections
September 2001		CRA replaced by Corporate Restructuring Promotion Act (**CRPA**)
9 September 2001		CC (Standard & Poor's)
October 2001		'Selective Default' (SD) (Standard & Poor's)
31 October 2001		**October Restructuring Programme**
25 July 2002		EC investigation initiated
23 April 2003		Preliminary Determination (Regulation 708/2003)
11 August 2003		Final Determination (Regulation 1480/2003)

ANNEX F-2

SUMMARY TABLE REGARDING KOREA'S CLAIMS AND ARGUMENTS CONCERNING THE EC SUBSIDY DETERMINATIONS*

	EC'S FINAL DETERMINATION OF				
	Financial Contribution by:		**Benefit Existence**	**Calculation of Benefit**	**Specificity**
PROGRAMME	**Public Body**	**Entrusting or Directing a Private Body**			
SYNDICATED LOAN			*Inconsistent*	*Inconsistent*	*Not reviewed*
KDB	*Consistent*				
KEB		*Consistent*			
KFB	*Not countervailed*				
KEIC GUARANTEE	*Consistent*		*Consistent*	*Inconsistent*	*Not reviewed*
KDB DEBENTURE PROGRAMME	*Consistent*		*Consistent*	*Inconsistent*	*Consistent*
MAY 2001 RESTRUCTURING PROGRAMME	*Inconsistent*		*Consistent***	*Inconsistent*	*Consistent*
OCT 2001 RESTRUCTURING PROGRAMME			*Consistent*	*Inconsistent*	*Consistent*
Six Option 1 Banks:					
Woori Bank		*Consistent*			
Chohung Bank		*Consistent*			
KEB		*Consistent*			
NACF		*Consistent*			
Citibank		*Consistent*			
KDB	*Consistent*				

* Our determination of "consistency" has to be read in light of the claims and arguments as made before us and as explained in our findings.
** This is assuming *arguendo* that the EC's determination of the existence of a financial contribution by the government was consistent with Article 1.1(a) of the *SCM Agreement*.

ANNEX F-3

PANEL'S CONCLUSIONS AS TO THE WTO CONSISTENCY OF THE EC DETERMINATION ON INJURY

Article 15.2: Volume Effects	
Treatment of unsubsidized imports	*Consistent*
Treatment of LGS imports	*Consistent*
Significance of the import increase	*Consistent*
Article 15.2: Price Effects	
Market dynamics	*Consistent*
Hynix not a market leader	*Consistent*
Alternative methodologies for evaluating price undercutting	*Consistent*
Injury POI period	*Consistent*
Article 15.4: Injury	
Evaluation of factors: • Wages • Other factors	 *Inconsistent* *Consistent*
Infineon statements	*Consistent*
Overall assessment of domestic industry	*Consistent*
Article 15.5: Causation	
Causal relationship between subsidized imports and injury to the domestic industry	*Consistent*
Non-attribution requirement: • Economic downturn • Inventory burn • Overcapacity • Other (non-subsidized) imports	 *Inconsistent* *Consistent* *Inconsistent* *Inconsistent*