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JAPAN – COUNTERVAILING DUTIES ON DYNAMIC RANDOM ACCESS MEMORIES FROM KOREA

Report of the Panel

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US – Norwegian Salmon CVD	GATT Panel Report, *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153, adopted 28 April 1994, BISD 41S/576

LIST OF ANNEXES

I. INTRODUCTION

1.1 On 14 March 2006, the Government of Korea ("Korea") requested consultations with the Government of Japan ("Japan") pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*DSU*"), Article 30 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"), and Article XXII of the *General Agreement on Tariffs and Trade 1994* (the "*GATT 1994*") regarding the imposition of countervailing duties by Japan on imports of certain Dynamic Random Access Memories ("DRAMS") from Korea, and certain aspects of the investigation and determination that led to the imposition of such duties.[1]

1.2 On 27 March 2006, the United States requested to be joined in these consultations pursuant to Article 4.11 of the *DSU*.[2] The European Communities made a similar request on 29 March 2006.[3] Japan accepted these requests.[4] Consultations were held on 25 April 2006, but failed to settle the dispute.

1.3 On 18 May 2006, Korea requested the Dispute Settlement Body (the "DSB") to establish a panel pursuant to Article 6 of the *DSU*, Article XXIII of the *GATT 1994*, and Article 30 of the *SCM Agreement*.[5]

1.4 At its meeting on 19 June 2006, the DSB established a Panel pursuant to the request by Korea in document WT/DS336/5, in accordance with Article 6 of the *DSU*. 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:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Korea in document WT/DS336/5, the matter referred to the DSB by Korea 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."

1.5 On 24 August 2006, the parties agreed to compose the Panel as follows:

Chairman: Mr. Daniel Moulis

Members: Dr. Faizullah Khilji
Mr. José Luis Santiago Pérez Gabilondo

1.6 China, the European Communities and the United States reserved their third party rights.

1.7 The Panel met with the parties on 5-6 December 2006 and on 23-24 January 2007. It met with the third parties on 6 December 2006.

1.8 The Panel issued its Interim Report to the parties on 16 April 2007.

II. FACTUAL ASPECTS

2.1 This dispute arises from Japan's imposition of definitive countervailing duties on imports of DRAMS from Korea manufactured by Hynix Semiconductor, Inc. ("Hynix"). Japan's investigating authorities (the "JIA") initiated a countervailing investigation on 4 August 2004, after an application for the imposition of countervailing duties on DRAMS from Korea was submitted by Elpida Memory,

[1] Document WT/DS336/1.
[2] Document WT/DS336/2.
[3] Document WT/DS336/3.
[4] Document WT/DS336/4.
[5] Document WT/DS336/5, attached at Annex A-1.

Inc. and Micron Japan, Ltd. The JIA sent questionnaires to a number of parties, including Hynix, the Government of Korea, and a number of Korean financial institutions. The period of investigation for the subsidy determination covered 1 January to 31 December 2003, while the injury period of investigation covered 1 April 2001 to 31 March 2004.

2.2 On 21 October 2005, the JIA informed the Government of Korea and the parties involved in the proceeding of the essential facts under consideration, pursuant to Article 12.8 of the *SCM Agreement*. In the essential facts, the JIA found that certain debt restructuring programmes entered into by Hynix and its creditors in October 2001 and December 2002 were countervailable subsidies, and calculated a countervailing duty rate of 27.2 per cent on imports of DRAMS from Korea manufactured by Hynix. The JIA provided the Government of Korea and parties involved in the proceeding with the opportunity to submit comments and rebuttals on the essential facts as well as surrebuttals to the rebuttal comments.

2.3 In its final determination dated 20 January 2006[6] the JIA upheld the findings set out in the essential facts. Annexed to the JIA's final determination were the essential facts ("Annex 1 (Essential Facts)")[7], and the JIA's summary of and response to the comments and rebuttals and surrebuttals that had been submitted ("Annex 3 (Rebuttals and Surrebuttals)")[8]. These Annexes constitute an integral part of the final determination.

2.4 Japan gave public notice of the final determination and announced the imposition of countervailing duties in Cabinet Order No. 13[9] and Ministry of Finance Notice No. 35,[10] published respectively in Issue No. 4264 and Special Issue No. 17 of the Official Gazette, both dated 27 January 2006.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. KOREA

3.1 Korea requests[11] the Panel to find that:

(a) Japan improperly calculated the benefit to the alleged recipient of the alleged financial contributions from the October 2001 and December 2002 restructurings using methods that were not specified in Japan's national legislation or implementing regulations. Its findings of subsidy benefits during the 2003 investigation period from those restructurings were, therefore, inconsistent with its obligations under Article 14 of the *SCM Agreement*.

(b) Japan improperly based its findings concerning "financial contributions" and "benefits" from the October 2001 and December 2002 restructurings on the absence of evidence, and failed to identify positive evidence supporting its conclusions. Its findings of subsidies from the October 2001 and December 2002 restructurings were, therefore, inconsistent with its obligations under Articles 1 and 2 of the *SCM Agreement*. More generally, its failure to conduct an impartial, fair and reasonable investigation of these issues was inconsistent with its obligations under Articles 10, 11, 12, and 22 of the *SCM Agreement* and Article X:3 of the *GATT 1994*.

[6] Exhibit JPN-01.
[7] Exhibit JPN-02; Exhibit KOR-03.
[8] Exhibit JPN-04; Exhibit KOR-04.
[9] Exhibit KOR-01; Exhibit JPN-07.
[10] Exhibit KOR-02; Exhibit JPN-07.
[11] *See* Korea's First Written Submission, para. 283.

(c) Japan improperly treated entities that had no interest in the investigation as "interested parties," improperly applied "facts available" instead of considering the information on the record, and improperly made adverse inferences against the interests of Hynix due to allegedly inadequate cooperation by other interested parties or by other entities that were not under Hynix's control and that were not obligated to participate in the investigation. Its findings of subsidies from the October 2001 and December 2002 restructurings were therefore inconsistent with its obligations under Article 12 of the *SCM Agreement*. More generally, its failure to conduct an impartial, fair and reasonable investigation as a result of its mistaken identification of "interested parties" was inconsistent with its obligations under Articles 10, 11, 12, and 22 of the *SCM Agreement* and Article X:3 of the *GATT 1994*.

(d) Japan improperly found that the October 2001 and December 2002 restructuring transactions constituted "direct transfers of funds"; it did not make the comparison of outcomes required to determine that "revenue otherwise due" had been "foregone or not collected" in those transactions; and it improperly found government "entrustment or direction" in those transactions based on incorrect assumptions about the behaviour of rational creditors, and without evidence that the government caused the creditors to act in an unreasonable manner. Its findings that Hynix received "financial contributions" from the October 2001 and December 2002 restructurings were, therefore, inconsistent with its obligations under Article 1.1(a) of the *SCM Agreement*.

(e) Japan improperly failed to determine whether the alleged government direction of the October 2001 and December 2002 restructurings made Hynix "better off"; it improperly analyzed exchanges of claims in those restructurings that had equal economic value without considering both sides of the exchange; and it improperly ignored market benchmarks demonstrating that the alleged "financial contributions" in those restructurings did not make Hynix "better off" than the market-based alternatives. Its findings that the alleged "financial contributions" in the October 2001 and December 2002 restructurings provided a "benefit" to Hynix were, therefore, inconsistent with its obligations under Article 1.1(b) and Article 14 of the *SCM Agreement*. Japan's imposition of countervailing duties based on this flawed analysis was inconsistent with the requirements of 19.4 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*.

(f) Japan improperly failed to consider whether the October 2001 and December 2002 restructurings were made using the same procedures and on the same terms that were generally available to other companies in a similar condition. Its findings that the alleged subsidies were specific to Hynix were, therefore, inconsistent with the requirements of Article 2 of the *SCM Agreement*.

(g) Japan imposed and maintained countervailing duties without determining whether a benefit continued to exist following changes in the ownership of Hynix as a result of the October 2001 and December 2002 restructurings. Its imposition of countervailing duties was, therefore, inconsistent with the requirements of Articles 10, 14, 19, and 21 of the *SCM Agreement*.

(h) Japan improperly levied a countervailing duty on imports entering Japan in 2006 to offset subsidies allegedly received in October 2001, even though, by Japan's own calculations, the alleged subsidies from the October 2001 restructuring had ceased to provide any benefit after 2005. Its imposition of countervailing duties was, therefore, inconsistent with the requirements of Articles 19 and 21 of the *SCM Agreement*.

(i) Japan's determination improperly failed to demonstrate that the allegedly subsidized imports were, through the effect of the alleged subsidies, causing injury within the meaning of the *SCM Agreement*. Its determination of injury and its imposition of countervailing duties were, therefore, inconsistent with the requirements of Articles 15.5 and 19.1 of the *SCM Agreement*.

(j) As a consequence of these errors, Japan's imposition of countervailing duties on imports of DRAMS from Korea was not consistent with the requirements of Article 32.1 of the *SCM Agreement*, which provides that "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of *GATT 1994*, as interpreted by this Agreement."

3.2 Korea also requests that the Panel suggest that the countervailing duty measures imposed by Japan on imports of DRAMS from Korea be immediately rescinded, and that any countervailing duties collected by Japan on such imports be refunded forthwith.

B. JAPAN

3.3 Japan requests the Panel to reject Korea's claims in their entirety.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions and oral statements to the Panel, and in their answers to questions. The parties' arguments as presented in their written submissions and oral statements are summarized in this section.

A. FIRST WRITTEN SUBMISSION OF KOREA

4.2 The following summarizes Korea's arguments in its first written submission.

1. Japan's Imposition of Countervailing Duties Was Based on a Fundamentally Flawed Assumption

4.3 The imposition of countervailing duties by the Japanese Investigating Authority ("JIA") on DRAMs from Korea produced by Hynix was based on its conclusion that restructuring transactions entered into by Hynix's creditors in October 2001 and December 2002 constituted subsidies within the meaning of the "*SCM Agreement*". That determination, in turn, hinged almost entirely on the JIA's assumption that no rational creditor would have entered into the restructuring transactions with a company in Hynix's financial condition.

4.4 The JIA's assumption, however, reflects a flawed understanding of how creditors of a firm that is facing "financial distress" actually operate.[12] For creditors of an insolvent firm, the fundamental issue is whether the firm's "going-concern" value is greater than its "liquidation value." If the going-concern value is higher, rational creditors will take the steps needed to capture that higher value. When the realization of the higher going-concern value requires new investments, the *existing*

[12] Korea notes that its use of the term "financial distress" in its submissions is meant to imply only that Hynix did not have the funds on hand to meet its current payment obligations. It does not mean that Hynix had engaged in any unsound financial practices, or that Hynix was not a good long-term investment.

It should be noted that Japan's determination in its investigation was based on its assumption that Hynix was "bankrupt" during much, if not all, of the relevant period. Korea's submission seeks to identify the logical errors occasioned by Japan's failure to consider the implications of that assumption. None of the arguments presented in Korea's submissions should be construed as an admission that Hynix actually was "bankrupt," or that Korea agrees with Japan's assessment of Hynix's financial condition.

creditors of an insolvent firm will be able to maximize their returns by providing new funds to the insolvent company – despite its apparently bad financial condition.

4.5 By contrast, the arithmetic of the cost-benefit analysis will discourage *new* investors from making new loans or investments to an insolvent firm, because any returns generated by the new investments will have to be shared with the existing creditors to satisfy their unsatisfied pre-existing claims, even if those existing creditors do not participate in the new investment. The advantage that existing claimants have when analyzing new investments is not, however, immutable – because the arithmetic of the cost-benefit analysis for new investments can be altered by changing the status of pre-existing claims (for example, by "subordinating" the pre-existing claims). In practice, this subordination of existing claims is often accomplished by converting pre-existing debt into equity. Pre-existing creditors may benefit from the conversion of pre-existing debt into shares, if that conversion allows the company to attract investments and generate returns that would not otherwise be available.

4.6 Despite these economic realities, creditors may, in practice, find it difficult to reach an agreement on debt-restructuring due to cooperation problems. Bankruptcy procedures have evolved both to enforce the legal rights of creditors, and to provide a mechanism for working out the conflicting interests of the creditors, managers and shareholders of the firm. In practice, a variety of approaches have been adopted. In the end, however, the outcome under the different approaches is essentially the same. As one World bank expert explained: "[T]he differences among bankruptcy laws matter mainly for negotiating tactics, not outcomes."[13]

4.7 The October 2001 and December 2002 restructurings of Hynix's debts were undertaken pursuant to a generally available Korean law modeled on the "London Approach" to debt restructuring. The restructurings were consistent with economic principles and with normal financial practices in Korea and other markets. And, they were extraordinarily successful for the creditors: The creditors that converted debt into equity in October 2001 earned a return of over 150 per cent, while the creditors that converted debt into equity in December 2002 earned a return of over 290 per cent.

4.8 In these circumstances, the JIA's assumption that no rational creditor would have entered into the October 2001 and December 2002 restructurings is fundamentally flawed. As discussed more fully below, the findings that the JIA made based on that assumption are not consistent with the requirements of the *SCM Agreement*.

2. Japan's Investigation Was Procedurally Flawed and Legally Invalid

(a) Failure to Promulgate Benefit Calculation Methods

4.9 Article 14 of the *SCM Agreement* requires that "any method" used to calculate the benefit of a subsidy must be provided for in the relevant legislation or implementing regulations. Japan's legislation and implementing regulations fail to meet this requirement. Japan's countervailing duty statute does not even mention the word "benefit." Its "Guidelines" – which implement Japan's countervailing duty statute – provide little guidance beyond what is already contained in Article 14 of the *SCM Agreement*. None of the detailed calculation formulas and methodologies described in Japan's determination in this case appear anywhere in the Japanese "Guidelines." In fact, although Japan's determination in this case sets forth specific rules for calculating the "benefit" of extensions of loan maturities and debt-equity swaps, the Guidelines do not even mention such transactions.

[13] *See* Ramachandran, *Bankruptcy's Role in Enterprise Restructuring: A Hammer to Turn a Screw?*, PUBLIC POLICY FOR THE PRIVATE SECTOR, The World Bank FPD Note No. 38 (March 1995).

4.10 If "any method" used to calculate the benefit of subsidies must be set forth in a Member's legislation or implementing regulations, then methods that are not set forth in legislation or implementing regulations *cannot be used.* Consequently, the JIA's determination that the alleged subsidies conferred a benefit on Hynix during the investigation period cannot be sustained. Indeed, unless and until Japan complies with the minimal procedural requirements of Article 14, it is not permitted to impose countervailing duties on imports from any WTO Members.

(b) Improper Burden of Proof

4.11 From the earliest days of the GATT, it has been recognized that an investigating authority may not *assume* that the dumping or subsidies exist, and then require the foreign respondents to refute that assumption. Instead, the investigating authorities must obtain positive evidence demonstrating the existence of each element required for the imposition of antidumping or countervailing duties.[14]

4.12 The JIA's analysis in this case failed to follow those principles. Its determination was based on the assumption that no rational creditor motivated by commercial considerations would have entered into the restructuring transactions. The JIA claimed (incorrectly in Korea's view) that the contrary evidence presented by the Korean government, Hynix and its creditors (including direct testimony) should be disregarded. But, the rejection of the evidence contradicting its assumptions is not proof that the assumptions were correct. Because the JIA failed to adduce *positive* evidence demonstrating the existence of a subsidy, its determination was not consistent with the provisions of Articles 2.4 and 15.1 of the *SCM Agreement* that require positive evidence of the existence of subsidies and injury, or with the more general requirement (under Articles 10, 11, 12, and 22 of the *SCM Agreement* and Article X:3 of the GATT 1994) that an investigating authority conduct an impartial, reasonable and fair investigation.

(c) Improper Identification of "Interested Parties"

4.13 The JIA issued questionnaires in Japanese to 16 financial institutions that had been creditors of Hynix during the relevant period. When some of those institutions failed to provide information, the JIA resorted to "facts available." According to the JIA, this use of "facts available" in this manner was authorized by Article 12.7 of the *SCM Agreement*.

4.14 By its terms, Article 12.7 applies only when necessary information is not provided by "interested parties." And, in order for an entity to be an "interested party," it must have an "interest" in the outcome of the proceeding.[15] If an entity does not have an interest in the outcome, Article 12.7 does not permit the use of "facts available" for information the entity is unable or unwilling to provide.

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[14] *See, e.g., Swedish Anti-Dumping Duties*, L/328, 23 February 1955, 3S/81, para. 15.

[15] For example, all of the entities that are specifically identified as "interested parties" by the SCM Agreement – *i.e.,* exporters, importers, foreign producers, domestic producers, and their associations – are directly affected by the outcome of investigations, and therefore have a clear "interest" in the conduct of the proceedings. Furthermore, Article 12.4 of the SCM Agreement presupposes that "interested parties" must have a "case" to present to the investigating authorities. Article 12.8 requires that investigating authorities provide "interested parties" with an adequate opportunity to "defend their interests." These provisions would make no sense if the term "interested parties" were defined to include entities that had no "interests" in the proceeding, and thus no "case" to present.

The SCM Agreement's provisions concerning the collection of information and the use of "facts available" mandate a similar interpretation. Articles 12.1 and 12.7 of the SCM Agreement permit investigating authorities to request information from interested parties, and provide consequences if the "interested parties" do not respond. Such provisions would be patently unfair – and would violate any notion of procedural due process – if the parties who *do* have an interest in the outcome of the case could have their interests prejudiced by the non-responsiveness of entities that have no interest in the outcome.

4.15 The JIA asserted that it was "obvious" and "normal" to consider the financial institutions to be "interested parties." However, the JIA never explained why it believed those entities were "interested" in the proceeding. Thus, it failed to establish a factual foundation for concluding that any of the financial institutions to which it sent questionnaires was, in fact, an "interested party."

4.16 As the Appellate Body has recognized, it is improper to punish exporters that cooperate fully in an investigation for the non-responsiveness of others that are beyond their control.[16] But that is exactly what the JIA did in this case: It imposed countervailing duties on Hynix's exports because other entities that were not under Hynix's control did not provide requested information, even though Hynix itself cooperated fully with all of the JIA's requests. That result is not consistent with the definition of "interested party" in Article 12 of the *SCM Agreement*, or with Japan's overall obligation to conduct an impartial, fair and reasonable investigation under Articles 10, 11, 12, and 22 of the *SCM Agreement* and Article X:3 of the GATT 1994.

3. Japan's Findings of Subsidies to Hynix Were Inconsistent with the Requirements of the SCM Agreement

(a) Improper Finding that Hynix Received Financial Contributions

(i) Improper Classification of Transactions that Did Not Involve Any Transfer of Funds as "Direct Transfers of Funds"

4.17 As a matter of elementary logic, a "direct transfer of funds" under sub-paragraph (i) of Article 1.1(a)(1) requires, at a minimum, that there be a *transfer* of *funds*. In this regard, the ordinary meaning of the term "transfer" requires a "conveyance from one person to another of property."[17] The term "funds" refers to "money."[18] Thus, in order for there to be a "transfer" of "funds," money must change hands – from the government (or government-directed private body) to the subsidy recipient.

4.18 In its determination, the JIA held that the term "direct transfers of funds" in sub-paragraph (i) encompassed all of the elements of the restructurings, including *inter alia*: (1) "extensions of the maturities" of existing loans, (2) "reductions of the interest rates on existing loans," (3) "conversion of interest-bearing debts to long-term loans," and (4) "debt-equity swaps." This conclusion is, however, plainly incorrect. There is no conveyance of money when a lender agrees to extend the maturities of existing loans, or to reduce the interest rates on existing loans, or to convert existing interest payment obligations into loan principal, or to write-off loans entirely, or to convert debts into equity. In those transactions, a creditor holding existing claims against the borrower agrees to modify the nature of those claims – or to exchange one set of claims for another – *without* providing any money to the borrower. Consequently, there is no *transfer* of *funds*, and sub-paragraph (i) of Article 1.1(a)(1) does not apply. As a result, the JIA's finding that the restructurings provided "financial contributions" because all of their elements were "direct transfers of funds" cannot be sustained.

(ii) Lack of Factual Findings for a Determination that Revenue Otherwise Due Had Been Foregone

4.19 Although modifications to loan terms and debt-equity swaps are not "direct transfers of funds" within the meaning of sub-paragraph (i) of Article 1.1(a)(1), they might, in appropriate circumstances, be considered "foregone government revenue" within the meaning of sub-paragraph (ii) of that provision. In this regard, the Appellate Body has explained that the analysis under sub-paragraph (ii) necessarily requires a "*comparison* between the revenues due under the

[16] *See United States – Anti-Dumping Measures On Certain Hot-Rolled Steel Products From Japan*, WT/DS184/AB/R, 24 July 2001, paras. 102-104.

[17] *See, e.g.*, SHORTER OXFORD ENGLISH DICTIONARY (5th ed. 2002) at 3325.

[18] *Id.* at 1049.

contested measure and revenues that would be due in some other situation."[19] But, the JIA never purported to make such a comparison in this case – and it never made the factual findings that would be needed for such a comparison. Thus, the JIA's finding of financial contributions from the various elements of the restructuring – such as the extension of the maturities of the loans, modifications to interest rates, write-off of debts, and swaps of debt for equity – cannot be sustained.

4.20 Even if Japan were permitted to offer *post hoc* rationalizations to explain how the various transactions constituted "foregone government revenue," the outcome would be the same. For example, extensions of loan maturities (or roll-ups of interest into principal) do not represent foregone revenue when interest is charged on the amounts to be paid for the extended loan period. Furthermore, exchanges of debt for equity do not represent foregone revenue, when the debt would otherwise have been discharged in bankruptcy proceedings, and did not have a greater value than the equity for which it was exchanged. In these circumstances, the various modifications to the terms of Hynix's outstanding debts did not represent any "foregoing" of revenues by Hynix's creditors, and thus were not financial contributions within the meaning of sub-paragraph (ii) of Article 1.1(a) of the *SCM Agreement*.

(iii) Improper Finding of "Entrustment or Direction" of Hynix's Private Creditors

4.21 The Appellate Body has observed that sub-paragraph (iv) of Article 1.1(a) is a kind of "anti-circumvention" provision, which prevents governments from evading the disciplines of the *SCM Agreement* by taking action through private bodies that would constitute subsidies if performed directly by the government.[20] A finding of "entrustment or direction" is permitted, therefore, only where a government uses a private body as a "proxy." The Appellate Body has also clarified that the evidence relied upon by an investigating authority in making that determination must demonstrate that entrustment or direction has occurred with respect to each private body in a given financial contribution.[21]

4.22 The JIA's finding of "entrustment or direction" was based, in the end, on the following findings:

(1) The Korean government had expressed an intention to "keep Hynix alive."

(2) The actions by Hynix's creditors were irrational, because

  (a) No rational creditor would have entered into the restructuring transactions, in view of Hynix's poor, and deteriorating financial condition; and

  (b) The evidence submitted by the individual creditors (or the "facts available" adopted by the JIA where the creditors were non-responsive) did not establish that the creditors had conducted a sufficient analysis of the transactions before entering into them.

In reality, however, each of these "findings" was demonstrably wrong. Taken individually or as a whole, they fail to establish government entrustment or direction.

4.23 *First*, none of the stories cited by the JIA reported a government desire to save Hynix at the expense of its creditors. Instead, the stories relating to the restructurings consistently reported only that the government viewed the restructurings as matters to be left to the creditors. There is no

[19] *See United States – Tax Treatment for "Foreign Sales Corporations*," WT/DS108/AB/R, 24 February 2000, para. 90 (emphasis added).

[20] *See United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors from Korea*, WT/DS296/AB/R, 27 June 2005, para. 113.

[21] *See United States – Countervailing Duty Investigation on DRAMs from Korea*, WT/DS296/AB/R, 27 June 2005, para. 140.

indication whatsoever that the government attempted to intervene to force the creditors to enter into transactions that were not in their own interests.

4.24 There were a number of reports indicating that the Korean government was keeping an eye on the developments in Hynix's situation throughout all of the restructurings – and that the government at times expressed its desire to see the situation resolved expeditiously. However, this monitoring and expressed desire for expeditious resolution *by the creditors* is entirely consistent with the government's prudential role in preventing serious harm to the overall financial sector. By the same token, an intent to see the creditors resolve matters quickly is not the same as an intent to use the creditors as a "proxy" to save Hynix by pressuring them into entering into transactions that were not in their own interests.

4.25 *Second*, as discussed above, rational profit-maximizing creditors can have sound reasons to provide new loans, extend the maturities of existing loans, swap debt for equity, or forgive loans entirely, even when the borrower is insolvent. Furthermore, there is ample evidence that such transactions occur all the time – whether in the context of formal bankruptcy proceedings or in informal workouts. The evidence in this case demonstrated that Hynix's going-concern value far exceeded its liquidation value at all relevant times. Consequently, the restructuring transactions were economically rational for Hynix's creditors.

4.26 *Third*, the JIA itself admitted that finding of *subjective* irrationality in the banks decision-making processes was based on its conclusion that the banks' decisions were *objectively* irrational. Fortified by an assumption that the creditors' actions simply had to be irrational, the JIA looked for justifications to reject the evidence showing that the creditors had, in fact, undertaken a rational analysis and come to a rational decision. In following that approach, the JIA clearly did not conduct an unbiased examination of the evidence. But even with its biased rejection of the information presented by the creditors, the JIA still failed to establish its case. While the JIA might have rejected the creditors' descriptions of the analyses they performed, it did not present any positive evidence demonstrating that the creditors had actually failed to perform a rational analysis.

4.27 *Finally*, the JIA's determination that the restructuring transactions were commercially irrational is inconsistent with the fact there were a number of "private creditors" who were not found by the JIA to be "entrusted or directed" and who entered into the restructuring transactions at the same time and on the same terms as the allegedly government-directed banks. Consequently, the JIA's assumption that the creditors entered into the restructurings only because of "entrustment or direction" by the Korean government cannot be sustained.

(b) Improper Finding that Hynix Received a Benefit from the Alleged Financial Contributions

4.28 The Appellate Body has held that the determination of the existence of a benefit under Article 1.1(b) of the *SCM Agreement* requires a comparison: A benefit exists only where the "financial contribution" makes the *recipient* "better off" than it would otherwise have been.[22]

4.29 Under Article 1.1(a)(1) of the *SCM Agreement*, the "financial contribution" from "entrustment or direction" is the *government's action*, and not the funds transfers or foregone revenue provided by the private creditors in response. Because the *SCM Agreement* refers to "benefits" flowing from the "financial contribution," it follows that the benefit analysis must focus on the effects of *that* government action. Consequently, the issue in this case is not whether Hynix was made "better off" by the various restructuring transactions. Instead, the issue is whether the alleged government involvement resulted in better restructuring transactions for Hynix than it would have been able to negotiate in the absence of government involvement.

[22] *See, e.g., Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, 2 August 1999, para. 157.

4.30 The JIA made no findings on that issue. It made no findings as to what a non-government-directed restructuring might have looked like. As a result, it never made the comparison required by the Appellate Body – to determine whether the *government action* constituting the "financial contribution" made Hynix "better off."

4.31 Furthermore, even if the benefit analysis were focused on the transactions themselves, and not on the alleged government action, the result would be the same.[23] Article 14 of the *SCM Agreement* makes clear that transactions that are consistent with normal market behaviour do not confer a benefit on the recipient. As discussed above, there is ample evidence that real-world creditors enter into restructuring transactions with insolvent companies all the time. The restructuring of Hynix's debt was fully consistent with normal commercial practices – especially in light of the evidence demonstrating that Hynix's going-concern value far exceeded its liquidation value.

4.32 And, the evidence was not just limited to economic theory and textbook examples. Instead, the evidence demonstrated that creditors that the JIA conceded were not government-directed entered into the same transactions on the same terms as the allegedly government-directed creditors. That fact alone should have resulted in a finding that the restructurings were consistent with the relevant market benchmarks.

4.33 The JIA claimed that the actions of the non-government-directed creditors could not establish a market benchmark, due to distortions caused by subsidies allegedly provided to Hynix in the past. In other words, the JIA ignored the actual market transactions because it considered them inconsistent with the hypothetical transactions in a hypothetical market in which past transactions had not occurred. That analysis cannot be reconciled with the *SCM Agreement*'s instructions to use actual market transactions as the benchmark for finding benefits. Also, it effectively double-counts alleged subsidy benefits, by finding a benefit from alleged past subsidies both when the alleged subsidy was first received and again when it allegedly permitted the recipient to obtain subsequent market-equivalent financing that would not otherwise have been available.

4.34 In these circumstances, the JIA's failure to rely on actual market behaviour and the available market benchmarks to measure the benefit to Hynix cannot be sustained. Because the restructurings were consistent with normal commercial practices, and because non-government-directed private bodies entered into the same transactions at the same time and on the same terms, there was no benefit from the alleged government entrustment or direction.

(c) Improper Finding that the Alleged Subsidies Were Specific to Hynix

4.35 The JIA found that the restructuring transactions were all specific to Hynix, because they were all "rescue measures specific to a specific corporation." But, that conclusion has no basis in the evidence. Even if the JIA were correct in describing the restructurings as government-directed "rescue measures", there is no evidence that such measures were unique to Hynix.

4.36 The legal framework that governed Hynix's restructurings was the same as the rules that governed the restructuring of other Korean companies. The type of reports by financial experts that were relied upon in the Hynix restructurings were also relied upon in the restructurings of other Korean companies. There is no evidence that the terms of the Hynix restructuring transactions were any more favourable to Hynix than the terms of other restructurings involving similarly situated

[23] In this regard, it should be noted that the restructuring transactions in this case involved exchanges by the creditors of one set of claims for another – which the JIA valued inconsistently. In particular, in determining whether there was a benefit from the restructuring, the JIA assumed that Hynix did not have the ability to repay its outstanding debts and was facing "bankruptcy" – which necessarily meant that the creditors could not expect to be paid in full. But, in calculating the amount of the benefit from the restructuring, the JIA assumed that Hynix's debts would have been repaid in full in the absence of the restructuring. This inconsistent analysis cannot be sustained.

companies in Korea. In fact, the evidence presented to the JIA (including statements by Hynix's creditors) confirmed that Hynix was not treated any more favourably than any other Korean companies going through restructurings.

4.37 By focusing microscopically on Hynix, the JIA missed the broader picture. In the absence of evidence that the role of the government and the government-directed banks in the Hynix restructuring was any different from their role in the thousands of similar situations occurring in Korea at the same time, the JIA's determination that the alleged subsidies were specific to Hynix cannot be upheld.

4. Japan Improperly Imposed Countervailing Duties on Imports that Were Not Subsidized

(a) Failure to Consider the Impact of Changes in the Ownership of Hynix

4.38 The debt-equity swaps undertaken in the restructurings worked a fundamental change in the ownership of Hynix. Before those transactions, none of the creditor banks or financial institutions owned any shares in Hynix. Afterward, the creditor banks and financial institutions collectively owned an overwhelming majority of Hynix's shares. The restructurings also resulted in a fundamental change in Hynix's management – with a vice president of KEB (the lead creditor bank) taking over as Hynix's Chief Executive Officer in July 2002.

4.39 The Appellate Body has held that, when there is a change in the ownership of a company at fair market value, the investigating authorities *must* consider whether the subsidies received before the change in ownership continue to provide a benefit after the ownership change. It has also held that such a change in ownership creates a rebuttable presumption that the benefits of the subsidy have been extinguished. And, it has found that the failure of investigating authorities to comply with that obligation is inconsistent with Articles 10, 14, 19, and 21 of the *SCM Agreement*.[24]

4.40 In this case, the JIA failed to consider whether the subsidies allegedly provided to Hynix continued to provide benefits following the change in ownership wrought by the debt-equity swaps. Thus, in accordance with the Appellate Body past decisions, the JIA's determination was not consistent with Articles 10, 14, 19, and 21 of the *SCM Agreement*.

(b) Improper Imposition of Duties on Imports after the Benefit of the Alleged Subsidies Had Expired

4.41 According to the JIA's analysis, Hynix's facilities had an estimated useful life of five years. As a result, the alleged subsidies were allocated over a five-year period, including the year in which they were received. Thus, the subsidies allegedly received by Hynix in 2001 were *all* allocated to the five-year period from 2001 to 2005.

4.42 The JIA's final determination was published in January 2006. At the time the determination was published, the JIA knew that, under its calculations, the benefits from the October 2001 restructuring had already been assigned fully to previous years, and could not have any additional impact on 2006 or future years. Nevertheless, the JIA imposed a countervailing duty of 18.1 per cent in 2006 to offset the subsidies allegedly received in the October 2001 restructuring.

4.43 Article 19.4 of the *SCM Agreement* provides that the countervailing duty imposed may not exceed the amount of the subsidy found "to exist." In other words, it does not permit duties to be imposed based on past subsidies that no longer "exist." Article 21.1 of the *SCM Agreement* makes

[24] *See, e.g., United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, 9 December 2002, paras. 126-27, 144 and 161.

this requirement explicit, providing that: "A countervailing duty shall remain in force only *as long as* and to the extent necessary to counteract subsidization which is causing injury."

4.44 In this case, the JIA's calculations fully allocated the benefits of the October 2001 restructuring to the five years from 2001 to 2005. There were no benefits left from the October 2001 restructuring to be allocated to 2006. Consequently, the JIA's imposition of countervailing duties in 2006 based on the alleged benefit of the October 2001 restructuring was inconsistent with the requirements of Articles 19 and 21 and cannot be sustained.

5. Japan's Finding that the Subsidized Imports Were Causing Injury Was Inconsistent with the Requirements of the SCM Agreement

4.45 The "causation" requirement set forth in Article 15.5 requires a demonstration "that the subsidized imports are, *through the effects of subsidies*, causing injury…." This requirement is echoed in Article 19.1, which permits the imposition of countervailing duties *only* if "a Member makes a final determination ... that, *through the effects of the subsidy*, the subsidized imports are causing injury...." Under these provisions, it is not enough that the *imports* which happen to be subsidized are causing injury. Instead, it must also be demonstrated that the injury is occurring "through the effects of the subsidy."

4.46 In its determination, the JIA concluded that any harm caused by Hynix's exports was necessarily a result of the subsidy, because Hynix would not have been in operation, and thus would not have been able to export, in the absence of subsidies. The JIA's argument is, however, based on a fundamental legal error. Contrary to what the JIA appears to believe, "bankruptcy" is not a synonym for piecemeal liquidation. Instead, "bankruptcy" is a legal process, which affords a debtor protection from its creditors while the debtor's future is being determined.

4.47 The Korean bankruptcy laws do provide for liquidation of insolvent debtors in certain circumstances. But, as a general matter, "Korean bankruptcy law favours reorganization over liquidation."[25] Consequently, there is no reason to believe that, if Hynix had filed for "bankruptcy," it would have ceased operations. In all likelihood, the "bankruptcy" of Hynix would simply have resulted in corporate reorganization before the Korean courts. Thus, the JIA's finding that the injury had occurred "through the effects of the subsidy" – which was based exclusively on its assumption that Hynix would have ceased operations without the alleged subsidies – has no basis. And, since the JIA has failed to "demonstrate that the subsidized imports are, through the effects of subsidies, causing injury," its countervailing duty measures cannot be sustained.

6. Request for Ruling and Recommendation

4.48 In Korea's view, once the JIA's determination is brought into conformity with Japan's obligations under the GATT 1994 and the *SCM Agreement*, there can be no basis for the imposition of countervailing duties on imports of DRAMs from Korea. Korea therefore requests that the Panel suggest that the countervailing duty measures imposed by Japan on imports of DRAMs from Korea be immediately rescinded, and that any countervailing duties collected by Japan on such imports be refunded forthwith.

B. FIRST WRITTEN SUBMISSION OF JAPAN

4.49 The following summarizes Japan's arguments in its first written submission.

[25] *See, e.g.*, Yun, *A Primer on Korean Bankruptcy Law*, 18-5 AM. BANKRUPTCY INST. J. 18 (June 1999).

1. The Panel's Terms Of Reference

4.50 Korea's First Written Submission (FWS) raises a number of claims that either are outside of the Panel's terms of reference under Article 6.2 of the DSU or fail to present a *prima facie* case. Of the ten potential claims ultimately raised by Korea[26], six lack sufficient specificity to form a valid claim. Specifically: Claim 2 (cites Articles not cited in Korea's Panel Request and fails to specify specific obligations within the cited Articles), Claim 3 (cites Articles not cited in Korea's Panel Request and fails to specify specific obligations within the cited Articles), Claim 5 (fails to specify specific obligations within the cited Article), Claim 6 (fails to specify specific obligations within the cited Article), Claim 7 (fails to specify specific obligations within the cited Articles), and Claim 10 (fails to provide any argument in support of the allegation), which correspond to Items 3, 4, 5, 6, 7, 9, 12, 13, and 15 of Korea's Panel Request, are not presented with sufficient clarity and should be dismissed.

4.51 Furthermore, as pointed out in Japan's Request for a Preliminary Ruling, Items 9, 10, and 15 of Korea's Panel Request were not presented with sufficient clarity under Article 6.2 of the DSU to begin with. Japan respectfully requests that the Panel make a preliminary ruling to dismiss such defective claims.

2. Evidentiary and Procedural Issues

(a) Korea Failed to Meet Its Burden of Proof in This Dispute

4.52 Korea fails to meet its burden of proof as the complaining party to present a *prima facie* case, and simply alleges violations without adequate analysis or explanation.[27] However, as the Appellate Body has confirmed, Korea cannot rely on the Panel to make a case for the complaining party.[28]

(b) The Standard of Review of the Panel

4.53 Article 11 of the DSU establishes the standard of review for panels which is to conduct an "objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." The Appellate Body has repeatedly clarified that in a dispute involving a determination made by investigating authorities, a panel may not conduct a *de novo* review of the evidence assessed in the investigation or substitute its judgement for that of the competent authorities, and that the panel's "objective assessment" is to inquire whether the evidence and explanation relied on by the investigating authority reasonably supports its conclusions.[29] For example, where an investigating authority makes a finding relying on the totality of the evidence which includes circumstantial evidence, the panel must review the investigating authority's conclusion on the same basis.

4.54 However, Korea has asked the Panel to review the JIA's determination in a manner that is different from how the JIA conducted its analysis and to examine information and arguments that was not before the JIA in the investigation. Korea's request for a *de novo* review is inconsistent with Article 11 of the DSU, and should be rejected.

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[26] Claims numbered in accordance with the order presented in paragraph 283 of Korea's FWS.

[27] *See* Appellate Body Report, *EC – Hormones*, para. 104, Appellate Body Report, *US – Shirts and Blouses*, p. 14.

[28] Appellate Body Report, *US – Gambling*, paras. 140-41. *See* also Appellate Body Report, *EC-Hormones*, para. 104.

[29] *See* Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 182-88.

3. The JIA's Factual Findings on The Subsidization of Hynix

4.55 In addition to its findings on subsidization through public bodies, the JIA determined subsidization through private bodies under entrustment or direction by the Government of Korea based on the totality of the evidence on record. The record of the investigation demonstrates that the Government of Korea maintained a political intent to promote its semiconductor industry and also made the normalization of Hynix, which had been experiencing serious financial difficulties, one of its economic priorities. The Government of Korea repeatedly stated that Korea would take measures to normalize certain companies, such as Hynix. As such, Korea had strong concerns about the financial situation of Hynix. The Prime Minister's Decree No. 408 in 2000 allowed the Government of Korea to request cooperation or support of financial institutions and to exercise its rights as a shareholder in financial institutions. Certain banks recognized this situation and that the government's policies may influence their investment decisions in prospectuses submitted to the US SEC. The Government of Korea executed Memoranda of Understanding with various banks, gaining a degree of control over these banks. Furthermore, the Government of Korea held a significant share of the ownership of certain banks and was in a position to exert substantial or direct influence on such banks. The JIA found that from late 2000 through late 2002, the Government of Korea intervened in the banks' financial decision-making repeatedly.

4.56 The JIA found that from late 2000 through May 2001, the Government of Korea extended subsidies to Hynix in a number of programs provided by public bodies and through private bodies under the entrustment or direction of the Government of Korea. Despite these subsidies, the financial situation of Hynix, which had been unable to obtain financing from the market, continued to deteriorate, necessitating further financial assistance. The Government of Korea's actions with respect to the private financial institutions ranged from, *inter alia*, pressing the private bodies to agree to provide financial support at meetings of Council for Creditor Financial Institutions, to sending instructions to KEIC to maintain prior subsidized financing, and to pressuring investment trust companies to make financial contributions against their will. The JIA found that the Government of Korea extended subsidies in the May 2001 Program through public bodies and private bodies entrusted or directed by the Government of Korea. The Government of Korea later officially acknowledged that the May 2001 Program was an example of success of the Government of Korea's efforts. The JIA examined each of the banks' determinations to participate in the Program on a bank-specific basis and found that the decisions of four banks to participate in the May 2001 Program were based on a factor other than commercial factors. Consequently, the JIA found entrustment or direction by the Government of Korea over these four banks.

4.57 Hynix's financial condition continued to deteriorate after the May 2001 Program, and in October 2001, Hynix fell into a situation of "Selective Default" for its loan obligations. Hynix was unable to obtain financing from the commercial market. The Government of Korea's interest and involvement in Hynix's restructuring continued after May 2001. Through an examination of, inter alia, their internal credit examination records and reports on Hynix by external organizations, the JIA found that certain private banks' decisions to participate in the October 2001 Program were not based on commercial considerations. Furthermore, although the banks claimed to have relied on the Arthur Anderson Report when making their decisions, the Report was not issued until after the decisions were made. Thus, the JIA found that the decisions by four banks to participate in the October 2001 Program were based on a factor other than commercial factors. Consequently, the JIA found entrustment or direction by the Government of Korea over these four banks.

4.58 The October 2001 Program did not solve Hynix's financial problems, which continued through 2002, necessitating yet another bailout in December 2002. The JIA found, *inter alia*, that the Government of Korea kept contacting creditors, requesting their cooperation, monitoring them, and had intervened into the preparation of the report commissioned by the banks and Hynix summarizing the December 2002 Program, *i.e.*, the Deutsche Bank Report, which contained obvious discrepancies in its calculations. Hynix itself admitted that the Deutsche Bank Report contained errors effecting its

calculation of the going-concern value of Hynix. The JIA found that the decisions of four banks to participate in the December 2002 Program were based on a factor other than commercial factors. Consequently, the JIA found entrustment or direction by the Government of Korea over these four banks.

4. Korea's Claims of Errors

(a) The JIA Correctly Based the Final Determination on an Objective Assessment of the Evidence on the Record and Provided Reasoned and Adequate Explanations Based on Probative and Compelling Evidence

4.59 The JIA conducted a reasonable and objective examination of the extensive evidence on record and made its determination on the basis of the evidence in its totality. Evidence on the record that infers entrustment or direction includes the Government of Korea's official documents, the questionnaire responses of the interested parties, sworn statements by the financial institutions to the US SEC recognizing the Government of Korea's influence on their decisions, the investigative reports of Korea's National Assembly, and detailed public comments by top officials of the Government of Korea and bank representatives attesting their collaboration for Hynix, and various news reports. The JIA also reviewed credit ratings by third parties and financial institutions that participated in Hynix bailout programs; reports for Hynix bailout programs prepared by several external organizations including SSB, Arthur Andersen, and Deutsche Bank; and internal credit examination documents of individual banks to decide whether to participate in Hynix bailout programs, and provided a reasoned explanation of how such evidence demonstrated entrustment or direction to certain private banks as well as its overall determination. The JIA also examined arguments raised by interested parties concerning the JIA's determination, and gave explanations of the reasons why it chose to discount alternatives to reach its conclusions. Thus, the JIA's Final Determination was consistent with the requirements of the *SCM Agreement*.

4.60 Korea has failed to demonstrate any example of an alleged "reversal of the burden of proof" or a "finding not based on affirmative evidence" by the JIA. Korea's claims on these issues are based on an erroneous position that "smoking gun" evidence is required for finding entrustment or direction, a position already rejected in prior disputes, and should be rejected.

(b) Korea Misinterprets the Evidentiary Standard for an Investigation

4.61 As clarified by the Appellate Body, the *SCM Agreement* does not specify a particular "standard for the evidence required to substantiate a finding of entrustment or direction under Article 1.1(a)(1)(iv)", and only requires that "the total evidence relied on by an agency must 'demonstrate' entrustment or direction" for the relevant financial institutions. This evidence need not be "irrefutable," nor "be of such quality or quantity so as to 'force' the [investigating authority] to arrive at a finding of entrustment or direction."[30] Under the *SCM Agreement*, individual pieces of circumstantial evidence may be assessed "in conjunction with other pieces of evidence" to establish a proposition. Consequently, investigating authorities may conduct a comprehensive analysis on "the totality of the evidence" and, when taking into account circumstantial evidence, consider "how the interaction of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation." [31]

4.62 The evidentiary standard Korea proposes has no basis in the *SCM Agreement*. If accepted, such argument would amount to an imposition of a qualitative standard higher than that contemplated by the *SCM Agreement*, and thus should be rejected.

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[30] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 138-39.
[31] *Ibid.*, para. 157.

(c) The JIA Properly Found Financial Contributions to Hynix

(i) The JIA's Finding of a Transfer of Funds Was Consistent with Article 1.1(a)(1)(i) of the SCM Agreement

4.63 The JIA correctly found that the extension of loan maturities, reductions of interest rates, transfers of the interest payments of loans into long-term loans, and debt-to-equity swaps were transfers of funds under Article 1.1(a)(1)(i) of the *SCM Agreement*. Korea appears to argue that only the types of transfers of funds explicitly listed in Article 1.1(a)(1)(i) qualify as transfers of funds for the purpose of the *SCM Agreement*. Korea, however, ignores the text of the provision, which indicates the listed transfers of funds are merely illustrative. This Article has been interpreted broadly in light of the use of an illustrative list. The panel in *Korea - Commercial Vessels* found that "interest rate reductions and deferrals," "interest/debt forgiveness," and "debt-for-equity swaps", which are the types of transfer of funds at issue in this case, are financial contributions under Article 1.1(a)(1)(i).[32] Korea also ignores the admonition of the Appellate Body that a narrow interpretation of the *SCM Agreement*'s financial contribution provisions "would permit the circumvention of subsidy disciplines" of the *SCM Agreement*.[33] Thus, Korea's claim on "transfer of funds" is based on an incorrect interpretation of Article 1.1(a)(1)(i) of the *SCM Agreement*.

(ii) The JIA Properly Found the Government of Korea's Entrustment or Direction to Private Creditors

4.64 The JIA examined the totality of the evidence on record and found that the Government of Korea entrusted or directed certain private bodies to provide financial contributions to Hynix within the meaning of Article 1.1(a)(1)(iv) of the *SCM Agreement*. The JIA's findings were consistent with the requirements of Article 1.1(a)(1)(iv) as clarified by the Appellate Body, which has explained that "entrust" and "direct" are broader than "delegation" and "command."[34]

4.65 The JIA based its finding of entrustment or direction on ample evidence, including evidence of the non-commercial nature of the investment decisions taken by the participating creditor banks[35], evidence demonstrating the Government of Korea's power to control the creditor banks that ultimately participated in the October 2001 Program and the December 2002 Program[36], and evidence that the Government of Korea had the clear intent to save Hynix and evidence that the Government of Korea exercised its authority over the banks, giving the banks the responsibility to restructure and rescue Hynix.[37] After assessing such evidence in its totality, The JIA reasonably concluded that the

[32] Panel Report, *Korea-Commercial Vessels*, para. 7.413.

[33] Appellate Body Report, *US – Softwood Lumber IV*, para. 64.

[34] *See* Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 110-11.

[35] Evidence of the non-commercial nature of the banks' investment decisions included the generally acknowledged disastrous financial state of Hynix at the time of the October 2001 and the December 2002 Programs, the non-existence of new investors or banks which were willing to extend credit to Hynix, the negative assessments made by a number of the existing creditor banks concerning further investments into Hynix, the lack of consultation of impartial and timely outside assessment and the lack of their own analysis on the going concern versus the liquidation value of Hynix, the inconsistent decisions of banks shown from their internal documents and the actual decisions made at the Creditors' Council, the inconsistent statements by the banks and other related evidence, the statements in the US SEC filings and in the banks' annual reports, and the evidence that a number of creditors cited reasons other than commercial reasons as reasons for participating in the Programs.

[36] Evidence of the Government of Korea's power to control the creditor banks included the Government of Korea's shareholding of creditor banks, Prime Minister's Decree, and the Memoranda of Understanding between the Government of Korea and the banks.

[37] Evidence of the Government of Korea's exercise of control over the banks included the statements by the Government of Korea, press reports, and acknowledgements of the banks themselves.

Government of Korea had entrusted or directed the financial institutions to provide the financial assistance to Hynix.

4.66 Such evidence demonstrated that the Government of Korea took actions that were much more than mere expressions of an intention to save Hynix, as the Government of Korea had exercised its authority over the banks to provide the financial measures to Hynix. The JIA examined each financial institution on a bank-specific and bailout program-specific basis, focusing on the banks' own assessments of Hynix and of the bailout programs. After reviewing such evidence, the JIA concluded that the banks based their decisions to participate in the programs on a factor other than commercial factors. The JIA did not, as Korea now argues, apply a particular economic theory in its analysis of the banks' decision-making process or operate under the broad supposition that "no rational creditor would have entered" the Hynix bailout programs. Indeed, the JIA did not require the banks to establish that they made a sufficient analysis according to some particular economic model. The JIA examined the banks' actual decision-making process to participate in the Hynix bailouts, following the process that these banks stated that they had followed. The JIA concluded that the evidence demonstrated that private creditors made non-commercial decisions. The JIA further determined that certain private banks participated in Hynix bailout programs because of entrustment or direction by the Government of Korea.

4.67 Korea mistakenly argues that entrustment or direction can only be found when the entrusted or directed party pursues a measure that is against its own interest. However, Korea's argument has no basis in the text of the *SCM Agreement*. It also ignores the Appellate Body's explanation that entrustment may be established when the government simply "giv[es] responsibility to someone for a task or an object."[38] Thus, an examination of entrustment or direction requires an objective determination of whether such responsibility was given, not whether the responsibility was against the interest of the entrusted or directed private body.

4.68 Korea's insistence that specific pieces of evidence should be examined in isolation from other evidence and must directly indicate a particular conclusion is inconsistent with the *SCM Agreement*, which does not limit the types of evidence on which an investigating authority may rely. As the Appellate Body explained, circumstantial evidence may be assessed in their totality; the interaction of certain pieces of evidence may justify certain inferences.[39] Thus, Korea's insistence that each of individual pieces of evidence must establish the fact of existence of the entrustment or direction is baseless, and it is an attempt to distort the analytical approach adopted by the JIA in the investigation. Korea is requesting a *de novo* review by the Panel. Its arguments, therefore, should be rejected.

4.69 Relying in part on an incorrect English translation of the JIA's determination, as well as information the Government of Korea, nor any other party, chose not to submit to the JIA during the investigation, Korea only presents general arguments on the JIA's bank-specific findings of entrustment or direction and ignores the JIA's actual analysis and explanations. A review of the JIA's actual bank-by-bank analysis would confirm that the JIA reasonably reached findings of entrustment or direction.

(d) The JIA Properly Found Benefit

4.70 Under Articles 1.1(b) and 14 of the *SCM Agreement* and as clarified by the Appellate Body[40], a benefit analysis is made from the perspective of the recipient, not the provider, and whether the recipient was better off than it would have been absent the financial contribution. Contrary to Korea's argument[41], there is no requirement in the *SCM Agreement* that an investigation authority must

[38] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 110.
[39] *See* Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 144-57.
[40] Appellate Body Report, *Canada – Aircraft*, paras. 154-55.
[41] FWS of Korea, paras. 229-30.

consider what a "non-government restructuring *might have looked like*" in determining the amount of benefit without referring to the evidence on the record. Korea bases its arguments on two erroneous premises: (i) that investigating authorities must compare financial contributions actually provided to the recipient with financing, which might have been available to the recipient, ignoring the fact that Hynix and bailout programs could not have existed without prior government subsidies and therefore no evidence on the record provides any basis to consider such situation, and (ii) that benefit can be measured by the difference of returns that the *creditors* could have received had there been no government entrustment or direction.

4.71 Korea ignores the Appellate Body's clarification[42] that a situation distorted by the very same subsidies in question may not serve as a benchmark for the calculation of benefit because the use of such a distorted situation would frustrate the object and purpose of the *SCM Agreement*. Accordingly, the JIA did not use subsidy-distorted transactions as a benchmark, because Hynix's financial conditions were realized only as a result of the Government of Korea 's prior and contemporaneous subsidies, for which the JIA determined benefit. Korea also ignores the fact that the financial institutions which were not found to have been entrusted or directed by the Government of Korea also entered into the bailout programs based on consideration of non-commercial factors and overlooks the facts including Hynix's disastrous and ever deteriorating financial state, its bad history of serving debt, the collapse of the stock price after the GDR issuance of June 2001, and the reality that no new investors were willing to put funds into Hynix.

4.72 Korea's remaining arguments on benefit either lack support in the evidence on the record of the investigation or are not based on the provisions of the *SCM Agreement*.

(e) The JIA Properly Found Specificity

4.73 The JIA correctly found specificity under Article 2 of the *SCM Agreement* because the bailouts in question were tailored subsidies for one particular company, Hynix. The panel in *EC-Countervailing Measures on DRAM Chips* affirmed a similar finding that the bailouts were specific to Hynix, explaining that these subsidies were "for Hynix," "to Hynix," and "of Hynix."[43] Korea has not attempted to distinguish the JIA's analysis on specificity in this case from that previously considered by the panel in *EC-Countervailing Measures on DRAM Chips*, nor has Korea identified the specific obligation within Article 2 of the *SCM Agreement* that the JIA allegedly violated. Japan is not required to search for the basis of Korea's claim among the numerous obligations under Article 2. The absence of any explanation specific obligations regarding specificity in Korea's FWS confirms that Korea has failed to present a *prima facie* case.

4.74 Korea argues that the legal framework in which the Hynix bailouts were conducted was available to other Korean enterprises prevents a finding of specificity. However, Korea ignores the fact that the JIA did not find that the general legal framework itself was a government subsidy and the JIA's analysis on specificity, which was similar to that affirmed by the panel report's explanation in *EC-Countervailing Measures on DRAM Chips*.[44]

4.75 Korea's argument is also based on non-record evidence concerning companies that were subject to the CRPA restructuring during the investigation. Therefore, Korea's claim concerning specificity should be dismissed.

[42] Appellate Body Report, *US – Softwood Lumber IV*, paras. 90-95.
[43] Panel Report, *EC-Countervailing Measures on DRAM Chips* para. 7.231.
[44] *See* Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.231.

(f) Korea's Change-in-Ownership Argument Is Irrelevant to the JIA's Subsidies Determination

4.76 Korea's change-in-ownership argument is presented without any analysis or explanation on how Articles 10, 14, 19, and 21 support its conclusion. Furthermore, Korea argues that the debt-to-equity swaps under the October 2001 and December 2002 Programs themselves extinguished the benefits received by Hynix, but does not present any argument or evidence regarding change in ownership subsequent to the findings of benefit under each Program. However, the issue of a change in ownership is whether a subsidy continues to provide a benefit after a transfer of all or substantially all the property of the recipient of the subsidy (i.e., through privatization) through an arm's length transaction at fair market value.[45] The debt-to-equity swaps under the October 2001 and December 2002 Programs do not meet any of these conditions. Korea is repeating an argument, which has already been rejected by the panel in *Korea – Commercial Vessels*, that a new subsidy, which is not a "fair market transaction", does not extinguish the benefit of a prior subsidy.[46] The provisions of Articles 1.1(a)(1)(i) and 14(a) of the *SCM Agreement* also clearly contradict an interpretation that an equity infusion that amounts to a subsidy simultaneously extinguishes the benefit therein. Thus, Korea has failed to meet its burden of proof to present a *prima facie* case, and its argument should be rejected.

(g) The JIA Properly Imposed a Countervailing Duty on Imports Found to Have Been Subsidized during the Period of Investigation

4.77 Korea's argument on the imposition period of countervailing duties does not follow from the *SCM Agreement* and should be rejected. The JIA found and calculated the amount of subsidies that existed at the time of the period of investigation, as required under Articles 19.1 and 19.4 of the *SCM Agreement*. There is no provision in the *SCM Agreement* that requires a determination of the imposition period in advance, or provides that an "allocation period" of a subsidy defines such imposition period. The provision of Article 19.2 - "all requirements for imposition *have been fulfilled*" - clarifies that the imposition of countervailing duties under Article 19 is a separate and distinct phase that occurs *after* the determination of subsidization. An investigating authority may impose a countervailing duty only after it determines that the countervailable subsidy "was bestowed"[47] during the period of investigation, from the information gathered with respect to a period of investigation. There is no additional obligation, as Korea insists, to determine that the subsidy "is being bestowed" at the time of the imposition of the duties.

4.78 Article VI:3 of GATT 1994, which authorizes the imposition of duties on a "subsidy *determined to have been granted*," further clarifies that an imposition of countervailing duties shall be based on a determination which necessarily precedes the imposition of the duty. Articles 10 and 11.1 of the *SCM Agreement* recognize that investigating authorities must conduct an investigation following multiple steps to determine the subsidization and injury; as a corollary of the time that is necessary to comply with these requirements, the imposition of countervailing duties concern the amount of subsidy found to exist in the period of investigation. The Appellate Body in *Mexico-Anti-Dumping Measures on Rice* also confirmed that the investigating authority's determination of the conditions for the imposition of a trade remedy may be based on a past period, *i.e.*, the period of investigation.[48] Korea's argument also ignores the guidance of the *EC-Tube or Pipe Fittings* panel report, which states, "[W]e are of the view that a finding that dumping exists during a recent past IP is a finding of 'present' dumping for the purposes of the Agreement."[49]

[45] *See* Appellate Body Report, *US - Countervailing Measures on Certain EC Products*, paras. 117, 127.
[46] *See* Panel Report, *Korea – Commercial Vessels*, para. 7.419.
[47] Panel Report, *US – Lead and Bismuth II*, para. 6.57.
[48] *See* Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 165-66.
[49] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.102.

4.79 Korea has not made any specific argument that a subsidy had been "removed" or "taken away" to qualify as a withdrawal in the meaning of Article 19.1 or any relevant argument concerning Article 21, which addresses a review that would be conducted after the imposition of countervailing duties.

4.80 Based on the above, Korea's claim concerning the imposition period of the countervailing duty should be rejected.

(h) Japan's Guidelines Sufficiently Set Forth the Benefit Calculation Methods

4.81 Contrary to Korea's argument, Japan complied with the requirements of Article 14 of the *SCM Agreement* to provide the calculation methods for subsidies in its Guidelines for Procedures Relating to *Countervailing and Anti-dumping Duties*, and notified WTO Members of the Guidelines prior to the investigation. The JIA explained the methods as applied in the present investigation and its application of the methods was consistent with the provisions of Articles 14.

4.82 Korea's argument overlooks "the considerable leeway" that WTO Members have "in adopting a reasonable methodology"[50] and the recognition of the Appellate Body that "more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient."[51] Korea's argument reflects a fundamental misunderstanding between the *methods* set forth in Japan's Guidelines in accordance with the chapeau of Article 14 of the *SCM Agreement* with the *application* of the methodologies in this particular case. Korea has not demonstrated that the Guidelines or the application of methodologies fall outside of the parameters of Articles 14(a) through (d) of the *SCM Agreement*. Thus, Korea has not presented a *prima facie* case that the JIA violated Article 14 of the *SCM Agreement.*

(i) The JIA's Designation of Certain Financial Institutions as "Interested Parties" Is Consistent with the *SCM Agreement*

4.83 Korea's argument on "interested parties" overlooks the last sentence of Article 12.9 of the *SCM Agreement* which allows WTO Members to include as interested parties domestic or foreign parties that are not included in the list of examples of interested parties. Contrary to Korea's argument, an interested party does not need to have an interest in the outcome of the proceedings, which is confirmed by Article 23, which recognizes the existence of "interested parties" that are not directly or individually affected by the administrative actions in the countervailing duty investigation. Thus, Korea's interpretation of "interested parties" would render inutile the provisions of Article 12.9 and Article 23 and is inconsistent with the *SCM Agreement*. Korea's argument also ignores the object of Article 1.1(a)(1)(iv), which is an "anti-circumvention" provision under which subsidies are provided through private bodies, as confirmed by the Appellate Body[52]. Korea's interpretation would remove the very parties that are at the centre of the investigation under Article 1.1(a)(1)(iv) from direct examination, ignoring the fundamental purpose of this provision.

4.84 Contrary to Korea's allegation, the JIA did not "punish" Hynix or apply "adverse facts available" by including certain financial institutions as interested parties. First, Korea has not offered any specifics of its allegations or indicated the specific provisions of the *SCM Agreement* that the JIA allegedly failed to follow. Korea has not provided any explanation of the relevancy of Appellate Body Report in *US – Hot-Rolled Steel*, the only case cited by Korea, to this dispute. As a factual matter, the JIA did not find any subsidy with respect to a financial institution which did not submit timely responses to the questionnaire or which refused to accept the on-the-spot investigation and did not include the financial contribution from these institutions in the countervailing duties imposed.

[50] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.213.
[51] Appellate Body Report, *US – Softwood Lumber IV*, para. 91.
[52] Appellate Body Report, *US - Countervailing Measures on Certain EC Products*, para. 113.

The JIA did not apply "adverse facts available" as Korea alleges. The JIA based its determinations on the information on the record that it was able to obtain, including the situations of the other parties that did provide information where interested parties did not provide information requested by the JIA. Korea has failed to present a *prima facie* case for its claim concerning the scope of interested parties, and Korea's arguments should be rejected.

(j) The JIA Correctly Considered the Effects of Subsidies to Injury

4.85 Korea has failed to present *any* specific arguments to support its assertion that the causation analysis of the JIA in this case, as explained in the Final Determination, failed to comply with Articles 15.5 and 19.1 of the *SCM Agreement*. Rather than present a *prima facie* case, Korea is seeking from the Panel an advisory opinion on a particular provision of the *SCM Agreement*. In the absence of specific claims and arguments, Korea's claim on this issue should be rejected.

4.86 Article 15.5 and footnote 47 of the *SCM Agreement* clearly equate the analysis of the effects of the subsidy to the analysis undertaken under Articles 15.2 and 15.4 relating to the effect and impact of the subsidized imports. Contrary to Korea's unsupported claim, the text of Article 15.5 of the *SCM Agreement* requires the establishment of a causal link between the subsidized imports and the injury to the domestic industry and does not impose an additional and separate inquiry into the role of the subsidies. Korea has presented no argument of any defect in the JIA's analysis under Articles 15.2 and 15.4. Its claim, therefore, fails.

4.87 In the investigation, the JIA found that the subsidies themselves allowed the importation of the subsidized imports, thereby causing injury to the domestic industry. Thus, the JIA correctly found that the injury was caused through the effects of subsidies. Korea's claims should be rejected.

(k) Korea's Claim under Article 32.1 of the *SCM Agreement* is without Merit

4.88 Any violation of Article 32.1 of the *SCM Agreement* is necessarily dependent on a violation of other provisions of the *SCM Agreement*. As Korea has not demonstrated any other inconsistencies under the *SCM Agreement*, there is no violation of Article 32.1

(l) Korea's Suggestion to the Panel to Specify a Particular Way to Implement a Recommendation (If Any) is Unnecessary

4.89 Japan is confident that the Panel will not need to issue any recommendation in this dispute. However, assuming *arguendo* that the Panel was to find an inconsistency with the covered agreements, there is no "exceptional" circumstance in the present case to necessitate a departure from the "general rule" to allow all possible modalities of implementation.

5. The Non-Record Evidence And Argument Presented By Korea Are Not Appropriately Before The Panel

(a) Korea's Submission of Non-Record Evidence Should Be Rejected

4.90 In its FWS, Korea submitted a new body of evidence (and analysis based on such evidence), which the JIA never saw and thus could not consider in the investigation. It would be inconsistent with the provisions of Article 11 of the DSU for the Panel to consider such evidence in dispute as it was not part of the record of the investigation under Article 12.2 of the *SCM Agreement*.

(b) Korea's Claims Based on Evidence and Arguments, Which the Government of Korea and Other Interested Parties Chose Not to Submit in the Investigation, Should Be Rejected

4.91 Under Article 12.2 of the *SCM Agreement*, the decision of "the investigating authorities can only be based on such information and argument as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation." When an interested Member or party chooses not to submit a specific argument or information to the investigating authority at the time of the investigation and as a result the investigating authority is precluded from considering such argument or information, the investigating authority cannot be faulted for not examining such argument or information.

4.92 Korea has submitted arguments and information regarding, *inter alia*, a "rational creditor" or a "rational profit-maximizing" person or action, who will not take into account previous investments or other sunk costs. During the investigation, however, The Government of Korea argued that the existing creditors would act differently from new investors. Korea also argues that the JIA should have considered evidence of other companies facing insolvency, which The Government of Korea and the other interested parties chose not to submit. In both cases, the JIA cannot be faulted for not considering such evidence or arguments which was not submitted in the investigation. Korea's arguments made based on such "non-record" arguments or evidence concerning the burden of proof, financial contributions, benefit, and specificity should also be rejected.

C. FIRST ORAL STATEMENTS OF KOREA

4.93 The following summarizes Korea's arguments in its first oral statements.

1. Opening Statement of Korea at the First Meeting of the Panel

- **Introduction**

4.94 It is beyond dispute that the government of Korea moved aggressively to address the fall-out from the Asian financial crisis. The focus of those efforts, however, was to relieve the financial crisis – to restore the banks to health. This process necessarily involved corporate restructuring – through debt write downs and operational restructuring – in order to eliminate an overhang of non-performing loans that otherwise might choke economic recovery.

4.95 In its investigation, the JIA focused on the small part of this process that concerned Hynix. It gathered dozens of newspaper articles, press releases and other statements describing the restructuring – all of which described a government playing its appropriate role in promoting corporate restructuring in order to ameliorate a banking crisis. Unfortunately, without understanding the overall context, the JIA wrongly concluded that the Government of Korea was taking extraordinary measures to force Hynix's creditors to save the company.

- **Errors In The JIA's Determination**

(a) Procedural Flaws In The JIA's Determination

(i) Use of Improper Benefit Calculation Methods

4.96 In paragraphs 90 to 106 of its Notice of Important Facts, the JIA listed the formulas and methodologies it intended to use to calculate the subsidy benefits in this case. These formulas and methodologies were not provided for in Japan's legislation and implementing regulations. Accordingly, the JIA's determination is not consistent with the first sentence of Article 14 of the *SCM Agreement*, which provides that "[A]ny 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."

4.97 Japan has claimed that Korea's arguments under this provision constitute an improper "as such" claim. But that is not correct. Korea is challenging the JIA's use *in this investigation* of methods that are not provided for in Japan's legislation and regulations. It is not arguing that the JIA could not, in other cases, calculate subsidy benefits using the rudimentary methods that are provided for in Japan's legislation and regulations.

4.98 Japan also claims that its legislation and regulations could not describe the detailed methods actually used in this case, because it needed to maintain flexibility. But the formulas and methodologies in question were actually copied from the published regulations of the US Department of Commerce. It is a little hard to take seriously Japan's claims that it could not have stated its methodologies in its regulations, when it copied those methodologies directly from the regulations of another country.

(ii) Improper Burden of Proof

4.99 The Appellate Body has held that the evidence cited by the investigating authority must "demonstrate" that the relevant criteria have been met. In addition, it has also specifically cautioned against acceptance of unsupported assumptions by an investigating authority.

4.100 In this case, the JIA did not establish the existence of the critical facts that would permit a finding of subsidies. Instead, it assumed that those facts existed, and then set about to explain why the Korean respondents' counter-arguments were insufficient. The result was to shift the burden of proof entirely onto the Korean respondents – treating them as "guilty" of subsidies unless they could prove their innocence.

4.101 Such an approach does not meet the requirement of "impartial" administration set forth in Article X:3 of the GATT. It makes a mockery of the provisions of Article 12, which provide that interested parties must have a fair opportunity to make their case, as well as the provisions of Article 22 requiring publication of the "reasons" for the determination. And, perhaps most importantly, it is inconsistent with the requirements of Articles 1 and 2 of the *SCM Agreement*, which allow a subsidy to be found only when certain defined criteria *exist* – and not whenever a respondent is unable to prove that those criteria do not exist.

(b) Determination of Financial Contribution

(i) Direct Transfer of Funds and Forgone Revenue

4.102 The JIA considered the extensions of loan maturities and debt-equity swaps encompassed in the restructuring transactions by the private entities to constitute transactions which, if performed by the government, would have fallen under the category of "direct transfer of funds." This classification is not consistent with the provisions of the *SCM Agreement*. The expression "transfer of funds" refers to situations in which financial resources, typically money, are transferred from one person to another. It does not refer to situations in which one person gives up a claim on another.

4.103 This does not mean that debt forgiveness, or maturity extensions, or debt-equity swaps can never be found to be "financial contributions" within the meaning of Article 1.1(a) of the *SCM Agreement*. Those transactions potentially fit within the concept of "government action foregoing or not collecting revenue" in sub-paragraph (ii) of Article 1.1(a) – at least if it is established that the government has actually foregone or not collected revenue by entering into those transactions. Consequently, if the JIA wanted to classify such transactions as "financial contributions," it needed to analyze them in terms of the requirements of sub-paragraph (ii). Because the JIA failed to undertake

such an analysis, its imposition of countervailing duties is not consistent with the requirements of the *SCM Agreement*.

(ii) Entrustment or Direction

4.104 Japan claims that Korea's argument regarding entrustment or direction is based on a mistranslation of paragraph 81 of the JIA's response to comments. However, the differences between the translation proposed by Japan and the translation prepared by Korea are slight, and do not affect the basic point.

4.105 On the issue of the Korean Government's alleged intent, Japan asserts that Korea has failed to look at the evidence in its totality. However, Japan has not identified any reports that Korea ignored, and it has not identified any evidence suggesting that the Government of Korea wanted the banks to adopt measures that were inconsistent with the banks' own best interests. An objective and unbiased review of the evidence in its totality would find that the Korean government's role was no more than the normal prudential supervision one would expect given the difficult situation of Korea's financial sector and the size of Hynix's debts.

4.106 Japan also contends that the JIA never actually found that no rational investor would have entered into the restructuring transactions on the same terms that Hynix's creditors accepted. However, that statement is belied by the JIA's determination. The JIA explicitly stated that, at the time of each of the restructuring transactions,

> Hynix could not obtain financing from commercial market, and that from the normal commercial point of view, there was no investor who was willing to invest in or provide loans to Hynix in the normal commercial market.

And, that conclusion was not the result of evidence at all. It was, instead, an inference, based solely on the JIA's finding that Hynix was in financial distress at the time of the restructurings.

4.107 As a logical matter, the mere fact that there was evidence that Hynix was in financial distress does not automatically justify the conclusion that *no* investor acting "from the normal commercial point of view" would have invested in or made loans to Hynix. Instead, two further assumptions are needed. *First*, one needs to make some assumption about the motivations of investors "in the normal commercial market" making decisions "from the normal commercial point of view." And, *second*, one needs to make some assumption about whether the particular investments in Hynix would or would not have been consistent with the accomplishment of the investor's objectives.

4.108 In Korea's first submission, it challenged the JIA's assumption that the restructuring transactions were not consistent with the objectives of investors "in the normal commercial market" making decisions "from the normal commercial point of view." In particular, Korea provided a lengthy explanation of the economic, legal and empirical analysis supporting the conclusion that a rational investor in the position of Hynix's creditors who was seeking to maximize expected profits would have entered into the restructuring transactions at issue in order to unlock the "going concern" value of the company, and avoid a liquidation that would have generated lower returns. The point is indisputable. Consequently, the JIA's conclusion that "from the normal commercial point of view, there was no investor who was willing to invest in or provide loans to Hynix in the normal commercial market" was based on a false assumption and is, therefore, fundamentally illogical.

4.109 In Korea's first submission, it also gave an example of Woori Bank's own internal analysis of the October 2001 and December 2002 restructurings which showed its participation in those transactions would allow Woori to avoid losses of hundreds of billion of Won. This example reveals that the JIA's assessment that the bank's internal analyses of the restructuring transactions were inadequate and did not follow normal commercial procedures was, biased.

4.110 None of the JIA's assumptions were based on evidence, and none was correct. Consequently, the JIA's finding of entrustment or direction was not consistent with the requirements of the *SCM Agreement*.

(c) Benefit

4.111 The guidelines set forth in Article 14 of the *SCM Agreement* do not directly address debt restructurings, but they do reflect the basic principle that benefits must be measured by comparing the alleged subsidy transaction with the normal practices of participants in transactions of the same type in the same market. Thus, if creditors of Hynix would have entered into the same restructuring transactions in the absence of government entrustment or direction, there is no benefit – whether the financial contribution is considered to be the alleged government entrustment or direction, or the participation in the restructurings by the allegedly entrusted or directed creditors.

4.112 In its determination, the JIA made no effort to determine what terms would have been available to Hynix if there had been no alleged government entrustment or direction. It failed to identify the normal practices of participants in transactions of the same type in the same market. As a result, the JIA failed to undertake the benefit analysis required by Articles 1 and 14 of the *SCM Agreement*. Its determination cannot, therefore, be upheld.

4.113 The JIA's benefit analysis is also inconsistent with the fact that more than a *hundred* separate institutions that were not found to be entrusted or directed also participated in the restructuring transactions. The fact that these private entities participated in the transactions on the same terms as the government bodies and the allegedly government-directed banks indicates that the transactions did not confer a benefit on Hynix.

4.114 The JIA has contended that the existence of past subsidies irrevocably tainted any subsequent market transactions by the non-entrusted or -directed creditors. But, that interpretation is flatly inconsistent with the requirements of the *SCM Agreement*. Among other things, the JIA's interpretation simply cannot be reconciled with the provisions of Article 14 requiring investigating authorities to look to *actual* market transactions and normal market practices as the benchmark for determining whether a benefit has been conferred. More generally, the interpretation of Article 14 proposed by the JIA would lead to absurd and inconsistent results. It would find a benefit based solely on the identity of the body making the loan, and not based on any finding that the terms of the government loan made the recipient "better off" than the available market alternatives.

(d) Allocation Period and Imposition Period

4.115 The JIA decided in this case that the alleged subsidies received by Hynix should be allocated over a five-year period, including the year in which they were received. This meant that the subsidies allegedly received by Hynix in 2001 were *all* allocated to the five-year period from 2001 to 2005. There was no remaining benefit from those subsidies in 2006, when the JIA issued its determination. Consequently, the JIA's decision to continue to impose countervailing duties based on the October 2001 restructuring for a period extending beyond the five-year benefit "amortization" period is inconsistent with Articles 19.4 and 21.1 of the *SCM Agreement*.

4.116 In its first written submission, Japan asserted that the JIA's imposition of duties was consistent with past decisions concerning similar provisions of the Antidumping Agreement. But the Antidumping Agreement does not permit investigating authorities to calculate dumping margins for years into the future based on an amortization of a non-recurring price differential at some time in the past. In these circumstances, any effort to analogize the *estimation* of dumping margins on sales during future periods with the *calculation* of the amortized amount of the subsidy benefits from a particular transaction in a particular future year is inherently illogical.

(e) Injury Causation

4.117 Articles 15.5 and 19.1 of the *SCM Agreement* require that the investigating authority must demonstrate "that the subsidized imports are, *through the effects of subsidies*, causing injury." The ordinary meaning of this requirement is clear. It is not enough that the *imports* which happen to be subsidized are causing injury. Instead, it must also be demonstrated that the injury is occurring "through the effects of the subsidy."

4.118 Japan, contends that this Panel should follow the interpretation adopted by a GATT Panel in *Norwegian Salmon*, which held that similar language in the Tokyo Round Antidumping and Subsidy Codes required only a finding that the dumped or subsidized imports caused injury, and not a finding that the injury occurred through the effect of the dumping or subsidies. Japan's position is, however, directly inconsistent with its strident criticism of the *Norwegian Salmon* decision at the time that decision was first announced. And, in any event, the *Norwegian Salmon* decision is not consistent with the ordinary meaning and context of the relevant provision.

4.119 In its determination, the JIA took the position that it *had* considered whether the injury had occurred through "the effect of the subsidy." In particular, the JIA claimed that it was appropriate to find that the injury had occurred through the "effect of the subsidies" because, in the absence of the subsidy, Hynix would have been forced into bankruptcy and ceased production and exports.

4.120 The problem in this case is that there is no evidence that Hynix would have ceased production and exports in the absence of the subsidies. The JIA did not identify provisions in the Korean bankruptcy laws that would have forced Hynix to cease production and exports in the event that it was forced to file for court protection under those laws. In fact, as demonstrated in Korea's first submission, the Korean bankruptcy laws would actually have allowed Hynix to continue operations under court protection while its creditors worked out a debt restructuring program. There is no reason to believe Hynix would have ceased production or export.

- **Conclusion**

4.121 This case is, in large part, about the difficulties the JIA had in handling its very first countervailing duty case, making things up as it went along in the absence of a sufficient description of procedures and substantive methodologies in Japan's statute and regulations. It may well be that the JIA tried its best. But effort does not excuse non-compliance with the procedural safeguards required by the *SCM Agreement*.

4.122 Perhaps even more fundamentally, this case is about assumptions. Despite all of the details in its Notice of Important Facts, the JIA's decision turned on certain critical assumptions about market behaviour, about Korean law, and even about the meaning of certain terms in the *SCM Agreement*. Those assumptions were not supported by any evidence, and they turned out, in the end, to be unreasonable and incorrect. In Korea's view, the inconsistency with the provisions of the *SCM Agreement* of a determination based on such flawed assumptions is manifest.

2. Closing Statement of Korea at the First Meeting of the Panel

4.123 In Korea's view, the Japanese investigating authority started its investigation with an assumption that the restructuring transactions must have been directed or entrusted by the Korean government, and then set about to compile evidence that it thought would be sufficient to justify a determination to that effect. But the underlying assumption with which the JIA began the case inevitably infected its judgment. It failed to see that the evidence it gathered did not, on its own, support the conclusions that the JIA wished to reach. Instead, as expressed in Korea's first written submission and in Korea's opening statement at the first meeting of the Panel, certain assumptions had to be made to link the evidence the JIA gathered to the conclusions it reached. It is telling that Japan

continues to deny that such assumptions were made, even as it repeated many of them in its oral statement at the first meeting of the Panel.

4.124 During the course of the JIA's investigation, Hynix and its creditors and the Korean government all explained to the JIA that the creditors had agreed voluntarily to the transactions at issue because those transactions made economic sense for the creditors. The JIA rejected that claim based on its assumption that "from the normal commercial point of view, there was no investor who was willing to invest in or provide loans to Hynix in the normal commercial market." In a single stroke of its pen, the JIA eliminated the vast army of lawyers, bankers and economists who, right now, are toiling on debt restructurings for financially insolvent companies, both inside and outside of formal bankruptcy proceedings, in virtually every single country in the world.

4.125 It is beyond dispute that firms all over the world at times find themselves in a position of "financial distress" in which they do not have the funds needed to make the payments that are due to their creditors — just as Hynix did. It is equally certain that the creditors of such firms routinely enter into debt restructurings to maximize their own expected profits. This is not economic theory. It is a reality that could be seen every day. And, once that reality is recognized, the JIA's determination falls apart.

4.126 One does not need assumptions of government interference to make sense of the restructurings. One needs only economic self-interest. And, even if Korea assumes for the sake of the argument that Japan were correct in asserting that the government of Korea twisted the arms of the creditors, there still would be no subsidy, because entrustment or direction of private entities to enter into transactions that are in the private entities' own interests cannot confer a benefit within the meaning of the *SCM Agreement*.

4.127 The *SCM Agreement* requires investigating authorities to base determinations on facts, not presumptions. In its finding of entrustment or direction, in its finding of a benefit, and in its finding that injury occurred through the effect of the alleged subsidies, the JIA failed to meet that standard. Consequently, its determination cannot be sustained, and the countervailing duties it imposed should be rescinded.

D. FIRST ORAL STATEMENTS OF JAPAN

4.128 The following summarizes Japan's arguments in its first oral statements.

1. Opening Statement of Japan at the First meeting of the Panel

(a) Standard of Review and Evidentiary Standard

(i) The Requirements under the WTO Agreements

4.129 Japan has pointed out errors in Korea's claims in its First Written Submission and emphasizes here the issues concerning the standard of review and evidence of a subsidy investigation under the WTO Agreements. First, it is essential that Korea's claims be reviewed in light of the applicable standard of review that "a panel . . . should, on the basis of the record evidence before the panel, inquire whether the evidence and explanation relied on by the investigating authority reasonably supports its conclusions".[53]

4.130 Secondly, the Appellate Body has rejected any particular standard of evidence beyond that set forth in the *SCM Agreement* (i.e., the existence of subsidy "can only be based on" record evidence)

[53] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 188.

and has recognized that an investigating authority has full discretion in conducting an investigation within such bounds, or "on its own terms".[54]

4.131 Thirdly, Article 1.1(a)(1)(iv) of the *SCM Agreement* "is, in essence, an anti-circumvention provision."[55] WTO Members may not escape the *SCM Agreement*'s disciplines where a government "entrusts or directs" private bodies to provide a financial contribution.

(ii) The Actual Investigation and Determination by the JIA

- Hynix's Financial Situation: On the Verge of Collapse

4.132 Korea has not based its arguments on the actual investigation that the Investigating Authorities of Japan ("IA") conducted; thus, its arguments are inconsistent with the applicable standard of review. Korea argues that the Hynix restructuring was rational in light of a certain economic model. However, the JIA determined whether the Government of Korea had entrusted or directed financial institutions to save Hynix, not whether the outcome might appear to align with a general voluntary work-out. The premise of Korea's voluntary work-out theory is that of a company facing a temporary funds shortage. However, the reality of Hynix was quite different. Japan will highlight here that: (1) Hynix had been facing a dire financial distress; and (2) The Government of Korea's consistent policy and actions to save Hynix.

4.133 The Hynix liquidity problem was not temporary. The Government of Korea's financial contributions had saved Hynix from collapse. After 1997, Hynix's situation was disastrous. Hynix's maturing debts of approximately KRW 9 *trillion* in 2001 dwarfed its 2000 year-end deposit balance of KRW 10.1 *billion*.[56] "Hynix did not have the cash on hand to repay those debts" [57] and would have gone "bankrupt without obtaining outside financing"[58]. Hynix's financial indicia continued to decline sharply in early 2001 when it was saved temporarily by the May 2001 Program.

4.134 In August 2001, Hynix defaulted on payment obligations[59]and by October 2001, Standard & Poor's downgraded Hynix's rating to "Selective Default,"[60] but the October 2001 Program could not solve Hynix's troubles, which worsened throughout 2002.[61] Its external advisor stated "Hynix is not an investment-grade company", and "Hynix is technically bankrupt, kept alive only through debt restructuring programs."[62] No financial institution would provide new credit to Hynix until the December 2002 Program.[63]

- The Policy and Actions of The Government of Korea to Save Hynix Since the "Big Deal"

4.135 In July 1998, the Government of Korea and its business community agreed to the "Big Deal" scheme to reorganize companies among five major conglomerates, which established Hynix.[64] The Government of Korea maintained its objective to promote the semiconductor industry and prioritized

[54] *Ibid*., paras. 140, 151.
[55] *Ibid*., para. 113.
[56] *See* Annex 1 of the Final Determination ("Annex 1"), paras.28, 110 (JPN-02), and JPN-02-12 and 02-104.
[57] First Written Submission ("FWS") of Korea, para. 74.
[58] *See* Annex 1, para.110 (JPN-02), and JPN-02-104.
[59] Annex 1, para.261 (JPN-02), and JPN-02-307 and 308.
[60] Annex 1, para.265 (JPN-02), and JPN-02-313 and 314.
[61] Annex 1, para.323 (JPN-02), and JPN-02-377 and 378.
[62] Annex 1, para.324 (JPN-02), and JPN-02-381.
[63] Annex 1, para. 325 (JPN-02).
[64] *Ibid.*, para. 38.

Hynix's normalization[65], its policy from the company's inception. The Government of Korea gave effect to its policy through the various Hynix bail-out programs from December 2000.

4.136 The Government of Korea did not merely exercise its general regulatory powers to do so. It drove the process at the 28 November 2000 Economic Ministers' Meeting, which formed the basis for the first three restructurings, discussing "Measures to alleviate the cash crunch of [Hynix]", and subsequently sent a notice to the Korea Export Insurance Corporation and the Korea Export Bank ("KEB") to instruct them to "carr[y the results of the discussion] out perfectly".[66] In accordance with this notice, KEB and two other banks requested the regulating government body for, and were promptly granted, a waiver of the credit ceilings of these banks, which allowed them to participate in the Syndicated Loan.[67]

4.137 The Government of Korea also possessed the legal means to involve itself in specific operations of banks.[68] The Government of Korea *did* exert such authority, as Woori Bank and Kookmin Bank admitted.[69]

4.138 In January 2001, the Financial Supervisory Service notified banks that liabilities would be exempted or reduced when loans became uncollectible for, *inter alia*, "a purchase of a financially deteriorating company that is necessary under the government's national industrial policy, and provision of assistance for operating funds, etc. after such purchase."[70]

4.139 At the Council for Creditor Financial Institutions' meeting in March 2001 which formed the basis of the May 2001 Program, high-ranking government officials pressured financial institutions to provide Hynix financial support.[71] The Government of Korea boasted that this Program was an example of success of *its own efforts*.[72] Deputy Prime Minister's announcement that "in the case that [the problem] does not settle, the government will directly step in...[t]here will be criticism no matter . . ., but we will accept the responsibility for resolving these problems"[73] exemplifies the Government of Korea's intent to support Hynix between the May 2001 and October 2001 Program. Hynix's financial situation further deteriorated in 2002, and The Government of Korea worked together with creditors to realize the December 2002 Program, intervening in the preparation of the structural adjustment plan.[74]

4.140 These *facts* and other facts, such as the content and process of internal examinations of KEB and Woori Bank, Chohung Bank and the National Agricultural Cooperative Federation ("NACF"), indicate the implementation of bailouts based on the Government of Korea's entrustment or direction. NACF, a quasi-public body, and these three private bodies were under the Government of Korea's substantial influence. Even other banks that also participated in the bailouts based their decisions on non-commercial factors. One of the reasons the JIA found entrustment or direction only to these four banks was because the Government of Korea's substantial power to control these banks further tilted the balance to infer entrustment or direction.

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[65] Annex 1, paras.35-41 (JPN-02), JPN-02-17 to 28 and 254, and Annex 3, para. 68 (JPN-04).
[66] Annex 1, para.117 (JPN-02), and JPN-02-110 and 111.
[67] Annex 1, para. 120(JPN-02), JPN-02-114, 115.
[68] *See* for example, Articles 5 and 6 of the Prime Minister Decree No. 408 (JPN-02-80).
[69] Annex 1, paras. 83 - 87 (JPN-02), and JPN-02-86 to 89.
[70] Annex 1, para. 82 (JPN-02), JPN-02-85.
[71] Annex 1, paras. 193-196 (JPN-02), JPN-02-218 to 238.
[72] Annex 1, para. 202 (JPN-02), JPN-02-253. See also Annex 1, para. 200 (JPN-02) and JPN-02-246 to 250.
[73] Annex 1, para. 272 (JPN-02), JPN-02-329. See also Annex 1, paras. 273-275 (JPN-02), JPN-02-330 to 334.
[74] Annex 1, paras. 329-336 (JPN-02), JPN-02-386 to 426.

(iii) The Facts Found in the Investigation and the Evidentiary Standard for Entrustment or Direction

4.141 Korea has clarified that it only disputes the JIA's factual findings regarding the October 2001 and December 2002 Programs and has not challenged the prior programs. Among the facts Korea does not dispute are the fact that:

- The Government of Korea has a long history of actively normalizing its semiconductor industry, in particular Hynix, and maintained a policy to save Hynix;
- The Government of Korea had the power to control the entrusted or directed banks;
- the banks' internal documents show their unusual decision making process to commit to the May 2001 Program *before* their internal decisions were made, that certain banks ignored their internal conditions, and that certain banks participated in the Program after internally decided *not* to participate;
- the Government of Korea granted subsidies to Hynix through the D/A financing, KDB Program, and May 2001 Program that helped keep alive, but not cure, Hynix;
- banks which participated in the October 2001 and December 2002 Programs recognized the deteriorating financial conditions of Hynix;
- the statements of high-ranking government officials on Hynix's financial crisis, various news articles reporting that the Government of Korea would or did intervene;
- NACF's admission that the Government of Korea intervened into the December 2002 Program; and
- the banks' consideration of non-commercial factors in reaching their decision to participate in the October 2001 and December 2002 Programs.

4.142 Korea's arguments on the factual findings are limited to five narrow aspects. First, Korea argues that the banks considered the Arthur Andersen Report ("AA Report") for the October 2001 Program. However, the AA Report was completed well after the Program's conclusion , and the banks were not able to consider it before deciding to participate.[75]

4.143 Second, Korea argues that Woori Bank and Chohung Bank's internal examination in the October 2001 Program negates the JIA's finding. These banks' internal examination indicated that they based their decisions on noncommercial factors; Korea also has not disputed the JIA's examination of internal decisions by KEB or NACF.

4.144 Third, the only assessment by the JIA concerning banks in the December 2002 Program Korea disputes is Woori Bank's examination. Korea argues that Woori Bank critically reviewed the Deutsche Bank Report and made its own assessment. However, the "internal document" Korea presents states only that Woori Bank considered the Report to be [[BCI]] because it [[BCI]][76], which does not indicate a critical review of the Report. Rather, Woori Bank wholly accepted the Report, and based its calculation of potential losses assuming [[BCI]].[77]

4.145 Fourth, Korea presents arguments based on the valuation in the Deutsche Bank Report; which contains critical errors, even admitted by Hynix, and thus is not reliable.

[75] *See* the cover page of the Arthur Andersen Report (KOR-17). *See* also pages 70 and 86 (KOR-17).
[76] *See* FWS of Korea, footnote 198, and Woori Bank's internal report, Section VI.3. (KOR-29).
[77] Business Confidential Information.

4.146 Finally, Korea argues that the participation of the banks for which the JIA made no finding of entrustment or direction in the October 2001 and December 2002 Programs indicates the commercial rationality of all of the banks. Korea, however, has not disputed the finding that such banks participated upon their consideration of non-commercial factors.

4.147 Korea argues that there is "no evidence that the [the Government of Korea] told any of the creditors what to do", without addressing any specific analysis by the JIA. However, such evidentiary standard does not exist; Article 1.1(a)(1)(iv) anti-circumvention cases will often involve an analysis of totality of facts based on circumstantial evidence[78], as done by the JIA. A claim that only smoking gun evidence can show entrustment or direction amounts to a request for a *de novo* review.

(iv) Non-Record Evidence and Arguments

4.148 Korea's non-record exhibits such as KOR-26 and arguments based on such exhibits are irrelevant under the standard of review of the Panel. Similarly, the JIA cannot be faulted for not examining an argument that was not presented in the investigation, and could not reasonably have considered, such as Korea's economic theory arguments. Korea's argument that the JIA should have considered the financing of others facing insolvency is belied by the refusal of the Government of Korea and other parties to submit evidence necessary for such an analysis.

(v) Conclusion

4.149 Korea's argument is inapposite to the JIA's determination. The reality was that there was no financing available from the general commercial market for Hynix. The Government of Korea had to step in to entrust or direct the creditors.

(b) Other Errors In Korea' s Claims

(i) Benefit

4.150 The first of the two other examples of errors in Korea's claims is its arguments on benefit. Benefit in the meaning of Articles 1.1(b) and 14 refer to a benefit to the *recipient*.[79] However, Korea argues whether the private creditors acted in their own interest by pursuing restructuring rather than liquidation.[80]

4.151 Korea also argues that banks, for which the JIA did not make any finding of entrustment or direction, should be the benchmark. However, Hynix was only in operation at the time because of subsidies, and the terms and implementation of the October 2001 and December 2002 Programs stood on such financial condition of Hynix. A benchmark other than the existing market may be used if the market was so distorted because of the government's involvement.[81] In this case, the Government of Korea subsidies heavily distorted the premise and the terms and conditions of these Programs.

4.152 In addition, the evidence indicates that the Government of Korea intervened in the content of the December 2002 Program when Hynix's creditors could not agree to the terms. Moreover, these "other" banks' decisions to participate were based on non-commercial considerations. Thus, their financing do not show usual investment practice or that their loans were commercially obtainable. The JIA reasonably found that these Programs were not from the normal commercial market and that financing by "other" banks could not serve as benchmark.

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[78] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 150 and footnote 277.

[79] *See, e.g.*, Appellate Body Report, *Canada – Aircraft*, para. 154.

[80] FWS of Korea, paras. 234-243.

[81] Appellate Body Report, *US – Softwood Lumber IV*, paras. 90 – 95.

4.153 Korea's argument that the AA Report and Deutsche Bank Report show that Hynix's going-concern value exceeded liquidation value is null. These valuations were based on Hynix's heavily distorted financial conditions, and cannot serve as a benchmark. Also, the alleged Hynix 2001 4Q going-concern value in the AA Report is an *ex post* calculation, incorporating the October 2001 Program's success.[82] The going-concern valuation could not have been reached absent the contributions from public bodies and the entrusted or directed private bodies, which contributed over [[BCI]] and [[BCI]] per cent respectively of the debt-to-equity swaps and new loans.[83] Thus, this going-concern value does not show what was obtainable without such financial contribution. The going-concern valuation in the Deutsche Bank Report[84] also assumed the success of the December 2002 Program; the values were not realizable absent the public bodies' and entrusted or directed banks' participation.[85] Furthermore, if the critical errors in that report were corrected, the going-concern values would [[BCI]]

(ii) Determination of the Amount of Subsidy

4.154 The second example is Korea's claim that the October 2001 Program ceased to provide benefit as of the end of 2005. The *SCM Agreement* simply requires a determination of subsidy at the time of the period of the investigation, based on data available therein, not a re-determination as of the time of duty imposition. The allocation period of non-recurring subsidy is just a part of the duty rate calculation as of the period of investigation, not a determination of benefit expiry. The JIA based this allocation period on the useful life of Hynix's assets, which may subsequently change.[86] The matters concerning the existence or amount of subsidy that can be discerned post-investigation period is to be reviewed under Articles 21.2 and 21.3 of the *SCM Agreement*; Japan does have a review mechanism that fully reflects the principles of Articles 19.4 and 21.

2. Closing Statement of Japan at the First Meeting of the Panel

4.155 First, in both its First Written Submission and its Oral Statement at the first meeting of the Panel, Korea referred to what it called the "syllogism." Korea summarized its position at the first meeting of the Panel by arguing that the determination of entrustment or direction by Japan was based on the findings that:

- The Korean Government had expressed an intention to 'keep Hynix alive';
- No rational creditor would have entered into the restructuring transactions, in view of Hynix's poor, and deteriorating financial condition; and
- The evidence submitted by the individual creditors (or the findings made by the JIA where the creditors were non-responsive) did not establish that the creditors had conducted a sufficient analysis of the various transactions before entering into them."[87]

4.156 The Panel should take careful note that in response to a question from Japan at the first meeting with the Panel, Korea confirmed that its claim was limited to these three elements. This answer by Korea is highly significant.

[82] *See* Arthur Anderson Report, pages 81 and 9 (KOR-17). *See also* pages 70 and 86.
[83] *See* Arthur Anderson Report, pages 9, 70 and 86 (KOR-17), and Annex 1, paras. 256, 311 (JPN-02), JPN-02-365.
[84] FWS of Korea, para. 241.
[85] Annex 1, para.318 (JPN-02).
[86] As recognized in the *International Accounting Standard 16*, para. 49 (shown in para. 51 of the 7 June 2004 text) (JPN-15).
[87] Korea's Opening Statement for the First Panel Meeting, para. 41.

4.157 As Japan explained in its First Written Submission, Korea is wrong when it asserts that the full overview of the Investigating Authority's determination can somehow be captured in these three points.

4.158 Korea's translation of this section of the Final Determination also was incorrect. Yet leaving aside translation issues, Korea has misinterpreted the findings of the Investigating Authority. With respect to the first element of the supposed syllogism, the record evidence, discussed at length in Japan's submission, showed that the Government of Korea not only had the clear intent to save Hynix, but exercised its authority over the banks to bail out Hynix through the October 2001 Program and the December 2002 Program. As for the second and third elements of the alleged syllogism, the Investigating Authority did not rely on "assumptions", but rather reviewed various factors on a bank-specific and program-specific basis. Based on this record evidence, the Investigating Authority found that non-commercial factors underlay the decision of the banks to participate in the October 2001 and December 2002 Program rescue programs.

4.159 The important point to stress here is that Korea's claim against entrustment and direction is ***limited*** to the three claims set out in its "syllogism." ***If Japan demonstrates that the "syllogism" does not accurately state the basis on which the investigating authority made its determination, then Korea's "entrustment or direction" claim must, of necessity, be dismissed.*** Japan mentioned that it will return to this issue in its Second Written Submission.

4.160 The other issue to discuss relates to the Panel's terms of reference. Japan has sustained – and continues to sustain – significant prejudice as a result of Korea's failure to comply with its binding obligations under DSU Article 6.2.

4.161 It is important to recall that Korea's failure to state its claims clearly is not some minor, procedural breach, but rather infringes the fundamental due process rights of Japan, as a responding party, to know the nature of the claims being made against it. The Appellate Body has articulated this obligation in unambiguous terms:

> The requirements of due process and orderly procedure dictate that claims must be made explicitly in WTO dispute settlement. Only in this way will the panel, other parties, and third parties understand that a specific claim has been made, be aware of its dimensions, and have an adequate opportunity to address and respond to it. WTO Members must not be left to wonder what specific claims have been made against them in dispute settlement.[88]

4.162 Unfortunately, in the present case, Japan has been left "wondering what specific claims have been made against it" by Korea. The situation in the present case is similar to that in *Thailand – H-Beams*, where the Panel found that the "prejudice to Thailand's ability to defend itself was a function of the fact that the precise nature and scope of the claims…remained unclear and confusing to Thailand -- and to us – even following Poland's first written submission."[89] As in that dispute, Japan's ability to defend itself is a function of the fact that the "precise nature and scope" of Korea's claims remain unclear and confusing to Japan – and doubtless to the Panel – even following Korea's First Written Submission. For example, for Korea to make broad sweeping claims, without bothering to provide any specificity as to the nature of its complaint, renders the due process requirements of DSU Article 6.2 essentially meaningless. Two examples will illustrate the problem.

4.163 First, as Japan has previously argued, Korea's Claim 15 is a "catch-all" claim of violation of "Articles 10, 11, 12, 14, 15, 22, and 32.1 of the *SCM Agreement* and Articles VI:3 and X:3 of the GATT 1994." This vague and expansive claim falls far short of the Appellate Body's admonition that

[88] Appellate Body Report, *Chile – Price Band System*, para. 164.
[89] Panel Report, *Thailand – H-Beams*, para. 7.29.

responding parties and third parties must be made aware of the "specific" claims being made, as well as their "dimensions." Stating claims in this manner deprives Japan of its due process rights to have an "adequate opportunity to address and respond" to the claims against it.

4.164 Second, in its Opening Statement, Korea used formulations such as the following:

- A determination based on assumption and not evidence is not consistent with ***each and every provision of the SCM Agreement*** requiring findings based on evidence, and a fair and impartial determination.[90]
- A determination based on "facts available," and not on evidence, is not consistent with ***each and every provision of the SCM Agreement*** requiring findings based on evidence, and a fair and impartial determination.[91]

Claims that Japan has violated "each and every provision" of the *SCM Agreement* render a nullity the due process provisions of the DSU, particularly in light of the Appellate Body's clear ruling that the "mere listing of treaty Articles" may not satisfy the standards of DSU Article 6.2. Since the Appellate Body has found that the listing of Articles – rather than their various sub-provisions – may fall short of the requirements of DSU Article 6.2, claims of violation of "each and every provision of the *SCM Agreement*" can only be an egregious violation of Japan's due process rights.

4.165 Accordingly, Korea's breach of DSU Article 6.2 has fundamentally prejudiced Japan's rights as a responding party in WTO dispute settlement. Japan respectfully requests this Panel to remedy this violation by placing the illegal claims identified by Japan outside its Terms of Reference.

E. SECOND WRITTEN SUBMISSION OF KOREA

4.166 The following summarizes Korea's arguments in its second written submission.

1. Japan's Imposition of Countervailing Duties was based on a Fundamentally Flawed Assumption

4.167 In its oral statement during the first panel meeting, Japan claimed that the finding of subsidies by the Japanese Investigating Authority ("JIA") was supported by the fact that Hynix was "facing dire, structural financial distress" that left it unable to pay its debts. Japan asserted that this severe financial distress meant that "Hynix would have gone bankrupt" and "could not have survived" without government help.[92] According to Japan, the "Government of Korea *had to* step in to entrust or direct the creditors" in order "to save Hynix."[93]

4.168 This assumption – that a company "facing dire, structural financial distress" could only have been saved by government intervention – underlay the JIA's entire analysis. But that assumption is demonstrably false. The debts of insolvent debtors – of companies "facing dire, structural financial distress" – are restructured by their creditors all the time, as long as the going-concern value of the company exceeds its liquidation value.

4.169 Japan and some of the third parties have attempted to confuse the issue by referring to different economic theories about the manner in which investors make their investment decisions. But the rationale for restructuring the debts of an insolvent debtor is simple arithmetic: Where the insolvent company's going-concern value exceeds its liquidation value, the creditors holding the

[90] *Korea's Initial Comments on Japan's Expanded Preliminary Ruling Request*, 1 December 2006, para. 24. (Emphasis added.)
[91] *Ibid*, para. 28. Emphasis added.
[92] *See* Japan's Opening Statement, para. 13.
[93] *See* Japan's Opening Statement, para. 46 (emphasis added).

company's debts *can earn a higher return* if they agree to restructure the debts through, *inter alia*, the provision of new loans, the modification of the terms of existing loans, or the exchange of debts into equity. The arithmetic is indisputable. And, it is borne out by actual real-world experience, in which the debts of insolvent companies are restructured, both in formal bankruptcy proceedings and informal workouts, in every market (including Japan).

4.170 The Appellate Body has cautioned that "[a]n investigating authority that uses a methodology premised on unsubstantiated assumptions does not conduct an examination based on positive evidence." And, it clarified that "[a]n assumption is not properly substantiated when the investigating authority does not explain why it would be appropriate to use it in the analysis."[94] It is difficult to imagine a more apt description of the basic flaw in the JIA's determination. Unless the Panel believes that insolvent companies must *always* be liquidated in the absence of government subsidies, the JIA's determination cannot be upheld.

2. Japan's Investigation Was Procedurally Flawed and Legally Invalid

(a) Failure to Promulgate Benefit Calculation Methods

4.171 In Korea's first submission, it demonstrated that the JIA's determination used benefit calculations that were not provided for in Japan's national legislation or implementing regulations, in contravention of the explicit requirement of the first sentence of Article 14 of the *SCM Agreement*. In response, Japan has asserted that the formulas and methodologies used in its determination were not "methods" within the ordinary meaning of that term. According to Japan, a "method" refers to "a mode of procedure; a (defined or systematic) way of doing a thing."[95]

4.172 But the formulas and methodologies used by Japan clearly meet that definition: The legal fictions adopted by the JIA to justify treating loan maturity extensions as loans and debt-equity swaps as equity infusions, the policy of allocating the benefits from equity infusions and debt forgiveness over a period of years, the formula used to allocate subsidy benefits, the adoption of the "useful life" from Korea's tax laws as the allocation period in that formula, the formula used to calculate the discount interest rate for non-creditworthy borrowers – all of these constitute "mode[s] of procedure; a (defined or systematic) way of doing a thing."

4.173 Japan has also contended that the argument presented in Korea's first submission was an improper "as such" claim that lacked the proper foundation. That claim is, however, incorrect. Korea is objecting to the methods *used* by the JIA *in this particular case.* Because those methods were not provided for in Japan's legislation or implementing regulations, the JIA's finding of a benefit is invalid and its imposition of countervailing duties must be rescinded.

(b) Improper Reliance on Assumptions and Reversal of Burden of Proof

4.174 In Korea's first submission, it noted that the JIA's determination was based on a number of assumptions. In response, Japan's first submission denied that any assumptions had been made.[96] According to Japan, all of the JIA's findings were direct inferences from evidence. A careful review of the JIA's determination confirms that the following assumptions, among others, were critical to its analysis:

- The JIA's finding of a "direct transfer of funds" was based on a legal fiction that "deemed" that Hynix had first repaid its outstanding debts, and that the creditors used the

[94] *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R, 29 November 2005, para. 205.
[95] *See* Japan's First Written Submission, para. 528.
[96] *See, e.g.*, Japan's First Written Submission, para. 238.

repaid funds to make new loans and equity infusions. This "fiction" was, of course, contrary to the JIA's own finding that Hynix was unable to repay its outstanding debts.

- The JIA's finding that the creditors were motivated by "external," "non-commercial" factors was explicitly based on an assumption that, in light of "the deterioration of Hynix's financial situation, ... there was no investor that would invest in or make loans to Hynix in the general commercial market from a normal commercial perspective." But, as discussed above, that assumption is inconsistent with the basic arithmetic and with the undisputed fact that private creditors acting solely from a "normal commercial perspective" do engage in restructuring transactions all the time.

- The JIA's finding of a subsidy benefit from the alleged financial contribution was based on the same incorrect assumption that "there were no investors who would additionally invest in or make loans to Hynix from a normal commercial perspective." Again, that assumption is inconsistent with the basic arithmetic and with the undisputed fact that private creditors acting solely from a "normal commercial perspective" do engage in restructuring transactions all the time.

- The JIA's finding that the subsidized imports had caused injury "through the effects of the subsidy" was based on the assumption that "Hynix had been saved from bankruptcy because of subsidies" and "[t]hus, the subsidies enabled Hynix to continue production and continue exporting." But bankruptcy is a process, not a defined outcome. And, the "Korean bankruptcy law favours reorganization over liquidation."[97] Consequently, there is no reason to believe that, if Hynix had filed for "bankruptcy," it would have ceased operations.

In these circumstances, it is clear that the JIA's determination was based, fundamentally, on assumptions, and that the JIA's assumptions do not stand scrutiny. Japan has suggested, however, that the JIA's determination should nevertheless be upheld, because it listed facts and provided explanations and responded to comments and claimed to make decisions based on the "totality of the evidence." In Japan's view, the Panel's role should be limited to ensuring that the JIA provided the form of a fair procedure, without looking at whether the JIA's determination was actually supported by the evidence.[98]

4.175 That view is, however, plainly incorrect. The Appellate Body has clarified that, in applying the standard of review set forth in Article 11 of the DSU, panels must undertake a "critical and searching, "in-depth" examination to "test whether the reasoning of the authority is coherent and internally consistent," and to ensure that "there was positive evidence before [the investigating authority] to support the inferences made and conclusions reached by it."[99] Furthermore, "a panel can assess whether an authority's explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation in the light of the facts and the alternative explanations that were before that authority."[100] And, perhaps most importantly, the Appellate Body has clarified that "[a]n investigating authority that uses a methodology premised on unsubstantiated assumptions does not conduct an examination based on positive evidence."[101]

[97] *See* Korea's First Written Submission, para. 280, citing Yun, *A Primer on Korean Bankruptcy Law*, 18-5 Am. Bankruptcy Inst. J. 18 (June 1999).

[98] *See, e.g.*, Japan's First Written Submission, paras. 39 to 41.

[99] *See United States – Investigation of the International Trade Commission in Softwood Lumber from Canada; Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, 13 April 2006, para. 93

[100] *Id.*, para. 99.

[101] *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R, 29 November 2005, para. 205.

4.176 Japan has asked the Panel to declare "inadmissible" the various academic publications that were cited in Korea's first written submission.[102] However, Japan has not asked the panel to disregard the logical arguments set forth in Korea's first submission. Those arguments are, by themselves, sufficient to show that the JIA's assumptions were "unsupported." Under the standard of review described by the Appellate Body, the JIA's decision cannot be sustained.

(c) Improper Identification of "Interested Parties"

4.177 As explained in Korea's first submission, the text and context of the *SCM Agreement* indicate that an investigating authority may only designate as "interested parties" those entities that have an interest in the outcome of the proceeding. Japan and the United States have argued that the provisions in Article 23 – which addresses the right to appeal administrative determinations – can be read to indicate that the term "interested parties" may encompass entities that "are not directly and individually affected by the administrative action." But the recognition that some entities may only be *indirectly* affected by the administrative action – such as labour unions representing domestic workers or trade associations made up of domestic producers – does not mean that entities that have *no* interest in the outcome of the proceeding can be classified as "interested parties."

4.178 Under the *SCM Agreement*, an investigating authority is permitted to base its decision on "facts available" only when an "interested party" fails to provide necessary information. An investigating authority is not permitted to rely on "facts available" when an entity that is not an "interested party" does not respond. Instead, the investigating authority must in such cases base its determination on evidence that relates directly to the specific factual issue.

4.179 In this case, the JIA failed to comply with that obligation. It based its decision on assumptions – using "facts available" to find that creditors for which it had no information acted in a non-commercial manner based solely on evidence relating to other banks. Such an approach is permitted under the *SCM Agreement only* if the creditors for which the JIA had no information were properly designated as "interested parties," and *only* if those creditors failed to provide necessary information that had been requested from them. Because the JIA did not establish a factual foundation for concluding that any of those creditors was an "interested party," its use of "facts available" for them cannot be sustained.

3. Improper Finding that Hynix Received Financial Contributions

(a) Improper Classification of Transactions that Did Not Involve Any Transfer of Funds as "Direct Transfers of Funds"

4.180 As explained in Korea's first submission, the JIA's determination improperly classified transactions that did not involve any transfer of funds as "direct transfers of funds" under sub-paragraph (i) of Article 1.1(a)(1) of the *SCM Agreement*. In response, Japan contends that the term "funds" is broader than mere "cash." But Korea never claimed that "funds" was limited" to coins and "legal tender" paper notes. Instead, Korea argued that a "transfer of funds" requires a conveyance of *monetary assets* to the alleged subsidy recipient. While the original loan from a creditor to a borrower would involve a conveyance of *monetary assets* to the recipient, the subsequent modification of the

[102] In this regard, it should be noted that Japan's request to declare the publications "inadmissible" has no basis in the DSU. As Japan has, itself, contended in other proceedings, the DSU does not impose any limitations on the materials that may be presented to a panel. *See United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, 28 February 2001, Annex A-3, para. 6, n. 3.

As Japan has conceded, it is for the Panel to decide how much weight should be given to those publications. In Korea's view, because those publications were submitted to contest the JIA's assumptions, and not to challenge the evidence relied upon by the JIA, the publications should be given great weight. But, in the end, whether the Panel relies on those publications or not, the outcome must be the same. Because the JIA's decision was based on unsubstantiated assumptions, its decision cannot be sustained.

terms of the loan (either through extensions of the loan maturities or the swapping of the debts into equity) does not.

4.181 Japan also claims that an expansive interpretation of the term "transfer of funds" is needed to prevent circumvention of the *SCM Agreement*'s disciplines on subsidies. But there is no need to do violence to the language of the *SCM Agreement*. In reality, extensions of loan maturities and debt-equity swaps that provide a "financial contribution" to the recipient can be classified as "foregone revenue" within the meaning of sub-paragraph (ii) of Article 1.1(a)(1).

4.182 The problem in this case is that the JIA failed to undertake the factual analysis necessary to show that the creditors actually did forego revenue as a result of the restructuring transactions. It failed to make the required "*comparison* between the revenues due under the contested measure and revenues that would be due in some other situation" that the Appellate Body has required.[103] As a result, the JIA's finding of a financial contribution is not consistent with the requirements of Article 1.1(a)(1) of the *SCM Agreement*.

(b) Improper Finding of "Entrustment or Direction" of Hynix's Private Creditors

4.183 The JIA's analysis of entrustment or direction was also based on flawed assumptions and biased analysis. In order to reach its conclusion, the JIA had to assume that creditors of insolvent companies would never agree to restructure the company's debts – despite the obvious point that such restructurings occur all the time in every market in the world. The JIA had to assume that the creditors did not conduct reasonable analyses of the restructurings, despite the evidence showing that the restructurings were in the creditors' interests, and that the creditors were aware of that fact. The JIA had to assume that creditors that it had never examined or even contacted were not acting in accordance with normal commercial considerations. And, it had to assume that the Korean government had an intent to save Hynix, even though the evidence as a whole showed nothing more than normal prudential concerns about the effect of uncertainty on the Korean financial system, and a desire to see Hynix's creditors resolve the situation one way or another as quickly and efficiently as possible.

4.184 An unbiased and objective analysis would, of course, have seen that each of the JIA's assumptions was flawed. In apparent recognition of the flaws in the JIA's analysis, Japan has now contended that a decision that made no sense in its details can nevertheless be upheld based on the totality of the evidence. But the totality of the evidence standard does not absolve an investigating authority of the requirement to draw reasoned and adequate conclusions from evidence without relying on unsubstantiated assumptions. The JIA's finding of entrustment or direction cannot, therefore, be sustained.

4. Improper Finding that Hynix Received a Benefit from the Alleged Financial Contributions

4.185 The JIA's finding of a benefit from the restructuring transactions was also contrary to the requirements of the *SCM Agreement*. Because Hynix's going-concern value was higher than its liquidation value at all relevant times, any rational actor in the position of Hynix's creditors who was following usual market practices would have agreed to the restructurings in order to unlock the higher going-concern value. In fact, the evidence indicates that a number of banks and financial institutions that were not found to be entrusted or directed by the Korean government engaged in the same transactions on the same terms as the allegedly entrusted or directed banks. The obvious conclusion is that the alleged government involvement in the restructurings did not confer any benefit on Hynix, because Hynix could have obtained the same terms in the absence of any alleged government action.

[103] *See United States – Tax Treatment for "Foreign Sales Corporations,*" WT/DS108/AB/R, 24 February 2000, para. 90 (emphasis added).

4.186 In order to avoid this obvious conclusion, the JIA engaged in a results-oriented analysis designed to find a benefit where none existed. Thus, the JIA did not compare the alleged financial contributions – *i.e.*, the restructuring transactions agreed to by Hynix's creditors – with a market benchmark based on the usual practices for similar transactions. Instead, it compared the alleged financial contributions with a market benchmark for completely different transactions (involving an initial full repayment of debts by Hynix followed by a subsequent transfer of new funds from the creditors to Hynix) that never occurred and that, under the JIA's findings, never could have occurred.

4.187 Furthermore, the JIA disparaged the analyses of Hynix's going-concern and liquidation values by respected financial services firms on completely frivolous grounds. The JIA's complaints about the analyses undertaken for the October 2001 restructuring show a complete misunderstanding of basic financial analysis. Its complaints about the analysis undertaken for the December 2002 raise nitpicking to an art form. A fair assessment confirms what an unbiased observer would have surmised – that it was the JIA officials, and not the experienced financial professionals who prepared the reports, who were mistaken.

4.188 The JIA's benefit analysis was, therefore, inherently and fundamentally flawed. It was not consistent with the requirements of Article 1.1(b) or the guidelines set forth in Article 14 of the *SCM Agreement*. And, it was not consistent with the fair and unbiased analysis that is always required in countervailing duty cases. In these circumstances, the JIA's determination that the alleged financial contributions conferred a benefit on Hynix cannot be sustained.

5. Improper Finding that the Alleged Subsidies Were Specific to Hynix

4.189 In order to make a proper finding of specificity under Article 2 of the *SCM Agreement*, the JIA was required to "clearly substantiate," based on "positive evidence," that the restructuring transactions were specific either in law or in fact. The conclusory statements made by the JIA – that the restructurings were specific because they were "specific to a specific corporation" – do not meet that requirement.

4.190 Japan has argued that the JIA's determination can be defended because it considered the restructurings, and not the CRPA, to be the relevant program for purposes of the specificity analysis. But neither Japan nor the JIA presented "positive evidence" demonstrating *why* the restructurings, and not the CRPA, constituted the relevant program. If the restructuring programs reflected only the normal operation of the CRPA, then the JIA should have considered the CRPA, and not the restructurings, as the relevant program. By focusing on the specific restructurings to find specificity, the JIA assumed what it was supposed to "substantiate" with "positive evidence.

6. Improperly Failure to Consider the Impact of Changes in the Ownership of Hynix

4.191 The Appellate Body has held that, when there is a change in the ownership of a company at fair market value, the investigating authorities *must* consider whether the subsidies received before the change in ownership continue to provide a benefit after the ownership change. It has also held that such a change in ownership creates, at a minimum, a rebuttable presumption that the benefits of the subsidy have been extinguished.[104] And, it has found that the failure of investigating authorities to comply with that obligation is inconsistent with Articles 10, 14, 19, and 21 of the *SCM Agreement*.

[104] In cases involving transactions between private parties, the Appellate Body has suggested that the presumption may be irrebuttable. *See United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, 9 December 2002, para. 124 ("The Panel's absolute rule of "no benefit" may be defensible in the context of transactions between two private parties taking place in reasonably competitive markets….").

4.192 Japan claims that Korea has failed to "present any evidence or argument that there has been a 'change in ownership' as defined by the Appellate Body."[105] It appears that Japan reads the Appellate Body's past decisions to require the sale of 100 per cent of the outstanding shares of the company. But the relevant Appellate Body decision distinguishes only between situations in which the *seller* retains *a controlling interest* in the company and those in which it does not. Indeed, the Appellate Body specifically stated that its analysis applied as long as the seller transferred "substantially all" of *its* interest.[106]

4.193 Finally, Japan also contended that the analysis set forth in the Appellate Body's past decision is inapplicable because Hynix's creditors did not pay fair market value for its shares. But Japan cannot seem to decide what it is arguing. It claims that Hynix's creditors paid both more *and* less than the fair market value for those shares.[107]

4.194 To the extent that Japan is asserting that Hynix's creditors paid too much for Hynix's shares, its arguments concerning the applicability of the past Appellate Body decision are plainly without merit. As the Appellate Body noted, the reason that a change in ownership "extinguishes" past subsidies is that the price that the new owners paid already includes the value of any past subsidies.[108] If the new owners paid too much for the shares, then the price they paid still includes the value of any past subsidies – but it also includes an additional amount. In either case, the result should be the same – because in both cases the price paid fully reflects the value of the past subsidies.

7. Improper Imposition of Duties on Imports after the Benefit of the Alleged Subsidies had Expired

4.195 The period of investigation chosen by the JIA was calendar year 2003. Significantly, none of the restructuring transactions and none of the other alleged subsidy programs occurred during that period. Instead, the restructuring transactions and other alleged programs analyzed by the JIA all occurred in 2000, 2001 and 2002. The JIA found subsidies during the 2003 investigation period only because it chose to "allocate" the benefit of subsidies allegedly received in earlier years to that period.

4.196 The JIA's own amortization – which was necessary to the JIA's finding of subsidies in 2003 – clearly indicated that the benefit from the October 2001 restructuring ended in 2005. Thus, the JIA's determination that a subsidy existed in 2003 necessarily implied that there was no continuing subsidy from the October 2001 restructuring transaction when the JIA issued its final determination in 2006.

4.197 Article 19.4 of the *SCM Agreement* provides that the countervailing duty imposed may not exceed the amount of the subsidy found "to exist" – and thus does not permit duties to be imposed based on past subsidies that no longer "exist." Article 21.1 makes this requirement explicit, providing that: "[a] countervailing duty shall remain in force only *as long as* and to the extent necessary to counteract subsidization which is causing injury." The JIA's continued imposition of duties in 2006 when it knew that the benefit of the October 2001 restructuring had already expired cannot be reconciled with these provisions.

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[105] *See* Japan's First Written Submission, para. 458.

[106] *See* Japan's First Written Submission, paras. 458 and 459, citing *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, 9 December 2002, para. 117.

[107] *See* Japan's First Written Submission, para. 463 (arguing that the debt-equity swap by Hynix's creditors was "[a} transaction done for '*above fair market value*,'" and also that "Hynix's equity transaction was made *far below the fair market value*.") (emphasis added).

[108] *See United States--Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, 10 May 2000, para. 68 (Since the new owners "paid fair market value for all the productive assets, goodwill, etc., they acquired and subsequently used in the production", the Appellate Body found no error in the Panel's conclusion that "the 'financial contributions' bestowed' on the previous owner "could not be deemed to confer a 'benefit' on [BCI].").

4.198 Japan has contended that the provisions of Article 21 do nothing more than establish the requirements for reviews of outstanding countervailing duty orders.[109] But, the very heading of Article 21 – which refers to the "*Duration and Review* of Countervailing Duties and Undertakings" – indicates that its content is not limited to reviews. Furthermore Article 21.1 (which sets forth the limitation on the duration of duties) does not mention the word review at all.

4.199 Japan also contends that the imposition of countervailing duties even after the benefit had expired is consistent with language in the Appellate Body's decisions in two antidumping cases (the *EC – Bed Linens* case and the *Mexico – Rice* case). But the issues addressed in those cases were entirely different – concerning the relationship between the finding of dumping for particular exporters in a particular period and the determination that dumped imports from all exporters had caused injury in what might be a different period.[110]

4.200 Furthermore, Japan's arguments ignore the fundamental differences between antidumping and countervailing duty proceedings. There are important textual differences between Article 9.3 of the Antidumping Agreement (which limits antidumping duties to a specific calculation undertaken pursuant to Article 2) and Article 19.4 of the *SCM Agreement* (which limits countervailing duties to "subsidies found to exist"). Furthermore, there is nothing in the Antidumping Agreement corresponding to Article 19.1 of the *SCM Agreement* (which prohibits the imposition of countervailing duties, even after the investigation has been completed, when the subsidies are "withdrawn"). And, finally, there is nothing in the Antidumping Agreement that permits the amortization of dumping from a period before the investigation period to find dumping in the investigation period and in future periods.

4.201 Finally, the imposition of duties after the benefit has expired would be contrary to the purpose of the *SCM Agreement* – which is simply to "offset" subsidies. [111] At the time it made its determination in this case, the JIA knew with certainty that the benefits from the October 2001 restructuring extended only until 2005, and did not exist in 2006. In such circumstances, the imposition of duties in 2006 could not "offset" the subsidies from the October 2001 restructuring, because those subsidies no longer existed.

8. Japan's Finding that the Subsidized Imports Were Causing Injury Was Inconsistent with the Requirements of the SCM Agreement

4.202 The text of Articles 15.5 and 19.1 require a determination that the injury caused by the subsidized imports occur "through the effects of the subsidy." Under these provisions, it is not enough that the *imports* which happen to be subsidized are causing injury. Instead, it must also be demonstrated that the injury is occurring "through the effects of the subsidy".

4.203 Japan and the United States assert that a footnote to Article 15.5 (footnote 47) defines the phrase "effect of the subsidy" to mean the price and volume effects, and the consequent impact on the domestic industry, described in Articles 15.2 and 15.4. But the footnote in question is placed immediately after the word "effects" and thus serves only to define that word. It does not define the entire phrase "through the effects of the subsidy." Indeed, a contrary interpretation would render the reference to the effects "of the subsidy" inutile.

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[109] *See, e.g.*, Japan's First Written Submission, para. 511.

[110] *See 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, 8 April 2003, para. 123; *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R, 29 November 2005, paras. 165-166.

[111] *See, e.g., United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R, 23 December 1999, para. 6.56.

4.204 Japan and the United States also contend that the Panel should follow the decision by a GATT Panel in the *Norwegian Salmon* cases.[112] But Japan itself severely criticized the *Norwegian Salmon* decision "subverted the rule" in the Tokyo Round Subsidies Code and "denied the true meaning" of the phrase "through effects of the subsidy."[113] The GATT Panel report was adopted only in light of the statement by the Chairman of the Committee on Subsidies and Countervailing Measures that the "Panel Report did not create obligations on parties that were not parties to the specific dispute addressed by the Panel Report, *nor did it represent binding legal precedent applicable to other disputes.*"[114] Because the *Norwegian Salmon* decision is not consistent with the ordinary meaning and context of the relevant provision, its holding should not in any way bind the Panel in this case.

4.205 Finally, it should be noted that the JIA, in this case, apparently agreed that it was necessary to demonstrate that the injury occurred "through the effects of the subsidy." But, the JIA concluded that any harm caused by Hynix's exports was necessarily a result of the subsidy, because Hynix would not have been in operation, and thus would not have been able to export, in the absence of subsidies.[115] As noted in Korea's first submission, that conclusion is based on a fundamental legal error. "Bankruptcy" is a legal process, which affords a debtor protection from its creditors while the debtor's future is being determined. Under the Korean bankruptcy laws, the "bankruptcy" of Hynix would have led to debt restructuring, not liquidation. Thus, the JIA's equation of bankruptcy with liquidation has no basis.

9. Failure to Comply with the Substantive and Procedural Requirements of the SCM Agreement

4.206 As discussed above, the JIA's imposition of countervailing duties in this investigation failed to comply with the procedural and substantive requirements of the *SCM Agreement* and the GATT 1994. Consequently, the imposition of those duties was inconsistent with the requirements of Articles 10 and 32.1 of the *SCM Agreement*.

F. SECOND WRITTEN SUBMISSION OF JAPAN

4.207 The following summarizes Japan's arguments in its second written submission.

1. Standard of Review and Burden of Proof

(a) Standard of Review

4.208 Article 11 of the DSU provides the proper standard of review to be applied by panels examining the subsidy determinations of WTO Members:[116] an objective assessment of the matter, including "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."[117] A panel may not reject an agency's conclusions simply

[112] *See, e.g.*, Japan's First Written Submission, para. 599, and US Third-Party Submission, para. 73, citing *United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153, 4 December 1992, paras. 328-334.

[113] *See* Committee on Subsidies and Countervailing Measures, Minutes of the Meeting Held on 28-29 April 1993, SCM/M/65, 31 August 1993, para. 104.

[114] *See* Committee on Subsidies and Countervailing Measures, Minutes of the Meeting Held on 28 April 1994, SCM/M/69, 21 September 1994, para. 77.

[115] *See* JIA Response to Comments, paras. 740-741. *See also* Japan's Opening Statement, paras. 46 and 50.

[116] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 182.

[117] *Ibid*. ("A panel's "objective assessment" will be informed by "an examination of whether the agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination." Such explanation

because the panel would have arrived at a different outcome if it were making the determination itself. Rather, a panel should, on the basis of the record evidence before it, "inquire whether the evidence and explanation relied on by the investigating authority reasonably supports its conclusions."[118] A panel should "examine the evidence in the light of the investigating authority's methodology", and in order to do so, a panel should "identify the inference drawn by the *agency* from the evidence, and then consider whether the evidence could sustain that inference."[119] An impermissible *de novo* review would occur "[w]here a panel examines whether a piece of evidence could directly lead to an ultimate conclusion – rather than support an intermediate inference that the agency sought to draw from that particular piece of evidence "[120]

4.209 Where an investigating authority relies on the totality of circumstantial evidence in finding entrustment or direction, "this imposes upon a panel the obligation to consider, in the context of the *totality* of the evidence, how the *interaction* of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation."[121]

(b) Burden of Proof

4.210 Two fundamental principles of the WTO dispute settlement procedures are of particular relevance to this case: (1) "[T]he burden of proof rests upon the party…who asserts the affirmative of a particular claim…."[122]; and (2) A "responding Member's law will be treated as WTO-consistent until proven otherwise."[123] The determination of the investigating authority in the present case must be assumed to be WTO-consistent in its entirety, and the burden rests on Korea to prove otherwise.

2. Korea's Claims of Error

(a) Japan's Guidelines

(i) The Limited Scope of Korea's Claim

4.211 Korea has limited its claim under Article 14 of the *SCM Agreement* to whether the method used by the JIA in the benefit calculation was "provided for" in Japan's national legislation or implementing regulations.

(ii) The JIA's Benefit Calculation Methodology Was Provided for in Japan's Law

- The Panel should reject Korea's "as such" claim

4.212 A claim that the calculation methodology has not been provided for in Japan's "national legislation or implementing regulations" is by definition an "as such" challenge but Korea's claim falls far short of the standard for "as such" challenges. Korea did not claim that the application of benefit calculation formulae in the Final Determination caused any impairment of procedural rights of interested parties during the investigation, that the formulae are inconsistent with methods set forth in the Guidelines, or that the formulae in the Final Determination were themselves inconsistent with Article 14 of the *SCM Agreement*.

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should be "discernible from the published determination itself ... The explanation provided … should also address *alternative explanations that could reasonably be drawn from the evidence* . . . ."") (emphasis added).

[118] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 188.

[119] *Ibid*., para. 151.

[120] *Ibid*., para. 151 (original emphasis; footnote omitted).

[121] *Ibid*., para. 157 (original emphasis).

[122] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[123] Appellate Body Report, *US – Carbon Steel*, para. 157 (emphasis in original).

- Korea continues to confuse method with application

4.213 The chapeau of Article 14 clearly delineates between the ***method*** used by the investigating authority to calculate benefit, which must be provided for in national legislation or implementing regulations and the ***application*** of that method to each particular case, which must be transparent and adequately explained. The ***method*** the JIA used to calculate benefit was provided for in Japan's Guidelines. Its ***application*** was set out in the Final Determination. The application of a method will inevitably be more detailed than the Guidelines upon which any investigating authority will rely.

- Article 14 does not prescribe how WTO Members must apply their Guidelines

4.214 Article 14 does not prescribe any particular methodology that Members must adopt, but provides "considerable leeway in adopting a reasonable methodology."[124] Paragraphs (a) through (d) of Article 14 should not be interpreted as "rigid rules that purport to contemplate every conceivable factual circumstance".[125] However, Korea urges the Panel to adopt such an interpretation. Such argument negates the discretion accorded to each WTO Member as explained by the Appellate Body and the panel. Japan's Guidelines set its benefit calculation methods as required under the chapeau of Article 14. The Guidelines are sufficiently detailed and in compliance with Article 14. The Guidelines left the application of the methods to individual cases.

- The Panel should reject Korea's argument that any failure to comply with Article 14 renders the countervailing duty order invalid

4.215 When a breach is found through a WTO dispute settlement procedure, under the general principle pursuant to Article 19.1 of the DSU, the Member concerned receives a recommendation to bring its measures into conformity and will have the discretion to determine the ***means*** of implementation and a reasonable period of time for doing so. [126] The countervailing duty as a whole would not be considered to be invalid.

(b) The Record Evidence

4.216 There is "no basis in the *SCM Agreement* or in the DSU to impose upon an investigating authority a particular standard for the evidence supporting its finding of entrustment or direction".[127] The *SCM Agreement* requires "positive evidence" only with respect to specificity under Article 2 and injury under Article 15.[128] The use of circumstantial evidence has been recognized by the Appellate Body[129], which has found that Article 1.1(a)(1)(iv) is, in essence, an anti-circumvention provision"[130] and that indirect or circumstantial evidence play an especially important role. Korea's premise, that only "positive evidence", "smoking gun" or "direct evidence" qualify as evidence in a subsidy investigation, in arguing that the JIA "shifted the burden of proof" is wrong.

4.217 The JIA conducted a reasonable and objective examination of the extensive evidence on the record and made its determination on the basis of evidence viewed in its totality. It also addressed alternative explanations regarding such evidence given from interested parties in the course of the

[124] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.213.
[125] Appellate Body Report, *US – Softwood Lumber IV*, para. 92. *See also* Panel Report, *US – Countervailing Measures on Certain EC Products*, paras. 7.114, 7.118.
[126] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 187.
[127] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 138.
[128] *Ibid.*, footnote 250. *See also* FWS of Japan, paras. 259-61.
[129] *See, e.g.*, Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 144-58.
[130] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 113.

investigation. When it disregarded such alternative explanations, it explained the reasons why it chose to discount such alternatives in reaching its conclusions.

(c) Designation of Certain Financial Institution as "Interested Parties"

4.218 Korea has not made any persuasive argument that financial institutions cannot be included as "interested parties" under the *SCM Agreement* and fails to establish a *prima facie* case.

(d) Financial Contribution

(i) The JIA Correctly Found a Transfer of "Funds"

4.219 The ordinary meaning of the term "funds" in the context of Article 1.1(a)(1)(i) of the *SCM Agreement* in light of its object and purpose encompasses debt-to-equity swaps and the extension of maturities of loans. The ordinary meaning of the word "funds" encompasses more than just "money" and includes as well all financial resources, which have monetary or exchangeable value or provide financial gains.[131] As a consequence, Korea's claim regarding "government revenue that is otherwise foregone" is irrelevant and should be rejected.

(ii) The JIA Correctly Determined that the Private Creditors Were Entrusted or Directed

- Summary of argument and general approach

4.220 "Entrustment or direction" occurs when a government "gives responsibility to" or "exercises its authority over" a private body.[132] The *SCM Agreement* imposes no particular evidentiary standard for the evidence for the determination of entrustment or direction.[133] In light of the anti-circumventive nature of an "entrustment or direction" case, circumstantial evidence may play a key role in a determination under Article 1.1(a)(1) of the *SCM Agreement*. The JIA found, based on the totality of the evidence before it, that the Government of Korea's involvement in the bailout programs for Hynix was not a mere facilitation for such programs, and the bailout programs were not an "inadvertent or a mere by-product of governmental regulation".[134] A review of the JIA's analysis of the individual pieces of circumstantial evidence in conjunction with other pieces of evidence, as the JIA did, as well as the accuracy of the individual pieces of evidence, and an assessment whether the intermediate findings of fact made by the JIA on the basis of these evidence, and the overall conclusion based on these intermediate findings, demonstrates that the JIA's determination provided a reasoned and adequate explanation.

- Rebuttal to Korea's arguments

4.221 Korea's argument that the JIA's finding of entrustment or direction rests solely on a three-prong "syllogism" misstates the JIA's determination and overlooks the fact that the JIA considered other factors (*e.g.*, the Government of Korea's power to control the private bodies, the Government of Korea's intervention into the progress of the October 2001 and December 2002 Programs).[135]

- The Government of Korea's intent

[131] *See, e.g.*, Oxford English Dictionary (5th ed. 2002) at 1049; Concise Oxford English Dictionary (10th ed. 2002) at 919.
[132] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 110-11.
[133] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 138.
[134] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 114.
[135] *See* FWS of Japan, paras. 335-46 for the summary of these factors.

4.222 The JIA had abundant evidence before it that the Government of Korea had expressed a clear intent to save Hynix.[136] As clarified by the Appellate Body, in some circumstances, "guidance" can constitute entrustment or direction.[137] Whether the government's action is ultimately not inconsistent with the private bodies' own interests is not a factor that needs to be considered in assessing the government's action of entrustment or direction.[138]

4.223 Contrary to Korea's allegation, the JIA did not ignore the newspaper article cited by Korea, but rather addressed it and explained the weight it was given.[139] The JIA sufficiently discussed other evidence related to the Government of Korea's actions related to the October 2001 Program.[140] The JIA fulfilled its responsibility to provide reasoned explanation on its determination under the *SCM Agreement*. In assessing the accuracy and adequacy of any statements by interested parties during the investigation, it was reasonable for the JIA to consider whether, in light of the totality of the evidence before it, such statements were accurate and adequate, and if the evidence demonstrated that they were not, to reach a finding that such statements are not reliable.

- Lack of investors and the lack of sufficient analysis by participating banks

4.224 As a premise, the JIA focused on the commercial reasonableness of the participating banks' decisions and decision making process, and the JIA's conclusion that the banks acted in a non-commercial manner sheds light on some of the other evidence on the record, as the Panel in *EC – Countervailing Measures on DRAM Chips* acknowledged that "such non-commercial behaviour may well be seen as an indication of possible government entrustment or direction".[141]

4.225 Next, with respect to the creditor banks for which the JIA did not make finding on whether entrustment or direction was made, it should be noted that the JIA had sent questionnaires to these banks and asked them to provide information concerning their decisions to participate in the Hynix bailout programs, but only one responded. Thus, the JIA relied on the facts that were otherwise available, including those provided by responsive bank. Also, the fact that the JIA did not make such finding does not suggest that the banks acted in commercial manner.

- Korea's Specific Arguments on the JIA's Assessment of the Lack of Investors Willing to Participate in the Bailout Programs

4.226 The JIA's finding was based on abundant of evidence that there existed no investors, either new or existing creditors, in the *general* commercial market who would have invested in or provided loans to Hynix *from a normal commercial perspective* such as views of investment analysts, investment trust companies, and purchasers of the GDRs, *i.e.*, an outsider's point of view.[142] The JIA further examined the commercial reasonableness for existing creditors to provide additional financing to Hynix even where no investors in the general commercial market would provide any financing.[143] The JIA followed the same process in examining banks' financing decisions in the October 2001

[136] *See, e.g.*, JPN-02-17-21, 24-25, 112, 113, 235, 321-323, 328, 329, 334, and 386-406.
[137] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116.
[138] *See* FWS of Japan, para. 69.
[139] Annex 3 of the Final Determination, para. 401 (JPN-04).
[140] *See* Annex 1 of Final Determination, paras. 269-75.
[141] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.59.
[142] *See* Annex 1 of Final Determination, paras. 261-68 (JPN-02) for the JIA's analysis on the October 2001 Program and *ibid*., paras. 322-27 for the same on the December 2002 Program.
[143] *See* Annex 1 of Final Determination, paras. 204-221 (JPN-02).

Program[144] and the December 2002 Program[145] on the premise that existing creditors would possibly provide additional funding in order to maximize the recovery of credit.[146]

4.227 The Arthur Andersen Report, which all the banks alleged to have formed the basis for their decision to participate in the October 2001 Program, was not ready until more than a month after the conclusion of the October 2001 Program. With respect to the December 2002 Program and the Deutsche Bank Report, the JIA examined the accuracy and adequacy of the Deutsche Bank Report. However, the JIA found it was not an objective third party analysis as the Deutsche Bank [[BCI]].[147] There also was evidence on the record that the government intervened in the preparation of the Deutsche Bank Report[148], as acknowledged by NACF.[149] In addition, KEB and Woori Bank refused to submit minutes of Special Committee for Corporate Restructuring irrespective of the JIA's request. Thus, it did not have sufficient third party character to substantiate a commercial judgment, given Hynix's serious financial situation.[150]

4.228 The JIA also pointed to a number of anomalies in this Report for which no satisfactory explanation was provided.[151] Equally important is the fact that all the creditors seemed to have ignored these anomalies and that they went ahead with the excessively risky investment in Hynix based on this unreliable Report, casting doubt on the general claim by the creditors that they based their decision on the Deutsche Bank Report and that this decision was therefore commercially reasonable.

4.229 The offer made by Micron in April 2002 cannot be evidence of the situation in December 2002 and the Memorandum of Understanding between Hynix and Micron was not submitted to the JIA at the time of the investigation.[152] None of the Korean banks stated that it relied on the Micron offer in evaluating the value of Hynix.

- Korea's Specific Arguments concerning the Lack of Analysis by Participating Banks

4.230 Exhibits KOR-27 and KOR-29 confirm a number of the JIA's findings on Woori Bank. With respect to the October 2001 Program, KOR-27 shows that the Bank [[BCI]]; that the Arthur Andersen report [[BCI]] in the October 2001 Program; and that Woori Bank took into account the [[BCI]]. With respect to the December 2002 Program, KOR-29 shows that Woori Bank accepted the Deutsche Bank Report at face value, despite of the many shortcomings both from a procedural and substantive point of view and its own admission that the Deutsche Bank was[[BCI]].

(e) The Determination of Benefit

(i) Introduction and Overview of Japan's Argument

4.231 The JIA's conclusion that Hynix could not raise funds on the commercial market comparable to those raised through the October 2001 Program and the December 2002 Program was reasonable

[144] *See* Annex 1 of Final Determination, paras. 269-97 (JPN-02).
[145] *See* Annex 1 of Final Determination, paras. 328-74 (JPN-02).
[146] Annex 3 of Final Determination, paras. 140-41 (JPN-04) (emphasis added).
[147] Annex 1 of the Final Determination, paras. 340-42 (JPN-02); Annex 3 of the Final Determination, paras. 480-83 (JPN-04).
[148] Annex 1 of the Final Determination, paras. 334–36 (JPN-02); Annex 3 of the Final Determination, paras. 472-74 (JPN-04).
[149] Annex 3 of the Final Determination, paras. 526 and 528 (JPN-04).
[150] Annex 1 of the Final Determination, paras. 338-42 (JPN-02).
[151] Annex 1 of the Final Determination, para. 343 (JPN-02); Annex 3 of Final Determination, paras. 489, 491-492, 495-499, 501-503, and 505.
[152] *See* Japan's Answer to Q.44 of the Panel's Questions (1st Substantive Meeting).

and is supported by facts on record.[153] Participation in these Programs by financial institutions, for which the JIA did not make any finding whether they were entrusted or directed by the Government of Korea, cannot be the benchmark to determine the benefit as these financial institutions also acted in consideration of non-commercial factors.

4.232 The terms and conditions of the October 2001 and the December 2002 Programs were so heavily distorted by past subsidies, as well as the concurrent government entrustment or direction for the particular subsidy, that they were not obtained from the commercial market. The evidence on the record also established, *inter alia*, that the Government of Korea intervened into the contents of the Deutsche Bank Report[154], which provided the financial terms of the December 2002 Program.

(ii) Rebuttal to Korea's Arguments

- Korea's flawed argument based on the going concern value

4.233 The assertion that the going concern value was higher than the liquidation value and thus the banks' participation reflected market benchmark is erroneous and unsubstantiated.[155] The Arthur Andersen Report was only finalized after the decisions to participate had already been taken and its going-concern value was based on Hynix's financial conditions after its receipts of the actual financings as executed under the October 2001 Program.[156] For the Deutsche Bank Report, the estimated recovery rates in case of turnaround scenarios, *i.e.*, its going-concern values for creditors, contain errors and various other deficiencies.

4.234 Neither Article 1.1(b) nor Article 14 provides any particular methodology that an investigating authority should use where no commercial benchmarks from the actual market are available as an "investigating authority is entitled to considerable leeway in adopting a reasonable methodology."[157]

4.235 With respect to the assertion that the JIA did not examine the normal practice of participants in transactions of the same type, Korea disregards the fact that the Government of Korea and other interested parties refused to submit information of the financings provided to other companies subject to the CRPA during the investigation, despite the request of the JIA. Thus, the JIA was precluded from considering such potential market benchmarks.[158]

- Korea's flawed argument using the banks - for which the JIA made no finding of whether they have been entrusted or directed - as benchmarks

4.236 In light of the fact that the banks, to which the JIA sent questionnaires, were the major creditors to Hynix, selected based on the response of the Government of Korea on this point, and the response of KEB, the lead bank in Hynix's Creditors Council (*i.e.*, that the credit of such other banks

[153] Such facts include the combination of Hynix's disastrous and deteriorating financial state, its bad history of servicing debt, the collapse of the stock price after the GDR issuance of June 2001, the reality that no new investors put funds into Hynix, including so-called vulture funds, that no existing creditor provided any financing outside of the October 2001 and December 2002 Programs. *See* Annex 1 of the Final Determination, paras. 170, 261, 263, 265-68, 323, 324 325-27, footnote 47 (JPN-02); Annex 3 of Final Determination para. 448 (JPN-04).

[154] Annex 1 of the Final Determination, paras. 334-36 (JPN-02); Annex 3 of the Final Determination, paras. 472-74.

[155] *See* Annex 1 of the Final Determination, para. 343 (JPN-02), Opening Statement of Japan, paras. 55-60.

[156] *See* Annex 1 of the Final Determination, paras. 276 and 299, and footnote 362 (JPN-02). *See also* Opening Statement of Japan at the First Substantive Meeting of the Panel, para. 32.

[157] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.213.

[158] See also FWS of Japan, paras. 627-31.

"is small" and that KEB does not "think this information is necessary for the countervailing duty investigation procedure"), the JIA's selection of banks to investigate was reasonable.

4.237 Article 14 does not require an investigating authority to accept as a benchmark a market so distorted by the government's intervention that the trade-distorting potential of the subsidy would not be properly recognized.[159] To require use of such a distorted benchmark would lead to an underestimation of the trade-distorting potential of the subsidy.

4.238 The "market" in this case is the financing by private entities that is commercially available to Hynix. If the government is heavily subsidizing a company, then private entities would construct their financial arrangements to the company based on its subsidy-distorted financial conditions. It is therefore clear that the government's intervention is distorting "the market" available to the company. In some cases, such as this one, the scale and timing of the subsidies is such that it is not just a question of impacting on the terms of the financing, but actually creates the existence of such financing itself. At the time of the October 2001 Program and the December 2002 Program, no commercial investment was available to Hynix[160] and it was well recognized that it would go bankrupt without a new financial infusion.[161]

4.239 In the case at hand, the JIA did not make any finding of whether certain banks were entrusted or directed, but this does not mean that such banks necessarily constitute a market benchmark. These other creditors had not acted in a commercially reasonable manner. Apart from Kookmin Bank, none of these other banks provided responses to the JIA's questionnaires, forcing the JIA to rely on the facts available.[162] With respect to the December 2002 Program, the JIA had no choice but to base its fact finding on the information from those banks that replied.

4.240 Subsidies such as the D/A financing, the KDB program and the May 2001 Program were not granted in the distant past. They remained in effect and enabled Hynix to survive until the October 2001 Program, which in turn enabled Hynix to stay in business until the December 2002 Program. Given the extent of the subsidies provided, it is evident that the terms and conditions of these banks' financings in the October 2001 and December 2002 Programs were affected and distorted by the earlier bail-out programs.

4.241 In the case at hand, the government's role in the restructuring of Hynix through public bodies and entrusted or directed private bodies was so predominant both prior to and at the time of the actual programs that were countervailed, that a comparison with a distorted private market would become completely circular.

(f) Imposition of a Countervailing Duty on Imports Found to Have Been Subsidized during the Period of Investigation

(i) The Limited Nature of Korea's Claim

4.242 Korea's claim under "Articles 19 and 21" has been narrowed down to its arguments based on Articles 19.4 and 21.1.

[159] Appellate Body Report, *US – Softwood Lumber IV*, paras. 90-95.

[160] *See* Annex 1 of Final Determination, para. 190 (JPN-02). *See also* Annex 1 of Final Determination, paras. 261-68 (JPN-02) for the JIA's analysis on the October 2001 Program and *ibid*., paras. 322-27 for the same on the December 2002 Program.

[161] *See, e.g.*, Oral Statement of Korea, para. 59.

[162] *See* Annex 1 of Final Determination, footnote 362 (JPN-02).

(ii) The Determination was Fully Consistent with Article 19.4

4.243 Article 19.4 of the *SCM Agreement* explicitly references the amount of the subsidy "*found to exist*", *i.e.*, using the past tense of "find," was made. A subsidy can only be "found" to exist during the period of investigation. If Korea's interpretation of Article 19.4 is accepted, investigating authorities would not be able to complete the investigation, as they would be forced to examine the amount of benefit concurrently with the imposition of a countervailing duty.

(iii) The Determination was Fully Consistent with Article 21.1

4.244 Article 21 covers "Duration and Review of Countervailing Duties…." Article 21 is inapplicable in a dispute over the imposition of countervailing duties in accordance with the final determination of an investigation. Korea's interpretation would negate the clear intent of the drafters, who chose to place Article 21.1 under the provision dealing with *reviews*, rather than under Article 19, which imposes disciplines with respect to *investigations*.

(iv) Article VI of the GATT 1994, and the Provisions of the SCM Agreement Provide Incontrovertible Textual Support for Japan's Position

4.245 Article VI of GATT 1994 and the provisions of the *SCM Agreement* provide vital textual support for use of a period of investigating ("POI") to determine the amount of the subsidy. Article VI:3 of GATT 1994 provides, in part, that the subsidy is that "***determined to have been granted***." The drafters have used the past perfect tense (referring to a subsidy "determined to have been granted") rather than the present tense (a subsidy "being granted"). The countervailing duty may be imposed on the basis of a subsidy "determined to have been granted" prior to the imposition of the duty, *i.e.*, during the POI.

4.246 Under Articles 10 and 11.1 of the *SCM Agreement*, the investigating authority determines the existence of the subsidy (*i.e.*, subsidization), as well as the degree of the subsidy (*i.e.*, the amount of subsidy) as of the time as alleged in the application. Article 15 provides that the determination of subsidy must precede the investigating authority's examination of injury. Consequently, the determination of the amount of subsidies, which constitutes the basis to determine the existence of subsidization, must also be made on the past data as of the time contemporaneous with the period of time in which the injury is determined. These provisions inform Article 19 that a final determination must be made based on the evidence on the record which relates to the POI. Article 19.4, in turn, authorizes imposition of countervailing duties where a subsidy has been "found" to exist during the POI. Nothing in the *SCM Agreement* requires a *redetermination* of subsidy at the time of imposition of the duties.

(v) Korea Wrongly Assumes that the Investigating Authority "Fully Allocated" the Subsidies to the 2001-2005 Period

4.247 The JIA did not make *any* finding on the expiry date of the effects of the non-recurring subsidy granted in the October 2001 Program but determined only that the amount of the subsidy to be allocated to the POI was one-fifth of the originally granted amount of the non-recurring subsidy. This determination was a finding of the subsidy allocation for 2003 and does not represent a finding that the appropriate amount of the subsidy to be allocated to 2004 or 2005 would necessarily be one-fifth of the total amount of the subsidy.[163]

4.248 The issue of the allocation of subsidies in later years must be determined upon review of relevant facts for those years in a review proceeding under Article 21 of the *SCM Agreement*. The JIA made no findings with respect to the amount of benefit that might be allocated to the period after

[163] Oral Statement of Korea, para. 90.

the POI or how such amount would be allocated. Such a finding cannot be made concurrently with the imposition of a countervailing duty, because, *inter alia*, the allocation factor to be used in the calculation of the amount of benefit for the relevant subsequent periods and the residual amount of the subsidy may also change.[164]

(vi) Korea's Claim Disregards Relevant Findings by the Appellate Body

4.249 Japan cited a number of WTO precedents[165] that directly supported Japan's argument, and negated Korea's claim. Korea has not commented on the merits of these rulings. Furthermore, similarities of the characteristics of the *Anti-Dumping Agreement* and the *SCM Agreement* lead to the logical conclusion that both Agreements should be interpreted similarly, where possible. There is no obligation either under the *Anti-Dumping Agreement* or the *SCM Agreement* that the investigating authority must re-calculate the anti-dumping or countervailing duty rate absent an affirmative act.

(g) Effects of Subsidies in Injury Determination

(i) Causal Link between the Subsidized Imports and Injury

4.250 Article 15.5 of the *SCM Agreement* requires an investigating authority only to demonstrate a "causal relationship between the subsidized imports and the injury to the domestic industry" and to conduct a non-attribution analysis in which the investigating authority examines "known factors other than the subsidized imports" to ensure that any injury caused by such known factors is not attributed to the subsidized imports. The "effects" are those set forth in Articles 15.2 and 15.4. Article 15.5 contains no additional requirement for an independent assessment of the effect of the subsidy itself.

4.251 Because "serious prejudice" under Article 6.3 of the *SCM Agreement* is an "entirely different concept from injury" under Article 15, Article 6.3 does not create any requirements under Article 15. The guidance provided by the Appellate Body that the parallel injury causation provisions in the *Anti-Dumping Agreement* do not specify particular analytical methodologies or approaches.[166] The provisions of the *Anti-Dumping Agreement* that correspond to Articles 15.1 and 15.2 of the *SCM Agreement* "do not set out a *specific* methodology."[167] The "particular methods and approaches" for non-attribution analyses under Article 15.5 "are not prescribed"[168] and "Article 15.5 does not impose any particular methodology when conducting the causation analysis set forth therein".[169]

(ii) The JIA Correctly Found that Hynix's Exports Were through the Effects of Subsidies Causing Injury to the Domestic Industry

4.252 Even assuming *arguendo* that Article 15.5 requires an investigating authority to examine causation between the effects of subsidies and the injury, the JIA still is in compliance with Article 15.5 as it found that the subsidized imports injured the domestic industry through the effects of subsidies as the subsidies themselves allowed the importation of the subsidized imports, thereby causing injury to the domestic industry. As a matter of fact, Hynix was able to continue its business, including exports of its DRAMs to Japan only because of subsidies.

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[164] *See* paragraph 51 of International Accounting Standard 16 (JPN-15).

[165] *See, e.g.*, Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 123; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165 (emphasis added, footnotes omitted). *See also* Panel Report, *EC – Tube or Pipe Fittings*, para. 7.102.

[166] Appellate Body Report, *US—Hot-Rolled Steel*, para. 224.

[167] Appellate Body Report, *EC—Bed Linen (Article 21.5-India)*, para. 113.

[168] Appellate Body Report, *US—Hot-Rolled Steel*, para. 224.

[169] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.405.

G. SECOND ORAL STATEMENTS OF KOREA

4.253 The following summarizes Korea's arguments in its second oral statements.

1. Opening Statement of Korea at the Second Meeting of the Panel

(a) Introduction

4.254 Korea's opening presentation at the second panel meeting focuses on four issues: (1) the proper understanding of the panel's task in this proceeding, (2) the appropriate method for determining whether an allegedly government-directed debt restructuring confers a benefit on the recipient, (3) the relationship between the amortization of a subsidy benefit and the duration of the countervailing duty, and (4) the requirement that there be a finding that the subsidized imports are, through the effects of the subsidy, causing injury to the domestic industry.

(b) The Panel's Task in this Proceeding

(i) The Interpretation of the Relevant Agreements

4.255 Although there appears to be a vast gulf in how Korea and Japan see this case, there are certain basic rules for interpreting the terms of the WTO Agreements on which the parties should be able to agree.

4.256 *First*, the panel must begin its analysis with an examination of the text of the relevant provision, giving meaning to each term. *Second*, the individual terms of the Agreements must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." And, *third*, the panel must exercise caution in reading meaning into provisions that is not supported by the text itself.

4.257 The application of these principles to the issues in this case should be straightforward. For example, in order to properly interpret the provisions of the *SCM Agreement* relating to "interested parties," it is necessary to assign some meaning to the word "interested." Japan's interpretation - which would permit an investigating authority to designate any entity that it sends a questionnaire to as an "interested party" - would render the word "interested" entirely superfluous.

4.258 Similarly, the interpretation of the first clause of the first sentence of Article 14 must reflect the actual language of that provision — which focuses on the methods actually *used* by the investigating authority. An investigating authority that *uses* methods that are not provided for in its national legislation or implementing regulations does not act consistently with the requirements of the first clause of the first sentence of Article 14, regardless of what other methods might be described in the legislation and regulations.

4.259 Finally, the phrase "direct transfer of funds" in sub-paragraph (i) of Article 1.1(a)(1) must be interpreted in light of the ordinary meaning of those terms — which does not encompass extensions of loan maturities or debt-equity swaps. Japan's suggestion that the *SCM Agreement* be read expansively cannot overcome the clear meaning of the language of the Agreement and, in particular, the phrase "transfer of funds."

(ii) The Requirement of a Prima Facie Case

4.260 Japan has argued repeatedly that Korea has failed in a number of instances to make a *prima facie* case. But the use of the Latin phrase should not obscure the obligations in this case. Korea does not have an obligation to prove that there were no subsidies, or that the findings by the Japanese Investigating Authority ("JIA") were factually wrong. Instead, Korea only needs to show that the JIA

failed to comply with the requirements of the *SCM Agreement*. There are a number of ways for Korea to meet that obligation - for example, by identifying instances in which the JIA ignored evidence, failed to consider alternative explanations, imposed improper burdens of proof, improperly resorted to facts available instead of creditor-specific information, or based its determination on unsupported assumptions. If Korea demonstrates that there were such errors, then it has established that the JIA's decision was inconsistent with the obligations of the *SCM Agreement* - even if Korea does not prove that the JIA's assumptions were, in fact, incorrect.

(iii) Evidentiary Requirements under the SCM Agreement

4.261 The Appellate Body has stated that the evidence relied upon by an investigating authority in a countervailing duty proceeding must "demonstrate" that the relevant subsidy criteria exist. Furthermore, the Appellate Body has clarified that, in applying the standard of review set forth in Article 11 of the DSU, panels must undertake a "critical and searching", "in-depth" examination to "test whether the reasoning of the authority is coherent and internally consistent," and to ensure that "there was positive evidence before [the investigating authority] to support the inferences made and conclusions reached by it."[170] As the Appellate Body has clarified, "[a]n investigating authority that uses a methodology premised on unsubstantiated assumptions does not conduct an examination based on positive evidence."[171]

4.262 The JIA's decision cannot withstand such scrutiny. Consider, for example, its treatment of loan-maturity extensions and debt-equity swaps. The JIA's Notice of Important Facts "deemed" those transactions to involve a two-step process in which Hynix first repaid its outstanding debts in full, and the creditors then used the funds received from Hynix to make new loans and equity infusions. But that assumption is illogical and completely without support: There was no evidence that Hynix, its creditors, or any lender or investor in Korea actually considered the loan-maturity extensions and debt-equity swaps to be equivalent to full repayments followed by new loans and new equity infusions - especially in light of Hynix's insolvency.

4.263 A similar problem can be seen with the JIA's finding of entrustment or direction. The JIA's analysis of "entrustment or direction" began with the assumption that, in light of "the deterioration of Hynix's financial situation, ... there was no investor that would invest in or make loans to Hynix in the general commercial market from a normal commercial perspective." But, there was no evidence to support that assumption. In reality, private creditors acting solely from a "normal commercial perspective" routinely engage in restructuring transactions with insolvent debtors whose finances are deteriorating.

4.264 Japan has attempted to distract the Panel from the unsupported assumptions, unreasonable inferences and other obvious flaws in the JIA's analysis by invoking the concept of the "totality of the evidence." But Japan's interpretation is fundamentally illogical. When an investigating authority invokes the "totality of the evidence" to support its findings, it is necessarily adopting the position that *all* of the evidence identified as supporting its conclusion was relied upon to reach the conclusion. After all, if some of that evidence that the investigating authority relied upon turns out to be incorrect, or to have been analyzed incorrectly, then the logic of the investigating authority's initial decision - which was based on a consideration of *all* of the evidence - can no longer hold.

4.265 In Korea's view, the evidence cited by the JIA is insufficient on its face to support a finding of entrustment or direction. But even if there were doubt, the Panel cannot uphold a decision that purports to be based on the "totality of the evidence," when some of the evidence relied upon by the

[170] *See United States – Investigation of the International Trade Commission in Softwood Lumber from Canada; Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, 13 April 2006, para. 93.

[171] *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R, 29 November 2005, para. 205.

investigating authority turns out to be incorrect or inconsistent with the investigating authority's interpretation.

(c) The Benefit Determination

(i) The Appropriate Benchmark

4.266 As mentioned, the JIA's benefit analysis "deemed" the restructuring transactions to be new loans and new equity investments by creditors whose pre-existing claims had already been repaid in full. The JIA therefore used the practices of investors considering "new" loans and investments as the benchmark for its benefit analysis. But that analysis is fundamentally inconsistent with the JIA's factual findings that Hynix was unable to repay its existing debts at the time of the restructuring transactions.

4.267 The problem for Hynix's creditors was that they could not get their money back from Hynix, because Hynix was insolvent. The creditors had, therefore, to try to maximize their returns given the fact that they had already committed their money to Hynix. The creditors did not have the option of taking back their money in full and investing it somewhere else. The behaviour of persons who did have that option is, therefore, irrelevant to the analysis of the options available to Hynix's creditors.

4.268 Japan has admitted that the JIA never considered the normal market practices of creditors of insolvent companies. Japan has also admitted that the JIA never made any findings regarding Hynix's going-concern and liquidation values at the time of the restructurings — even though those figures would have been critically important to creditors of insolvent companies acting in accordance with usual market practice. In the absence of such findings, there was no evidentiary basis for the JIA's conclusion that the restructurings were inconsistent with market benchmarks.

(ii) The Evidence Concerning Hynix's Going-Concern and Liquidation Values

4.269 The evidence before the JIA included reports from various financial advisors and industry experts, as well as analyses from the creditors themselves, confirming that Hynix's going-concern value was higher than its liquidation value at the time of the October 2001 restructuring and at the time of the December 2002 restructuring.

4.270 In its analysis of the October 2001 restructuring, the JIA disregarded the valuation analyses performed by outside consultants, because the final versions of the reports were not completed until after the restructuring had been approved. But, even if the JIA were correct about the timing of those reports, it would not affect the *benefit* analysis. As Japan has conceded, creditors acting in accordance with the usual market practices would have obtained similar valuation analyses. And, when presented with such figures, creditors acting in accordance with usual market practices would have agreed to restructure Hynix's debts. Consequently, there was no benefit to Hynix from the alleged government entrustment or direction.

4.271 The JIA's analysis of the December 2002 restructuring took a different approach: It claimed that the report by the outside consultant was so obviously flawed that no creditor acting under usual market practices would have relied on it. But the JIA reached that conclusion by taking statements out of context and portraying minor disagreements about presentation as evidence of error. In reality, its criticisms were without merit. An objective and unbiased analysis would have found that the financial consultant's report relating to the December 2002 restructuring was consistent with the normal practices of financial advisors assisting creditors in figuring out what to do with an insolvent debtor, and that the creditors' reliance on that report was consistent with normal market practices.

4.272 On the whole, there was no evidence to support the JIA's assertion that the restructurings were inconsistent with normal market practices. Consequently, the JIA's finding of a benefit to Hynix from

the October 2001 and December 2002 restructurings was inconsistent with the requirements of the *SCM Agreement*.

(iii) Participation of Non-Entrusted or-Directed Creditors

4.273 Only four of the banks that participated in the restructurings were found by the JIA to have been entrusted or directed by the Korean government. The JIA did not find entrustment or direction of any of the more than one hundred other financial institutions that participated in the restructuring on the same terms. Indeed, the JIA did not even contact most of these institutions - even though many of them held a higher share of Hynix's debt than some of the banks the JIA did investigate.

4.274 Japan has asserted that the JIA was justified in ignoring the behaviour of the financial institutions it never contacted, because Hynix's financial condition at the time of the restructurings was distorted by past subsidies. But Japan's arguments concerning the relevance of past subsidies are inconsistent with the provisions of Article 14 of the *SCM Agreement*. Article 14 provides that the benefit of a subsidy is to be measured solely by the difference between the terms of the subsidized transaction and the terms of an equivalent market benchmark transaction. By contrast, Japan's proposed approach would define the benefit from subsidies to include not only the difference between the subsidized financing and the market benchmarks, but also any future financing, even if that future financing is fully consistent with market benchmarks.

4.275 As Korea has demonstrated, Japan's interpretation would also lead to absurd results, where two identical companies with identical subsidies in a prior period and identical financing in the investigation period might nevertheless be subjected to drastically different countervailing duties. Such an interpretation of the *SCM Agreement* cannot be correct.

(d) Imposition of Duties Beyond the Amortization Period

4.276 It is undisputed that the alleged subsidy benefit from the October 2001 restructuring was fully allocated to the period from 2001 to 2005 by the methods adopted in the JIA's determination. Because the transaction in question was found by Japan to be a non-recurring subsidy, there is no basis for assuming that it might somehow be resuscitated to provide a new subsidy and new benefits in the future.

4.277 Japan has suggested that there might have been uncertainty about the subsidy rate in 2006, because the volume of sales or production used as the denominator for the calculation of the duty rate in 2006 was unknown at the time of the JIA's decision. But, no matter what Hynix's sales were in 2006, the duty rate relating to the October 2001 restructuring would have been zero - because a subsidy benefit of zero divided by any number results in a rate of zero.

4.278 Japan also contends that it was possible that the subsidy amortization period might have changed after the JIA's determination — if, for example, the estimated useful lives of Hynix's assets, and thus the subsidy amortization period, were modified. But, this issue is also irrelevant: The estimated useful lives of Hynix's assets during the entire amortization period was already known at the time the JIA made its final determination in January 2006, because the amortization period had ended in December 2005.

4.279 In this case, the JIA knew at the time that it made its decision in January 2006 that there was no continuing benefit from the October 2001 restructuring. It knew that the duty was no longer necessary to counteract any alleged subsidization arising from the October 2001 restructuring. Consequently, the imposition of duties is inconsistent with the provisions of Article 21.1 of the *SCM Agreement*, which specifically states that "A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury." In addition, it is also

inconsistent with the requirements of Article 19.4, which provides that "No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist...."

(e) Causation of Injury "Through the Effects of Subsidies"

4.280 Japan contends that the phrase "through the effects of subsidies" in the first sentence of Article 15.5 has no distinct meaning, and that the only purpose of the first sentence of Article 15.5 is to introduce the remaining sentences of Article 15.5. But Japan's interpretation cannot be correct, because it would not give meaning to every word in the first sentence of Article 15.5 — or, indeed, to the first sentence of Article 15.5 as a whole.

4.281 In its determination in this case, the JIA never stated that it was unnecessary to show that the injury had occurred "through the effects of the subsidy." Instead, the JIA claimed that the evidence showed that the injury had occurred "through the effects of the subsidy," because the mere fact that Hynix was still in operation, and able to export, reflected the fact that the alleged subsidies had saved Hynix from bankruptcy. But, as Korea has shown, this conclusion makes no sense. Under the Korean bankruptcy laws, the "bankruptcy" of Hynix would have led to debt restructuring, not liquidation, as long as Hynix's going concern value was higher than its liquidation value. There is no basis for the JIA's assumption that Hynix would have been liquidated in the absence of the alleged subsidies.

4.282 Japan has responded that there is nothing in the *SCM Agreement* that required the JIA to make findings about the operation of the Korean bankruptcy laws. But, it was the JIA (and not Korea) that chose to base the causation analysis on an assumption about how bankruptcy would have affected Hynix's production and exports. It was the JIA that asserted, without any evidence to support it, that bankruptcy would have necessarily required Hynix to cease production and export. Because the JIA's assertion was just unsupported (and, indeed, flatly wrong), the JIA's determination cannot be upheld under the relevant standard of review.

(f) Conclusion

4.283 The logic that led the JIA to find government "entrustment or direction" and to conclude that Hynix benefited from that alleged government action is flawed. The creditors acted in accordance with their rational self-interest, and the debt restructurings they adopted were consistent with the usual market practices of creditors of insolvent companies. Consequently, there was no reason to assume, as the JIA did, that there must have been government interference, and there is no reason to conclude that the alleged entrustment or direction made Hynix "better off." Because the JIA's determination was inconsistent with basic logic, everyday experience, and the requirements of the *SCM Agreement*, it cannot be upheld by the Panel.

2. Closing Statement of Korea at the Second Meeting of the Panel

4.284 Korea has engaged in a great deal of discussion at its meetings with the Panel and in its past written submissions about the circumstances of the Hynix restructurings that are at the heart of this case. As noted, there is no doubt that Hynix was in financial distress and unable to pay its debts in full at the time of the restructurings. But, contrary to Japan's apparent view, Hynix's difficult financial situation is not the end of the analysis. Instead, it is only the beginning.

4.285 Korea has presented arguments - based on the evidence and the JIA's own determinations - which in Korea's view compel the conclusion that there was no entrustment or direction, that there was no benefit, and that there was no injury through the effects of the subsidies. Korea believes that it is clear that Hynix's condition left the creditors with no real options other than to restructure Hynix's debts. Japan, it seems, wants to outlaw bankruptcy and informal debt workouts. The answer is clear: The restructuring of Hynix's debts was not the result of government entrustment or direction that

made Hynix better off than the market alternatives, but was, instead, the expected outcome of rational creditors following the usual market practices.

4.286 Nevertheless, as noted previously, it is not Korea's obligation in this proceeding to prove that there were no subsidies. Instead, Korea is required only to show that the JIA failed to live up to its obligations under the *SCM Agreement*.

4.287 Japan has repeatedly accused Korea of failing to present a *prima facie* case. Consider, for example, paragraph 27 of Japan's response to Korea's questions, where Japan stated:

> Japan notes that it is Korea's responsibility to show a *prima facie* case with respect to the value of Hynix if liquidated in accordance with the relevant provisions of Korean insolvency laws, if Korea wishes to advance such a claim in this dispute.

As a matter of law, this statement is simply wrong. Korea does not bear the burden of proving there were no subsidies. Instead, Korea's burden is simply to establish that the JIA's findings were not consistent with the requirements of the *SCM Agreement*.

4.288 In examining whether the JIA complied with those requirements, it may be useful to pause, for a moment, to consider some of the things that Japan has admitted the JIA did not do. Among other things, in its response to Korea's questions, Japan admitted that the JIA made no findings as to what Hynix's going concern or liquidation value might have been at the time of the restructurings.[172] And, in its statement at the second meeting of the Panel, Japan admitted that the JIA made no findings as to what Hynix's creditors — or what other private actors in the position of Hynix's creditors making decisions in accordance with usual market practices — would have done in the absence of the alleged entrustment or direction.

4.289 This can be seen plainly in paragraphs 33 to 36 of Japan's Opening Statement. In paragraph 33, Japan stated explicitly that "Hynix would have been unable to continue its business if the situation had been left untouched, *i.e.*, if Hynix's creditors would not have taken actions to allow Hynix to continue its business." But, in the very next sentence, Japan went on to clarify that:

> This finding, however, does not mean that the JIA made a finding as to what steps Hynix creditors would have taken had no subsidies been provided. The fact in this case is that the actual subsidies, not some potential restructuring, were granted to save Hynix.[173]

In those two sentences, Japan has admitted that the JIA had no basis for finding a benefit in this case.

4.290 As the Appellate Body has made clear, a finding of a benefit under Articles 1 and 14 requires a determination that the recipient has been made "better off" than the alternatives available in the relevant market.[174] Now, Japan has admitted that the JIA made no findings as to the alternatives that were available in the relevant market if the alleged entrustment or direction had not occurred. Japan has, therefore, conceded that the JIA made no finding as to whether the alleged entrustment or direction made Hynix "better off."

4.291 In case there were any doubt about what Japan meant, Japan continued on to repeat twice more that the JIA failed to examine what would have happened without the alleged subsidies. According to Japan, "Whether or not any other theoretical restructuring would have saved Hynix, if

[172] *See* Japan's Response to Korea's First Questions, paras. 23-27.
[173] Japan's Second Opening Statement, para. 34.
[174] *See, e.g., Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, 2 August 1999, para. 157.

the subsidies had not been granted, is *an irrelevant question*."[175] Japan admits the JIA did not look at what would happen in a market-based restructuring because that is not what happened; according to Japan subsidies are what happened. In Japan's view looking at "other potential bailout plans" would be "pointless."[176]

4.292 Under the *SCM Agreement*, however, looking at the "other potential bailout plans" that would have been available from the market is not "pointless." It is, instead, the entire point. A government financial contribution is not a subsidy unless it confers a benefit on the recipient, and it only confers a benefit on the recipient if it makes the recipient "better off" than the available market alternatives. By declaring an analysis of the available market alternatives "pointless", Japan has simply read the benefit requirement out of the Agreement. The Panel obviously cannot uphold that result.

4.293 Korea has plainly met its burden of proof in this proceeding: In its submissions, it has identified instances in which the JIA ignored evidence, failed to consider alternative explanations, imposed improper burdens of proof, improperly resorted to facts available instead of creditor-specific information, and based its determination on unsupported assumptions. As a result, Korea has established that the JIA's decision was inconsistent with the obligations of the *SCM Agreement*. In its statement at the Second Substantive meeting of the Panel, Japan has admitted that Korea are right.

H. SECOND ORAL STATEMENTS BY JAPAN

4.294 The following summarizes Japan's arguments in its second oral statements.

1. Opening Statement of Japan at the Second Meeting of the Panel

(a) Korea's Economic Theories Arguments are Irrelevant

4.295 In light of the irrelevance of its argument and the Panel's standard of review, Korea's economic theories argument cannot serve as the basis for the Panel to make any assessment of the JIA's determination.

(b) Japan's Provision of Methods is Consistent with Article 14

4.296 The application of the method under Article 14 need only fall within the umbrella of the methods "provided for". Beyond the "provided for" requirement, Article 14 does not specify a particular level of detail.[177]

(c) The "Assumptions" Alleged by Korea

(i) The First Category of an "Assumption" Alleged by Korea is Based on an Incorrect Understanding of the JIA's Determination[178]

4.297 The JIA first made a finding that there was no financing available from the viewpoint of outside investors. The JIA then examined the existing creditors "*on the premise that existing creditors would possibly provide additional funding in order to maximize the recovery of credit.*"[179] The JIA examined the actual decisions made by the existing creditors by reviewing the processes and materials actually considered by the creditors.

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[175] Japan's Second Opening Statement, para. 35 (emphasis added).
[176] *Id.*
[177] Panel Report, *US – Softwood Lumber IV*, para. 92.
[178] SWS of Korea, paras. 51and 59.
[179] Annex 3 of Final Determination, para. 141 (JPN-04) (emphasis added).

(ii) The Second Category of an "Assumption" Alleged by Korea Is in Fact a Factual Finding Based on the Evidence on the Record[180]

4.298 Korea's second category of an alleged "assumption" is not an assumption, but a finding of fact that the Government of Korea in fact had intervened in the existing creditors' preparation of the Hynix bailout programs and in individual banks' decision making to provide financing to Hynix[181].

(iii) The Third Category of an "Assumption" Alleged by Korea is Based on an Incorrect Understanding of the JIA's Findings and the Evidence[182]

4.299 The third category of Korea's alleged "assumptions" is made regarding the JIA's injury finding. The JIA did not assume, but found, that Hynix was able to continue production and export because of the Government of Korea' subsidies.[183]

(iv) The Fourth Category of an "Assumption" Alleged by Korea Is in Fact a Factual Finding Based on the Evidence on the Record [184]

4.300 The fourth category of an alleged "assumption" is contradicted by the Final Determination. Korea has not identified any failure to consider the Government of Korea and the other interested parties' arguments and has not identified any specific evidence on the record in support of its assertion.

(d) Positive Evidence and Standard of Review

(i) Korea's Erroneous Application of a "Positive Evidence" Standard

4.301 The Appellate Body's findings cited by Korea[185] concern only injury determinations under Article 3 of the *AD Agreement* and Article 15 of the *SCM Agreement*.

(ii) Non-Record Evidence Should Not Be Examined

4.302 Regardless of how Korea tries to characterize the non-record evidence it submits, in light of Article 12.2 and the Panel's standard of review, it is obvious that the fact that the JIA did not consider such evidence and argument based thereon presented to the JIA does not affect the reasonableness of the JIA's determination. KOR-34, 42, 43 and 44 should also be excluded from the Panel's consideration.

(e) Interested Parties

(i) Korea's Argument on the Scope of Interested Parties Is Without Merit

4.303 Korea's argument on the scope of interested parties under Article 12.9 of the *SCM Agreement* is inconsistent with Articles 12.9 and 23 of the *SCM Agreement*.

[180] SWS of Korea, para. 51.
[181] *See, e.g.*, Annex 1 of the Final Determination, paras. 269-75 and 328-37.
[182] SWS of Korea, paras. 51, 79.
[183] *See* Annex 1 of the Final Determination, paras. 550 and 605 (JPN-02).
[184] SWS of Korea, para. 53.
[185] *See* SWS of Korea, paras. 6, 68-70, 79, fn. 5, 50-53, 66, in which Korea cites the Appellate Body's findings in *US – Softwood Lumber VI*, para. 92 and *Mexico-AD Measures on Rice*, para. 204.

(ii) Korea's "Adverse Facts Available" Argument Is Without Merit

4.304 The JIA has not applied "adverse facts available", and Korea fails to identify how any of the examples it raises can be viewed as "adverse facts available."

(f) Revenue Foregone/Transfer of Funds

(i) Korea's Interpretation of "Transfer of Funds" Is Erroneous

4.305 Korea's argument that a "transfer of funds" only means that "money must change hands" is unsubstantiated.

(ii) The Extension of Maturity of Loans and Debt-to-Equity Swap

4.306 The JIA considered that an extension of a loan maturity consists of two elements (*i.e,*. the original loan is repaid and a new loan is granted) and that the debt-to-equity swap consists of two elements (*i.e.*, the existing loan is satisfied and equity is issued). These interpretations are reasonable and entirely consistent with the nature of these transactions.

(g) Financial Contribution

(i) The "Syllogism" Korea Asserts Is an Erroneous Understanding

4.307 Korea's argument on a "syllogism" is based on either a misunderstanding or a misstatement of the JIA's actual finding on financial contribution.

(ii) The Decisions of Woori Bank and Chohung Bank

4.308 An examination of the relevant evidence in its totality indicates that the decisions by these banks were not made from a commercial viewpoint.

(iii) The JIA's Finding on Government Intent Was Reasonable

4.309 The JIA considered all record evidence, examined such evidence, and made findings as to the weight and credibility of such evidence in light of the other evidence and facts.

(iv) Prime Minister's Decree No. 408 Does Not Prohibit Government Intervention

4.310 Contrary to Korea's assertion, Article 5 of the Decree permits the Financial Services Agencies to "request cooperation or assistance of Financial Institutions, etc. for the purpose of stability of the financial market…" and provided the power to make such request to the Government of Korea.

(h) Benefit

(i) Korea's Argument that Hynix's Debts Were Worthless Is Without Merit

4.311 The record evidence shows that loans were swapped at their full principal amount.[186]

(ii) Korea's Going-Concern Value Argument Is Without Merit

- Korea's Arguments are Based on Assumptions Without Any Evidence

[186] *See* Variance of New Equity Issuance and Capital Amount (JPN-24).

4.312 Even assuming, *arguendo*, that the going-concern value was higher than its liquidation value, the evidence contradicts an assumption that consequently creditors would always participate in a restructuring.[187]

4.313 The JIA examined the evidence of the actual decision-making of individual banks taking into account the possibility that they may participate even when no investors from an outsiders' commercial view point would, but found that the financial institutions participated upon consideration of non-commercial factors.[188] The JIA concluded that these Programs were not obtained on a commercial basis and accordingly could not be the benchmark to determine the benefit.[189] The JIA also established that the terms and conditions of the Programs stood on Hynix's financial condition that was heavily distorted by subsidies.[190] These facts demonstrate that such terms and conditions were achieved because of the Government of Korea.

- The JIA's Findings on The October 2001 Program Were Reasonable

4.314 The evidence on the record shows that Woori Bank and Chohung Bank did not evaluate the available options in deciding participation in the October 2001 Program, contrary to Korea's acknowledgement that "any creditor" considering options "***would require*** an analysis showing the effect of choosing ***each*** of those options."[191] Other Hynix creditors decided to participate without reviewing the Arthur Andersen Report valuation.

- The JIA's Findings on The December 2002 Program Were Reasonable

4.315 The Deutsche Bank Report was hardly an independent third party report, and was prepared under the scrutiny and intervention by the Government of Korea, which had requested Deutsche Bank to revise the Report after reviewing the draft.[192]

4.316 Korea ignores the going-concern values calculated under all of the [[BCI]]. The JIA reasonably found that the lack of analysis on [[BCI]][193] is strange. Deutsche Bank's consideration of the [[BCI]] necessitates an examination of the details of the feasibility of such, [[BCI]].

4.317 The JIA pointed out that the Deutsche Bank Report did not explain why it relied on a recovery rate of [[BCI]] per cent to assess the validity of liquidation value instead of the rate of [[BCI]] per cent. For creditors, these recovery rates would be the material issue to examine whether they would be better off, but the Deutsche Bank Report failed to mention such material fact. The JIA correctly found that the recovery rate calculations under the [[BCI]] in the Deutsche Bank Report would have [[BCI]][194] Hynix admitted that an error was made in the Report.[195]

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[187] *See* Annex 1 of the Final Determination, para. 200 (JPN-02).

[188] *See* Annex 1 of the Final Determination, paras. 278-88, 299, 347-65 and 376, and footnote 362 (JPN-02).

[189] *See* Annex 1 of the Final Determination, paras. 299 and 376 (JPN-02).

[190] *See* Annex 1 of the Final Determination, paras. 299 and 376 (JPN-02).

[191] SWS of Korea, para. 184 (emphasis added).

[192] *See* Annex 1 of the Final Determination, paras. 334-35 (JPN-02). *See also* Annex 3 of the Final Determination, para. 526 (JPN-04) (NACF stated that "*despite* the intervention of the government, the conclusion of the . . . Report *remained* 'normalization of operation' of Hynix to be the top priority".) (emphasis added).

[193] Annex 1 of the Final Determination, para. 344 (JPN-02).

[194] *See* Notes (5) in page 13 of the Deutsche Bank Report (KOR-20).

[195] *See* Annex 3 of Final Determination, para. 500 (JPN-04).

- The JIA's Treatment of Other Creditors Was Reasonable

4.318 The JIA reasonably identified the financial institutions which should be investigated and found that the Other Creditors participated in the bailout programs for non-commercial reasons.

- The Distortion to the Market Caused by Past Subsidies

4.319 The JIA found that Hynix was able to obtain financing under the terms and conditions of the Programs because of prior subsidies, and therefore, their terms and conditions were not those obtainable from the commercial market.[196] This finding is separate from the finding that Other Creditors made their decisions to participate based on non-commercial considerations.

4.320 The issue is the government's role in structuring the prices in the market. The Government of Korea's subsidies played a predominant role in creating the terms and conditions of the Programs. In light of the JIA's discretion in calculating benefit[197], the JIA's calculation of the benefit where there was no comparable market benchmark is reasonable.

- The JIA Reasonably Found that Past Subsidies Caused a Distortion

4.321 Korea erroneously assumes that Hynix could have repurchased its debt at discounted value, disregarding the evidence on the record to the contrary.

4.322 To determine the available commercial loans, the JIA examined the interest rate that would be available to Hynix, based on the information with respect to similarly situated companies. Korea's argument that the JIA should have used the "usual practice" of creditors is baseless.

(i) Specificity

4.323 The relevant Programs were designed and executed solely for Hynix, and thus *de jure* specific to Hynix.

(j) Change in Ownership

4.324 The Hynix bailout programs can not be evaluated as a "change in ownership" in the meaning of the Appellate Body's findings.[198]

(k) Allocation of Subsidies

4.325 Article 21 of the *SCM Agreement* concerns circumstances after the imposition of a countervailing duty and thus does not apply to an original investigation.[199] As Korea agreed, a "withdrawal" of a subsidy in Article 19.1 requires an affirmative action by the government or recipient, which has not occurred. Neither Article 19.1 nor Article 21 supports Korea's argument.

(l) Injury Determination

4.326 Korea's argument that the *SCM Agreement*'s use the same terms ("the effect of the subsidy") for both serious prejudice and material injury necessitates an identical analysis ignores the different provision in which the term was used.

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[196] Annex 1 of the Final Determination, paras. 299, 376 (JPN-02).
[197] *See* Appellate Body Report, *US–Softwood Lumber IV*, para. 92.
[198] *See, e.g.,* Appellate Body Report, *US - Countervailing Measures on Certain EC Products*, paras. 117 *et seq.*
[199] Appellate Body Report, *US – Carbon Steel*, para. 70 (emphasis added).

2. Closing Statement of Japan at the Second Meeting of the Panel

(a) Introduction

4.327 Japan would like to address certain significant issues that Korea argues in its Opening Statement.

(b) Korea's Erroneous Understanding of its own Obligation to Establish a *Prima Facie* Case

4.328 Korea's argument concerning a *prima facie* case[200] is entirely erroneous. As Japan has already explained[201], "a *prima facie* case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to each of the elements of the claim."[202] Thus, Korea's argument that "[to establish a prima facie case means nothing more than that Korea] must present arguments that are sufficient to persuade the Panel"[203] is wrong – such argument must be based on evidence. Furthermore, the examples Korea raises as instances of Korea's failure to establish a *prima facie* case[204], as pointed out by Japan, are all instances in which Korea first made a claim, or tried to make a claim, to which Japan rebutted by pointing out that Korea failed to establish a *prima facie* case in forwarding the particular claim. For example, in response to Korea's argument that there was no rational basis for the JIA's finding that the Hynix shares had no value, Japan *first demonstrated that in paragraphs 414 to 415 of Japan's FWS that there had been a reasonable basis for the JIA's determination*, then pointed out, in paragraph 416 therein which Korea cited, that Korea failed to establish a *prima facie* case to contradict the reasonableness of the JIA's finding. Japan has not once in this panel proceeding requested that Korea establish a *prima facie* case that the Government of Korea did not provide subsidy to Hynix. Each of Japan's indication of Korea's failure of establishing a *prima facie* case point to Korea's failure to establish a *prima facie* case of its claim that alleges that the JIA's investigation and determination had been inconsistent with the requirements of the *SCM Agreement*.

(c) Submission of an "Argument" in a Panel

4.329 Japan would like to further clarify its view on the example Korea raised concerning the admissibility of a mathematical proof in the second meeting of the Panel. If such mathematical proof is relevant to the dispute before a panel, it may be subject to examination by a panel. In such instance, Appendix 4 of the DSU may become relevant. However, if a mathematical proof is irrelevant to the matter before the panel, any argument based on such proof similarly would be irrelevant. This is a matter of relevance, not admissibility. As a separate matter, in a case where the issue is whether an investigating agency should have considered a particular mathematical proof, unless the evidence and the arguments on the record of the investigation demonstrates that the particular mathematical proof was before the investigating agency, an *ex post* submission of evidence or presentation of argument of such mathematical proof is inadmissible in light of the standard of review of a panel.[205]

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[200] Korea's Opening Statement for the Second Panel Meeting, paras. 12-17.

[201] FWS of Japan, paras. 24-27.

[202] Appellate Body Report, *US – Gambling*, paras. 140-41 (emphasis original). *See also* Appellate Body Report, *Thailand – H- Beams*, para.136.

[203] Korea's Opening Statement for the Second Panel Meeting, para. 13. *See also ibid.*, para. 16.

[204] Korea's Opening Statement for the Second Panel Meeting, para. 13.

[205] *See* FWS of Japan, paras. 30-36, SWS of Japan, paras. 5-15, Opening Statement of Japan at the First Substantive Meeting of the Panel, paras. 2-11, Opening Statement of Japan at the Second Substantive Meeting of the Panel, paras. 2-6.

(d) Korea's Argument on the Interpretation of the Extension of the Maturity of Loans and the Debt-To-Equity Swap has no Merit

4.330 Korea's argument on the extension of the maturity of loans and debt-to-equity swaps in its Opening Statement shows that its argument is based on a distorted understanding of the JIA's finding and Japan's statements. Japan does not argue, nor did the JIA find, that "Hynix first repaid its outstanding debts in full, which funds that the creditors then used to make new and equity infusions" as alleged by Korea.[206] The JIA's statements on the nature of these transactions, as stated in paragraphs 103 and 104 of the Essential Facts, are the JIA's reasonable interpretation of facts, not the facts themselves. It is not an issue of substituting a finding based on evidence with an assumption as Korea alleges. The issue of the interpretation must be distinguished from the issue of fact-finding.

4.331 Korea's attempt to separate a debt-to-equity swap into debt forgiveness and issuance of the equity does not comport to the clear designation of "equity infusion" as a direct transfer of funds in Article 1.1(a)(1)(i). Korea argues that a debt-to-equity swap is a type of debt forgiveness, which must be classified in Article 1.1(a)(1)(ii). However, where certain monetary value is given to the equity-issuing company in exchange for the equity, such transaction ***is*** the equity infusion. Korea has not provided any explanation of this apparent discrepancy between its interpretation and the nature of the transaction.

(e) Korea's Argument on Individual Banks' Analysis was based on an Isolated Portion of Evidence and Failed to Address other Relevant Evidence

4.332 Korea again argues in its Opening Statement that Woori Bank considered the expected loss, Hynix's going concern value, and liquidation value in the October 2001 Program.[207] Korea again considered in isolation only a part of the evidence, ignoring the other evidence – unlike the JIA, which assessed the evidence in its totality. In the October 2001 Program, Woori Bank did not consider all options available, as discussed in Japan's Opening Statement.[208] In addition, Woori Bank repeatedly emphasized public interest concerns, such as [[BCI]].[209] Furthermore, Woori Bank's President stated even before the October 2001 Program was prepared, "If the Council for Creditor Financial Institutions agrees to support Hynix, we can change the current debt of Hynix into investment. We can also provide more financial aid,"[210] indicating that Woori Bank prioritized certain interests to save Hynix over its own economic interests.

4.333 As this example shows, Korea's allegations on the analysis of individual banks are based on a highly selective presentation of a portion of the evidence, and failed to consider the entire record of evidence, ignoring the JIA's determination, thus making the request of the de novo review to the Panel.

(f) Korea Now Admits that Deutsche Bank Prepared the Report in its Capacity as Financial Advisor to Hynix

4.334 Although Korea previously questioned the JIA's finding that the contractual relationship between Hynix and Deutsche Bank called into question neutral, external nature of Deutsche Bank

[206] Korea's Opening Statement for the Second Panel Meeting, para. 25.

[207] Korea's Opening Statement for the Second Panel Meeting, paras. 25 and 54. While Korea also presents arguments regarding Chohung Bank's consideration in October 2001 Program and Woori Bank's consideration in December 2002 Program, which Japan has already rebutted in prior submissions, and will not repeat herein.

[208] Opening Statement of Japan at the Second Substantive Meeting of the Panel, para. 70.

[209] *See* evidence listed in the footnote 347 of the Annex 1 of the Final Determination (JPN-02-347).

[210] Annex 1 of the Final Determination, footnote 348 (JPN-02). *See also* evidence listed therein (JPN-02-348)

Report[211], Korea recognize that Deutsche Bank was "***Hynix's*** financial advisor"[212] and thereby admitted that the financial advisor was not exclusively representing Hynix's creditors. The fact that Deutsche Bank was one of Hynix's financial advisors is a fact, which the JIA considered in relation to the other relevant facts.

(g) The Deutsche Bank Report is not Immune from Review

4.335 Korea suggests that the JIA should have been deferential to Deutsche Bank Report because it "was prepared by one of the world's leading financial services firms."[213] However, it is not axiomatic that the brand name of a financial advisor necessitates the reliability of its work. Indeed, the Government of Korea itself has recognized that the objectivity of highly-esteemed financial advisors may be compromised.[214] In the context of the October 2001 Program, for example, Korea's Minister of Finance and Economy acknowledged before the National Assembly that "the creditor banks do not consider that the [Salomon Smith Barney] Report is reliable, and it is expected that a different, objective organization will carry out the evaluation."[215] Like Deutsche Bank, Salomon Smith Barney was the one of the world leading firms. Korea's suggestion of brand name reliability in this dispute does not square with the Government of Korea's intervention into the Deutsche Bank Report. Korea completely ignores the record evidence that the Government of Korea "request[ed Deutsche Bank] to revise its contents . . . [breaking] its promise . . . not to interfere with inspections made by . . . Deutsche Bank" and that the Government of Korea "requested Deutsche Bank to review the plan."[216]

(h) Korea's Alleged Scope of Entrustment or Direction Based on its own Economic Theory is Contrary to the Scope under the *SCM Agreement*

4.336 Korea alleges that the Government of Korea's entrustment or direction is irrelevant because creditors had no options other than further financing to Hynix.[217] According to Korea, creditors had no choice but to "make new investments needed … when the company's going-concern value exceeds the liquidation value."[218] This argument is flawed legally, factually, and theoretically.

4.337 Legally, the government's "twist[ing]" of the arms of creditors can be an example of the government's entrustment or direction, and is quite relevant to an entrustment or direction under Article 1.1(a)(1)(iv). Entrustment or direction by the government may be found where the government's entrustment or direction is one of the factors influencing the decision of the creditors to finance the debtor. Korea's interpretation that creditors would never be subject to government entrustment or direction whenever the going-concern value is higher than the liquidation value, regardless of the manner in which the government intervenes, is erroneous interpretation of the *SCM Agreement*. It does not have to be the sole basis for their decision to provide financing.

4.338 Factually, Hynix's creditors could not reach the terms and conditions of the October 2001 Program and the December 2002 Program until the Government of Korea intervened. The October 2001 Program then offered three options for creditors to choose from. In this case, therefore,

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[211] *See, e.g.*, SWS of Korea, paras. 191-92 (citing Annex 1 of the Final Determination, para. 340 (JPN-02).

[212] Opening Statement of Korea, para. 50.

[213] Opening Statement of Korea, para. 73.

[214] *See* Annex 1 of the Final Determination, para. 276 (JPN-02); Annex 3 of the Final Determination, para. 367 (JPN-04).

[215] Annex 3 of the Final Determination, para. 367 (JPN-04).

[216] Annex 1 of the Final Determination, para. 334 (JPN-02).

[217] *See* Korea's Opening Statement for the Second Panel Meeting, para. 44 ("whether the government twisted their arms or left them entirely alone, the creditors did not have the option of taking back their money in full and investing it somewhere else.")

[218] Korea's Opening Statement for the Second Panel Meeting, para. 49.

there were options for banks to choose from, and there was room for the Government of Korea to entrust or direct creditors to provide financing to Hynix.

4.339 Theoretically, creditors always have choices to remain as creditors of a troubled company or to cash out and leave the company. A going concern value is always based on the prediction of the future. Accordingly, such prediction always involves a certain amount of uncertainty. Creditors usually assess risk of potential failure of the prediction or predictions. The result of the assessment may vary by creditors. For example, an additional investment if it failed could threaten the very existence of the creditor. Depending on the situation of the debtor and individual creditors, it is not commercially reasonable for a creditor to extend financing blindly even when going concern value exceeds liquidation value. In this context, what becomes relevant is the creditors' assessment of the risk. An economic theory on creditors' behaviour by no means dictates what a particular creditor will do according to a theory given the particular situation. Korea's argument is simply misuse of a theory. A theory does not decide reality.

(i) The JIA's Investigation Sufficiently Covered Hynix's Representative Financial Institutions

4.340 Regarding the JIA's selection of Hynix's creditor financial institutions, Korea ignores evidence that Hynix did submit during the investigation. [219] The lists submitted by Hynix in the investigation confirm that the JIA's investigation sufficiently covers Hynix's representative creditor financial institutions, as the JIA sent its questionnaires to 18 financial institutions, or [[BCI]] per cent of Hynix's total debts out of 19 financial institutions or [[BCI]] per cent thereof identified in the list as of October 2001, and 8 financial institutions, or [[BCI]] per cent of the total debts out of 10 financial institutions or [[BCI]] per cent thereof identified in the other list as of December 2002. In addition, the KEB, the main bank of Hynix and chair of the Hynix's Creditor Financial Institutions Council, also responded that "we decided to omit the full 114 name of companies because their amount of credit is small," and "we do not think this information is necessary for the countervailing duty investigation procedure."[220] Therefore, the Investigating Authority reasonably found that it had sufficiently covered Hynix's representative creditor financial institutions.

(j) Korea's Interpretation of EC Regulations is Incorrect; EC's Regulations in fact Support Japan's View

4.341 Korea's citation of Article 15(1) of the EC's anti-subsidy regulations does not support Korea's argument concerning the relationship between an amortization period and countervailing duties.[221] The provision that "unless…***it has been demonstrated that the subsidies no longer confer any benefit***" supports Japan's point that a determination of whether a subsidy no longer confers any benefit subsequent to the POI necessitates a new investigation which demonstrates such fact. There was no such "demonstration" in this case.

(k) Korea's Interpretation of "Found to Exist" is out of Context of the *SCM Agreement*

4.342 Korea's *ad hoc* comment at the second meeting of the Panel on the term "found" in Article 19.4, while informative on grammatical terms, did nothing to undermine Japan's interpretation, which is amply supported by the text of this Article and the context of other Articles of the *SCM Agreement* and Article V:3 of the GATT, as clarified by the Appellate Body reports in *Mexico* –

[219] Evidence listed in the footnote 2 of Annex 3 (JPN-04-2).

[220] Annex 3 of the Final Determination, para. 10 (JPN-04), and evidence listed in footnote 3 of Annex 3 (JPN-04-3).

[221] Korea's Opening Statement for the Second Panel Meeting, para. 95. As Korea has already conceded that an expiry of an amortization period does not amount to a "withdrawal of a subsidy" (*see* Opening Statement of Japan at the Second Substantive Meeting of the Panel, para. 150), Korea's citation concerning a withdrawal of a subsidy is irrelevant.

Antidumping Measures on Rice[222] and *EC-Bed Linens (Article 21.5 – EC)*[223] and the panel reports in *US-Lead and Bismuth Steel* and *US-Lead and Bismuth II.*[224]

(l) Conclusion

4.343 In conclusion, Japan would like to recall its obligations under the *SCM Agreement*. The *Agreement* gives investigating authorities certain obligations: to request information, to accept information and argument, to consider such, to reach reasoned conclusions, and to explain their conclusions. Japan's investigating authority did just that and did so reasonably. Thus, in applying its standard of review, which is to examine whether the JIA acted reasonably, the Panel should find that Japan fulfilled its obligations under the *SCM Agreement*. Japan would like to thank the Panel for its careful consideration and efforts in this dispute.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, China, the European Communities and the United States, are set out in their written submissions and oral statements to the Panel, and in their answers to questions. The third parties' arguments as presented in their written submissions and oral statements are summarized in this section.

A. THIRD PARTY WRITTEN SUBMISSION OF CHINA

5.2 The following summarizes China's arguments in its third party written submission

1. Introduction

5.3 In its third party submission, China presents its views on two key issues involved in this dispute: (i) whether the effect of past subsidies could be a proper ground for rejecting a primary market benchmark; and (ii) for non-recurring subsidies that are allocated over time, whether the imposition period of the CVDs against such subsidies may extend beyond the allocation period established by the investigating authority.

2. Effects of Past Subsidies over the Primary Market Benchmark

5.4 In the investigation carried out by the JIA, it was ruled that the investment decisions by private entities were influenced by Hynix's financial situation enhanced by past subsidies, and for this and other reasons, the JIA refused to deem such investment decisions as market benchmark.

5.5 Firstly, China observes that the threshold for abandoning a primary benchmark is very high. In accordance with Article 14 (a) and (b) of the *SCM Agreement*, the market benchmark for government provision of equity capital is the ***usual*** investment practice of private investors in the territory of that Member while the benchmark for government loans is the amount the firm would pay on a comparable commercial loan which the firm could ***actually*** obtain on the market. In China's view, both the words "usual" and "actually" imply that the benchmarks contemplated under Article 14 point to the actions of private entities in the marketplace. Thus, in this dispute, the decisions by those private financial institutions, which had not been found to be entrusted or directed by the Government of Korea, to participate in the restructurings at issue obviously represent the usual and actual practice

[222] Appellate Body Report, *Mexico – Antidumping Measures on Rice*, paras. 165-66.
[223] Appellate Body Report, *EC-Bed Linen (Article 21.5-EC)*, para. 123.
[224] Panel Report, *US-Lead and Bismuth II*, para. 6.57. *See also* Panel Report, *US-Lead and Bismuth Steel*, para. 6.50. For additional discussion on this point, see FWS of Japan, paras. 479-502, SWS of Japan, paras. 135-139, and the Opening Statement of Japan at the Second Substantive Meeting of the Panel, paras.149-53.

of private investors, and thus constitute a primary market benchmark for measuring the benefits conferred by the alleged subsidies by the Government of Korea.

5.6 By reference to the holdings of the Appellate Body in *US – Softwood Lumber IV* which relates to paragraph (d) of Article 14, China submits that in order to abandon a primary benchmark, the investigating authority must meet the high threshold, which, in that particular dispute, is that the private prices are aligned with those of the government-provided goods such that both prices have no noticeable differences. China submits that such high threshold should apply to the present dispute involving paragraphs (a) and (b) of Article 14.

5.7 In China's view, the actions of private financial institutions in this dispute represent the ***actual*** market reaction with respect to the ***same*** target company and under the particular circumstances surrounding the company and the transactions at issue. Such actions are more persuasive than those terms and conditions that the recipient ***"could"*** obtain from the market.

5.8 Therefore, China believes that unless the investigating authority has sufficient evidence on the record that shows the investment decisions by the private entities are so distorted as to fail to reflect the actual market situation, such decisions as primary market benchmark should not be disregarded lightly.

5.9 Secondly, China does not consider appropriate the JIA's reliance on the effect and influence of the previous subsidies as one of the factors that justify the disregard of the primary benchmark.

5.10 In China's view, a rationale private investor will undoubtedly take into account the financial situation of the target company before making an investment decision. However, whether such financial situation is enhanced by the effects of previous subsidies is out of the concern of the investor. Based on China's understanding of the position of the Appellate Body in *Canada – Aircraft*, the market benchmark shall be the terms and conditions available to the recipient at the time of the transaction and under the particular situation of the recipient. This market benchmark does not bear any qualification to the effect that the recipient must not have received any previous subsidies.

5.11 In addition, China submits that in case of a CVD investigation targeting multiple subsidies, the existence and amount of benefit of each individual financial contribution should be assessed independently. However, in this dispute, China notes that although such an approach was adopted by the JIA, it was finally ruled that the previous subsidies enhanced Hynix's situation and therefore, the investment decisions made by the private financial institutions were distorted by the previous subsidies. China believes such a position held by the JIA would be problematic for a CVD investigation involving multiple subsidy programs in that it would mean that once a previous subsidy is found, the subsequent action of the private investor would always be tainted by the previous subsidy. According to the JIA's approach, this may probably rendered the primary market benchmark unusable and meaningless. In China's view, such a position would undermine the basic concept of benefit and the guidelines provided for in Article 14 of the *SCM Agreement*.

5.12 In summary, in China's view, in consideration of the high threshold of rejecting a primary benchmark, the effect of past subsidies on the financial situation of the company at issue cannot be a proper factor that justifies the rejection of the actions of private investors as market benchmark.

3. Imposition Period v.s. Allocation Period

5.13 The second issue that China comments on is whether, for non-recurring subsidies allocated over time, the imposition period of CVDs against such subsidies can extend beyond the allocation period established by the investigating authority.

5.14 Firstly, China finds no clear guideline under the *SCM Agreement* as to how to allocate subsidies in a CVD investigation, but certain disciplines do exist between the lines of the *SCM Agreement*. China recalls that the word "offsetting" under Article VI:3 of *GATT 1994* informs the purpose of CVDs, i.e. to offset (or counteract) subsidies, which is also echoed by Article 19.4 and Article 21.1 of the *SCM Agreement* which respectively require that CVDs may not exceed the amount of subsidy found to exist and CVDs may only exist as long as and to the extent necessary to counteract subsidization.

5.15 In China's view, in case of non-recurring subsidies allocated over time, once the investigation authority establishes the total amount of the subsidies and the relevant allocation period, two things have become definite: (i) the amount of benefit allocated to a specific year; and (ii) the period of existence of the subsidy. By way of allocation, the one-time subsidies are deemed to be granted repeatedly during each year within the allocation period and in the amount equal to the allocated amount.

5.16 Having said that, if the investigating authority imposes a CVD order with duration beyond the allocation period, the order that remains in effect after the allocation period would be offsetting a subsidy that is not deemed to exist at that time. Thus, such an order would contradict the underlying purpose of a CVD measure as provided in Article VI:3 of *GATT 1994*.

5.17 In the investigation at issue, when the JIA made the final determination, the JIA was clearly aware that the benefit accruing from the October 2001 Restructuring had been allocated within the fixed period of five years which ended in 2005. Nevertheless, the JIA imposed the CVD order of 18.1 per cent which would remain in effect from 2006 until 2010. Therefore, such an order is offsetting a subsidy that does not exist as of 2006 and is inconsistent with Article 21.1 of the *SCM Agreement* because it fails to remain in force only ***as long as and to the extent necessary*** to counteract subsidization.

5.18 Secondly, China does not agree to the reasoning of Japan that, like an anti-dumping investigation, in case of a CVD investigation, the investigating authority also needs to rely on the historical data for the investigation period and may disregard the fact that a subsidy may cease to exist after such period.

5.19 In accordance with Article 18.1 of the *SCM Agreement*, no CVD shall be imposed if the subsidy is eliminated. This provision also supports the view that even if a subsidy is found to exist during the period of investigation, a CVD still cannot be imposed so long as it has be ***established*** during the investigation that the subsidy at issue will cease to exist after the investigation period. This understanding is in line with Article VI:3 of *GATT 1994* regarding the purpose of CVD as well as Article 21.1 of the *SCM Agreement* discussed above.

5.20 Furthermore, in China's view, for the particular issue under discussion, it is not appropriate to refer to the "parallel provision" in the *AD Agreement* due to the different nature of AD and CVD investigations.

5.21 In case of AD investigations, the investigating authority when concluding the investigation can only make sure whether dumping occurred during the period of the investigation and is ***not*** aware whether dumping will continue. This is true because: (i) dumping margin can only be calculated based on the transaction and cost data available to the investigating authority at the time of investigation and such data is related to the actual situation during a past period of time (i.e. investigation period); and (ii) dumping is an act by the exporter and it may be changed by the exporter at its own discretion. Therefore, it is reasonable to deem a finding of dumping during a recent past period of investigation as a finding of "present" dumping in the context of Article 11.1 of *the AD Agreement*.

5.22 In contrast, in case of CVD investigations, the investigating authority, in most cases, is able to ***ascertain*** whether the subsidy will continue to exist after the investigation. For example, in case of recurring subsidies having a definite term, the investigating authority may establish the exact date of expiry of such subsidies. In case of non-recurring subsidies allocated over time, as discussed above, the investigating authority may also establish the period of existence of the subsidies once it determines the period of allocation.

5.23 In China's view, so long as the investigating authority ***establishes*** that the subsidy exists in a fixed period of time, the presence of subsidies during a past investigation period cannot be simply regarded as "present" subsidization for the purpose of Article 21.1 of the *SCM Agreement*. Thus, China submits that Japan's argument based on the *AD Agreement* does not support its view that the JIA has properly imposed a CVD with duration beyond the relevant allocation period against a subsidy the benefit of which had been fully allocated.

5.24 In summary, given the above understanding of the provisions in the *SCM Agreement* and *GATT 1994*, China submits that in case of non-recurring subsidies that are allocated over time, the imposition period of CVDs that relate to such subsidies shall not extend beyond the allocation period as established by the investigating authorities.

4. Conclusion

5.25 In conclusion, China is of the following views on the key issues discussed above:

- China believes that in considering whether to reject the actions of private investors as market benchmark, the effect of previous subsidies on the company at issue is not a relevant factor to be taken into account;

- For non-recurring subsidies that are allocated over time by the investigating authority, the imposition period of CVDs against such subsidies should not extend beyond the allocation period of such subsidies as established by the authority.

B. THIRD PARTY ORAL STATEMENT OF CHINA

5.26 The following summarizes China's arguments in its third party oral statement.

1. Effects Of Past Subsidies Over The Primary Market Benchmark

5.27 The first legal issue China would like to address is whether the effect of past subsidies could be a proper ground for rejecting a primary market benchmark.

5.28 In the investigation carried out by the JIA, it was ruled that Hynix's financial situation had been enhanced by past subsidies, and consequently the investment decisions by the private financial institutions were influenced by such financial situation. For this and other reasons, the JIA refused to deem the investment decisions as market benchmark. In this respect, China submits the following views.

5.29 First, China observes that the threshold for abandoning a primary market benchmark is very high. In accordance with Article 14 (a) and (b) of the *SCM Agreement*, the market benchmark for government provision of equity capital is the ***usual*** investment practice of private investors in the territory of that Member. And the market benchmark for government loans is the amount the firm would pay on a comparable commercial loan which the firm could ***actually*** obtain on the market. In China's view, both the words "usual" and "actually" imply that the benchmarks contemplated under Article 14 point to the actions of private entities in the marketplace. In this dispute, the decisions by those private financial institutions not found to be entrusted or directed by the Government of Korea

obviously represent the usual and actual practice of private investors. Such decisions should constitute a primary market benchmark for calculating the benefits of the alleged subsidies.

5.30 Meanwhile, considering the Appellate Body's holdings in *US – Softwood Lumber IV* in respect of paragraph (d) of Article 14, China believes that the investigating authority must meet very high threshold before it can reject the primary benchmark. China submits that such high threshold should also apply to the present dispute involving paragraphs (a) and (b) of Article 14. Furthermore, since the private investors decided to invest in the same target company under the same conditions, such decisions are more persuasive than those terms and conditions that the recipient "could" obtain in the market.

5.31 Therefore, China believes that, unless the JIA has sufficient evidence on the record showing that, the private investment decisions are so distorted as to fail to reflect the actual market situation, such decisions as primary market benchmark should not be disregarded lightly.

5.32 Second, the JIA relied on the effect and influence of previous subsidies as one of the basis for disregarding the primary market benchmark. China does not think it appropriate to do so.

5.33 In China's view, before making an investment decision on a target company, a rationale private investor will certainly take into account the financial situation of that company. However, whether such financial situation is enhanced by the effects of previous subsidies is out of the concern of the investor. As the Appellate Body ruled in *Canada – Aircraft*, the market benchmark shall be the terms and conditions available to the recipient at the time of the transaction and under the particular situation of the recipient. There is no such requirement on the market benchmark that the recipient must not have received any subsidy previously.

5.34 In addition, China submits that the JIA's approach would be problematic in a countervailing investigation involving multiple subsidies. The JIA's position would mean that once a previous subsidy is found, the subsequent action of the private investor would always be tainted by the previous subsidy. In China's view, such a position undermines the concept of benefit and the guidelines under Article 14 of the *SCM Agreement*, and would probably render the primary market benchmark unusable and meaningless.

5.35 In summary, taking into account the high threshold of rejecting a primary benchmark, China submits that the effect of past subsidies on the current financial situation of the subject company is NOT such a proper factor that can justify the disregard of the actions of private investors as market benchmark.

2. Imposition Period v.s. Allocation Period

5.36 The second issue China would like to address is whether, for non-recurring subsidies allocated over time, the imposition period of countervailing duties against such subsidies can extend beyond the allocation period established by the investigating authority.

5.37 First, China observes that certain disciplines on allocation of subsidies do exist between the lines of the *SCM Agreement*. China recalls that the word "offsetting" under Article VI:3 of *GATT 1994* informs the purpose of a countervailing duty, namely, to offset subsidies. Such purpose is echoed by two provisions in the *SCM Agreement*. Article 19.4 provides that countervailing duties may not exceed the amount of subsidy found to exist while Article 21.1 requires that countervailing duties may only exist as long as and to the extent necessary to counteract subsidization.

5.38 In China's view, in the case of non-recurring subsidies allocated over time, by way of allocation, the one-time subsidies are deemed to be granted repeatedly during each year within the allocation period and in an amount equal to the allocated amount. Therefore, if the investigating

authority imposes a countervailing duty with duration beyond the allocation period, the duty existing after the allocation period would be offsetting a subsidy that is not there. Thus, such a duty would contradict the purpose of countervailing measures.

5.39 Turning to this investigation at issue, when making the final determination, the JIA was clearly aware that the benefit of the October 2001 Restructuring had been allocated within five years until 2005. Nevertheless, the JIA decided to impose the countervailing duty of 18.1 per cent from 2006 until 2010. Accordingly, such a duty is offsetting a subsidy that does not exist as of 2006. It thus violates Article 21.1 of the *SCM Agreement* as it fails to remain in force only ***as long as and to the extent necessary*** to counteract subsidization.

5.40 Second, China does not agree to Japan's position that the investigating authority may disregard the fact that a subsidy may cease to exist after the investigation period.

5.41 Under Article 18.1 of the *SCM Agreement*, no countervailing duty shall be imposed if the subsidy is eliminated. This provision supports the view that even if a subsidy is found to exist during the period of investigation, a countervailing duty still cannot be imposed, so long as it has be ***established*** that the subsidy at issue will cease to exist after the investigation period.

5.42 Furthermore, for the particular issue under discussion, China does not consider it appropriate to refer to the "parallel provision" in the *AD Agreement* due to the different nature of anti-dumping and countervailing investigations.

5.43 In the case of anti-dumping investigations, when concluding the investigation, the investigating authority can only establish whether dumping occurred during the period of the investigation while is ***not*** aware whether dumping will continue. This is so because dumping margin can only be calculated based on historical data available to the investigating authority at the time of investigation. In addition, dumping is an act by exporters and may be changed by exporters at their own discretions. Therefore, it is reasonable to deem a finding of dumping during a recent past period of investigation as a finding of "present" dumping in the context of Article 11.1 of *the AD Agreement*.

5.44 By contrast, in the case of countervailing investigations, the investigating authority, in most cases, is able to ***ascertain*** whether the subsidy will continue to exist after the investigation. A vivid example is the case of non-recurring subsidies allocated over time. As discussed above, the investigating authority may establish the period of existence once it determines the period of allocation.

5.45 In China's view, so long as the investigating authority ***establishes*** that the subsidy only exists in a fixed period of time, the presence of subsidies during a past investigation period cannot be simply regarded as "present" subsidization for the purpose of Article 21.1 of the *SCM Agreement*.

5.46 Therefore, given the above understanding of the provisions in the *SCM Agreement* and *GATT 1994*, China submits that in the case of non-recurring subsidies allocated over time, the imposition period of countervailing duties against such subsidies shall not extend beyond the allocation period established by the investigating authorities.

C. THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

5.47 The following summarizes the European Communities arguments in its third party written submission.

1. Article 6.2 of the DSU

5.48 In *Korea – Dairy* the Appellate Body set out a four stage test for fulfilling the requirements of Article 6.2 DSU. As regards the fourth requirement, the Appellate Body considered that Article 6.2 demands only a brief summary of the legal basis of the complaint, but the summary must, in any event, be one that is "sufficient to present the problem clearly". In other words, it is not enough that the legal basis of the complaint is summarily identified; the identification must "present the problem clearly".

5.49 In *EC – Bananas* the Appellate Body stated that there are two important reasons for insisting on precision in the request for a panel. First, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint. These reasons were further described by the Appellate Body in *Brazil – Desiccated Coconut.* In view of Japan's arguments in section II of its first written submission, it is in particular the reason relating to the rights of defence or "due process" that is at stake in this case.

5.50 In this respect the Appellate Body found in *Thailand – H-Beams* that :

> Article 6.2 of the DSU calls for sufficient clarity with respect to the legal basis of the complaint, that is, with respect to the "claims" that are being asserted by the complaining party. A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence. Likewise, those Members of the WTO who intend to participate as third parties in panel proceedings must be informed of the legal basis of the complaint. This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings.

5.51 In *US – OCTC Sunset Reviews* the Appellate Body specified further that for a panel request to "present the problem clearly", it must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed. In *EC-Bananas* the Appellate Body considered that there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establishes the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims. However, in *Korea – Dairy* the Appellate Body considered whether the listing of articles of an agreement is generally sufficient to meet the standard of Article 6.2 DSU. Therefore, the analysis must be made on a case-by-case basis.

5.52 The Panel should first examine whether Korea has presented claims that are not based on the legal bases identified in its panel request. In the second stage the Panel should examine on a case by case basis whether the mere listing of treaty articles is sufficient. It would appear that for the second stage analysis the Panel has some discretion in order to assess whether the ability of the respondent to defend itself was prejudiced.

2. Burden of Proof and Standard of Review

5.53 Any investigation involves an enquiry into facts, evidence, law and legal characterisation of the facts. Some degree of factual inference is inevitable in all investigations. If there is significant factual inference, such a situation is sometimes described as one in which there is "circumstantial evidence", although what really characterises such cases is the degree of factual inference. In such cases the authority may particularly look at the totality of the facts and evidence when reaching its determinations. Where it appears that necessary facts or evidence are being withheld, the procedures set out in Article 12.7.

5.54 The *SCM Agreement* does not expressly impose on Members obligations regarding burden of proof rules to be applied by authorities in investigations. Article 1 uses the term "shall be deemed to exist", supporting the view that inference may be appropriate or necessary when determining the existence of a subsidy, and particularly the imputation of the measure to a government. Past panels and the Appellate Body have confirmed this. This is consistent with the fact that a subsidy investigation, unlike a dumping investigation, enquires into the behaviour of *governments*. Whilst governments are subject to the same or an even higher obligation of co-operation as companies, there may be practical differences between the investigation of companies and the investigation of governments. For this and other reasons, in practice it is likely to be more difficult for an investigating authority to conduct effective verifications on government premises. This situation also has implications for the Panel's standard of review.

3. Interested Parties

5.55 Article 12.7 refers to any interested *Member* or interested party. The term "Member" includes "government" as that term is first used in Article 1.1(a)(1). The term "government" is then used a second time in Article 1.1(a)(1), being ***defined*** as "a government or any public body within the territory of a Member". It follows that a bank that is a "public body" that is alleged to have made a financial contribution is necessarily to be identified with "government" and in turn with "Member"; thus being in turn an interested Member or party within the meaning of Article 12.7. Article 1.1(a)(1) then refers to "a private body" that is entrusted or directed by government to carry out one or more of the functions illustrated, which would normally be vested in the government, and the practice in no real sense differs from practices normally followed by governments. It follows that a bank that is a "private body" that is alleged to have been entrusted or directed is also an interested Member or party within the meaning of Article 12.7.

4. Financial Contribution

- **Direct transfer of funds**

5.56 Article 1.1(a)(1)(i) of the *SCM Agreement* does not provide that a subsidy is deemed to exist *if there is* a direct transfer of funds. Rather, it provides that a subsidy is deemed to exist if "***a government practice involves*** a direct transfer of funds". This wording reflects the well established principle that the analysis is conducted on an ***accrual*** basis, rather than a payment basis. A subsidy exists at the moment it is ***granted***, even if there has not yet been a direct transfer of funds. The subsidy does not only come into existence at some later date when, for example, an amount of money is actually paid to the recipient pursuant to the terms of the grant. Thus, all that is required is that there is a "government practice" (such as a grant) that "involves" "a direct transfer of funds" (a grant involves now or in the future a direct transfer of funds).

5.57 It follows that whenever the terms of the "government practice" (be it a grant, loan or equity infusion) are modified, and particularly in any manner that is more favourable to the recipient, then there is a new "government practice" within the meaning of Article 1.1(a)(1)(i) which "involves" (now or in the future) "a direct transfer of funds". There is no doubt that the extension of the maturities of existing loans and a debt-to-equity swap qualify as "government practice" that "involves" (now or in the future) "a direct transfer of funds", thus triggering the application of Article 1.1(a)(1)(i) of the *SCM Agreement*.

- **Revenue foregone**

5.58 In the light of the preceding observations, the EC agrees with Japan that Korea's submissions with respect to revenue foregone are irrelevant.

- **Entrustment or direction**

5.59 The EC generally agrees with the submissions of Japan rather than those of Korea. The EC believes that these issues have already been extensively discussed in the Panel Report in *EC-DRAMs*, and subsequently in the Appellate Body Report in *US-DRAMs*, and the EC concurs with those findings. The EC respectfully invites this Panel to follow the same approach in these Panel proceedings. The EC reserves the right to re-visit this issue in its oral statement.

5. Benefit

- **Any method used to calculate benefit to the recipient must be provided for in legislation or implementing regulations**

5.60 The first obligation in the chapeau of Article 14 requires that any method used by the investigating authority to calculate the benefit to the recipient is provided for in the national legislation or implementing regulations. The EC disagrees with Korea's assertion that if there is an inconsistency with the first obligation in the chapeau of Article 14, it necessarily follows that the measure imposing countervailing duties "cannot be sustained" or is "invalid". Japan's municipal law is, at least in part, entitled "Guidelines …", whereas the chapeau of Article 14 refers to "legislation" and "implementing regulations". The EC believes that as a general matter in the municipal laws of WTO Members the terms "legislation" and "regulation" would generally suggest measures having binding force, whereas the term "guidelines" might not. Notwithstanding this the use by Japan of "Guidelines" should be considered capable of being consistent with the chapeau of Article 14.

5.61 There is a distinction between the "method" and its *application* in specific cases. The fact that, when applying a method in a specific case, it is necessary to elaborate it, does not automatically mean that there is an inconsistency with the first obligation in the chapeau of Article 14. The dictionary meanings (which are relevant to although not determinative of the meaning) of the term "method" include: "procedure for attaining an object; systematic arrangement, order." The term "method" thus indicates something that can be described in relatively abstract and brief terms. The use of the term "provided for" is significant. The relevant obligation does not require, for example, that the method be "exhaustively set out"; but merely "provided for". The use of this term simply indicates something that is "foreseen".

- **Any such method used to calculate benefit to the recipient must be consistent with the guidelines in Article 14, paragraphs (a) to (d)**

5.62 What must be consistent with the guidelines set out in paragraphs (a) to (d) of Article 14 is both the method set out in the national legislation or implementing regulations; and the method used in the measure imposing the countervailing duty. Korea has failed to precisely explain exactly which part of Japan's legislation or regulations (including Japan's Guidelines) is supposed to be inconsistent with paragraphs (a) to (d) of Article 14, and why. "Extensions of loan maturities" are capable of falling within, for example, paragraph (b) of Article 14; and thus within the corresponding provisions of Japan's legislation and regulations (including Japan's Guidelines). The fact that the measure imposing countervailing duties calculates an amount of benefit with respect to such instruments does not indicate any inconsistency with the *SCM Agreement*. The position is the same with respect to debt-equity swaps.

6. Specificity

5.63 These issues have already been extensively discussed in the Panel Report in *EC-DRAMs*, and the EC concurs with the Panel in that case on this matter. The EC invites this Panel to follow the same approach in these Panel proceedings.

7. Imposition of countervailing duties

5.64 Countervailing duties are levied on imported products, calculated in terms of subsidization per unit of the subsidized and exported product, typically at an *ad valorem* rate. The *ad valorem* rate is determined by expressing the amount of the subsidy as a percentage of the total value of the relevant sales of the firm in question. There is no other basis on which the *ad valorem* rate could be calculated. The calculation can only be made on the basis of data relating to the investigation period. The amount of the subsidy will therefore be the amount of the subsidy granted during the investigation period (or allocated to the investigation period, if the subsidy pre-dates the investigation period). As will the value of the relevant sales. It is permissible to allocate large "non-recurring" subsidies over a period of time, starting with the year in which the subsidy is granted. This approach reflects the duration of the economic "benefit" to the recipient of such subsidies and ensures that such large non-recurring subsidies do not escape from an appropriate remedy. After the end of year five, and in the context of assessment or refund proceedings based on a period of investigation or review contemporaneous with the exports for which final liability is being established, and with reference to year six or later, the amount of the subsidy, and thus the duty, would be zero.

5.65 The starting date for the period of allocation must be the year in which the subsidy is granted. The EC sees no basis on which the starting date could be deferred. That would be to dissociate the date on which the subsidy was granted from the remedy, in a manner that would be inconsistent with the *SCM Agreement*. Once the allocation period had ended, there is no further subsidy, and therefore no further remedy under the *SCM Agreement*. Where the allocation period ends ***after*** the date on which final measures are imposed, the final measure may nevertheless potentially remain in force for the five years provided for in Article 21.3, subject always to the possibility of assessment or refund proceedings, or changed circumstances proceedings under Article 21.2 of the *SCM Agreement*. The expiry of the allocation period does not trigger an automatic termination of the countervailing duty. Even if such a termination is requested by the exporting country, due process must be respected and the investigating authority has the right to investigate, for example, any new allegations of subsidy, before deciding whether to continue the measure.

5.66 The Panel should reject Korea's claim under Article 19.4. The subsidy is *always* found to have "existed" during the investigation period, as a *proxy* for present subsidy. It is *never* found to exist on the date on which the countervailing duty is levied. The allocation period is used merely for calculating the *ad valorem* rate of the countervailing duty. The rule in Article 19.4 might operate during assessment or refund proceedings. It has no relevance to the facts of the present case. The position with respect to Korea's claim under Article 19.1 is less clear. There is a distinction between a subsidy being "withdrawn" (such as, for example, the repayment of a grant); and a notional allocation period expiring. On the other hand, Korea argues that it is not justified for a Member to decide to impose a remedy, even in circumstances where that Member has itself effectively recognised that the subsidy is no longer having any *effects* – a point with which one might at first sight have some sympathy. That might also be seen as a point under Article 15, and here too the question(s) of causation and non-attribution are resolved by reference to the injury investigation period, and not the date of the final measure.

5.67 No equivalent to the phrase in question "unless the subsidy or subsidies are withdrawn" appears in the *Anti-Dumping Agreement*. That is presumably because dumping is in essence a matter of behaviour over time. Whereas a subsidy is granted at a specific moment or moments of time, even if it may have its effects over an extended period of time. This suggests that the phrase is concerned with the punctual question of grant/withdrawal, rather than economic effects over time.

8. Causation

5.68 Once a subsidy to a company has been allocated to a specific product, it may be determined that the subsidy has had the effect of lowering the price of that product. In an environment of

continuous subsidisation there may be no historical trend of higher prices, but the application of straightforward economic reasoning nevertheless dictates such a conclusion. The position under Part III of the *SCM Agreement* is not fundamentally different, even if, under Part V of the *SCM Agreement* the particular focus is on imports, given the nature of the remedy to be imposed.

D. THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

5.69 The following summarizes the European Communities arguments in its third party oral statement.

- **Introduction**

5.70 The European Communities makes its third party oral statement because of its systemic interest in the correct interpretation of the *SCM Agreement*. There are six issues to comment on, and they are:

- Article 6.2 of the DSU;
- the circumstances in which the market benchmark for determining benefit may be other than the market of the granting Member;
- the need to use the position of an outside investor, rather than an inside investor, as the market benchmark;
- the distinction between the existence and grant of a subsidy;
- the point at which a subsidy may be deemed to exist within the meaning of Article 1.1 of the *SCM Agreement*; and
- the circumstances in which the change of ownership case law may be relevant.

1. Article 6.2 of the DSU

5.71 In view of its systemic interest in this case the European Communities did not enter into details in its written submission on whether or not certain items on Korea's panel request "presented the problem clearly" in accordance with Article 6.2 of the DSU. The United States has in its written submission addressed two of these items in more detail.

5.72 The European Communities would like to echo the concerns that the United States has presented in particular on item 15. Under this item Korea generally listed seven different articles of the *SCM Agreement* and two articles of the GATT. Korea claimed that these provisions have been breached because Japan "failed to conduct a thorough and complete investigation, and failed to conduct its investigation and make determinations in accordance with fundamental substantive and procedural requirements".

5.73 The European Communities is of the view that item 15 is a prime example of a claim that does not present a problem clearly. A number of provisions are cited generally although some of them contain multiple obligations. In addition, these provisions are connected with an alleged omission and reference is just made to the breach of "fundamental substantive and procedural requirements".

5.74 The European Communities is of the view that such a presentation of the problem breaches the due process rights of the defendant.

2. The market benchmark for determining the existence and amount of a benefit is the market of the granting member, provided that it has not itself been distorted by government subsidies

5.75 When determining whether or not a financial contribution confers a benefit, and when determining what the amount of any such benefit may be, it may be necessary to compare the actions of the government with a market benchmark. Article 14(d) of the *SCM Agreement* refers, in the case of the provision of goods or services or the purchase of goods by a government, to the prevailing market conditions for the good or service in question in the country of provision or purchase. The other provisions of Article 14 do not contain the same language.

5.76 Thus, in the case of Article 14(d), the market benchmark relates to the Member, rather than the markets of other Members or the international market. The different market benchmarks could be different, depending, for example, on prevailing interest rates and currency exchange rates. In these circumstances, the correct benchmark is the market of the Member.

5.77 However, the situation prevailing on the territory of the Member must nevertheless be capable of falling within the term "prevailing *market* conditions", meaning market conditions that have not been predominantly distorted by government subsidy or intervention. If, as would appear to be the case, the capital markets in Korea were distorted during the relevant period by government subsidy or intervention, then it may be the case that there is, in fact, no "market" as such on the territory of the granting Member suitable for use as a benchmark. In such circumstances, the investigating authority may determine that there are no reliable market benchmarks in the granting Member, and rely instead on suitable alternatives.[225]

3. The market benchmark for determining the existence and amount of benefit is that of an outside not an inside investor

5.78 The European Communities then turned to a related but different question, namely that of whether the market benchmark for determining the existence and amount of benefit is that of an outside investor (that is, one that has no existing exposure to the beneficiary) or an inside investor (that is, one that has an existing exposure to the beneficiary). The European Communities considers that the market benchmark is that of an outside investor, not an inside investor. That is especially the case in circumstances where the existing exposure of the inside investor has been created as a result of past government action. That is, when the government has previously entrusted or directed a private bank to take or maintain positions in Hynix other than on market terms, as would appear to be the case.

5.79 Parties attempting to minimise or eliminate the amount of benefit sometimes argue for an inside investor perspective. They do so because they believe that a "market" benchmark based on the existing position of an inside investor may be lower. That is based in turn on a rejection of the "expected utility model" of investment, according to which rational investors do not let the value of past investments affect present or future investment decisions; in favour of the so-called "prospect theory", according to which investors will continue to make investments in a particular project or entity in the hopes of minimizing past losses, even if the investment would not be justified based only on the potential for future return.

5.80 The European Communities considers that the *SCM Agreement* is based on a fundamental distinction between government on the one hand and markets on the other hand; and that any

[225]Appellate Body Report, *US-Softwood Lumber*, paras. 89 to 107; Panel Report, *EC DRAMs*, paras. 7.158 to 7.159 and footnote 171.

measurement of benefit must be made by reference to an objective market benchmark, that being one that does not depend on the subjective position of an existing stakeholder in the company.[226]

4. Distinction between the existence of a subsidy and the grant of a subsidy

5.81 The next point on which the European Communities would like to briefly comment relates to the distinction between the existence of a subsidy within the meaning of Article 1.1 of the *SCM Agreement*, and the moment at which a subsidy becomes available or is granted.

5.82 Some subsidies may be unconditional from the moment they exist, in which case the moment of existence ***is the same*** as the moment of granting. This explains why it may not always be necessary to distinguish precisely between the two, and why the term "granting" may be used to refer to the same moment as the moment of existence.

5.83 Other types of subsidies may be contingent on future events. Thus, the moment of existence and the moment of granting (when the contingency is fulfilled) are, ***by definition***, not the same, the moment of granting being ***after*** the moment of existence. ***In such cases it is necessary to distinguish between the existence of the subsidy, and the subsequent granting, when the contingency is fulfilled***.

5.84 This view is confirmed by the consistent manner (at least 15 times) in which the word "exist" is used in the *SCM Agreement* to refer to the moment at which a subsidy is deemed to exist within the meaning of Article 1.1.[227] The distinction between the existence of a subsidy and the granting of a subsidy was also confirmed by the Appellate Body in the *Brazil – Aircraft* case.[228] The Appellate Body also confirmed in the same case that "granting" occurs when all the legal conditions have been fulfilled that entitle the beneficiary to receive the subsidies, which is not the case if the exports in question have not yet occurred.[229] Consistent with this approach, the Appellate Body found in the *Canada – Automotive Industry* case that it is the "underlying legal instrument" that must provide expressly or by necessary implication that "the subsidy is available [or granted] only upon fulfilment of the condition of export performance".[230]

5.85 Thus, whilst the European Communities agrees with Japan that an actual "transfer of funds" is not essential in order for a subsidy to exist within the meaning of Article 1.1 of the *SCM Agreement*,

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[226] Panel Report, *EC-DRAMs*, para. 7.160.

[227] *SCM Agreement*, **Article 1.1** "a subsidy shall be deemed to exist"; **Article 4.2** "the existence and nature of the subsidy in question"; **Article 4.5** "the existence and nature of the measures in question"; **Article 7.2(a)** "the existence and nature of the subsidy"; **Article 11.1** "the existence, degree and effect of any alleged subsidy"; **Article 11.2** "the existence of a subsidy"; **Article 11.2(iii)** "the existence, amount and nature of the subsidy"; **Article 11.6** "the existence of a subsidy"; **Article 17.1(b)** "a subsidy exists"; **Article 19.1** "the existence and amount of the subsidy"; **Article 19.4** "the subsidy found to exist"; **Article 22.4** "the existence of a subsidy"; **Article 22.4(iii)** "the existence of a subsidy"; **Article 24.3** "the existence and nature of any subsidy"; **Annex III, para. 2** "no subsidy should be presumed to exist".

[228] Appellate Body Report, *Brazil Aircraft*, para. 156 : "… we see the issue of the *existence* of a subsidy and the issue of the point at which that subsidy is *granted* as two legally distinct issues." (original emphasis).

[229] Appellate Body Report, *Brazil Aircraft*, para. 158 "We agree with the Panel that "PROEX payments may be 'granted' where the unconditional legal right of the beneficiary to receive the payments has arisen, even if the payments themselves have not yet occurred." We also agree with the Panel that the export subsidies for regional aircraft under PROEX have not yet been "granted" when the letter of commitment is issued, because, at that point, the export sales contract has not yet been concluded and the export shipments have not yet occurred. For the purposes of Article 27.4, we conclude that the export subsidies for regional aircraft under PROEX are "granted" when all the legal conditions have been fulfilled that entitle the beneficiary to receive the subsidies. We share the Panel's view that such an unconditional legal right exists when the NTN-I bonds are issued." (footnotes omitted).

[230] Appellate Body Report, *Canada – Automotive Industry*, para. 100.

in making that point the European Communities wishes to make it clear that there are circumstances in which a distinction must be drawn between existence and grant, and these should not be considered to occur at the same moment in all cases.

5. Point at which a subsidy may be deemed to exist within the meaning of Article 1.1 of the SCM Agreement

5.86 The European Communities made a penultimate point relating to the moment at which a subsidy may be deemed to exist within the meaning of Article 1.1 of the *SCM Agreement*. In this respect, the European Communities is of the view that a subsidy cannot be said to exist within the meaning of Article 1.1 until each of the relevant requirements set out in that provision has been fulfilled. Thus, in the case of a grant, for example, it would normally be necessary to identify such matters as the identity of the granting authority; the identity of the beneficiaries; the form, amount and terms and conditions of the grant; the time at which the grant would be made; the purpose of the grant; and so forth. Prior to the requirements of Article 1.1 being met, it is not the case that all and any government action or omission, even if relating to the eventual beneficiary, are sufficient for there to be a subsidy within the meaning of Article 1.1.

5.87 Thus, whilst the European Communities agrees with Japan that an actual "transfer of funds" is not essential in order for a subsidy to exist within the meaning of Article 1.1 of the *SCM Agreement*, in making that point the European Communities wishes to make it clear that a subsidy cannot be said to exist within the meaning of Article 1.1 until such time as each of the relevant requirements set out therein has been demonstrated to be met.

6. The relevance of the change of ownership case law does not depend on privatisation

5.88 Finally, the European Communities would like to comment on the assertion made in the third party written submission of the United States that the change of ownership case law is not relevant to this case.[231] The European Communities disagrees in principle with the United States suggestion that the case law should be so restricted. In particular, the European Communities disagrees that the change of ownership case law is irrelevant, unless there is a privatisation. The Appellate Body has expressly stated otherwise.[232]

E. THIRD PARTY WRITTEN SUBMISSION OF THE UNITED STATES

5.89 The following summarizes the United States arguments in its third party written submission.

1. Procedural Issues

5.90 **Claims 10 and 15 of Korea's Panel Request.** In Item 10, Korea's panel request refers to Article 15 of the *SCM Agreement* in its entirety; likewise, Item 15 is exceedingly vague, cites to a number of articles containing multiple obligations, and provides no indication of the "problem" that is the subject of the dispute. Insofar as the articles referenced therein contain multiple obligations, those aspects of Item 15 do not meet the standard established under Article 6.2 and, like Item 10, should be considered outside of the Panel's **terms of reference.**

5.91 **Analysis of "Prejudice" to the Respondent.** Korea incorrectly asserts that "'prejudice' to the responding party from alleged insufficiency of a panel request can only be established by a

[231] United States third party written submission, paras. 60 to 64.

[232] Appellate Body Report, *US-CVDs on Certain Products from the EC*, para. 124 : "The Panel's absolute rule of "no benefit" may be ***defensible in the context of transactions between two private parties*** taking place in reasonably competitive markets; however, it overlooks the ability of governments to obtain certain results from markets by shaping the circumstances and conditions in which markets operate." (bold italic emphasis added).

consideration of the 'actual course of panel proceedings'" and therefore "a panel cannot rule on a respondent's claim under Article 6.2 until the end of the process."[233] While panels are not *required* in all cases to make findings prior to the conclusion of the proceedings, evaluation of prejudice to the respondent does not preclude them from doing so, and panels have in the past issued preliminary rulings regarding DSU Article 6.2 well before the proceedings have concluded. Korea's argument appears to rest upon a mischaracterization of references by certain panels and the Appellate Body to the "course of the panel proceedings" in analyzing compliance with DSU Article 6.2, and would substantially compromise the ability of respondents and third parties to participate effectively in panel proceedings where a complaining party has made a number of vague assertions of breaches of WTO obligations.

2. Burden of Proof, Standard of Review, and Evidence

5.92 **Burden of Proof.** In its submission, Korea often appears to advance facts and arguments without specifying the legal obligations that it asserts are breached as a result, or identifies legal obligations it claims have been breached without indicating the arguments that support its conclusion. As the Appellate Body noted in *US – Gambling*, "A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments."[234] Absent such an analysis with respect to these claims, the United States submits that Korea has not established a *prima facie* case.

5.93 **Standard of Review.** Certain aspects of Korea's arguments suggest that it misunderstands the proper standard of review that a panel should apply when reviewing the WTO-consistency of an investigating authority's countervailing duty determination. It is well established that a panel may not conduct a *de novo* review of the evidence before the investigating authority or substitute its own judgment for that of the investigating authority. The *SCM Agreement* does not require an investigating authority to take into consideration economic theories that are not on the record of the proceedings in making its decision. Furthermore, as the Appellate Body noted in *US – Lamb Meat*, a panel may not conclude that a decision is "not reasoned" simply because an alternative explanation is found to be "plausible." Rather, the explanation under review must be found not "adequate in the light of that alternative explanation."[235]

5.94 **Evidence.** Korea makes a number of incorrect assertions regarding the nature of the evidence that an investigating authority must identify and how it must analyze that evidence in making its determination. In particular, throughout its submission, Korea claims that there exists a general obligation for an investigating authority to identify "positive evidence demonstrating the existence of each element required for the imposition of antidumping or countervailing duties."[236] Beyond where expressly provided, the *SCM Agreement* does not contain specific standards regarding the evidence that investigating authorities must use to support their determinations.

3. Subsidy Determination

5.95 **JIA's Treatment of Several Banks as "Interested Parties".** Korea claims that the JIA improperly treated various financial institutions as "interested parties" and inappropriately applied

[233] Response of Korea to Preliminary Ruling Request of Japan, paras. 30 and 36.

[234] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, paras. 140-41.

[235] Appellate Body Report, *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, adopted 16 May 2001, para. 106.

[236] First Written Submission of Korea, paras. 141 and 220.

facts available when these financial institutions failed to respond to requests for information.[237] Korea's narrow interpretation of "interested party" is contradicted by the text of Article 12.9 of the *SCM Agreement*, which provides that "interested parties" "shall" include certain entities, such as foreign exporters or producers of the product under investigation, but then specifies that "This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties." Furthermore, the ordinary meaning of the term "interested" supports the conclusion that an entrusted or directed entity may be considered an "interested party" under the *SCM Agreement*. Korea's narrow reading of Article 12.9 is also at odds with how the term "interested party" is used elsewhere in the *SCM Agreement*, and the panel's findings in *EC – DRAMS* support the conclusion that an investigating authority may apply facts available when a third party entity fails to cooperate with an investigation.[238]

5.96 **Korea's Interpretation of the "Entrusts or Directs" Standard.** Referencing the Appellate Body report in *US – DRAMS*, Korea asserts that the evidence relied upon by an investigating authority in cases involving entrustment or direction must be "probative and compelling."[239] Neither Article 1.1(a)(1)(iv) itself nor any other provision of the WTO agreements supports the notion that a special evidentiary standard exists for purposes of determining the existence of entrustment or direction. The Appellate Body's report in *US – DRAMS* states that an investigating authority is not required to base its determination on a "qualitative standard higher than that contemplated by the *SCM Agreement*."[240] Korea also argues that the determination was insufficient because "there is actually no evidence that the Korean government told any of the creditors what to do in any of the restructurings."[241] Korea's argument appears to suggest that, in order to establish entrustment or direction, an investigating authority must have evidence of a "direct" or "actual" government delegation or command, an interpretation that is unsupported by the text of the *SCM Agreement*, as clarified by prior panel and Appellate Body findings. Furthermore, Korea appears to introduce an additional requirement of governmental "intent" or "motive" to a finding of entrustment or direction which has no support in the text of the *SCM Agreement*. Korea also suggests that the JIA could not reach a finding of entrustment or direction absent a finding that the Korean government intended to save Hynix "at the expense of its creditors."[242] The existence of entrustment or direction under Article 1.1(a)(1)(iv) is determined by reference to the actions of the government, as well as the financial condition of the recipient firm *at the time the financial contribution is made*. As long as the investigating authority reasonably concludes based on the record that there is evidence that a government has entrusted or directed a body to provide a financial contribution, Article 1.1(a)(1)(iv) is satisfied. Finally, Korea proceeds to critique evidence cited in the JIA's analysis on a piecemeal basis, contrary to the holistic approach that the JIA appears to have used in its determination. Insofar as the JIA appears to have adopted a holistic approach, the Panel should evaluate whether the evidence as a whole supports the determination, and should avoid looking at individual pieces of evidence in isolation as advocated by Korea in its submission.

5.97 **Korea's Interpretation of "Financial Contribution".** Korea's interpretation of the term "direct transfer of funds" is inconsistent with the provisions of Article 1.1(a)(1) and at odds with prior findings of WTO panels and the Appellate Body. Article 1.1(a)(1)(i) specifies a number of *examples* of instruments that may result in a direct transfer of funds, but does not suggest that Article 1.1(a)(1)(i) is limited to the enumerated instruments. Nothing in the text of the agreement supports Korea's narrow interpretation of Article 1.1(a)(1)(i), particularly Korea's suggestion that "funds" only refers to "money;" indeed, prior panels have concluded that the types of transactions that

[237] *Id.*, paras. 153-164.
[238] Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, paras. 7.266-7.267.
[239] First Written Submission of Korea, para. 196.
[240] *Id.*, para. 139.
[241] *Id.*, para. 144.
[242] *Id.*, para. 200.

Korea claims do not constitute "direct transfers of funds" may in fact qualify as such. Korea's conclusion that the French and Spanish texts of the *SCM Agreement* support its "money changing hands" interpretation of "direct transfer of funds" is unsupported by the ordinary meaning of those terms. Moreover, the *Korea – Commercial Vessels* panel found that, contrary to what Korea now asserts, loan restructuring, debt forgiveness and debt-to-equity swaps are direct transfers of funds. **Korea also incorrectly argues that modifications of** existing loan terms and debt-to-equity swaps can only be defined as "revenue foregone" under Article 1.1(a)(1)(ii) of the *SCM Agreement*.[243] Nothing in the text of Article 1.1(a)(1)(i) obligated the JIA to treat these transactions as foregone revenue under Article 1.1(a)(1)(ii). Further, in the context of Article 1.1(a), the term "revenue" refers to forms of *government* revenue, such as taxes, duties, or other monies collected by a government, rather than income or profit by a creditor, as Korea seems to suggest.

5.98 **Korea's Approach to the Benefit Analysis.** Korea argues that the government "financial contribution" that confers a benefit is the government's action of entrustment or direction[244], and that therefore the investigating authority was required to evaluate whether the action of entrustment or direction made Hynix "better off."[245] Korea's emphasis on whether the "restructuring made the *creditors* ... "better off"' is misplaced:[246] in determining the existence of a benefit, the issue is the position of the *recipient* "but for" or "absent" the government's financial contribution. **Korea misidentifies the "financial contribution" by which the existence of a benefit is determined under Article 1.1. In essence, Korea confuses the two-step financial contribution analysis required under Article 1.1(a)(1)(iv) in cases of entrustment or direction with the analysis required under Article 1.1(b) to determine the existence of a benefit. The term "financial contribution," as stated in Article 1.1(a)(1), necessarily refers to the functions of the types listed in subparagraphs (i) through (iii), irrespective of whether the case is one of government entrustment or direction. The term does not, as Korea improperly asserts, refer to the government action of entrusting or directing. Notably, in *US – DRAMS*, the Appellate Body found that "a finding of entrustment or direction, by itself, does not establish the existence of a financial contribution."**[247] Further, Korea's argument would be nearly impossible to apply: Korea's approach to the benefit analysis would involve comparing the government entrusted or directed restructuring to a hypothetical non-government entrusted or directed restructuring.

5.99 **Privatization Jurisprudence and Determination of Benefit From a Debt-to-Equity Swap.** Citing the Appellate Body report in *US – Countervailing Measures on Certain EC Products*, Korea argues that the JIA was required to consider the effect of the change in Hynix's share ownership during the December 2002 restructuring on Hynix's benefit, and that its failure to do so was inconsistent with Articles 10, 14, 19, and 21 of the *SCM Agreement*.[248] A debt-to-equity swap, in which creditors exchange the debt owed them for equity shares in a firm, is not the same as the privatization of a state-owned firm, and Korea has not demonstrated that a privatization occurred in this case: it has not asserted that the government owned Hynix prior to the debt-to-equity swap and that, through the swap, it transferred all or substantially all of Hynix to a new private owner, retaining no controlling interest for itself. Further, the question posed by privatization analysis is whether the privatization of a firm extinguishes the benefit received from a *prior* financial contribution. As Korea notes, the privatization methodology described above applies to an analysis of the benefit from subsidies "received before the change in ownership."[249] Here, it is the restructuring debt-to-equity swap itself that the JIA concluded *conferred* the benefit. For these reasons, the Appellate Body's

[243] *Id.*, paras. 176-178.
[244] *Id.*, para. 228.
[245] *Id.*, para. 228-29.
[246] *Id.*, para. 242 (emphasis added).
[247] Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, para. 124.
[248] First Written Submission of Korea, paras. 261-262.
[249] *Id.*, para. 261.

assessment of privatization in *US – Countervailing Measures on Certain EC Products* is irrelevant to the analysis of whether the December 2002 debt-to-equity swap resulted in a benefit to Hynix.

4. Injury Determination

5.100 **Articles 15.5 and 19.1 of the SCM Agreement.** Korea's claim that the JIA's injury determination is inconsistent with Articles 15.5 and 19.1 of the *SCM Agreement* proceeds from the premise that these provisions require authorities to demonstrate a causal link between the subsidy practice(s) at issue and the material injury experienced by the domestic industry. Korea's interpretation of Articles 15.5 and 19.1 is inconsistent with their language and prior reports discussing them. The subject of both the first sentence of Article 15.5 and the third clause of Article 19.1 is the same: "the subsidized imports." Thus, under each provision, it is the "subsidized imports" that must be causing injury. This conclusion is buttressed by the second sentence of Article 15.5, which states that "[t]he 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 "demonstration" that the first clause of this sentence references is the same thing that "must be demonstrated" for purposes of the first sentence of Article 15.5. Additionally, footnote 47 of the *SCM Agreement* indicates that an authority properly conducts the assessment of "the effects of subsidies" referenced in the first sentence of Article 15.5 by examining the volume, price effects, and impact of the subsidized imports. It does not require an authority to conduct a separate or independent examination of subsidy practices. In *United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, the panel rejected the same argument that Korea raises here.[250] Contrary to Korea's assertion, WTO panel and Appellate Body reports reinforce the notion that the *Atlantic Salmon* panel's interpretation of Article 6:4 of the Tokyo Round Subsidies Code is fully applicable with respect to the nearly identical wording of Article 15.5 of the *SCM Agreement*. This reading is further supported by the two previous panel reports addressing Korean challenges to countervailing duty measures on DRAMs. In both reports, the panels considered injury caused by the *subsidized imports* to be the focus of Article 15.5[251].

F. THIRD PARTY ORAL STATEMENT OF THE UNITED STATES

5.101 The following summarizes the United States' arguments in its third party oral statement.

5.102 The United States made a few brief points on the following topics: (1) the preliminary ruling requests of Japan; (2) certain threshold issues regarding burden of proof, standard of review, and evidence; (3) two issues regarding the subsidy determination of the Japanese investigating authority (or "JIA"); and (4) the JIA's injury determination.

1. Preliminary Ruling Requests

5.103 Regarding Japan's preliminary ruling requests, a panel must evaluate the consistency of a panel request with DSU Article 6.2 based on the terms of the request itself. Contrary to Korea's assertion in its December 1 submission, "information reasonably available to the responding parties at the time they received the panel request", but that was not included in the request, is not relevant to an assessment of whether the panel request complies with Article 6.2.[252] Korea asserts that information submitted to the JIA could be deemed "reasonably available" such that Japan would not be prejudiced by a defective panel request. The United States believes that this assertion is legally irrelevant and

[250] SCM/153 (adopted 28 April 1994), paras. 335-339.

[251] Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, modified by Appellate Body Report, WT/DS296/AB/R., para. 7.320.

[252] Initial Comments of the Republic of Korea on the Expanded Request for a Preliminary Ruling in Japan's First Written Submission (Dec. 1, 2006), para. 7.

factually doubtful. However, even if it were correct, Korea ignores the fact that such information was not "reasonably available" to other WTO Members, including the third parties to this proceeding.

5.104 DSU Article 6.2 establishes a standard that is no different for claims relating to antidumping and countervailing duty determinations than for claims relating to other types of measures. In all instances, a panel request must "identify the specific measures at issue and present a brief summary of the legal basis of the complaint sufficient to present the problem clearly." With respect to Items 10 and 15 of Korea's panel request, the United States agrees with Japan that, to the extent they reference articles containing multiple obligations without specifying the particular subprovision at issue, Items 10 and 15 do not satisfy the requirements of DSU Article 6.2, and the Panel should find them to be outside the Panel's terms of reference. Korea's arguments to the contrary do not accord with the text of Article 6.2, and, if accepted, would substantially compromise the ability of both third parties and responding Members to participate effectively in panel proceedings.

2. Burden of Proof, Standard of Review, and Evidentiary Standards

5.105 Turning to a different topic, as the United States discussed in its written submission, Korea's first submission fails to make a *prima facie* case with respect to certain claims, suggests an incorrect standard of review in analyzing others, and mischaracterizes how the Panel should properly assess the evidence before the JIA in evaluating Korea's claims.

5.106 For example, in its five paragraphs challenging Japan's specificity determination, Korea does not cite once to Article 2 of the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*"), much less a particular provision or obligation of that Article.[253] Korea simply has not met its burden of putting forth both evidence and *legal argument* to support each element of its claim.[254] Korea cannot expect the Panel to make its case for it, by choosing which particular provisions of the *SCM Agreement* might be implicated and how Japan might have breached its obligations under those provisions. In the United States' submission, several other areas in which Korea's submission appears to have failed to set forth a *prima facie* case were noted.[255]

5.107 In addition to asking the Panel to make its case for it, Korea would have the Panel engage in a *de novo* review of Japan's subsidy determination. Korea advances an alternative theory to the JIA's analysis of entrustment or direction, based upon economic and corporate workout theories.[256] However, it appears that the evidence upon which this theory is based was not on the record before the investigating authority. As the Appellate Body noted in *US – DRAMS*, a panel's findings may not be based on facts that were not before the investigating authority at the time it made its determination.[257] Moreover, and just as importantly, as the Appellate Body noted in *US – Lamb Meat*, the question before the Panel is not whether an alternative explanation advanced by Korea is "plausible." Instead, the question is whether the JIA provided a reasoned and adequate explanation of how the evidence on the record supported its findings, and how those findings supported its overall determination.

5.108 Additionally, in several portions of its submission, Korea erroneously urges the Panel to impose an evidentiary standard on an investigating authority not contemplated by the *SCM Agreement*. Other than where expressly stated, the *SCM Agreement* does not require an investigating

[253] Korea First Written Submission, paras. 253-257.

[254] *See* Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, paras. 140-41.

[255] US Third Party Submission, para. 15.

[256] *See, e.g.*, Korea First Written Submission, paras. 43-57.

[257] Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, para. 175.

authority to support a subsidy determination with "positive evidence," and the Agreement contains no requirement that evidence of entrustment or direction be "probative and compelling."[258]

5.109 Thus, Korea's first submission rests on a number of incorrect characterizations regarding the burden of proof, standard of review, and evidentiary standards to be applied in evaluating the claims raised in this proceeding. The Panel should decline Korea's invitation to make its case for it, based upon a *de novo* review of the evidence and economic theories not on the record in the investigation, using evidentiary standards not contemplated by the *SCM Agreement*.

3. Rejection of Private Benchmarks

5.110 Turning to the JIA's benchmark analysis, the United States addressed Korea's arguments in the United States' written submission. The United States would like to address the assertion by China in its own third party submission that there is a "very high threshold" for rejecting as benchmarks investments or loans made by private entities that were not entrusted or directed.[259] Contrary to China's assertion, the *SCM Agreement* does not impose a special standard on investigating authorities in selecting a benchmark. Therefore, consistent with *SCM Agreement* Article 12.2, the task for the Panel is to evaluate whether a reasonable, objective decisionmaker, looking at all the evidence on the investigation record, could have concluded that the benchmark selected by the JIA was appropriate.

5.111 A number of factors may render a private entity's loan or investment an inappropriate benchmark, and the text of Article 14(a) and (b) does not impose a higher burden on an investigating authority in making such a determination. For example, as the panel in *EC – DRAMS* noted, the nature of a private entity's relationship with the recipient of the financial contribution as well as with the government, and the particular characteristics of the private entity's investment or loan in relation to the financial contribution at issue, may make it an inappropriate benchmark for purposes of an investigating authority's analysis.[260] In such circumstances, an investigating authority may properly disregard investments or loans of those entities insofar as, consistent with *SCM Agreement* Article 14(a) or (b), they do not reflect "the usual investment practice ... of private investors in the territory" or a "comparable commercial loan," respectively. Likewise, circumstances may exist in which the government's financial contribution affects the terms on which private entities invest in, or lend to, a particular industry or company, such that private investments in, or loans to, the subsidy recipient would not be appropriate benchmarks.

5.112 Furthermore, the United States disagrees with China's assertion that the threshold is "even higher if certain private entities also participate in the ***same*** transactions that are alleged to be subsidies."[261] In fact, in such circumstances, the private loan or investment may be even less likely to reflect "the usual investment practice ... of private investors" or a "comparable commercial loan," insofar as the terms on which the loan or investment was made may be influenced by the government's financial contribution. Accordingly, an investigating authority may properly reject such loans or investments as benchmarks.

5.113 Finally, China's reliance on the Appellate Body's findings in *Softwood Lumber* is misplaced. As China concedes, the Appellate Body in that case was analyzing the language of Article 14(d), not Article 14(a) or (b). Furthermore, the Appellate Body *acknowledged* that private benchmarks may be inappropriate if they are affected by extensive government involvement in the market[262], explaining

[258] Korea First Written Submission, para. 196.

[259] China Third Party Submission, section 2.1.

[260] Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, para. 7.206 fn. 185.

[261] China Third Party Submission, para. 15 (emphasis in original).

[262] Appellate Body Report, *United States - Final Countervailing Duty Determination With Respect to Certain Softwood Lumber From Canada*, WT/DS257/AB/R, adopted 17 February 2004, paras. 100-103.

that private market prices may be inappropriate as benchmarks if the extensive government involvement in the market indirectly affects those prices. Similarly, if a government intervenes in the market to support a particular industry or company, through grants, loans, or investments, this government support could influence the decisions of private entities to invest in, or lend to, an industry or company. In such circumstances, grants, loans, or investments by these entities may not be appropriate benchmarks, even if the entities have not been entrusted or directed by the government.

4. The Chapeau of Article 14

5.114 With respect to Korea's assertion that Japan breached its obligation under the chapeau of Article 14 to provide in its national legislation or regulations for any method used to calculate the benefit, the United States does not offer a view on the particular facts. However, the United States agrees with the EC that, even if the Panel finds that Japan breached this obligation, such a finding does not necessarily mean that the countervailing duty determination itself is invalid.[263] Nothing in the text of the chapeau so provides, and Korea does not identify any obligation in the WTO Agreements that requires such a result. If the Panel finds that Japan acted inconsistently with the chapeau, then – consistent with DSU Article 19.1 – any recommendation to Japan to bring its measures into conformity with the Agreement should leave it to Japan to decide precisely how it does so.

5. Injury Determination

5.115 With respect to the JIA's injury determination, the United States disagrees with Korea's contention that Articles 15.5 and 19.1 of the *SCM Agreement* require authorities to demonstrate a causal link between the subsidy practice(s) at issue and the material injury experienced by the domestic industry.

5.116 With respect to the text of the pertinent provisions, the subject of both the first sentence of Article 15.5 and the third clause of Article 19.1 is the same: "the subsidized imports." Under each provision, it is the "subsidized imports" that must be causing injury.

5.117 The first sentence of Article 15.5 further states that an authority must demonstrate that the subsidized imports are causing injury "through the effects of subsidies." This phrase does not appear in the text in isolation. Instead, its meaning is explained by footnote 47 of the *SCM Agreement*. Footnote 47 indicates that the pertinent "effects of subsidies" are those set forth in Articles 15.2 and 15.4.

5.118 In turn, both Articles 15.2 and 15.4 of the *SCM Agreement* concern the "subsidized imports." Neither provision requires an authority to make an independent assessment of the effects of the subsidy itself. Rather, Article 15.2 requires the authority to consider "the volume of the subsidized imports" and "the effects of subsidized imports on prices." Article 15.4 concerns examination of "the impact of the subsidized imports on the domestic industry."

5.119 Consequently, footnote 47 to the *SCM Agreement* indicates that an authority properly conducts the assessment of the "effects of subsidies" referenced in the first sentence of Article 15.5 by examining the volume, price effects, and impact of the *subsidized imports*. Thus, the first sentence of Article 15.5, along with its footnote, directs an authority to ascertain that the *subsidized imports* are causing injury. It does not require the authority to conduct a separate or independent examination of the effects of *subsidy practices*.

[263] EC Third Party Submission, para. 35.

5.120 This interpretation of Article 15.5 finds support in the *Atlantic Salmon* GATT panel's interpretation of virtually identical language in Article 6:4 of the Tokyo Round Subsidies Code.[264] It is also consistent with numerous dispute panel and Appellate Body reports. Indeed, each of the two previous panel reports addressing Korea's challenges to countervailing duty measures on DRAMs considered injury caused by the *subsidized imports* to be the focus of Article 15.5.[265]

5.121 Finally, the *Korea – Commercial Vessels* panel report on which Korea relies does not purport to address injury or causation standards in countervailing duty investigations. Instead, it addresses the unrelated "serious prejudice" provisions of Article 6.3(c) of the *SCM Agreement*. The Panel's conclusion in *Commercial Vessels* was dependent on the distinctive textual structure of Article 6.3 – one that is not shared by Article 15.5. Indeed, in its submissions to the panel in *Commercial Vessels*, Korea argued that the causation standards for "serious prejudice" inquiries under Article 6 were different from those for countervailing duty investigations under Article 15. Korea was correct at the time in drawing a distinction between the provisions in Articles 6 and 15. The Panel should draw the same distinction for purposes of this dispute.

VI. INTERIM REVIEW

6.1 On 16 April 2007, we submitted the Interim Report to the parties. Both parties submitted written requests for the review of precise aspects of the Interim Report. Parties also submitted written comments on the other party's comments. Neither party requested an interim review meeting. We have briefly outlined our reaction to the parties' comments below.

A. COMMENTS BY KOREA

6.2 In addressing Korea's comments, we note that Korea has sought to re-argue many of the points that it made during its submissions. This is not necessarily the purpose of the interim review mechanism set forth at Article 15.2 of the *DSU*. In particular, we do not consider that Article 15.2 of the *DSU* requires us to provide a defence of our findings at the Interim Review stage.

6.3 Regarding our finding at para. 6.91 of the Interim Report (para. 7.91 of this Report), Korea doubts our assessment of the JIA's use of the word "therefore". We have reviewed Korea's arguments, but see no need to amend our findings. We remain of the view that the JIA's conclusion was based on findings of fact, rather than abstract economic theory.

6.4 Regarding para. 6.275 of the Interim Report (para. 7.276 of this Report), Korea expresses concern that the Interim Report appears to accept the proposition that a benefit may be found solely on evidence that the creditors failed to undertake a sufficient analysis of the restructuring. We have included note 475 to this Report in order to provide some clarification of our finding. We remain of the view that evidence of reliance on non-commercial considerations indicates terms more favourable than those available from the market.

6.5 Regarding paras 6.288 to 6.289 of the Interim Report (paras 7.289 to 7.290 of this Report), Korea claims that there is no basis in the *SCM Agreement* for applying "facts available" when creditors that were never contacted do not provide information that they were never asked to submit. Notes 484 and 485 to this Report make it clear that the JIA only applied facts available in respect of "interested parties", and only treated Other Creditors to which it sent questionnaires as "interested parties". Accordingly, there is no factual basis for Korea's allegation that we found that the JIA was entitled to use facts available in respect of Other Creditors that did not provide information that they

[264] *United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153 (adopted 28 April 1994).

[265] *EC – DRAMS*, paras. 7.401-7.402; *US – DRAMS (Panel)*, para. 7.320.

were never asked to submit. We therefore see no need to change our findings in light of Korea's comment.

6.6 Regarding para. 6.392 of the Interim Report (para. 7.393 of this Report), Korea asserts that an investigating authority should not be allowed to base its decision on "facts available" whenever needed information is lacking from the record, in light of the investigating authority's need to complete its investigation. Korea asserts that such an approach in the present case led to Hynix being "punished for the actions of third parties that it could not control". It is a practical reality that an investigating authority must in all circumstances be able to complete its investigation on the basis of facts, even if interested parties and third parties are non-responsive. However, this does not necessarily mean that respondents will be "punished" as a result of the non-responsiveness of some third party, since the investigating authority is simply completing its investigation on the basis of facts. Korea has failed to demonstrate that Hynix was "punished" in the present case. In particular, Korea failed to establish that the JIA made any adverse inferences against Hynix. We therefore see no need to amend our findings in light of Korea's comment.

6.7 Regarding paras 6.441 to 6.443 of the Interim Report (paras 7.442 to 7.444 of this Report), Korea claims that the Panel ignored the normal usage of the term "transfer of funds". Korea suggests that we did so "out of a concern that a finding that extensions of loan maturities and debt-equity swaps were not 'direct transfers of funds' would mean that those transactions could [not] be classified as 'financial contributions' under the SCM Agreement". This, however, was not a concern that motivated our findings. Instead, we were concerned to interpret the term "transfer of funds" in accordance with the requirements of Article 3.2 of the *DSU*. We stand by that interpretation, and see no need to amend our findings in light of Korea's comments.

6.8 Regarding our findings on Korea's Causation of Injury claim, Korea takes issue with our treatment of (i) the relationship between Article 15.5 of the *SCM Agreement* and Article VI of the *GATT 1994*, (ii) the relevance of the Article 6 serious prejudice causal standard, and (iii) the relevance of Article 11.2. We considered these issues carefully in reaching our interim findings, and see no need to amend our findings in light of Korea's comments.

B. COMMENTS BY JAPAN

6.9 Japan made a number of comments regarding typographical and clerical errors contained in our Interim Report. We are grateful for those comments, and have made the necessary corrections. Japan also requested certain changes to avoid suggestions that the Panel was implicitly criticizing Japan, and to clarify the arguments made by Japan. We have modified certain of our findings in line with these requests. In addition, Japan made certain substantive comments, to which we respond below.

6.10 Regarding para. 6.166 of the Interim Report (para. 7.166 of this Report), Japan made a number of comments regarding the Panel's findings on the JIA's treatment of the contractual relationship between Deutsche Bank and Hynix. We have made a number of changes to clarify our findings in this regard. In doing so, we stand by our conclusion that the JIA could not properly have called into question the independence of the Deutsche Bank Report on the basis of Deutsche Bank's contractual relationship with Hynix.

6.11 Regarding paras 6.167 and 6.168 of the Interim Report (paras 7.167 and 7.168 of this Report), Japan requested a number of changes regarding the implications of the appointment of Morgan Stanley Dean Witter Asia Ltd. as a joint financial adviser with Deutsche Bank. According to Japan, the JIA found that Morgan Stanley disagreed with Deutsche Bank's conclusions, and in any event only played a supplementary role in the process. Japan also asserts that Korea did not make any arguments regarding the role of Morgan Stanley in the review of the December 2002 restructuring. First, we do not consider that the scope of our findings should necessarily be limited to the arguments of the

parties. Provided we remain within our terms of reference, we consider that we have discretion to apply our own legal reasoning to the matter before us. Second, the facts that Morgan Stanley may have disagreed with Deutsche Bank, or may only have played a supplementary role in the review of the restructuring, do not negate our view that the presence of Morgan Stanley would have limited Deutsche Bank's ability to favour the interests of Hynix over those of its creditors. We therefore see no need to make any of the changes requested by Japan.

6.12 Regarding note 399 to the Interim Report (note 401 to this Report), Japan submits that there was sufficient evidence on the JIA's record indicating that the "normalization plan" was actually the Deutsche Bank Report. However, none of the evidence referred to by Japan actually refers to the Deutsche Bank Report as the "normalization plan". Furthermore, our findings proceed on the basis that the Deutsche Bank Report and "normalization plan" are one and the same thing. There is therefore no need to make any change to our findings on the basis of Japan's comment.

6.13 Regarding para. 6.209 and note 431 to the Interim Report (para. 7.215 and note 435 to this Report), Japan submits that there is no evidence to suggest that the creditors actually obtained the relevant legal opinion. We have deleted the last sentence of para. 6.209 of the Interim Report pursuant to Japan's request. However, we do not consider it necessary to delete note 437 of this Report, as Japan's Interim Review arguments still fail to establish that the JIA found "that the legal opinion had not been made available to the creditors".

6.14 Regarding paras 6.214 and 6.218 of the Interim Report (paras 7.220 and 7.224 of this Report), Japan asks the Panel to indicate whether it agrees with Japan that a particular calculation error was made in the Deutsche Bank Report. We have already concluded that the JIA failed to find that the Deutsche Bank Report contained the relevant calculation error. There is nothing in Japan's Interim Review comments that leads us to change this conclusion. Absent any appropriate finding by the JIA, there is no basis for us to conclude that the alleged error existed.

6.15 Regarding paras 6.233 and 6.238 of the Interim Report (paras 7.239 and 7.244 of this Report), Japan complains that the Panel failed to address the substance of a particular error that the JIA did find to exist. We have concluded that the JIA did not have a proper basis for finding that the Deutsche Bank Report contained the relevant calculation error, in the sense that it improperly found that Hynix had acknowledged the existence of such error. There is nothing in Japan's Interim Review comments to lead us to change this conclusion.

6.16 Regarding paras 6.236 and 6.237 of the Interim Report (paras 7.242 and 7.243 of this Report), Japan asserts that the Panel incorrectly attributed the JIA's summary of arguments made by Hynix to the JIA. We have amended the text to clarify that the phrase we quote is the JIA's summary of Hynix's argument. However, since the Final Determination sets forth the *JIA*'s summary of Hynix's argument, technically it is correct to attribute these words to the *JIA*.

6.17 Japan takes issue with the Panel's treatment, in the Interim Report, of an alleged admission by NACF that the Government of Korea intervened in the preparation of the Deutsche Bank Report. We have made a number of changes to our findings regarding this matter. However, we remain of the view that the alleged admission by NACF does not impugn the independence of Deutsche Bank or the commercial reliability of the Deutsche Bank Report.

6.18 Regarding paras 6.250, 6.290 and 6.297 of the Interim Report (paras 7.251, 7.291 and 7.298 of this Report), Japan objects to the Panel's reference to "direct" and "indirect" evidence. Japan suggests that the term "direct" evidence might be inconsistent with the Panel's observation that the JIA based its finding of entrustment or direction on circumstantial (and therefore "indirect") evidence. We have amended our findings accordingly.

6.19 Regarding note 489 to para. 6.292 of the Interim Report (*see* para. 7.292 of this Report), Japan objects to a finding by the Panel regarding the JIA's use of the term "bankruptcy". Since this finding is not essential for our principal findings, we have deleted the relevant footnote.

6.20 Regarding note 495 to para. 6.295 of the Interim Report (note 494 to para. 7.296 of this Report), Japan objects to the Panel's finding that the JIA failed to make any findings on the existence or role of "contemporaneous" subsidies. We stand by our finding that Japan's arguments regarding this matter constitute *ex post* rationalization. We note that Japan has only referred to an *ex post* submission (*i.e.*, its response to Question 37 from the Panel) in support of its position (*see* para. 55 of Japan's comments on the Interim Report). Japan still fails to identify where this issue was addressed by the JIA. In light of these considerations, we see no need to change our findings in this regard.

6.21 Regarding para. 6.312 of the Interim Report (para. 7.313 of this Report), Japan submits that the Panel has made findings on a matter not presented to the Panel by Korea. We disagree. First, we note that Japan does not assert that this matter falls outside our terms of reference. Second, we do not consider that the scope of our findings should necessarily be limited by the arguments developed by the parties, since we are entitled to apply our own legal reasoning to the matter before us. Third, we consider that Korea did in fact make the argument that we address at para. 6.312 of the Interim Report, for Korea argues (at para. 234 of its First Written Submission) that "[a] proper analysis of these transactions requires consideration of all parts of the exchanges — not only the value of whatever the recipient received, but also the value of whatever the recipient gave in return." In doing so, Korea cited para. 7.212 of the report of the panel in *EC – Countervailing Measures on DRAM Chips*. Our finding, in turn, refers to para. 7.213 of that panel's report, which is an obvious extension of the reasoning (referred to by Korea) set forth in para. 7.212. For these reasons, we see no need to amend our findings in line with Japan's comment.

6.22 Regarding para. 6.313 of the Interim Report (para. 7.314 of this Report), Japan asks the Panel to make a factual finding that certain interested parties refused to submit particular information to the JIA. Since Japan has failed to identify any basis in the JIA's Final Determination for such a finding of fact, we decline Japan's request.

6.23 Regarding note 543 to para. 6.348 of the Interim Report (note 542 to para. 7.349 of this Report), Japan claims that the Panel erred in finding that loans and loan maturity extensions constitute non-recurring subsidies. Japan also submits that the scope of the Panel's findings exceed the scope of Korea's claim, which was limited to those non-recurring subsidies whose benefit was allocated by the JIA from 2001 to 2005. We stand by our statement that "one-off loans are more properly treated as non-recurring subsidies". However, we note that our findings are based in large part on the JIA's allocation of benefit from the period 2001 to 2005. We have therefore limited our findings to those non-recurring subsidies whose benefit was allocated by the JIA in this way.

VII. FINDINGS

7.1 We shall begin by evaluating Korea's claim regarding the JIA's determination of entrustment or direction, after we have addressed the general issues of standard of review, burden of proof, and the rules of treaty interpretation. Before turning to those general issues, though, we must first consider two requests by Japan for preliminary rulings.

A. REQUESTS FOR PRELIMINARY RULINGS

7.2 On 5 September 2006, Japan filed a request for a preliminary ruling pursuant to *DSU* Article 6.2, which provides:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a

> brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

7.3 Japan's 5 September request is based on the second sentence of that provision. Japan requests a preliminary ruling that items 9, 10 and 15 of Korea's Request for the Establishment of a Panel[266] (hereinafter "Request for Establishment") failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

7.4 Japan included an additional request for preliminary rulings in its First Written Submission.[267] The Panel addressed a number of written[268] and oral questions to Japan on this subject. In light of Japan's replies to these questions, we understand Japan to argue that:

- sub-paragraphs (b), (c) and (e) of para. 3.1 *supra* fall outside the Panel's terms of reference, in so far as those claims allege violations of Articles 10, 11, 12, 14, 15, 22 and 32.1 of the *SCM Agreement*, and Articles VI:3 and X:3 of the GATT 1994, because item 15 of the Request for Establishment, in which those provisions are enumerated, did not cover the issues identified in sub-paragraphs (b), (c) and (e); and

- items 3, 4, 5, 6, 7, 9, 12, 13, and 15 of Korea's Request for Establishment are inadmissible because those items did not "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly," contrary to Article 6.2 of the *DSU*.

7.5 Before addressing each of Japan's requests in detail, we must first resolve a basic difference between the parties regarding the interpretation and application of the second sentence of Article 6.2 of the *DSU*. In particular, we must decide whether consistency with the second sentence of Article 6.2 may be assessed exclusively on the basis of the text of the Request for Establishment, as alleged by Japan, or whether consistency must be determined on the basis of whether or not Japan suffered prejudice during the course of the Panel proceedings as a result of the lack of specificity in the Request for Establishment, as argued by Korea.

7.6 In calling for a prejudice-based approach, Korea relies heavily on the ruling of the Appellate Body in *Korea – Dairy*. In that case, the Appellate Body applied *DSU* Article 6.2 taking into account "whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated."[269] Korea interprets the Appellate Body to mean that *DSU* Article 6.2 must always be applied at the end of the panel proceedings, in light of whether or not the respondent actually suffers prejudice during the course of the proceedings.

7.7 However, we note that the Appellate Body also ruled in another case, *US – Carbon Steel*, that:

> The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, **the terms of reference, and the request for the establishment of a panel on which they are based, serve the *due process* objective of notifying the parties and third parties of the nature of a complainant's case**. When faced with an issue relating to the scope of its terms of reference, a panel must **scrutinize carefully the request for establishment** of a

[266] Document WT/DS336/5, attached at Annex A-1.
[267] *See* Japan's First Written Submission, para. 23.
[268] *See* Questions 1, 2 and 3 from the Panel.
[269] *Korea – Dairy*, Appellate Body Report, para. 127.

> panel "to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU."[270] (footnote omitted, bold emphasis supplied)

7.8 The Appellate Body's ruling in *US – Carbon Steel* would seem to indicate that the sufficiency of the request, in terms of the due process objective of *DSU* Article 6.2, should be assessed purely on the basis of the text of the request. This approach was subsequently applied by the panel in *Canada – Wheat Exports and Grain Imports*, which found - during its analysis of the US Request for Establishment relatively early in the panel process - that:

> the summary of the legal basis for the United States' claims under Article 2 of the *TRIMs Agreement* presents the problem raised with sufficient clarity, such that Canada is able to know the case it has to answer and begin preparing its defence. We also think that the summary provided is sufficient to inform the third parties about the legal basis of the complaint and to give them an opportunity effectively to respond to the United States' complaint. We therefore do not consider that the summary of the legal basis for the claims under Article 2 of the *TRIMs Agreement* fails to comply with the requirements of Article 6.2.[271]

7.9 We agree with the approach adopted by the Appellate Body in *US – Carbon Steel*, as subsequently applied by the panel in *Canada – Wheat Exports and Grain Imports*. In our view, the due process objective of the second sentence of Article 6.2 of the *DSU* may only properly be upheld if panels apply that provision on the basis of the text of the Request for Establishment. We believe that consideration of an actual prejudice suffered during the panel process undermines that due process objective, since it allows a Member to correct any lack of clarity in its request during the panel proceedings, even though the request may not have been sufficiently clear for the respondent to begin preparing its defence at the beginning of the panel process.

7.10 Accordingly, we shall address Japan's requests for preliminary rulings on the basis of the totality of the text of Korea's Request for Establishment, by establishing whether or not the problem was presented with sufficient clarity such that Japan was able to know the case it had to answer and begin preparing its defence.

1. Japan's 5 September Request

7.11 Japan's 5 September request concerns items 9, 10 and 15 of Korea's Request for Establishment.

(a) Item 9

7.12 Item 9 of Korea's Request for Establishment alleges a violation of:

> Articles 14 and 19.4 of the *SCM Agreement* and Article VI:3 of the GATT 1994 because, *inter alia*, Japan failed to properly measure the benefit in accordance with the principles of the *SCM Agreement*, which resulted in countervailing duties levied in excess of the amount allowed under the *SCM Agreement* and the GATT 1994.

7.13 According to Japan, item 9 fails to comply with Korea's obligations under *DSU* Article 6.2 for two reasons. First, Article 14 establishes "not one single, distinct obligation, but rather multiple obligations,"[272] and "[i]n such a situation, the listing of articles of an agreement, in and of itself, may

[270] *US – Carbon Steel*, para. 126.
[271] *Canada – Wheat Exports and Grain Imports*, para. 6.10, sub-paragraph 51.
[272] Appellate Body Report, *Korea – Dairy*, para. 124.

fall short of the standard of Article 6.2."[273] Second, Japan asserts that Korea provides no indication of the "principles of the *SCM Agreement*" Japan is alleged to have violated.

7.14 Korea submits that item 9 is not a "mere listing" of articles of treaties. Instead, it contains a narrative description of the "problem". Korea also notes that Article 14 is one of the few provisions of the *SCM Agreement* that does not contain separate paragraphs — there is no Article 14.1 or 14.2 or 14.3. In addition, Article 19.4 (the other provision cited by this claim) contains only a single obligation (limiting the amount of countervailing duties imposed to the amount of the subsidy found to exist). Korea asserts that, when Articles 14 and 19.4 of the *SCM Agreement* are read together and in the context of Article VI:3 of the *GATT 1994* and of Korea's other claims under Article 14, the meaning of item 9 should be clear: Korea is objecting to the imposition of duties in excess of the amount of the benefit that may permissibly be calculated under the provisions of Article 14 (and, in particular, the provisions of Article 14 addressing the calculation of subsidy benefits).

7.15 We recall that, although *DSU* Article 6.2 requires that requests for establishment must be "sufficient to present the problem clearly", they need only provide a "brief summary" of the legal basis of the complaint. We consider that item 9 satisfies that standard, since it requires very little effort on the part of the reader[274] to identify the "problem" described in all the elements of that item: it is that Japan violated Article 14 because it failed to calculate the amount of benefit in conformity with the guidelines set forth in that provision, and thereby collected countervailing duties in excess of the amount of the subsidy found to exist, or the amount equal to the estimated bounty or subsidy determined to have been granted, contrary to Article 19.4 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*. Item 9 therefore presented the problem raised with sufficient clarity, such that Japan was able to know the case it had to answer and begin preparing its defence.

(b) Item 10

7.16 Item 10 of Korea's Request for Establishment alleges a violation of:

> Article 15 of the *SCM Agreement* because, *inter alia*, Japan improperly found material injury caused by the allegedly subsidized imports without proper evidentiary or legal foundations.

7.17 Korea also made a claim regarding Article 15.5 of the *SCM Agreement* in item 11 of its Request for Establishment. Korea confirmed at the Panel's first substantive meeting with the parties that it was not pursuing any Article 15 claim other than that covered by item 11.[275] Since Korea has not pursued any other claim under Article 15, there is no need for us to address Japan's request for a preliminary ruling regarding item 10 of Korea's Request for Establishment.

(c) Item 15

7.18 Item 15 of Korea's Request for Establishment alleges a violation of:

> Articles 10, 11, 12, 14, 15, 22, and 32.1 of the *SCM Agreement* and Articles VI:3 and X:3 of the GATT 1994 because Japan, *inter alia*, failed to conduct a thorough and complete investigation, and failed to conduct its investigation and make determinations in accordance with fundamental substantive and procedural requirements.

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[273] *Ibid.*

[274] We consider that a complaining party is entitled to expect that the respondent Member reading the Request for Establishment is familiar with WTO issues and parlance.

[275] *See* Korea's oral statement at the first substantive meeting, para. 97.

7.19 Japan asserts that Korea does not identify for which of the multiple obligations encompassed in Articles 10, 11, 12, 14, 15, 22, and 32.1 of the *SCM Agreement*, or the very general obligations under Articles VI:3 and X:3 of the *GATT 1994*, it is alleging an inconsistency. Japan submits that there is no indication as to which aspects of these nine articles Japan allegedly breached in terms of its failure "to conduct a thorough and complete investigation" or "make determinations in accordance with fundamental substantive and procedural requirements." Japan submits that, absent greater specificity, Korea could present innumerable claims while the Panel's terms of reference would remain vague and undefined, and Japan and third parties would be denied their fundamental due process rights to defend their interests.

7.20 Korea submits that item 15 is not a "mere listing" of articles of treaties. Instead, it contains a narrative description of the "problem" — which is that "Japan failed to conduct a thorough and complete investigation, and failed to conduct its investigation and make determinations in accordance with fundamental substantive and procedural requirements."

7.21 Item 15 cites nine separate provisions of the *SCM Agreement* and *GATT 1994*. These provisions address an extremely broad variety of issues, ranging from the sufficiency of an application for countervailing relief (Article 11.2) to the conduct of on-site verifications (Article 12.6). In the context of such a multitude of diverse obligations, it is simply not possible to tell from item 15, even when read in conjunction with the remainder of Korea's Request for Establishment, what specific "problem" Korea is addressing under item 15. Accordingly, we find that item 15 did not meet the minimum requirements of *DSU* Article 6.2, since the language was not sufficiently clear for Japan to know the case it had to answer and begin preparing its defence.

2. Japan's Additional Request

7.22 We recall that the first part of Japan's additional request concerns the admissibility of sub-paragraphs (b), (c) and (e) of para. 3.1 *supra*, in so far as those claims allege violations of Articles 10, 11, 12, 14, 15, 22 and 32.1 of the *SCM Agreement*, and Articles VI:3 and X:3 of the *GATT 1994*, by virtue of item 15 of the Request for Establishment. We have already ruled that item 15 of Korea's Request for Establishment does not meet the requirements of the second sentence of Article 6.2 of the *DSU*. Any claims based on item 15 therefore fall outside our terms of reference. Accordingly, we rule that any claims in sub-paragraphs (b), (c) and (e) of para. 3.1 *supra*,[276] in so far as they are based on item 15 of Korea's Request for Establishment, are inadmissible.

7.23 The second part of Japan's additional request concerns the consistency of items 3, 4, 5, 6, 7, 9, 12, 13, and 15 of Korea's Request for Establishment with the second sentence of Article 6.2 of the *DSU*. For each item, Japan asserts that Korea failed to present the problem clearly because "Korea presented the 'mere listing of the treaty articles' as the legal basis of its claims, despite the fact that these articles provide[] [for] multiple obligations."[277] Korea provided detailed comments in respect of Japan's arguments concerning items 3, 4 and 9. For the remainder, Korea relied on its argument that conformity with Article 6.2 of the *DSU* should be assessed in light of any prejudice suffered by the respondent during the Panel proceedings.[278] We shall address each item in turn, noting that we have already examined the conformity of items 9, 10 and 15 with the second sentence of Article 6.2 of the *DSU* in the context of Japan's 5 September request.

(a) Items 3, 4 and 9

7.24 Items 3, 4 and 9 of Korea's Request for Establishment allege violations of:

[276] Sub-paragraphs (b), (c) and (e) concern entrustment or direction, benefit, and interested parties respectively.

[277] *See* Japan's reply to Question 3 from the Panel.

[278] *See* Korea's comments on Japan's replies to Questions 1, 2 and 3 from the Panel.

> 3. Articles 1.1 and 14 of the *SCM Agreement* because, *inter alia*, Japan failed to demonstrate that a benefit was conferred upon the respondent Hynix Semiconductor, Inc., ("Hynix"), given available market benchmarks and the circumstances of financial restructuring.
>
> 4. Articles 1.1 and 14 of the *SCM Agreement* because, *inter alia*, the analyses of the "commercial rationality" of loans and other investments in Hynix, and the other analyses related to the determination of the financial contribution and benefit to Hynix, that were undertaken by Japan are inconsistent with Japan's obligations under the *SCM Agreement*.
>
> 9. Articles 14 and 19.4 of the *SCM Agreement* and Article VI:3 of the GATT 1994 because, *inter alia*, Japan failed to properly measure the benefit in accordance with the principles of the *SCM Agreement*, which resulted in countervailing duties levied in excess of the amount allowed under the *SCM Agreement* and the GATT 1994.

7.25 Korea asserts that, taken together, items 3, 4 and 9 reflect a clear and concisely expressed position that the JIA's determination of benefit failed to follow the provisions of the *SCM Agreement* concerning the determination of benefit, and therefore led to the improper imposition of countervailing duties.

7.26 In our view, whether taken together or individually, the above items meet the requirements of the second sentence of Article 6.2 of the *DSU*. Items 3 and 4 concern Articles 1.1 and 14 of the *SCM Agreement*. Although Article 1.1 of the *SCM Agreement* contains a number of sub-paragraphs, it is evident – in the context of a claim expressly referring to benefit – that the relevant provision is Article 1.1(b). That is the only provision in Article 1.1 dealing with benefit.

7.27 Since it is now well established that the existence and amount of benefit are determined by reference to the market, Korea's reliance on Article 14 is also self-explanatory. Korea's claim under the *chapeau* of Article 14 is addressed at item 8 of the Request for Establishment. Accordingly, these other claims necessarily concern the remainder of Article 14, *i.e.*, the guidelines. We do not consider that a Member need necessarily specify precisely which of the four guidelines it seeks to rely on in its Request for Establishment (especially in a case where certain of the measures at issue, such as debt-to-equity swaps, are not expressly mentioned in those guidelines).

7.28 We have already ruled on the admissibility of item 9. We are of the view that the claim being made under Article 19.4 of the *SCM Agreement* and Article VI:3 of the *GATT 1994* is readily apparent from the text of Korea's Request for Establishment, since item 9 refers directly to a matter expressly covered by those provisions, namely the alleged imposition of countervailing duties in excess of the amount of subsidy found to exist, or determined to have been granted.

7.29 In short, we find that items 3, 4 and 9 of Korea's Request for Establishment met the minimum requirements of *DSU* Article 6.2, since the language was sufficiently clear for Japan to know the case it had to answer and begin preparing its defence.

(b) Item 5

7.30 Item 5 of Korea's Request for Establishment alleges a violation of:

> Article 2 of the *SCM Agreement* because, *inter alia*, Japan did not properly establish that all of the alleged subsidies were specific to Hynix on the basis of positive evidence.

7.31 Japan asserts that Korea failed to specify which sub-paragraph of Article 2 it was relying on. We acknowledge that Article 2 contains a number of sub-paragraphs, dealing with different types of specificity. However, we also note that the JIA failed to indicate whether it had made a finding of *de facto* or *de jure* specificity.[279] In these circumstances, it would be wholly unreasonable to expect that Korea could specify the precise sub-paragraph of Article 2 at issue in this claim. In the context of the JIA's determination of specificity, the language of item 5 was sufficiently clear for Japan to know the case it had to answer and begin preparing its defence. We therefore find that item 5 of Korea's Request for Establishment met the minimum requirements of *DSU* Article 6.2.

(c) Item 6

7.32 Item 6 of Korea's Request for Establishment alleges a violation of:

> Articles 1 and 2 of the *SCM Agreement* because, *inter alia*, Japan imposed an improper burden of proof on Hynix and Korea; reached conclusions without adequate evidentiary basis, and thereby failed to base its decisions on affirmative, objective, and verifiable evidence.

7.33 Read in the context of the five preceding items, we consider that the reader could readily discern that item 6 concerns the JIA's treatment of evidence in respect of its determinations of entrustment or direction, financial contribution, benefit and specificity. Accordingly, we find that item 6 of Korea's Request for Establishment met the minimum requirements of *DSU* Article 6.2, since the language was sufficiently clear for Japan to know the case it had to answer and begin preparing its defence.

(d) Item 7

7.34 Item 7 of Korea's Request for Establishment alleges a violation of:

> Article 12 of the *SCM Agreement* because, *inter alia*, Japan improperly treated entities that had no interest in the investigation as "interested parties," improperly applied "facts available" instead of considering the information on the record, and improperly made adverse inferences against the interests of Hynix due to allegedly inadequate cooperation by other interested parties or by other entities that were not under Hynix's control and that were not obligated to participate in the investigation.

7.35 Although item 7 does not state expressly which sub-paragraphs of Article 12 are concerned by this claim, we consider that the description of the problem is sufficiently clear for a reader to understand that the claim concerns sub-paragraphs 7 and 9 of Article 12, since those are the provisions concerning the problem described in item 7, namely the use of facts available and the definition of interested parties. Accordingly, we find that item 7 of Korea's Request for Establishment met the minimum requirements of *DSU* Article 6.2, since the language was sufficiently clear for Japan to know the case it had to answer and begin preparing its defence.

(e) Item 12

7.36 Item 12 of Korea's Request for Establishment alleges a violation of:

> Articles 10 and 32.1 of the *SCM Agreement* because, *inter alia*, the countervailing duties imposed by Japan against DRAMS originating in Korea were not in

[279] For this reason, the Panel addressed Question 48 to Japan, asking whether the JIA had found *de facto* or *de jure* specificity. (Japan replied that the JIA had found *de jure* specificity.)

> accordance with the relevant provisions of the *SCM Agreement* or the relevant provisions of GATT 1994.

7.37 Item 12 therefore concerns Articles 10 and 32 of the *SCM Agreement*. Article 10 does not contain any sub-paragraphs, and Korea has specifically identified the first sub-paragraph of Article 32. Given the text of these two provisions, and the language of item 12, we consider that the problem covered by item 12 is readily apparent to the reader. It is that Japan allegedly imposed countervailing duties contrary to the provisions of the *SCM Agreement* and the *GATT 1994*, in violation of the express terms of Articles 10 and 32.1. Accordingly, we find that item 12 of Korea's Request for Establishment met the minimum requirements of *DSU* Article 6.2, since the language was sufficiently clear for Japan to know the case it had to answer and begin preparing its defence.

(f) Item 13

7.38 Item 13 of Korea's Request for Establishment alleges a violation of:

> Articles 10, 14, 19, and 21 of the *SCM Agreement* because, *inter alia*, Japan imposed and maintained countervailing duties without determining whether a benefit continued to exist following changes in the ownership of Hynix.

7.39 Item 13 refers to four provisions of the *SCM Agreement*. We believe that, in the context of items 3 and 4, a reference to Article 14 combined with a reference to the determination of benefit met the requirements of Article 6.2 of the *DSU*, given the relevance of the Article 14 guidelines for determining the existence of benefit. Furthermore, although Articles 19 and 21 contain multiple sub-provisions, the reference to the continued existence of benefit in conjunction with references to those provisions suggests strongly that Korea's claim is likely to be based on Articles 19.4 and 21.1 in particular. In addition, since Article 10 is concerned with the imposition of countervailing duties in violation of the provisions of the *SCM Agreement* and *GATT 1994*, a reference to Article 10 in the context of any claim against a determination leading to the imposition of countervailing duties would make sense to the reader. For these reasons, we find that item 13 of Korea's Request for Establishment met the minimum requirements of *DSU* Article 6.2, since the language was sufficiently clear for Japan to know the case it had to answer and begin preparing its defence.

3. Conclusion

7.40 For the above reasons, we uphold Japan's request that item 15 of Korea's Request for Establishment failed to meet the requirements of the second sentence of Article 6.2 of the *DSU*. Claims made under that item are, therefore, inadmissible. We reject the remainder of Japan's requests for preliminary rulings. [280]

B. GENERAL ISSUES

1. Standard of Review

7.41 Article 11 of the *DSU* sets out the applicable standard of review in proceedings under the *SCM Agreement* and the *GATT 1994*. Article 11 of the *DSU* states, in relevant part, that:

[280] Accordingly, we find that the claims set out in sub-paragraphs (a), (d), (e), (f), (g), (h) and (i) of para. 3.1 above fall within our terms of reference. The claims set forth at sub-paragraphs (b) and (c) fall outside our terms of reference, insofar as they concern Articles 10, 11, 12 and 22 of the *SCM Agreement*, and Article X:3 of the *GATT 1994*.

> [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... (emphasis added)

7.42 In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body offered the following guidance regarding the application of Article 11 of the *DSU* in the context of reviewing an investigating authority's subsidy determination:

> [W]e are of the view that the "objective assessment" to be made by a panel reviewing an investigating authority's subsidy determination will be informed by an examination of whether the agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination. Such explanation should be discernible from the published determination itself. The explanation provided by the investigating authority—with respect to its factual findings as well as its ultimate subsidy determination—should also address alternative explanations that could reasonably be drawn from the evidence, as well as the reasons why the agency chose to discount such alternatives in coming to its conclusions.
>
> A panel may not reject an agency's conclusions simply because the panel would have arrived at a different outcome if it were making the determination itself. In addition, in the absence of an allegation that the agency failed to investigate sufficiently or to collect certain information, a panel must limit its examination to the evidence that was before the agency during the course of the investigation, and must take into account all such evidence submitted by the parties to the dispute. In other words, a panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the investigating authority. A failure to apply the proper standard of review constitutes legal error under Article 11 of the DSU.
>
> These general principles reflect the fact that a panel examining a subsidy determination should bear in mind its role as *reviewer* of agency action, rather than as *initial trier of fact*. Thus, a panel examining the evidentiary basis for a subsidy determination should, on the basis of the record evidence before the panel, inquire whether the evidence and explanation relied on by the investigating authority reasonably supports its conclusions. ...[281] (footnotes omitted)

7.43 We are, therefore, conscious of the fact that it is not our role to perform a *de novo* review of the evidence which was before the JIA at the time it made its determination. We will examine whether on the basis of the record before it, a reasonable and objective investigating authority could have reached the conclusions that the JIA reached. Our task is first to understand what the JIA decided and how it came to those decisions. Our examination of those decisions will be informed by whether the JIA provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination. At the same time, we believe that our examination of the JIA's conclusions must be critical and searching, and that we would not be fulfilling our function if we were to simply defer to the conclusions of the JIA.[282]

2. Burden of Proof

7.44 We recall the general principles applicable to burden of proof in WTO dispute settlement, which require that a party claiming a violation of a provision of a covered agreement by another

[281] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 186-188.
[282] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

Member must assert and prove its claim.[283] In this dispute, Korea, which has claimed that Japan acted inconsistently with the *SCM Agreement* and the *GATT 1994*, thus bears the burden of demonstrating that Japan acted inconsistently with the relevant provisions of those covered agreements. In addition, it is generally for each party asserting a fact to provide proof thereof.[284] We note in addition that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.

3. Treaty Interpretation

7.45 Article 3.2 of the *DSU* directs panels to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is well settled in WTO case law that the principles codified in Articles 31, 32 and 33 of the *Vienna Convention* are such customary rules. These provisions read as follows:

Article 31: General rule of interpretation

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

[283] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[284] *Ibid*.

Article 33: Interpretation of treaties authenticated in two or more languages

> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
>
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
>
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
>
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

7.46 We shall apply these principles in interpreting the relevant provisions of the covered agreements.

C. ALLEGED REVERSAL OF THE BURDEN OF PROOF

7.47 Korea claims that the Japan acted inconsistently with Articles 1 and 2 of the *SCM Agreement*, on the basis that the JIA reversed the burden of proof in the countervailing duty proceeding by basing its subsidy determination on the absence of evidence disproving the existence of subsidies. Japan submits that the Panel should reject Korea's claim and argument.

7.48 This claim is concerned with the treatment of evidence by the JIA. Since we consider Korea's arguments regarding the treatment of evidence as part of our broader analysis of Korea's substantive claims under Articles 1 and 2 of the *SCM Agreement*, we see no need to rule on this claim in the abstract.

D. THE JIA'S DETERMINATION OF ENTRUSTMENT OR DIRECTION OF CERTAIN PRIVATE BODIES

1. Introduction

7.49 Hynix's creditors comprised both public and private bodies.[285] Ordinarily, measures taken by private bodies may not be treated as subsidies. This is because Article 1.1(a)(1) of the *SCM Agreement* defines a "subsidy" as a "financial contribution" that confers a "benefit" and, in general, only government, or public body, actions may constitute "financial contributions". Thus, 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)(1) of the *SCM Agreement*. If a private body undertakes the same action, there is generally no financial contribution in the sense of Article 1.1(a)(1) of the *SCM Agreement*. However, Article 1.1(a)(1)(iv) of the *SCM Agreement* provides that measures taken by private bodies may be treated as "financial contributions" if such measures are taken pursuant to government entrustment or direction. Thus, if it were established that a private body was entrusted or directed by the government to carry out one of the functions illustrated in subparagraphs (i) to (iii), that private body action would constitute a financial contribution in the sense of Article 1.1(a)(1) of the *SCM Agreement*.

[285] Korea has not raised any claims regarding the JIA's designation of certain entities as "public bodies".

7.50 The JIA found that four of Hynix's private creditors (KEB, Woori Bank, Chohung Bank and NACF, referred to hereinafter as the "Four Creditors") had been entrusted or directed by the Government of Korea to participate in the October 2001 and December 2002 restructurings. Thus, having established that these Four Creditors had carried out a function illustrated in subparagraph (i), the JIA treated their participation in the restructurings as financial contributions. The JIA made no findings of entrustment or direction in respect of the remaining (private) creditors that also participated in the restructurings (referred to hereinafter as the "Other Creditors").

7.51 In a nutshell, the JIA found that the decisions of the Four Creditors to participate in the restructurings were not commercially reasonable, and could therefore only be explained by some external, non-commercial factor, namely the involvement in the restructurings of the Government of Korea. To support this explanation various statements by Government ministers, officials and others, and non-attributed statements, and various circumstances relating to the restructurings, were referred to in the JIA's determination as circumstantial evidence of entrustment or direction. It was the totality of this evidence that was the basis for the JIA's finding.

2. The Claim

7.52 Korea claims that Japan acted inconsistently with its obligations under Article 1.1(a) of the *SCM Agreement*, on the basis that the JIA did not have a proper basis for its finding that the Government of Korea "entrusted or directed" the Four Creditors to participate in the October 2001 and December 2002 debt restructurings.

7.53 Japan submits that the Panel should reject Korea's claim and argument.

3. Applicable Provisions

7.54 Korea's claim pertains to paragraph (iv) of Article 1.1(a)(1) of the *SCM Agreement*. Article 1.1(a)(1) of the *SCM Agreement* provides in its totality that:

> 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 ..." (emphasis added, footnote omitted)

4. The JIA's Determination

7.55 The JIA provided the following summary of its finding of entrustment or direction[286] in respect of the October 2001 restructuring:

> (289) The measures taken by KEB, Woori Bank, Chohung Bank and NACF for the October 2001 Program were "new loans", "debt-to-equity swap", and "extension of maturity and interest rate reduction", which would constitute practices involving direct transfers of funds within the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement* if the Government of Korea had directly carried out such practices.
>
> (290) At the time of October 2001, the deterioration of Hynix's financial situation was such that its rating was downgraded even to "Selective Default", and it was unable to raise funds from the commercial market. The Investigating Authorities therefore find that there was no investor that would invest in or make loans to Hynix in the general commercial market from a normal commercial perspective.
>
> (291) Under such circumstances, KEB, Woori Bank, Chohung Bank and NACF made financing decisions that were not based on commercial consideration.
>
> (292) It is generally inconceivable that financial institutions which are private bodies voluntarily make financing decisions that are not based on commercial consideration. It is reasonable to conclude that some kind of external factor existed when they made financing decisions that was not based on commercial consideration.
>
> (293) At the time of the October 2001 Program, the Government of Korea was in a position to exert substantial influence on these financial institutions. This is because there was a legal framework that allowed the government to be involved in the individual business activities of banks in Korea at that time, the Government of Korea held all or a large proportion of stocks in KEB, Woori Bank and Chohung Bank, and NACF was a quasi-public body. Moreover, the Government of Korea had the political intent to have Hynix survive at that time, had been ascertaining at all times the progress of discussion and implementation of the October 2001 Program, which commenced from the end of July 2001, as well as the previous bailout measures by the creditor financial institutions, continuously contacted creditor financial institutions, exerted pressure on some creditors, and had the intention to intervene in the October 2001 Program depending on the progress of the considerations given to the October 2001 Program.
>
> (294) Moreover, in the course of the investigation, the Investigating Authorities did not find any external factor which could have influenced the decision making of the financial institutions other than the facts described above.
>
> (295) Based on the above facts, it is reasonable to find that the financing judgments of KEB, Woori Bank, Chohung Bank and NACF, which were not based on commercial consideration, were made pursuant to the Government of Korea's involvement.

[286] We note that the JIA made findings of "entrustment or direction", without specifying whether it found "entrustment", "direction", or both. The Appellate Body has confirmed that the concept of "entrustment" is not the same as the concept of "direction" (*see US – Countervailing Duty Investigation on DRAMS*, Appellate Body Report, para. 116, quoted at para. 77 *infra*). We do not pursue this issue, though, since it is not a matter that has been raised by Korea.

> (296) Because Hynix was not able to obtain funds from the commercial market at the time of the October 2001 Program, this involvement of the government was indispensable to the provision of funds by the above-mentioned creditor financial institutions. It is reasonable to find that such involvement of the government towards private bodies constitutes entrustment or direction within the meaning of Article 1.1(a)(1)(iv) of the *SCM Agreement*.
>
> (297) Therefore, the measures taken by KEB, Woori Bank, Chohung Bank and NACF in the October 2001 Program constitute the financial contributions based on the government's entrustment or direction within the meaning of Article 1.1(a)(1)(iv) of the *SCM Agreement*.[287]

7.56 The JIA summarised its finding of entrustment or direction in respect of the December 2002 restructuring in very similar terms.[288]

5. Main Arguments of Korea

7.57 Korea asserts that the JIA's finding of "entrustment or direction" was based on a syllogism comprised of the following three premises:

(1) The Korean government had expressed an intention to "keep Hynix alive";

(2) No rational creditor would have entered into the restructuring transactions, in view of Hynix's poor, and deteriorating, financial condition; and

(3) The evidence submitted by the individual creditors (or the findings made by the JIA based on facts available where the creditors were non-responsive) did not establish that the creditors had conducted a sufficient analysis of the various transactions before entering into them.

7.58 According to Korea, the conclusion of the syllogism was that the actions of Hynix's creditors could, in the JIA's view, only be explained by Korean government pressure to save Hynix.

7.59 Korea submits that each of the premises of the JIA's syllogism was flawed, because they were based on presumptions rather than evidence. Korea submits that (a) the JIA's analysis of the Government of Korea's alleged intent was biased and inconsistent with the evidence, as none of the evidence cited by the JIA demonstrated a government desire to save Hynix at the expense of its creditors; (b) the JIA's inference of entrustment or direction incorrectly assumed that creditors will never agree to restructure the debts of insolvent corporations without government intervention; (c) the JIA's analysis of the internal examinations of the restructuring transactions by the creditor banks does not support its conclusions, since the evidence submitted by the individual creditors established that they had conducted a sufficient analysis of the various transactions before entering into them; and (d) the willingness of Other Creditors to enter into the same transactions on the same terms confirms that the transactions were based on commercial considerations.

6. Main Arguments of Japan

7.60 Japan submits that Korea's syllogism argument fails to correctly identify all of the elements underpinning the JIA's determination of entrustment or direction. Japan rejects Korea's argument that none of the press reports or stories cited by the JIA reported a government desire to save Hynix at the expense of its creditors. Japan also denies that the JIA arrived at its finding of entrustment or direction on the basis of an assumption that no rational investor would have entered into the

[287] *See* Annex 1 (Essential Facts).
[288] *See* Annex 1 (Essential Facts), paras. 366 – 374.

restructuring transactions. Furthermore, Japan rejects Korea's argument that the evidence submitted by the individual creditors showed that the creditors had conducted a sufficient analysis of the various transactions before entering into them. Finally, Japan denies that the willingness of Other Creditors to enter into the same transactions on the same terms confirms that the transactions were based on commercial considerations.

7. Evaluation by the Panel

7.61 Korea's arguments raise four substantive issues regarding the JIA's determination of entrustment or direction: (1) the alleged presumption that no rational creditor would have restructured Hynix; (2) the determination of the Government of Korea's intent to save Hynix; (3) the JIA's analysis of the commercial reasonableness of the participation of the Four Creditors in the restructurings; and (4) the participation of Other Creditors in the restructurings. In making these arguments, Korea does not challenge the basic methodological approach adopted by the JIA, *i.e.*, a conclusion of entrustment or direction based on intermediate factual conclusions regarding the actions and intent of the Government of Korea, and the commercial reasonableness of the restructurings *etc*. Instead, Korea challenges the validity of a number of the intermediate factual conclusions reached by the JIA. Before examining the four substantive issues raised by Korea's arguments, we shall first address certain legal, interpretational, and evidentiary issues raised by the parties' arguments.

(a) Legal, Interpretational, and Evidentiary Issues

(i) General Considerations

7.62 The concept of "entrustment or direction" is not defined in the *SCM Agreement*. However, its meaning has gradually been distilled through four WTO cases: *US – Export Restraints*; *Korea – Commercial Vessels*; *US – Countervailing Duty Investigation on DRAMS*; and *EC – Countervailing Measures on DRAM Chips*. Only one of these cases was appealed to the Appellate Body. In reviewing the interpretation applied by the panel in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body found that "[a] finding of entrustment or direction ... requires that the government give responsibility to a private body – or exercise its authority over a private body – in order to effectuate a financial contribution".[289] In particular, the Appellate Body found:

> 110. The term "entrusts" connotes the action of giving responsibility to someone for a task or an object. In the context of paragraph (iv) of Article 1.1(a)(1), the government gives responsibility to a private body "to carry out" one of the types of functions listed in paragraphs (i) through (iii) of Article 1.1(a)(1). As the United States acknowledges, "delegation" (the word used by the Panel) may be a means by which a government gives responsibility to a private body to carry out one of the functions listed in paragraphs (i) through (iii). Delegation is usually achieved by formal means, but delegation also could be informal. Moreover, there may be other means, be they formal or informal, that governments could employ for the same purpose. Therefore, an interpretation of the term "entrusts" that is limited to acts of "delegation" is too narrow.
>
> 111. As for the term "directs", we note that some of the definitions—such as "give authoritative instructions to" and "order (a person) *to do*"—suggest that the person or entity that "directs" has authority over the person or entity that is directed. In contrast, some of the other definitions—such as "inform or guide"—do not necessarily convey this sense of authority. In our view, that the private body under paragraph (iv) is directed "*to carry out*" a function underscores the notion of authority that is included in some of the definitions of the term "direct". This understanding of

[289] Appellate Body Report, *US - Countervailing Duty Investigation on DRAMS*, para. 113.

the term "directs" is reinforced by the Spanish and French versions of the *SCM Agreement*, which use the verbs "ordenar" and "ordonner", respectively. Both of these verbs unambiguously convey a sense of authority exercised over someone. In the context of paragraph (iv), this authority is exercised by a government over a private body. A "command" (the word used by the Panel) is certainly one way in which a government can exercise authority over a private body in the sense foreseen by Article 1.1(a)(1)(iv), but governments are likely to have other means at their disposal to exercise authority over a private body. Some of these means may be more subtle than a "command" or may not involve the same degree of compulsion. Thus, an interpretation of the term "directs" that is limited to acts of "command" is also too narrow.

(...)

113. We recall, moreover, that Article 1.1(a)(1) of the *SCM Agreement* is concerned with the existence of a financial contribution. Paragraph (iv), in particular, is intended to ensure that governments do not evade their obligations under the *SCM Agreement* by using private bodies to take actions that would otherwise fall within Article 1.1(a)(1), were they to be taken by the government itself. In other words, Article 1.1(a)(1)(iv) is, in essence, an anti-circumvention provision. A finding of entrustment or direction, therefore, requires that the government give responsibility to a private body—or exercise its authority over a private body—in order to effectuate a financial contribution.

114. It follows, therefore, that not all government acts necessarily amount to entrustment or direction. We note that both the United States and Korea agree that "mere policy pronouncements" by a government would not, by themselves, constitute entrustment or direction for purposes of Article 1.1(a)(1)(iv). Furthermore, entrustment and direction—through the giving of responsibility to or exercise of authority over a private body—imply a more active role than mere acts of encouragement. Additionally, we agree with the panel in *US – Export Restraints* that entrustment and direction do not cover "the situation in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market". Thus, government "entrustment" or "direction" cannot be inadvertent or a mere by-product of governmental regulation. This is consistent with the Appellate Body's statement in *US – Softwood Lumber IV* that "not all government measures capable of conferring benefits would necessarily fall within Article 1.1(a)"; otherwise paragraphs (i) through (iv) of Article 1.1(a) would not be necessary "because all government measures conferring benefits, *per se*, would be subsidies."

115. Furthermore, such an interpretation is consistent with the object and purpose of the *SCM Agreement*, which reflects a delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures. Indeed, the Appellate Body has said that the object and purpose of the *SCM Agreement* is "to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions". This balance must be borne in mind in interpreting paragraph (iv), which allows Members to apply countervailing measures to products in situations where a government uses a private body as a proxy to provide a financial contribution (provided, of course, that the other requirements of a countervailable subsidy are proved as well). At the same time, the interpretation of paragraph (iv) cannot be so broad so as to allow Members to apply countervailing

> measures to products whenever a government is merely exercising its general regulatory powers.
>
> 116. In sum, we are of the view that, pursuant to paragraph (iv), "entrustment" occurs where a government gives responsibility to a private body, and "direction" refers to situations where the government exercises its authority over a private body. In both instances, the government uses a private body as proxy to effectuate one of the types of financial contributions listed in paragraphs (i) through (iii). It may be difficult to identify precisely, in the abstract, the types of government actions that constitute entrustment or direction and those that do not. The particular label used to describe the governmental action is not necessarily dispositive. Indeed, as Korea acknowledges, in some circumstances, "guidance" by a government can constitute direction. In most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction. The determination of entrustment or direction will hinge on the particular facts of the case. (footnotes omitted)

7.63 We consider that the above findings of the Appellate Body provide important guidance for interpreting and applying Article 1.1(a)(1)(iv) in the present case.

(ii) In the Creditors' Own Interests

7.64 On several occasions in its First Written Submission, Korea suggested that the JIA could not find entrustment or direction absent a finding that Hynix's creditors were forced to enter into transactions that were not "in their own interests". At para. 20, for example, Korea asserted that "[t]here is no indication whatsoever that the government attempted to intervene to force the creditors to enter into transactions that were not in their own interests".

7.65 Japan responded that there is no requirement in Article 1.1(a)(1)(iv) that the alleged entrustment or direction must require private bodies to act contrary to their own interests.

7.66 In response to Question 64[290] from the Panel, Korea asserted that:

> As a conceptual matter, sub-paragraph (iv) of Article 1.1(a) does not limit a finding of "entrustment or direction" to situations in which private entities are forced by a government to undertake actions that are not in their own interests. A government could, for example, order a bank to make a loan on commercial terms to a creditworthy borrower. In such cases, there might be entrustment or direction, but there would also be no benefit to the recipient — and, as a result, there would be no subsidy.

7.67 We therefore understand Korea to accept, as a legal matter, that an investigating authority may find the existence of a financial contribution on the basis of entrustment or direction of private bodies, even if those private bodies are not required to act contrary to their own interests.

7.68 As an evidentiary matter, though, Korea argued that:

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[290] Question 64:
At para. 48 of its oral statement, Korea asserts that "[t]here is no evidence that the Government of Korea wanted the banks to take any measures that were inconsistent with the banks' own best interests". Does the fact that a bank might have acted in a manner consistent with its own best interests exclude a finding of entrustment / direction? Is there government entrustment / direction if a government directs a bank to make a loan that the bank would have made anyway? Please explain.

> a finding that a transaction was or was not in the private entity's own interests would ordinarily be relevant to a determination whether entrustment or direction occurred that is based on circumstantial evidence. Obviously, a finding that a particular transaction was not in the private entity's own interests would lead to an inference that some "external," "non-commercial" factor (to use the JIA's phraseology) had caused the private entity to enter into the transaction. On the other hand, such an inference would obviously be improper when there is a finding that the particular transaction actually was in the private entity's own interests.

7.69 Japan stated that a private body's action contrary to its own interests would be evidence indicating that the private body would have acted pursuant to certain external factors, including *inter alia* government entrustment or direction. We note that the JIA's determination of entrustment or direction is in large part premised on a finding that the relevant creditors acted on non-commercial terms, and therefore contrary to their own (commercial) interests. Furthermore, we note that Japan asserted at para. 311 of its First Written Submission that "a creditor's provision of financing to a company against the creditor's interests would be an element that might indicate the government's intervention".

7.70 In principle, we agree with the parties that conduct which is contrary to a private body's commercial interests might be indicative of government entrustment or direction. In the Panel's view it could not be determinative of itself, because it says nothing about the conduct of the government concerned. Evidence of non-commercial conduct would therefore need to be coupled with other evidence having sufficient probative value in order to arrive at a finding of entrustment or direction.

(iii) Direct / Circumstantial Evidence

7.71 In its First Written Submission, Korea argued that the JIA's finding of entrustment or direction was invalid because "there is actually no evidence that the Korean government told any of the creditors what to do in any of the restructurings".[291]

7.72 This statement might suggest that, in Korea's view, an investigating authority may not properly find entrustment or direction in the absence of direct and conclusive evidence, or a "smoking gun",[292] that demonstrates a government had explicitly "told" a private body to provide financial contribution. Japan rejects such an interpretation.[293] Subsequently, and pursuant to Japan's rejection of this argument, Korea clarified that, in its view "a finding of 'entrustment or direction' based on circumstantial evidence does not require a 'smoking gun.'"[294] Accordingly, there is no dispute between the parties on this issue.

7.73 We agree with the parties' view on this matter, since the entrustment or direction of a private body will rarely be formal, or explicit. For this reason, allegations of government entrustment or direction are likely to be based on pieces of circumstantial evidence, as was the case in the investigation at hand. The JIA made its findings on the basis of intermediate factual conclusions drawn from the totality of the evidence it reviewed.[295] In assessing Korea's claims regarding the JIA's treatment of record evidence in its totality, we shall be guided by the following statement of the Appellate Body in *US – Countervailing Duty Investigation on DRAMS*:

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[291] *See* Korea's First Written Submission, para. 144.
[292] *See* Korea's Second Written Submission, para. 143.
[293] *See* Japan's First Written Submission., para. 244.
[294] *See* Korea's Second Written Submission, para. 143.
[295] *See*, for example, paras. 285 and 288 of Annex 1 (Essential Facts), and para. 150 of Japan's First Written Submission.

> 150. ... if, as here, an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding of entrustment or direction, a panel reviewing such a determination normally should consider that evidence in its totality, rather than individually, in order to assess its probative value with respect to the agency's determination. Indeed, requiring that each piece of circumstantial evidence, on its own, establish entrustment or direction effectively precludes an agency from finding entrustment or direction on the basis of circumstantial evidence. Individual pieces of circumstantial evidence, by their very nature, are not likely to establish a proposition, unless and until viewed in conjunction with other pieces of evidence.
>
> 151. Furthermore, in order to examine the evidence in the light of the investigating authority's methodology, a panel's analysis usually should seek to review the agency's decision on its own terms, in particular, by identifying the inference drawn by the *agency* from the evidence, and then by considering whether the evidence could sustain that inference. Where a panel examines whether a piece of evidence could directly lead to an ultimate conclusion—rather than support an intermediate inference that the agency sought to draw from that particular piece of evidence—the panel risks constructing a case different from that put forward by the investigating authority. In so doing, the panel ceases to *review* the agency's determination and embarks on its own *de novo* evaluation of the investigating authority's decision. As we explain below, panels may not conduct a *de novo* review of agency determinations.
>
> 152. In this case, as we observed above, the USDOC relied on the evidence to arrive at certain factual conclusions as an intermediate step in its analysis *before* finding entrustment or direction. These intermediate factual conclusions were: (i) the GOK pursued a policy of preventing the financial collapse of Hynix; (ii) the GOK held control or influence over Hynix's Group B and C creditors; and (iii) the GOK pressured certain of Hynix's Group B and C creditors into participating in the financial restructuring. A proper assessment by the Panel, therefore, would have considered whether the individual piece of evidence being examined could tend to support—not establish in and of itself—the *particular intermediate factual conclusion* that the USDOC was seeking to draw from it. By looking instead to whether such evidence directly supported a finding of entrustment or direction, the Panel determined certain pieces of evidence not to be probative when, in fact, had they been properly viewed in the framework of the USDOC's examination, their relevance would not have been overlooked. (footnotes omitted)

7.74 We add that in the assessment of circumstantial evidence, which could be taken to suggest entrustment or direction, an investigating authority must also take into account evidence, circumstantial or otherwise, which is contrary to that suggestion. This is the very nature of an investigating authority's obligation to evaluate the evidence before it in order properly to arrive at its conclusions.

(iv) Probative and Compelling Evidence

7.75 At para. 196 of its First Written Submission, Korea argues that the Appellate Body clarified in the *US – Countervailing Duty Investigation on DRAMS* case that "the evidence relied upon by an investigating authority in making [a] determination [of entrustment or direction] must be 'probative and compelling'."

7.76 Japan denies the existence of any evidentiary standard that imposes a qualitative standard higher than that contemplated by the *SCM Agreement*, and argues that the above finding by the Appellate Body did not set out any new evidentiary standard.

7.77 In *US – Countervailing Duty Investigation on DRAMS*, the panel had stated that the evidence of entrustment and direction "must in all cases be probative and compelling".[296] Although the Appellate Body upheld the standard applied by the panel, it suggested that the panel would have erroneously applied a qualitative standard higher than that contemplated by the *SCM Agreement* if the panel had interpreted "compelling" to mean "of such weight as to require the decision-maker to arrive at one given conclusion".[297] The Appellate Body found that the panel had not applied such a qualitatively higher standard. According to the Appellate Body, "the Panel properly examined whether the USDOC's evidence could support its conclusion".[298] The Appellate Body emphasised that "neither the *SCM Agreement* nor the *DSU* explicitly articulates a standard for the evidence required to substantiate a finding of entrustment or direction".[299] The Appellate Body stated further that there is "no basis in the *SCM Agreement* or in the *DSU* to impose upon an investigating authority a particular standard for the evidence supporting its finding of entrustment or direction."[300]

7.78 In light of the above guidance afforded by the Appellate Body in *US – Countervailing Duty Investigation on DRAMS*, we shall not be requiring the JIA's finding of entrustment or direction to have been based on a "probative and compelling" standard of evidence. Rather, we shall consider whether or not the JIA's evidence could support its conclusion.

(v) Positive Evidence

7.79 In its First Written Submission, Korea claimed that there exists a general obligation for an investigating authority to identify "positive evidence demonstrating the existence of each element required for the imposition of antidumping or countervailing duties."[301]

7.80 According to Japan, the "positive evidence" standard only applies to findings of specificity and injury (by virtue of Articles 2.4 and 15.1 of the *SCM Agreement*, respectively). Japan submits that this standard does not apply to findings of entrustment or direction.

7.81 Whereas Article 2.4 of the *SCM Agreement* provides that "[a]ny determination of specificity ... shall be clearly substantiated on the basis of positive evidence", and Article 15.1 provides that "[a] determination of injury ... shall be based on positive evidence", no requirement for positive evidence is imposed in respect of findings of government entrustment or direction under Article 1.1(a)(1)(iv).[302] Furthermore, we have already noted the Appellate Body's finding in *US – Countervailing Duty Investigation on DRAMS* that there is "no basis in the *SCM Agreement* or in the *DSU* to impose upon an investigating authority a particular standard for the evidence supporting its finding of entrustment or direction."[303] Accordingly, we do not consider it appropriate to consider whether or not the JIA's finding of entrustment or direction was based on "positive evidence", in so far as the application of such a standard would exclude the possibility that circumstantial evidence could properly support the JIA's conclusion. Rather, in addressing the substantive arguments made by the parties in respect of

[296] *US – Countervailing Duty Investigation on DRAMS*, para. 7.35.
[297] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 137 and 139.
[298] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 139.
[299] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 138.
[300] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 138.
[301] *See* First Written Submission of Korea, para. 141; *see also* para. 220 ("While the JIA might have rejected the creditor's description of the analysis they performed, it did not present any positive evidence demonstrating that the creditors had actually failed to perform a rational analysis.").
[302] We note that the Appellate Body has referred to the need for investigating authorities to rely on "positive evidence" in the context of sunset reviews under Article 11.3 of the *Anti-Dumping Agreement* (*see US – Oil Country Tubular Goods Sunset Reviews*, Report of the Appellate Body, para. 302). In light of the express wording of Article 1.1(a)(1)(iv) of the *SCM Agreement*, and the Appellate Body's own findings regarding the absence of special evidentiary rules in respect of findings of government entrustment or direction, we see no need to apply a "positive evidence" standard in the present case.
[303] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 138.

Korea's claim against the JIA's determination of entrustment or direction, we shall simply examine whether or not the JIA's evidence could support its conclusion of entrustment or direction.

7.82 It is to those substantive arguments that we now turn.

(b) The Alleged Presumption That No Rational Creditor Would Have Entered Into The Restructuring Transactions, In View Of Hynix's Poor, And Deteriorating, Financial Condition[304]

(i) Arguments of Korea

7.83 Korea asserts that the JIA's analysis of "entrustment or direction" in connection with both the October 2001 and December 2002 restructurings began with the following statement:

> [T]he deterioration of Hynix's financial situation was such that its rating was downgraded even to "Selective Default," and it was unable to raise funds from the commercial market. The Investigating Authorities therefore find that there was no investor that would invest in or make loans to Hynix in the general commercial market from a normal commercial perspective.
>
> Under such circumstances, KEB, Woori Bank, Chohung Bank and NACF made financing decisions that were not based on commercial consideration[s].[305]

7.84 Korea submits that this analysis is based explicitly on the assumption that "there was no investor that would invest in or make loans to Hynix in the general commercial market from a normal commercial perspective." Korea also submits that, more importantly, the JIA's description of its analysis makes clear that it used that assumption as the basis for its inference that "KEB, Woori Bank,

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[304] This is the first premise of the alleged syllogism identified by Korea. Korea submits that the JIA's determination on entrustment or direction took the form of a syllogism based on three premises. Japan denies that the JIA's determination of entrustment or direction was based solely on the three elements identified by Korea. According to Japan, the JIA relied on additional elements not included in Korea's syllogism argument. Although the parties disagree on whether or not Korea has properly identified all of the elements considered, and intermediate factual conclusions drawn, by the JIA, we do not consider it necessary to resolve this issue in order to dispose of Korea's claims. Korea has made specific arguments against certain of the intermediate factual conclusions drawn by the JIA. These arguments may be assessed in their own right, irrespective of whether or not these arguments cover all of the factors considered by the JIA. If upheld, these arguments would undermine the validity of the JIA's determination of entrustment or direction, since that determination was made on the basis of the totality of the intermediate factual conclusions drawn by the JIA. The JIA did not claim in its determination, nor has Japan claimed in these proceedings, that any one of the intermediate conclusions, or a combination of some of them, supported the JIA's finding. We make no findings regarding any elements of the JIA's determination of entrustment or direction that are not covered by Korea's claims and / or arguments. This would include, for example, the JIA's reliance on the extent of the Government of Korea's shareholdings in the Four Creditors.

[305] *See* Annex 1 (Essential Facts), paras. 290-91 (discussing October 2001 restructuring). Korea notes that the corresponding statement regarding the December 2002 restructuring was as follows:

> At the time of December 2002, there was no prospect of improvement in Hynix's financial conditions, and since October 2001, Hynix's credit rating had remained downgraded to "Selective Default." Hynix was in the situation where the company could not obtain financing from the commercial market. The Investigating Authorities find that, from a normal commercial perspective, there existed no investors who would invest in, or make loans available to, Hynix in the general commercial market.
>
> Under such conditions, KEB, Woori Bank, Chohung Bank, and NACF made financing decisions that were not based on commercial consideration[s].

Annex 1 (Essential Facts), paras. 367-68.

Chohung Bank and NACF made financing decisions that were not based on commercial consideration."[306] According to Korea, therefore, the finding that the individual banks did not act in accordance with commercial considerations was based on the assumption that "there was no investor that would invest in or make loans to Hynix in the general commercial market from a normal commercial perspective." Korea submits that if the JIA had not made that assumption — if it had assumed, instead, that creditors of insolvent banks operating from normal commercial perspectives often do agree to debt restructurings — then the outcome would have been completely different: the JIA would have had no logical basis for concluding that "KEB, Woori Bank, Chohung Bank and NACF made financing decisions that were not based on commercial consideration."

7.85 Based on the allegedly different perspectives of "inside" investors (*i.e.*, existing investors) and "outside" investors (*i.e.*, potential new investors), Korea challenges the JIA's alleged presumption that no rational investor would have entered into the restructuring transactions. Korea argues that this presumption has no basis in economics or the evidence. Korea submits that rational, profit-maximizing creditors can have sound reasons to provide new loans, extend the maturities of existing loans, swap debt for equity, or forgive loans entirely, even when the borrower is insolvent. Korea further argues that there is ample support for the proposition that existing creditors acting solely from a "normal commercial perspective"[307] do engage in restructuring transactions all the time.

7.86 Korea submits that "inside" investors have different claims on the future income of a company than "outside" investors, who have not yet made any investments in the company. Korea asserts that when the borrowing company is insolvent, the difference in the pre-existing claims held by "inside" investors and "outside" investors becomes an important factor. Korea asserts that an insolvent company, by definition, cannot pay its outstanding debts in full — which means that some portion of the pre-existing claims held by the "inside" investors will not be met by the company's current operations. According to Korea, the "inside" investors will therefore have a claim on a portion of the additional returns from any new investments made in the company, whether those investments are made by "inside" or "outside" investors, due solely to their unsatisfied pre-existing claims. Korea submits that the need to share any returns from new investments with creditors holding pre-existing claims means that the investment arithmetic for "outside" investors is different from the investment arithmetic for "inside" investors. Korea submits that the JIA failed to take this difference into account, and wrongly presumed that because it was not economically rational for outside investors to participate in the Hynix restructurings, it was similarly irrational for Hynix's existing creditors to do so. Korea asserts that it was economically rational for Hynix's creditors to participate in the restructurings, since there was record evidence demonstrating that Hynix's going concern value exceeded its liquidation value.

(ii) Arguments of Japan

7.87 Japan rejects Korea's assertion that the JIA arrived at its finding of entrustment or direction on the basis of an assumption that no rational investor would have entered into the restructuring transactions. According to Japan, the JIA did not make a determination that participation in the various programmes was *per se* irrational in the abstract. Rather, the JIA examined the actual decision-making processes of each financial institution on an institution-by-institution basis, including a review of the actual internal examination documents and the specific individual circumstances of each of the institutions. Japan asserts that the JIA neither applied a generic standard of inherent rationality nor a fixed economic model. Japan notes that the JIA accepted the "premise that existing creditors would possibly provide additional funding in order to maximize the recovery of credit."[308] According to Japan, the JIA examined the actual decision-making processes of the creditors to assess whether their actions demonstrated that they were acting in accordance with this premise.

[306] *See* Annex 1 (Essential Facts), para. 291.
[307] *See* Annex 1 (Essential Facts), para. 290.
[308] *See* Annex 3 (Rebuttals and Surrebuttals), para. 141.

(iii) Evaluation by the Panel

7.88 In support of its argument, Korea presented the Panel with a substantial volume of evidence and argument regarding the economics of corporate restructuring. As mentioned above, Korea's basic point is that "inside" investors, such as Hynix's creditors, have different claims on the future income of a company than "outside" investors, who have not yet made any investments in the company.

7.89 We consider that there are two elements to Korea's arguments. First, we understand Korea to assert that the JIA *presumed* that it was not economically rational for *outside* investors to participate in the Hynix restructurings. Second, we understand Korea to argue that the JIA failed to consider the economic rationality of the restructurings from the perspective of Hynix's *inside* investors, *i.e.*, its existing creditors.

The alleged presumption

7.90 As noted by Korea, the JIA found that:

> [T]he deterioration of Hynix's financial situation was such that its rating was downgraded even to "Selective Default," and it was unable to raise funds from the commercial market. The Investigating Authorities *therefore* find that there was no investor that would invest in or make loans to Hynix in the general commercial market from a normal commercial perspective.[309] (emphasis supplied)

7.91 We have emphasised the word "therefore" in the above extract because it demonstrates that the JIA's conclusion "that there was no investor that would invest in or make loans to Hynix in the general commercial market from a normal commercial perspective" (*i.e.*, from an outside investor's perspective[310]), was premised on the JIA's statement, in the previous sentence, that "Hynix's financial situation was such that its rating was downgraded even to 'Selective Default,' and it was unable to raise funds from the commercial market." The conclusion "that there was no investor that would invest in or make loans to Hynix in the general commercial market from a normal commercial perspective" was not, therefore, a presumption based on abstract economic theory.[311] It was, instead, a finding of fact based on evidence regarding Hynix's inability to raise funds from potential outside investors.[312] We therefore reject Korea's argument that the JIA *presumed* that it was not economically rational for outside investors to participate in the Hynix restructurings.

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[309] *See* Annex 1 (Essential Facts), para. 290.

[310] Japan explained in response to Question 31 from the Panel that this was a finding from the perspective of *outside* investors. Korea has not challenged Japan's explanation, which seems reasonable in the overall context of the JIA's determination.

[311] The parties disagree on the admissibility of certain evidence provided by Korea in support of its economic arguments. In light of our finding that the JIA's determination of entrustment or direction did not depend on presumptions based on abstract economic theory, and in light of our finding in the next sub-section of our Report that the JIA did acknowledge the economic rationale for inside investors to participate in restructurings of insolvent companies, there can be no relevant dispute between the parties regarding the validity of Korea's economic arguments, and therefore no need for us to consider Korea's evidence – or the admissibility thereof – in further detail.

[312] The relevant evidence in respect of the October 2001 restructuring was set out at paras. 261 – 268 of Annex 1 (Essential Facts). The relevant evidence in respect of the December 2002 restructuring was set out at paras. 322 – 327 of Annex 1 (Essential Facts). Korea's only challenge to the JIA's intermediate factual conclusion that there was no outside investor willing to invest in Hynix concerns the offer made by Micron in April 2002 for Hynix's Memory Division (*see* para. 67 of Korea's oral statement at the first substantive meeting). Since this offer was made in April 2002, it has no bearing on the JIA's treatment of the October 2001 restructuring. Furthermore, we can find no reference to any evidence on the JIA's record of an offer by Micron at the time of the December 2002 restructuring. Indeed, Korea has acknowledged (at para. 211 of its Second Written Submission) that there was "no offer from Micron on the table" at that time. Accordingly, the existence

The inside investor perspective

7.92 As noted above, the JIA made findings regarding the absence of new, outside investors. Elsewhere in its findings, the JIA also considered whether or not the decisions of *existing* creditors to participate in the restructurings were based on commercial considerations. In particular, the JIA made factual findings regarding the alleged reliance of Hynix's *existing* creditors on internal and external analyses of the viability of the October 2001 and December 2002 restructurings.[313] The JIA did so because it explicitly accepted the "premise that existing creditors would possibly provide additional funding in order to maximize the recovery of credit."[314] Japan has confirmed that this means that the JIA accepted "the notion that existing creditors might engage in restructuring measures that potential, outside investors would not".[315] Furthermore, the JIA accepted that debt forgiveness by creditors might be "commercial" "[i]f such action is reasonably found to be unavoidable in order to maximize the debt recovery".[316] Accordingly, we find that the JIA explicitly accepted that an inside investor standard was an appropriate standard to apply to the question of the commerciality, or otherwise, of the restructurings.

7.93 For these reasons, we are not persuaded that the JIA failed to consider the economic rationality of the restructurings from the perspective of Hynix's *inside* investors, *i.e.*, its existing creditors.

Conclusion

7.94 In light of the above, we reject Korea's argument that the JIA's findings were exclusively based on presumptions concerning the perspective of outside investors.

(c) The Government of Korea's Alleged Intent To "Keep Hynix Alive"

7.95 The JIA's determination of entrustment or direction was based in part on its intermediate factual conclusion that the Government of Korea had the political intent to save Hynix.[317] Korea challenges that intermediate factual conclusion in order to impugn the validity of the JIA's determination of government entrustment or direction.

(i) The JIA's findings

7.96 In respect of the October 2001 restructuring, the JIA found:

> Given the totality of these facts, the Investigating Authorities find that the Government of Korea had a political intent to make Hynix survive at the time, had

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of Micron's offer in April 2002 does not undermine the JIA's finding that there were no outside investors willing to invest in Hynix at the time of either the October 2001 or December 2002 restructurings.

[313] *See* Sections 2.8.2.2.3 and 2.9.2.2.3 of Annex 1 (Essential Facts).

[314] *See* Annex 3 (Rebuttals and Surrebuttals), para. 141. Despite references to this statement by Japan in its First Written Submission (*see* para. 379) and in subsequent submissions to the Panel (*see*, for example, para. 90 of Japan's Second Written Submission), Korea only acknowledged this statement in its final submission to the Panel after the Second Substantive Meeting (*see* Korea's Final Comments, para. 4). This statement appears to have been overlooked by Korea during the earlier stages of the Panel proceedings.

[315] *See* Japan's response to Question 98 from the Panel. There is, therefore, no dispute between the parties regarding the appropriateness of analyzing the restructurings from the perspective of inside investors. In other words, it was common ground between the parties that an inside investor standard can be a valid benchmark for the purpose of assessing the commercial reasonableness of conduct in the context of the *SCM Agreement*. Accordingly, there is no need for us to make any findings on whether or not the inside investor perspective constitutes a valid market benchmark for the purpose of establishing the existence of subsidization under the *SCM Agreement*.

[316] *See* Annex 3 (Rebuttals and Surrebuttals), para. 429.

[317] *See*, for example, Annex 1 (Essential Facts), para. 293.

> been ascertaining at all times the progress of discussion of the October 2001 Program, which is considered to have started at the end of July 2001, kept in contact with creditor financial institutions, and had an intention to intervene depending on the circumstances.[318]

7.97 Regarding the December 2002 restructuring, the JIA found similarly that:

> Further, taking into account the facts that the Government of Korea had a strong interest in the Hynix problem since the end of 2000, that the government had kept contacting the creditor financial institutions, requesting their cooperation and monitoring them, and that in 2002 the government undertook intervention as described above, the Investigating Authorities find that it was commonly recognized that the Government of Korea had the intent to support Hynix at the time of the December 2002 Program.[319]

(ii) Arguments of Korea

7.98 Korea submits that the JIA's analysis of the Government of Korea's alleged intent was biased and inconsistent with the evidence, as none of the evidence cited by the JIA demonstrated a government desire to save Hynix at the expense of its creditors.

7.99 According to Korea, the press reports and statements cited by the JIA do not demonstrate any intent of the Government of Korea to save Hynix. First, Korea asserts that, because there is no formal process for developing a government intent, the process of assigning meaning to government action is speculative. Korea asserts that no government is a single entity with a single mind. Korea suggests that, because of differences of view within a government, and inter-agency battles, a "healthy degree of skepticism"[320] is required for any effort to discern a specific government intent from such reports.

7.100 Second, Korea asserts that there is no indication whatsoever that the Government attempted to intervene to force the creditors to enter into transactions that were not in their own interests. Korea asserts that the reports cited by the JIA merely indicated that the Government of Korea viewed the restructurings as matters to be left to the creditors. Korea prepared Attachments 2 and 3 to its First Written Submission in support of this argument. Although Korea acknowledges that the Government of Korea was "keeping an eye on"[321] developments, Korea asserts that this monitoring, and the expressed desire for expeditious resolution by the creditors, was entirely consistent with the government's prudential role in preventing serious harm to the overall financial sector.

7.101 Third, Korea asserts that the JIA only reached the conclusion that the Government of Korea had the intent to save Hynix because of the JIA's alleged assumption that the creditors were not acting in their own interests. Korea asserts that if the JIA had believed, instead, that the restructurings were in the creditors' interest, the JIA would undoubtedly have viewed the Korean government's role differently — that any government encouragement of restructurings that really were the best deal possible for the creditors had nothing to do with a desire to save Hynix, and everything to do with an intent to save the banks. Korea submits that the JIA would not then have attributed the allegedly entrusted or directed creditors' participation in the restructurings to "some kind of external factor",[322] namely the Government of Korea's intent to save Hynix.

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[318] *See* Annex 1 of the Final Determination, para. 275.
[319] *See* Annex 1 (Essential Facts), para. 337.
[320] *See* Korea's First Written Submission, para. 199.
[321] *See* Korea's First Written Submission, para. 202.
[322] *See* Annex 1 (Essential Facts), para. 292.

(iii) Arguments of Japan

7.102 Japan rejects Korea's argument that none of the press reports or stories cited by the JIA reported a government desire to save Hynix at the expense of its creditors. According to Japan, the JIA reached findings of fact based on the totality of the evidence with respect to the issue in question. These findings of fact took into account various pieces of evidence including, but not limited to, news reports. Japan asserts that Korea's approach seeks to evaluate each piece of evidence separately and to disregard those that do not directly prove a particular point, and should be rejected as inconsistent with the Appellate Body's clear guidance in *US – Countervailing Duty Investigation on DRAMS* on how WTO panels are to review the findings of an investigating authority relating to determinations that were made based on an assessment of the evidence in its totality.

(iv) Evaluation of the Panel

7.103 We have identified three main elements to Korea's arguments: (1) the singularity of government intent; (2) the reports of the intent of the Government of Korea; and (3) the assumption regarding the commercial interests of the creditors. We shall examine each element in turn.

Singularity of Government Intent

7.104 Depending on the circumstances, there may well be a certain degree of speculation in seeking to establish the intent of a government in the abstract. However, to the extent that Korea is suggesting that the motivations behind government actions or statements are not relevant in determining the existence of government entrustment or direction, we disagree. In the case of alleged government entrustment or direction, it is reasonable for an investigating authority to seek to determine the motivations behind certain actions or statements by government agencies or representatives. Entrustment or direction necessarily entails the conveying, by a government, of a message of some sort to third parties to the effect that they have the responsibility to take a particular course of action, or must behave in a particular way. Identifying motive and intent can assist in determining whether such a message was conveyed. Provided appropriate caution is exercised in assessing the reliability of evidence, in our view an investigating authority may do so on the basis of statements properly attributed to named government agencies or representatives, in the absence of express denials, corrections, or other evidence to the contrary.

Reports of the Intent of the Government of Korea

7.105 Upon review of the evidence relied on by the JIA in respect of the October 2001 restructuring, we consider that Korea has failed to establish a *prima facie* case that a reasonable and impartial investigating authority could not properly have concluded that the relevant reports demonstrated the Government of Korea's intent to save Hynix. In our view, the evidence of "Government Action" cited by the JIA[323] could properly be interpreted as indicating that the Government of Korea had a preference for the continued existence of Hynix, and that the Government of Korea was prepared to intervene directly in the Hynix restructuring process.[324]

7.106 In particular, the JIA noted that on 2 July 2001 the President of Korea hosted an Economic Ministers' Meeting at which the May 2001 restructuring of Hynix was reported as one of the achievements of the FSC – a government body - during the first half of 2001. This could properly be treated as evidence that the FSC, and therefore the Government of Korea, had been directly involved

[323] *See* paras. 269 – 275 and 328 – 337 of Annex 1 (Essential Facts).

[324] We do not wish to suggest that evidence of government intent to save Hynix in and of itself could support a finding of government entrustment or direction to save Hynix.

in the May 2001 restructuring, and that direct Government of Korea involvement in the October 2001 restructuring would not have been unprecedented.[325]

7.107 In addition, the JIA observed that on 24 July 2001 the Economic Ministers announced their decision "to strongly promote the structural reform of the six companies subject to the KDB Program, including Hynix",[326] and envisaged "additional restructuring measures"[327] for those companies. Furthermore, it was decided that "the financial supervisory authorities [would] check the progress"[328] made pursuant to these decisions. In our view, an objective and impartial investigating authority might properly interpret these reports, emanating from a government entity, as evidence that the Government of Korea intended to pursue the restructuring of Hynix beyond the May 2001 restructuring.

7.108 Furthermore, the JIA noted that on 3 August 2001 the Deputy Prime Minister stated that "[i]f Hynix says it needs an additional KRW 1 trillion, and if the creditor group cannot make a decision whether or not to provide additional support, the financial authorities should decide",[329] and that "[i]n the event that the creditor group is unable to resolve the Hynix Semiconductor issue, the government will come forward to make a quick decision".[330] The JIA found that the Deputy Prime Minister also stated on 8 August 2001 that "[c]reditor banks will help settle the problem of several companies[331] engaged in deals with foreign countries within this month, and in the case that it does not settle, the government will directly step in".[332] We consider that these statements might properly be treated as further evidence that the Government of Korea was prepared to intervene directly in the Hynix restructuring process, and to "save Hynix" in one way or other.

7.109 Regarding the December 2002 restructuring, the JIA found that at least one Hynix creditor complained of "the government's headlong approach toward the handling of Hynix".[333] In addition, the JIA observes that on 15 November 2002 the 2002 Report of the National Audit Results stated that "KDB, through discussions with interested parties *such as the government* and the creditor group, should determine and implement an action plan for dealing with Hynix Semiconductors as soon as possible".[334] In our view, an objective and impartial investigating authority might properly conclude from these statements, read in light of relevant evidence regarding the October 2001 restructuring, that the Government of Korea was directly involved in the December 2002 restructuring, and that this was because the Government of Korea's intent was that Hynix should be saved.

7.110 According to Korea, the evidence collected by the JIA "consistently reported only that the government viewed the restructurings as matters to be left to the creditors".[335] Korea refers in this

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[325] The JIA referred to evidence regarding the May 2001 restructuring in its findings of entrustment or direction in respect of the October 2001 restructuring (*see* para. 269 of Annex 1 (Essential Facts)). Korea asserts (Attachment 2, page 17) that evidence regarding the May 2001 restructuring should have no bearing on the analysis of the October 2001 restructuring. Since the May 2001 restructuring took place only five months before the October 2001 restructuring, and since the relevant evidence actually dates from after the May 2001 restructuring, we find that the JIA did not err in considering such evidence in the context of the October 2001 restructuring.

[326] *See* Annex 1 (Essential facts), para. 270, fourth indent.

[327] *Ibid*.

[328] *Ibid*.

[329] *See* Annex 1 (Essential Facts), para. 272, first indent.

[330] *Ibid*.

[331] The Panel notes that Japan explained in response to Question 24 from the Panel that Hynix could properly be understood to be one of the "several companies" at issue. Korea has not disputed this interpretation of the evidence.

[332] *Ibid*, second indent.

[333] *See* Annex 1 (Essential Facts), para. 334, fifth indent.

[334] *See* Annex 1 (Essential Facts), para. 329, ninth indent, emphasis added.

[335] *See* Korea's First Written Submission, para. 200.

regard to a 3 September 2001 statement by the Chairman of the FSC that "Hynix is the issue which should be assessed and determined by the creditor financial institution group", and his request to FSC officials "to take no part and even to refrain from expressing personal opinion".[336] According to Korea, "[t]his statement clearly indicates the FSC's position that the resolution of Hynix's situation was to be left to the creditors, and that the government should not intervene."[337] However, only five days later the very same government official was quoted as stating that "the government will determine how to treat the problems of Hynix ... by the end of September".[338] Not only is the first statement capable of suggesting to an objective and impartial investigating authority that the FSC Chairman had to instruct officials not to intervene in the Hynix process precisely because they had been doing so, but the second statement could reasonably be taken to demonstrate that the FSC Chairman himself acknowledged that the Government of Korea was prepared to intervene directly in the Hynix restructuring process. Korea's argument regarding the proper interpretation of the 3 September 2001 statement is therefore not persuasive.

7.111 At the first substantive meeting, Korea submitted to the Panel a newspaper article dated 1 September 2001, in the form of Exhibit KOR-33. Korea asserted that the treatment of this report reveals a great deal about the JIA's approach to the evidence in this case. Korea also asserted that the JIA had ignored this article completely in Annex 1 (Essential Facts). Korea drew the Panel's attention to the following statements reported in the article:

- The Deputy Prime Minister of Korea was quoted as saying "The creditor council will support Hynix if it sees any hope for Hynix, but the slow down in semiconductor and other factors can lead them to another decision."

- The President of Shinhan Bank, Lee Inho, was quoted as saying, "Before all financial support, we should make a right judgment if Hynix can survive or not, and more financial aid would be difficult."

- The President of Hanvit Bank, Lee Deokhun, was quoted as saying that the creditor's council might agree to provide additional financial assistance to Hynix. In this regard, he noted that the alleged Korean government interference "does not matter since the creditor council is independently searching a support plan to minimize our own financial damage."

7.112 In our view, this article is not sufficient to establish a *prima facie* case against the JIA's finding of a government intent to save Hynix. First, an investigating authority might reasonably conclude that the reported statements by the Presidents of two private banks were not indicative of the intent of the Government of Korea in respect of the Hynix restructurings. Second, regarding the statement of the Deputy Prime Minister, there is no doubt that there was some evidence on the JIA's record to the effect that the Government of Korea would let the creditors decide for themselves whether or not to restructure Hynix. However, this does not necessarily invalidate the JIA's determination, since the JIA might reasonably have found that there was also substantial evidence on the record to the effect that the Government of Korea intended to save Hynix, through direct intervention if necessary. Indeed, the JIA's record indicates that the very same Deputy Prime Minister was quoted only weeks earlier as stating that the Government of Korea would "step in"[339] and resolve the Hynix issue if necessary. In addition, we note that the article was not ignored completely in Annex 1 (Essential Facts), as alleged by Korea. It was explicitly referred to by the JIA at para. 281 of Annex 1 (Essential Facts), in the context of the JIA's analysis of Woori Bank's internal examination of

[336] *See* Annex 1 (Essential Facts), para. 272, fourth indent.
[337] *See* Attachment 2, page 21, Korea's First Written Submission.
[338] *See* Annex 1 (Essential Facts), para. 272, fifth indent.
[339] *See* para. 7.108 *supra*.

the October 2001 restructuring. For these reasons, we are not persuaded by Korea's arguments concerning the press report set forth in Exhibit KOR-33.

7.113 We would emphasise that we do not mean to imply that all of the evidence before the JIA was consistent with the conclusion that the Government of Korea was prepared to intervene directly in the Hynix restructuring process. This would be unlikely in an investigation based in large part on circumstantial evidence. Nevertheless, the JIA could properly have concluded that the balance of the record evidence did indicate that the Government of Korea was prepared to intervene directly in the Hynix restructuring process. Furthermore, the JIA explicitly reviewed the record evidence in the context of earlier findings that the Government of Korea had "exerted pressure on certain banks when it implemented support measures such as KEIC's insurance on the D/A financing and KDB Program".[340] These earlier findings, which dated from late 2000, and which concerned earlier measures safeguarding the continued viability of Hynix, have not been challenged by Korea in the present proceedings. In our view, the JIA properly reasoned that such findings from the recent past provide relevant context for interpreting the numerous reports of government intent and intervention in respect of the October 2001 and December 2002 restructurings.[341] Faced with evidence of government pressure on Hynix creditors in the recent past, and evidence that the Government of Korea was prepared to intervene directly in order to preserve Hynix as a going concern at the time of the October 2001 and December 2002 restructurings, we consider that the JIA could properly have concluded that the Government of Korea had the political intent to save Hynix at the time of those restructurings – through direct intervention if necessary - even if not all of the record evidence pointed in this direction.[342]

7.114 In light of the above, we find that the JIA could properly have concluded that the Government of Korea intended to save Hynix at the time of the October 2001 and December 2002 restructurings.

Assumption that the creditors were not acting in their own interests

7.115 Korea asserts that the JIA only reached its conclusion on the Government of Korea having the intent to save Hynix because of the JIA's alleged assumption – based on an outside investor standard – that the creditors were not acting in their own interests. Korea further asserts that the conclusion therefore cannot be maintained, because the outside investor standard is not the standard that the JIA should have applied.

7.116 We recall our finding that the JIA applied both an outside and inside investor standard, and that the JIA applied an inside investor standard because it explicitly acknowledged "that existing

[340] *See* Annex 1 (Essential Facts), para. 269.

[341] The JIA acknowledged that *inter alia* evidence regarding government pressure on creditors does not date from the time of the restructurings at issue, but nonetheless concluded that such evidence was relevant to its the findings of entrustment and direction in respect of those restructurings (*see* paras. 269 and 328 of Annex 1 (Essential Facts)). Korea submits that evidence in respect of such earlier events "would have no bearing on" the later restructurings "unless it was demonstrated that there was a continuation of the government policy" (*see* pages 1 and 17 of Attachment 2 to Korea's First Written Submission). We disagree with Korea's evaluation of the potential relevance of evidence pre-dating the restructurings at issue. We see no reason why an investigation of alleged government entrustment or direction of Hynix creditors in respect of the October 2001 and December 2002 restructurings could not properly have regard to evidence of government entrustment or direction of those same Hynix creditors dating from late 2000.

[342] We have noted Attachment 3 to Korea's First Written Submission, which addresses evidence in Annex 1 (Essential Facts) allegedly "indicating that the Korean Government's 'intent' was to leave decisions concerning the May 2001, October 2001 and December 2002 restructurings to the creditors." We have already noted (*see* para. 7.112 *supra*) that statements purporting to leave the decision to creditors need not, when properly reviewed in the context of other evidence, necessarily be determinative. Reviewing Attachment 3 as a whole, in the context of the remainder of the evidence considered by the JIA, we do not believe that the evidence cited by Korea was sufficient to prevent the JIA from properly concluding that the Government of Korea intended to save Hynix.

creditors would possibly provide additional funding in order to maximize the recovery of credit."[343] The JIA also accepted that debt forgiveness by creditors might be "commercial" "[i]f such action is reasonably found to be unavoidable in order to maximize the debt recovery".[344] We further recall our finding that the JIA did not rely on presumptions regarding the outside investor standard, but rather made factual findings regarding the lack of outside investors willing to invest in Hynix at the time of the restructurings.[345] Thus, there is no basis to Korea's argument that the JIA only reached its conclusion on the Government of Korea having the intent to save Hynix because of the JIA's alleged assumption – based on an outside investor standard – that the creditors were not acting in their own interests.

Conclusion

7.117 For the above reasons, we reject Korea's argument that the JIA's analysis of the Government of Korea's intent was biased and inconsistent with the evidence.[346]

(d) Commercial reasonableness: the JIA's analysis of the internal examinations of the restructurings by the Four Creditors

7.118 A further element relied on by the JIA in finding that the Government of Korea had entrusted or directed the Four Creditors to participate in the restructurings was its intermediate factual conclusion that the Four Creditors had decided to participate in the restructurings on the basis of non-commercial considerations.

7.119 Korea submits that the JIA's analysis of the internal examinations of the restructuring transactions by the creditor banks does not support its conclusions, since the evidence submitted by the individual creditors established that they had conducted a sufficient analysis of the various transactions before entering into them. Korea does not dispute that the commercial reasonableness of the creditors' actions might be relevant to a determination of government entrustment or direction.

7.120 Japan asks the Panel to reject Korea's argument.

(i) Main Arguments of Korea

7.121 Korea submits that the creditor banks that responded to the JIA's questionnaires told the JIA the same basic story: they had received the information needed to analyze the October 2001 and December 2002 restructuring transactions (in some cases, through draft versions of reports that were only finalized at the time the restructuring agreements were adopted); they had analyzed that information through their normal internal procedures; and they had concluded that the restructuring transactions were in their economic interests, especially in light of the available alternatives.

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[343] *See* Annex 3 (Rebuttals and Surrebuttals), para. 141. Despite references to this statement by Japan in its First Written Submission (*see* para. 379) and in subsequent submissions to the Panel (*see*, for example, para. 90 of Japan's Second Written Submission), Korea only acknowledged this statement in its final submission to the Panel after the Second Substantive Meeting (*see* Korea's Final Comments, para. 4). This statement appears to have been overlooked by Korea during the earlier stages of the Panel proceedings.

[344] *See* Annex 3 (Rebuttals and Surrebuttals), para. 429.

[345] Although the JIA ultimately concluded that, because the Four Creditors had not acted on the basis of commercial considerations, they had likely been influenced by external factors such as the intent of the Government of Korea to save Hynix, this does not mean that the JIA's conclusions on the Government's intent were based on assumptions regarding the creditors' failure to act in their commercial interests. The JIA made distinct factual findings regarding these two matters.

[346] We recall that Korea has only challenged the evidentiary basis for the JIA's intermediate factual conclusion regarding government intent. Korea has not disputed that intermediate factual conclusions regarding government intent might support a finding of government entrustment or direction.

7.122 According to Korea, the JIA rejected the banks' claims in large measure because the JIA applied an outside investor standard, and could not accept that any rational bank would have entered into those transactions. Korea asserts that, having already decided that the banks' decision-making processes must have been irrational (from an outside investor perspective), the JIA then considered the actual evidence of what the banks actually did. Korea asserts that the JIA's finding of subjective irrationality in the banks' decision-making processes was therefore based on the JIA's conclusion that the banks' decisions were objectively irrational, from an outside investor perspective.

7.123 Korea submits that the JIA's discussion of the banks' decision-making processes was not an even-handed assessment of the evidence. Instead, it was a search for excuses to disregard evidence demonstrating that the banks had actually acted in a rational manner. According to Korea, this bias can be seen by looking at the specific issues that the JIA relied upon to discount the bank's statements concerning the October 2001 and December 2002 restructurings:

- October 2001: Korea asserts that the independent analyses by Anjin Accounting and the Monitor Group had demonstrated that Hynix's going-concern value at the time of the October 2001 restructuring far exceeded its liquidation value.

  Korea accepts that these reports were not finalized until after the terms of the October 2001 restructuring had been approved by the banks, but asserts that the banks testified that they had received the reports in draft form before they made their decisions. Korea also asserts that at least one of the banks also submitted its own internal analysis, showing roughly the same results.

- December 2002: Korea asserts that the analyses prepared by Deutsche Bank and [[BCI]] in connection with the December 2002 restructuring had shown that Hynix's going concern value far exceeded its liquidation value. Korea states that the final versions of these reports had been prepared and circulated to the banks before the banks made their decisions to participate in the restructuring.

  Korea asserts that the JIA never disputed the calculation of the going-concern value or liquidation value in those reports. Instead, the JIA disputed the substantive merits of the reports.

(ii) Main Arguments of Japan

7.124 Japan submits that the distinction drawn by Korea between objective and subjective rationality is artificial and not consistent with the approach of the JIA. Japan asserts that what Korea calls the objective and the subjective rationality of the creditor banks are not two separate elements but are rather mutually supporting aspects of the same overall intermediate findings that the creditor banks did not act in a commercially reasonable manner. Japan asserts that the JIA's finding was based on abundant evidence that there existed no investors, either new or existing creditors, in the general commercial market who would have invested in or provided loans to Hynix from an outsider investor's perspective. Japan argues that the JIA did not base its examination of the commercial reasonableness of the Four Creditors' actions exclusively from the perspective of outside investors, but also examined commercial reasonableness from the inside investor perspective.

7.125 Regarding the JIA's examination of the commercial reasonableness of existing creditors' decisions to participate in the Hynix restructurings, Japan asserts that the JIA followed the same process for both the October 2001[347] and December 2002[348] restructurings. Japan asserts that the JIA explained this examination process in the following terms:

[347] *See* Annex 1 of Final Determination, paras. 269-97.
[348] *See* Annex 1 of Final Determination, paras. 328-74.

> Based thereon, the Investigating Authorities examined the decision-making process of the individual creditor banks and find that there were decisions that were not commercially reasonable. It is not found that the decisions of the creditor banks were commercially unreasonable directly from the fact that it was impossible to raise funds from the commercial market or from new investors. …
>
> In the Essential Facts, the commercial reasonableness of the decisions by the creditor banks to participate in the Hynix bailout measures was examined based on the specific individual circumstances and on the evidence concerning the review process pertaining to participation in the bailout measures on the premise that existing creditors would possibly provide additional funding in order to maximize the recovery of credit.[349]

(iii) Evaluation by the Panel

7.126 In the context of its claim regarding the JIA's intermediate factual conclusion that the decisions of the Four Creditors to participate in the restructurings were not commercially reasonable, Korea's arguments raise the question of whether or not the JIA improperly applied an outside investor standard. Korea's arguments also raise issues regarding the JIA's treatment of internal analyses and external reports prepared in respect of the October 2001 and December 2002 restructurings. We shall examine each of these issues in turn.

Outside / Inside Investor Perspective

7.127 Korea asserts that the JIA rejected the Four Creditors' claims that their actions were commercially reasonable in large measure because the JIA applied an outside investor standard. Korea submits that the JIA's finding of subjective irrationality in the banks' decision-making processes was based on the JIA's conclusion that the banks' decisions were objectively irrational, from an outside investor perspective. Korea relies in this regard on the following statement by the JIA:

> In the Essential Facts, the Investigating Authorities find it was difficult for Hynix to raise funds from the commercial market at the time taking into consideration the worsening DRAM market, the deteriorating financial condition of Hynix, the trends of Hynix share price and others, the deterioration in its external credit rating, and other indicators. Based thereon, the Investigating Authorities examined the decision-making process of the individual creditor banks and find that there were decisions that were not commercially reasonable.[350]

7.128 Read in isolation, this statement by the JIA might well support Korea's interpretation of the JIA's analysis. However, the very next sentence in the JIA's Response to Comments states that "[i]t is not found that the decisions of the creditor banks were commercially unreasonable directly from the fact that it was impossible to raise funds from the commercial market or from new investors".[351] This clarification was made by the JIA in Annex 3 (Rebuttals and Surrebuttals), in response to virtually the same argument that Korea has raised in the present proceedings. The JIA's full response[352] to that argument reads:

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[349] *See* Annex 3 (Rebuttals and Surrebuttals), paras. 140-41.
[350] *See* Annex 3 (Rebuttals and Surrebuttals), para. 140.
[351] *Ibid.*
[352] There are differences between the two translations of Annex 1 (Essential Facts) and Annex 3 (Rebuttals and Surrebuttals) submitted by the parties. Japan has challenged a number of alleged translation errors in the version submitted by Korea (see, for example, Japan's First Written Submission, para. 348, concerning para. 140 of Annex 3 (Rebuttals and Surrebuttals)). Since Korea has not responded to Japan's argument that Korea's translation of para. 140 of Annex 3 (Rebuttals and Surrebuttals) is erroneous, and since

(140) In the Essential Facts, the Investigating Authorities find it was difficult for Hynix to raise funds from the commercial market at the time taking into consideration the worsening DRAM market, the deteriorating financial condition of Hynix, the trends of Hynix share price and others, the deterioration in its external credit rating, and other indicators. Based thereon, the Investigating Authorities examined the decision-making process of the individual creditor banks and find that there were decisions that were not commercially reasonable. *It is not found that the decisions of the creditor banks were commercially unreasonable directly from the fact that it was impossible to raise funds from the commercial market or from new investors.* Accordingly, the rebuttal by the Government of Korea that "the Investigating Authorities concluded that the debt restructuring acts of the banks were all non-commercial measures because of the unsatisfactory financial state of Hynix," and "commercial reasonableness was examined by evaluating the measures from the perspective of corporations that are providing new financing or investment to the pertinent company" differs from the findings in the Essential Facts; thus this rebuttal cannot be accepted. *When examining the decision-making processes of the individual creditor banks, the Investigating Authorities conducted substantive bank-by-bank analysis of their decision-making processes to participate in the Hynix support measures based on the submitted internal examination documents and other materials that served as a basis for their decisions.* Consequently, the rebuttal that "an abstract and general evaluation of the commercial reasonableness of the debt restructuring was conducted despite that it must be evaluated from the real and specific standpoint of the creditor institutions participating in such measures" also differs from the findings in the Essential Facts; thus this rebuttal cannot be accepted.

(141) In the Essential Facts, the commercial reasonableness of the decisions by the creditor banks to participate in the Hynix bailout measures was examined based on the specific individual circumstances and on the evidence concerning the review process pertaining to participation in the bailout measures on the premise that existing creditors would possibly provide additional funding in order to maximize the recovery of credit. No abstract judgment was made as to whether or not the decisions conform to a fixed economic model. The assertions of Hynix and Micron are both arguments that concern economic models, and are not based on specific evidence leading to the decisions by the individual banks to participate in the bailout measures. Accordingly, they cannot be accepted.

(142) In any case, irrespective of whether one is an existing creditor or not, financial institutions examine a variety of factors from a profit-maximization or loss-minimization perspective such as the financial conditions of the pertinent company, its future potential, comparison of its going-concern value with its liquidation value when making investment or lending decisions. If such an examination was carried out in a reasonable manner, then it can be said that a commercially reasonable decision had been made based on the results of the examination even if the result was the incurrence of a loss. On the other hand, in the case where the examination was insufficient, then one cannot make a finding that a commercially reasonable decision had been made even if it resulted in generation of profit. In the Essential Facts, the Investigating Authorities find that the financial institutions that participated in the support did not conduct sufficient examination of this sort, and that they decided to support non-commercially. (emphasis supplied)

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note 19 to Korea's Second Written Submission suggests that Korea is prepared to accept the translations proposed by Japan, we proceed on the basis of the translations submitted by Japan.

7.129 We understand Japan to argue that the JIA first established whether it was commercially reasonable for either outside or inside investors to participate in the restructurings from an outside investor perspective.[353] Japan asserts that the JIA then assessed whether it was commercially reasonable for individual inside investors to participate in the restructurings from an inside investor perspective.[354] This is consistent with the JIA's own description of its analysis, as detailed above.

7.130 It is also consistent with the JIA's findings in Annex 1 (Essential Facts). In particular, having concluded that "Hynix was unable to raise funds from the commercial market, and [that] there existed no investors in the general market who would invest in Hynix or provide a loan to Hynix from a normal commercial perspective",[355] the JIA examined the "situation of [the] credit examination by banks".[356] With respect to Woori Bank's participation in the October 2001 restructuring,[357] for example, the JIA made *inter alia* the following findings:

> According to the internal credit examination document concerning the October 2001 Program Woori Bank submitted at the on-the-spot investigation, Woori Bank was fully aware of the pessimistic financial situation of Hynix. It based its approval of the October 2001 Program on considerations of the public interest [[BCI]].* Moreover, there was a news report that President of the Bank had stated that the Bank was prepared to provide support for the debt-to-equity swap and new funds if the creditor banks agreed.* These facts support the fact that Woori Bank gave priority to the public interest, *i.e.*, the bailout of Hynix, over its own commercial judgment. At the same time, according to Woori Bank's response to the questionnaires, the credit rating of Hynix was [[BCI]]* the soundness classification was [[BCI]] at the end of 2001, and Woori Bank set aside [[BCI]]% [of claims to Hynix] as a loan-loss reserve.* This rate was very high compared with the average reserve rate for other claims, which was [[BCI]]%,* and it shows that the bank had low expectations of the possibility of recovering Hynix loans. As described above, with regard to the reports by various institutions, which was submitted as the basis for its judgment, it was apparent at that time that the two reports existing at the time of the resolution of the October 2001 Program (the SSB Report and the Monitor Group Report) lacked reliability to serve as the material to substantiate the validity of the financial analysis to participate in the October 2001 Program from a commercial perspective. At the same time, Woori Bank selected option 1 prior to the release of the Arthur Andersen Report, on which the October 2001 Program relied. The Investigating Authorities do not find that Woori Bank's provision of credit under such circumstances as credit provided based on normal commercial judgment.[358] (* footnotes omitted)

7.131 Thus, in addition to finding that it was not commercially reasonable for investors to participate in the October 2001 restructuring from an outside investor's perspective, based on objective considerations such as the poor financial state of Hynix, the JIA then considered *inter alia* Woori's participation from the inside investor's perspective, having regard to what Woori itself had indicated was "the basis for its judgment" (*i.e.*, its internal analyses, the SSB Report, the Monitor Group Report, and the Anjin Accounting Report).

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[353] *See* Annex 1 (Essential Facts), paras. 261-68 for the JIA's analysis of the October 2001 Program and *ibid*., paras. 322-27 for the same on the December 2002 Program.

[354] Japan made the same argument in response to Questions 99 and 100 from the Panel after the Second Substantive Meeting.

[355] *See* Annex 1 (Essential Facts), para. 268.

[356] *See* Annex 1 (Essential Facts), section 2.8.2.2.3.

[357] The JIA also examined the commercial reasonableness of the internal analyses of the restructurings undertaken by KEB, Chohung Bank and NACF (*see* Annex 1 (Essential Facts), paras. 278, 284 and 287 respectively. Korea has not challenged the findings of the JIA regarding the internal analyses of the October 2001 restructuring by KEB and NACF.

[358] *See* Annex 1 (Essential Facts), para. 281.

7.132 In light of these distinct phases in the JIA's analysis, we reject Korea's argument that the JIA's finding of subjective irrationality in the banks' decision-making processes was based on its conclusion that the banks' decisions were objectively irrational from the perspective of outside investors.

Internal analyses of the October 2001 restructuring

7.133 Korea submits that the JIA's review of the Four Creditors' internal analyses of the October 2001 restructuring does not support the JIA's conclusion that the decisions of the Four Creditors to participate were not based on commercial considerations. In particular, Korea asserts that the internal examinations of the October 2001 restructuring by Woori Bank and Chohung Bank explicitly considered the financial impact of the restructurings on those banks. Korea asserts that these banks based their decisions to participate in the restructurings on an assessment that doing so would minimize their losses because Hynix's going concern value exceeded its liquidation value.

7.134 Japan notes that the JIA found that Woori Bank based its approval of the October 2001 Program on considerations of the public interest, "[[BCI]]".[359] The JIA also found that Woori Bank opted for option [[BCI]]. On the basis of the JIA's review of Woori's internal analysis, together with other factors, the JIA reached an intermediate factual conclusion that "Woori Bank did not select Option [[BCI]] pursuant to a normal commercial judgment".[360]

7.135 In our view, the JIA could properly have doubted the commercial reasonableness of Woori Bank's internal credit analysis on the basis of Woori's failure to consider options [[BCI]] in that analysis. Under such circumstances, Woori's analysis of the October 2001 restructuring, which involved a choice between three options, was incomplete. We also agree with the JIA's assessment that the commercial reasonableness of that analysis is further undermined by Woori Bank's consideration of "[[BCI]]", and its statement that "[[BCI]]".[361] In its Final Comments, Korea attributes such "public interest" considerations to Woori's concern for "[[BCI]]".[362] Although Woori did refer to the need to purchase a guarantee for a loan to a Hynix affiliate, this would not explain Woori's concern for [[BCI]]. Furthermore, Woori went so far as to estimate the [[BCI]] in the event that Hynix were liquidated, or entered into court receivership. Thus, the relationship between [[BCI]] and [[BCI]] has not been sufficiently explained by Korea.

7.136 Korea also submits that "the first and most important factor identified by Woori [] is the difference between the estimated going-concern value of [[BCI]] trillion Won and the estimated liquidation value of [[BCI]] trillion Won. In light of these estimates, the Woori Bank analysis expressly stated that '[[BCI]].'"[363] Although we acknowledge that Woori Bank did estimate that Hynix's going concern value would exceed its liquidation value, we note the JIA's finding that Woori's estimates were unsubstantiated, in the sense that Woori's analysis did not "record any basis for the estimate".[364] We also note that there is nothing in Woori's internal analysis to suggest that its estimate that Hynix's going concern value exceeded its liquidation value was "the most important factor identified by Woori", as alleged by Korea. Given Woori's failure to examine options [[BCI]], and its consideration of non-commercial factors pertaining to the public interest, including especially [[BCI]], Korea has failed to establish a *prima facie* case that the JIA's review of Woori Bank's internal analysis was flawed simply by virtue of Woori's reference to an unsubstantiated estimate that [[BCI]].[365]

[359] *See* Annex 3 (Rebuttals and Surrebuttals), para. 400.
[360] *See* Annex 3 (Rebuttals and Surrebuttals), para. 400.
[361] *See* Exhibit KOR-27, page 3.
[362] *See* Korea's Final Comments, para. 41.
[363] *See* Korea's Final Comments, para. 40.
[364] *See* Annex 3 (Rebuttals and Surrebuttals), para. 382.
[365] In its Final Comments to the Panel, Korea challenges the JIA's interpretation of a statement made by the President of Woori Bank. After referring to public interest considerations in Woori's internal analysis, the

7.137 Regarding Chohung Bank, the JIA found *inter alia* that:

> Chohung Bank extended credit in a non-commercial manner on the basis of fact that *inter alia* the decision was made to fulfil the [Memorandum of Understanding (hereinafter "MOU")] rather than based on the possibility of rehabilitating Hynix and that the Bank selected Option 1 before the AA Report and others were presented. With regards to the finding, Chohung Bank asserts that it had "various internal and external materials;" however, Chohung Bank responded at the on-the-spot investigation that "the materials that formed the basis of the pertinent examination no longer remain at our Bank,"* and it has not submitted the aforementioned "various internal and external materials" to the Investigating Authorities. In addition, although the internal credit examination document that the Bank submitted contains an analysis of the liquidation value of Hynix (*i.e.*, the compensation when selected Option 3), there is no indication that the Bank evaluated the Hynix going-concern value or the Hynix share price for the selection of Option 1 or Option 2. Thus, the assertion that the Bank selected the most favourable option from Options 1, 2, and 3 based on the impact each option would have on its profit-and-loss is inconsistent with the evidence on the record of the investigation. Consequently, the assertion that the Bank "selected Option 1 which was the most favourable to the Bank, out of Options 1, 2, and 3, based on the impact it would have on profit-and-loss and the MOU" and the similar assertion of Hynix cannot be accepted.[366] (* footnote omitted)

7.138 Korea made no arguments regarding these specific findings by the JIA. Furthermore, regarding Chohung's alleged need to comply with its MOU, we note that the "synthesis opinion" in Chohung's internal analysis contains two bullet points, both of which refer to the MOU. The first bullet point states that "non-participation ... results in the miscarriage of MOU for this period". The second bullet point contains the conclusion that "the participation is of help for CHB to achieve MOU". In addition, we note that there is no quantification of either the share price or the going concern value in Chohung's internal analysis of options 1 and 2. In light of these observations, there is no basis to conclude that the JIA's review of Chohung's internal analysis was flawed.

7.139 For the above reasons, we reject Korea's arguments regarding the JIA's review of the internal analyses of the October 2001 restructuring performed by Woori Bank and Chohung.

Reliance on external reports for the October 2001 restructuring

7.140 Korea asserts that the creditors worked with a variety of outside experts before deciding to participate in the October 2001 restructuring. Korea asserts first that Salomon Smith Barney continued to provide financial advice and extensive studies for review by the creditor group. Second,

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JIA referred to "a news report that President of the Bank had stated that the bank was prepared to provide support for the debt-to-equity swap and new funds if the creditor banks agreed". The JIA stated that this confirmed that Woori bank "gave priority to the public interest" (Annex 1 (Essential Facts), para. 281). According to Korea, "[u]nder any fair reading, that statement indicates only that Woori Bank would be able to [] go along with the decision of the Council for Creditor Financial Institutions, which might include debt-equity swaps [] and other types of financial support []. There is nothing in the Woori Bank president's statement suggesting that the Creditors Council was expected to adopt a programme that was not in the creditors' interests, or that Woori Bank was willing to sacrifice its own interests 'to save Hynix'" (Final Comments, para. 45). Korea's argument overlooks the explanation provided by Japan, which emphasised that the President's statement had been made "even before the October 2001 Program was prepared". In this regard, we note that the statement was dated 31 August 2001, whereas Woori's internal analysis was dated 31 October 2001. In other words, the President's statement was made before Woori's internal analysis had been completed. In these circumstances, the JIA could properly have relied on the President's statement as evidence that Woori participated in the October 2001 restructuring on the basis of non-commercial considerations.

[366] *See* Annex 3 (Rebuttals and Surrebuttals), para. 407.

the creditors drew upon an assessment of Hynix's operational strengths and weaknesses provided by the Monitor Group on [[BCI]]. Third, the creditors conducted a valuation exercise, with Anjin Accounting estimating the liquidation value of Hynix versus its value as a going concern.[367] Korea asserts that the analysis prepared by Anjin Accounting indicated that Hynix's going-concern value far exceeded its liquidation value.

7.141 We shall examine the JIA's treatment of each of the external reports referred to by Korea.

SSB Report

7.142 According to Japan, the JIA found that SSB was Hynix's financial adviser at the time it compiled its Report. Furthermore, the Deputy Prime Minister Chin Nyum stated the creditor banks did not consider that the SSB Report was reliable, and it was expected that a different, objective organization would carry out the evaluation.[368] The JIA therefore found that the SSB Report was not an objective source of information to decide whether to provide credit. In particular, the JIA found that "the SSB Report lacked reliability to serve as a material to substantiate the validity of the financial analysis to participate in the October 2001 Program from a commercial perspective".[369]

7.143 Korea does not challenge the JIA's finding regarding the lack of objectivity of the SSB report. Accordingly, there is no basis for us to conclude that the JIA improperly concluded that "the SSB Report lacked reliability to serve as a material to substantiate the validity of the financial analysis to participate in the October 2001 Program from a commercial perspective".[370]

Monitor Group Reports

7.144 There were two Monitor Group Reports on the JIA's record. One was dated [[BCI]], the other [[BCI]].

7.145 According to Japan, the JIA found that the [[BCI]] Monitor Group Report merely outlined the relative position of Hynix in the DRAM market, especially its capabilities in manufacturing and technology, as well as its problems, but did not address matters concerning Hynix's financial situation or the possibility of debt repayment. The JIA therefore found that the [[BCI]] Monitor Group Report lacked reliability to substantiate the validity of the financial analysis from a commercial perspective in connection with the participation in the October 2001 Program. Regarding the [[BCI]] Monitor

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[367] In its Final Comments to the Panel, Korea challenges Japan's assertion that Woori Bank had informed the JIA that it had relied on the Anjin Accounting Report when deciding to participate in the October 2001 restructuring (*see* paras. 38 and 39 of Korea's Final Comments). We note that Japan's assertion was made on at least two occasions in its First Written Submission (*see* paras. 164 and 169). We also note Article 14 of our Working Procedures, which provides:

> Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals or answers to questions. Exceptions to this procedure will be granted upon a showing of good cause. The other party shall be accorded a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

According to Article 14, therefore, Korea's challenge to Japan's factual assertion (which was supported by references to the JIA's Final Determination) should have been made by the end of the Panel's first substantive meeting with the parties. Since Korea has not demonstrated good cause for failing to challenge Japan's factual assertion in good time, we proceed on the basis that Woori Bank *did* tell the JIA that it had relied on the Anjin Accounting Report when deciding to participate in the October 2001 restructuring. In any event, Korea's argument would not change our evaluation of the JIA's treatment of Woori's internal analysis, nor of the JIA's handling of the Anjin Accounting Report. It would simply mean that the Anjin issue would not apply in respect of Woori Bank.

[368] *See* Annex 1 (Essential Facts), para. 276.

[369] *See ibid.*

[370] *See ibid.*

Group Report, the JIA found that this also could not serve as the basis for the decisions of the financial institutions to choose one of three options because this Report was issued after the resolution of the October 2001 restructuring.[371]

7.146 Korea does not dispute the JIA's finding that the [[BCI]] Monitor Group Report was insufficient to justify creditors' participation in the October 2001 restructuring because it did not address matters concerning Hynix's financial situation or the possibility of debt repayment.[372]

7.147 We note that the Monitor Group's [[BCI]] Report did contain an analysis of Hynix's "[[BCI]]", but that report was only completed in [[BCI]], and was therefore not available to the creditors at the time they decided to participate in the October 2001 restructuring. While Korea does not dispute that the [[BCI]] report was not available to creditors in October 2001, Korea asserts that the Monitor Group's analysis was already underway at the time the decision to participate in the October 2001 restructuring was made, and that Monitor Group officials were in contact with representatives of the creditors. We are unable to accept this argument, though, since Korea has presented no evidence from the JIA's record in support thereof. In this regard, Korea complains that the JIA refused to accept that the creditors had access to the Monitor Group's analysis before deciding to participate in the October 2001 restructuring because "it could not be confirmed whether the … report[s] were disclosed at the draft stage".[373] We consider that it was entirely reasonable for the JIA to have acted in this manner. The JIA had evidence on its record that the report was dated after the restructuring. It allowed the parties to address the issue, at least because the Essential Facts disclosed the JIA's finding and the nature of the evidence which underpinned the finding. One might reasonably suppose that there would have been some record of any informal contacts between Monitor Group and creditors' officials, such as minutes of meetings, notes to file, or records of telephone conversations, and that such evidence would have been submitted to the JIA pursuant to its requests for all materials used by the creditors in deciding whether or not to participate in the restructurings, or in response to the Essential Facts.[374] Similarly, given the extent of the October 2001 restructuring, one might reasonably suppose that creditors would have kept any draft versions of the Monitor Group's [[BCI]] Report that were made available to them, in order to maintain a complete internal record of the reasons for their participation in that restructuring. In our view, the complete absence of any such evidence provides a reasonable basis for the JIA to conclude that input from the Monitor Group's [[BCI]] Report was not available to creditors at the time of the October 2001 restructuring.[375]

7.148 Accordingly, there is no basis to conclude that the JIA erred in finding that the [[BCI]] Monitor Group Report did not properly establish the commercial reasonableness of the Four Creditors' participation in the October 2001 restructuring.

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[371] *See ibid*.

[372] At para. 218 of its First Written Submission, Korea asserts that "the independent analyses by Anjin Accounting and the Monitor Group had demonstrated that Hynix's going-concern value at the time of the October 2001 restructuring far exceeded its liquidation value". Later in the same paragraph, however, Korea clarifies that this statement is made in respect of the [[BCI]] Monitor Group Report.

[373] *See* JIA Annex 3 (Rebuttals and Surrebuttals), para. 380 ("In the responses to the questionnaire of the Government of Japan questionnaire and at the on-the-spot investigations in Korea, it [could] not be confirmed whether or not the Anjin Accounting Report and the Monitor Group Report were disclosed during their draft stage. In addition, there should be some kind of evidence if such drafts would have been obtained. No evidence, however, has been presented. Accordingly, this rebuttal is not substantiated by any evidence or information on the record and cannot be accepted.")

[374] *See* Japan's reply to Question 25 from the Panel. Korea has not denied Japan's assertion that the JIA requested all materials used by the creditors in their examination of the restructurings.

[375] This is supported by the fact that the only internal analysis shown to the Panel that refers to any Monitor Group data is the internal analysis conducted by [[BCI]]. Korea confirmed, in response to Question 113 from the Panel, that this data was taken from the [[BCI]] Monitor Group Report.

Anjin Accounting Report

7.149 According to Japan, the JIA found that the Anjin Accounting Report could not have served as a basis for creditors to decide to participate in the October 2001 restructuring because it was issued after those decisions to participate were made.

7.150 In response to Question 66 from the Panel, Korea asserted that, although the final version of this report was not available at the time the creditors made their decision to participate in the October 2001 restructuring, the Anjin Accounting analysis was already underway at the time the decision was made, and the Anjin Accounting analysts were in contact with representatives of the creditors prior to the approval of the restructuring. In its First Written Submission, Korea also suggests that the creditors obtained draft versions of the Anjin Accounting Report, and argues that the JIA never explained why the banks would have kept copies of draft reports after they received the final versions that supported their decisions in more polished form. In support, Korea submits an affidavit to the effect that "it is quite common for drafts of such presentations, reports and analyses to be circulated among creditors while a restructuring is being negotiated".[376]

7.151 We note that Korea has not pointed to any record evidence in support of its argument that the Anjin Accounting analysts were in contact with representatives of the creditors prior to the approval of the restructuring. In contrast, Woori's internal analysis states that "[[BCI]]".[377] As noted by the JIA[378], this suggests that Woori had not, at that time, received any input from Anjin regarding Hynix's liquidation value.

7.152 We recall that, although it has not relied on record evidence, Korea has provided the Panel with an affidavit in support of its position. Japan challenges both the probative value and the admissibility of that affidavit. Regarding admissibility, Japan asserts that the affidavit was not on the JIA's record. Korea has not disputed this. We agree with Japan that the Panel should refrain from considering non-record evidence when reviewing the JIA's determination. Accordingly, it is not necessary for the Panel to make any findings regarding the probative value of the affidavit. Moreover the affidavit does not attest to the proposition that the draft Anjin Accounting Report was seen by the banks prior to the October 2001 restructuring.

7.153 Furthermore, (as indicated above in respect of the Monitor Group Report,) we consider that the fact that the report was published after the restructuring, and the absence of any evidence of informal contacts between Anjin and the creditors, or evidence demonstrating that creditors had access to draft versions of the Anjin Report, constitutes a sufficient basis for a reasonable and objective investigating authority to conclude that Anjin's analysis was not made available to creditors at the time they decided to participate in the October 2001 restructuring.[379]

7.154 In light of the above, there is no basis to conclude that the JIA erred in finding that the Anjin Accounting Report did not properly establish the commercial reasonableness of the Four Creditors' participation in the October 2001 restructuring.

Internal analyses of the December 2002 restructuring

7.155 In considering the individual decisions of the Four Creditors to participate in the December 2002 restructuring, the JIA made frequent references to its analysis – and rejection – of a

[376] *See* Korea's First Written Submission, note 193.
[377] *See* [[BCI]]'s internal analysis of the October 2001 restructuring, page 2, Exhibit KOR-27.
[378] *See* para. 381 of Annex 3 (Rebuttals and Surrebuttals).
[379] Furthermore, we note that there are no references to any Anjin data in either the [[BCI]]' internal analyses of the October 2001 restructuring.

report prepared by Deutsche Bank.[380] Indeed, the JIA begins its analysis of the creditors' internal examination of the December 2002 restructuring by evaluating the Deutsche Bank Report. The JIA does so because:

> In the responses to the questionnaires and the responses at the on-the-spot investigation regarding their decision to participate in the December 2002 Program under such conditions, the creditor banks alleged that they had determined to provide credit after having examined the Deutsche Bank Report. ... [381]

7.156 It is apparent that the JIA first concluded that the Deutsche Bank Report alone did not provide a sufficient basis "to substantiate commercial judgments",[382] and then analyzed the Four Creditors' internal analyses in light of that conclusion.[383] If the JIA had reached a different conclusion regarding the Deutsche Bank Report, its approach to the internal examinations of the Four Creditors would necessarily have been markedly different.

7.157 We conclude from this that the JIA's consideration of the adequacy of the internal analyses was predicated on its findings concerning the insufficiency of the Deutsche Bank Report in providing a commercial justification for their participation in the December 2002 restructuring.

The December 2002 Restructuring: Creditors' Reliance on the Deutsche Bank Report

7.158 Korea asserts that the analysis prepared by Deutsche Bank[384] in connection with the December 2002 restructuring had shown that Hynix's going concern value far exceeded its liquidation value. Korea states that the final version of this report had been prepared and circulated to the banks before the banks made their decisions to participate in the restructuring.

7.159 The JIA did not dispute that the Deutsche Bank Report was available to creditors at the time that they undertook the December 2002 restructuring. However, the JIA rejected the Deutsche Bank Report as proof of the commercial reasonableness of the banks' participation in the December 2002 restructuring for both formal and substantive reasons. On form, the JIA disputed the independence of the Report. In particular, it found that "the Deutsche Bank Report does not have sufficient third-party character to substantiate commercial judgments"[385] for two reasons:

- First, the Deutsche Bank [[BCI]], and therefore its independence from Hynix's interests was questionable.[386]

[380] *See*, for example, paras. 350, 351, 354, 355, 356, 357, 358, 362 and 363 of Annex 1 (Essential Facts).

[381] *See* Annex 1 (Essential Facts), para. 339.

[382] *See* Annex 1 (Essential Facts), para. 342.

[383] Furthermore, for KEB and [[BCI]], the JIA applied facts available on the basis of non-cooperation. As a result, the JIA proceeded on the basis that these banks had decided to participate in the December 2002 restructuring "based on the Deutsche Bank Report". (*See* Annex 1 (Essential Facts), paras. 349 and 354.) This confirms that the JIA's analysis of these banks' participation in the December 2002 restructuring was necessarily premised on its assessment of the Deutsche Bank Report. In addition, the JIA explicitly rejected Chohung's claim that it had relied on an internal examination in addition to the Deutsche Bank Report. The JIA found instead that Chohung "simply accepted the Deutsche Bank Report" (Annex 3 (Rebuttals and Surrebuttals, para. 522).

[384] Korea explains that the Deutsche Bank Report was based on input from [[BCI]]. [[BCI]] is an outside consulting firm (*see* Korea's Second Written Submission, para. 187).

[385] Annex 1 (Essential Facts), para. 342.

[386] *See* Annex 1 (Essential Facts), para. 340.

- Second, the Government of Korea intervened into the process of the preparation of the Deutsche Bank Report, …[387]

7.160 On substance, the JIA found that the Deutsche Bank Report contained discrepancies, which "should have been easy for a person who engages in the corporate financing business to identify"[388], and that therefore "the Deutsche Bank Report, reviewed from the aspect of its content as well, is not a sufficient basis for the commercial financing judgment of experienced financial institutions."[389]

7.161 Korea asserts that each and every one of the "discrepancies" advanced by the JIA was demonstrably wrong. We shall examine each of these issues in turn, starting with the JIA's conclusions regarding the independence of the Deutsche Bank Report.

The Independence of the Deutsche Bank Report

7.162 The JIA questioned the independence of the Deutsche Bank Report, on the basis that [[BCI]], and that the Government of Korea had intervened in the preparation of the Report. This was, in turn, one of the factors relied upon by the JIA in its finding that the Deutsche Bank Report was not reliable, in a commercial sense, and thus that the behaviour of the Four Creditors in entering into the December 2002 restructuring was non-commercial. "Non-commerciality", in the JIA's view, was an indicator that the Four Creditors were entrusted or directed by the Government of Korea to enter into that restructuring.

[[BCI]] contract

7.163 According to Korea, the evidence before the JIA demonstrated that Deutsche Bank had a contractual relationship with [[BCI]] to pay the fees for any professional services obtained by the creditors in connection with the restructuring. Korea provided the Panel with a Memorandum of Understanding between [[BCI]] of which stipulated that:

> [[BCI]] may … seek advice from public accountants, lawyers or other assessment specialists. In this case, [[BCI]] shall assume the fee expenses paid for them.[390]

7.164 Korea submits that [[BCI]] agreement to pay Deutsche Bank's fees as required by [[BCI]] agreement with its creditors does not in any way call into question Deutsche Bank's independence.

7.165 Korea asserts that the panel rejected a similar argument raised by the European Communities in the *Korea – Commercial Vessels* case:

> We understand the EC to argue that the Anjin report should not have been relied on by DHI's creditors since the report was commissioned by DHI and KDB, a public body, both of which had an interest in seeing DHI restructured rather than liquidated.
>
> Korea submits that Anjin was retained by the KDB, on behalf of all creditors. Korea asserts that, although DHI was mentioned in the retainer agreement, this was only because DHI was responsible for paying Anjin's fees….
>
> The EC has not challenged these statements by Anjin. In particular, the EC has not disputed that it is standard practice for companies under receivership / workout to pay

[387] *See* Annex 1 (Essential Facts), para. 341.
[388] *See* Annex 1 (Essential Facts), para. 345.
[389] *Ibid*.
[390] *See* Memorandum of Understanding, [[BCI]]. *See* also Memorandum of Understanding, [[BCI]] (Exhibit KOR-36).

> the fees of professional advisors. Nor has the EC disputed that DHI "was not in a position to receive reports and/or updates thereof from Anjin." We also note that the cover letter accompanying Anjin's report was addressed exclusively to KDB, and not to DHI. Since we have no reason to believe that DHI was in a position to influence the substance of Anjin's report, there is no reason to discredit the Anjin report merely because Anjin's fees were paid by DHI.[391]

7.166 In light of Korea's argument regarding [[BCI]] of the abovementioned MOU, the Panel asked Japan to provide a copy of the contract between [[BCI]] and Deutsche Bank. Upon review of the document submitted by Japan, we note that the contract referred to by the JIA was not between Deutsche Bank and [[BCI]] exclusively. [[BCI]][392], was also party to the contract. Thus, Deutsche Bank was "jointly engaged" by [[BCI]]. Accordingly, there is nothing of a contractual nature to suggest that Deutsche Bank was likely to have prepared its report in such a way as to favour the interests of [[BCI]] over those of the creditors (as represented by [[BCI]]).[393] In addition, the contract appoints Deutsche Bank "[[BCI]], including the split of [[BCI]] into several entities, other solutions to the restructuring of [[BCI]] and any possible sale or transfer of all or some of [[BCI]] semiconductor businesses".[394] Deutsche Bank's work, therefore, was restricted to the restructuring of [[BCI]] (whether by refinancing [[BCI]], breaking [[BCI]] up, or trying to sell its businesses). Accordingly, there is nothing to suggest that Deutsche Bank had been [[BCI]] before then, such that it possibly had vested interests resulting from advice that it may have given [[BCI]] in the past. Nor is there anything to suggest that Deutsche Bank had been appointed to act as [[BCI]], to give credence to the view that it might have drafted its report in such a way as to favour the continued existence of [[BCI]] as a going concern.

7.167 Finally, we note that the contract refers explicitly to the appointment of [[BCI]] as "joint [[BCI]] with Deutsche Bank for the business and financial restructuring of"[395] [[BCI]]. In our view, the participation of an additional [[BCI]] also contradicts the proposition that Deutsche Bank could be expected to have acted in a way that might favour the interests of [[BCI]] over those of the creditors.

7.168 In its Final Determination, the JIA did not provide any analysis of the contents of Deutsche Bank's contract with [[BCI]]. The contract was evidence on the JIA's record. On our review of that contract, we do not consider that the JIA could have properly come to the conclusion that it did regarding that contract. For the reasons given above, we consider that the JIA could not properly have called into question the independence of the Deutsche Bank on the basis of the contract appointing Deutsche Bank as (joint) [[BCI]].[396]

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[391] *See Korea – Commercial Vessels*, paras. 7.440 to 7.443.

[392] *See* 22 May 2002 contractual document, page 11.

[393] Japan argues that the fact that the Deutsche Bank Report was "[[BCI]]" (*see* Deutsche Bank Report, [[BCI]] section) indicates that the Report was prepared [[BCI]]. In fact, [[BCI]] provides that the Report was "[[BCI]]". Since the Report was also prepared [[BCI]], we do not consider that the phrase "[[BCI]]" could mean that the Report was prepared exclusively [[BCI]]. Furthermore, there is no reference to the JIA having referred to the phrase "[[BCI]]" in assessing the independence of the Deutsche Bank Report in the Final Determination.

[394] *See* 22 May 2002 contractual document, page 1. There is no suggestion by the JIA that this contract precluded Deutsche Bank from considering the liquidation of Hynix.

[395] *See* 22 May 2002 contractual document, page 2.

[396] Japan has sought to rely on the statement by the panel in *Korea – Commercial Vessels* that "the cover letter accompanying Anjin's report was addressed exclusively to KDB, and not to DHI" (*see* para. 7.443). Japan asserts that the Deutsche Bank Report was addressed to [[BCI]]. In *Korea – Commercial Vessels*, the fact that the cover letter accompanying the report was not addressed to the company being restructured was one of several factors that led the panel to conclude that the restructured company was not "in a position to influence the substance of" (*ibid.*) the relevant report. While the JIA has not made any findings regarding the addressees of the cover letter accompanying Deutsche Bank's Report, we agree with that panel's view that the critical issue is whether or not the restructured company was in a position to influence the substance of the consultant's

Government intervention in the preparation of the Deutsche Bank Report

7.169 The JIA referred to a number of press reports (from August, September and October 2002) to the effect that the Government of Korea had intervened in the preparation of the Deutsche Bank Report.[397] The JIA relied on this evidence in order to impugn the commercial reliability of the Deutsche Bank Report, and to therefore find that the decisions made by the Four Creditors to enter into the December 2002 restructuring were not commercially based. Although the JIA did not rely on this evidence explicitly, Japan asserts[398] that the JIA also relied on a finding that NACF had admitted that the Government of Korea had intervened in the preparation of the Deutsche Bank Report.

7.170 Korea submits that the JIA neglected to mention that it had specifically asked KEB, the lead creditor bank, to comment on those reports at verification. Korea asserts that KEB denied that those reports were accurate, and stated that there were no changes between the draft and final report. Korea further asserts that even if the press reports relied upon by the JIA had been correct, they did not in any way impugn the accuracy of the Deutsche Bank Report's calculation of Hynix's going-concern and liquidation values. Instead, Korea says that the press reports indicated only that the government was encouraging the creditors to consider the sale of Hynix as an alternative to keeping it operating as an independent entity, and sought to have the Deutsche Bank consider that alternative.

7.171 Japan submits that KEB failed to provide evidence in support of its assertion that there had been no changes between the draft and final versions of the report. Japan asserts that KEB failed to provide the JIA with a draft copy of the report pre-dating the press reports relied on by the JIA.

7.172 We note that the press reports that the JIA relied on as evidence of intervention by the Government of Korea in the preparation of the Deutsche Bank Report are described in para. 334 of Annex 1 (Essential Facts). We emphasise that these reports were relied on by the JIA as evidence of a specific fact, *i.e.*, government involvement in the preparation of the restructuring plan set forth in the Deutsche Bank Report.[399] We have therefore reviewed these reports from that perspective, in order to establish whether or not the JIA might properly have relied on them as evidence of government intervention in the preparation of the Deutsche Bank Report. Although we necessarily begin by reviewing the reports individually, we also consider them collectively, in case aspects of different reports together might support a finding of government intervention even where reports taken individually do not.[400]

7.173 The first report, dated 23 August 2002, quotes the President of KEB referring to creditors "having discussion[s] with the government". We note that this report refers only to "discussion[s]", but does not say that such discussions took the form of government involvement in the preparation of

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report. We do not consider that the JIA could properly have treated the mere fact that the Deutsche Bank Report was addressed to [[BCI]] as evidence that [[BCI]] was in a position to influence the substance of that Report.

[397] *See* Annex 1 (Essential Facts), para. 334.

[398] *See* para. 94 of Japan's Second Written Submission.

[399] We note that we have accepted that certain of these reports could properly have been treated as evidence of the Government of Korea's intent to save Hynix (*see* para. 7.109 *supra*). This does not necessarily mean that the same reports could properly be treated of something far more specific, namely the Government's intervention in the preparation of the Deutsche Bank Report.

[400] The JIA merely referred to the press reports individually. The JIA did not explain how the reports could be read together to support a finding of government intervention in the preparation of the Deutsche Bank Report. Nevertheless, we note the statement by the Appellate Body in *US – Countervailing Duty Investigation on DRAMS* (para. 150) that "a panel reviewing [] a determination normally should consider that evidence in its totality, rather than individually, in order to assess its probative value with respect to the agency's determination. Indeed, requiring that each piece of circumstantial evidence, on its own, establish entrustment or direction effectively precludes an agency from finding entrustment or direction on the basis of circumstantial evidence. Individual pieces of circumstantial evidence, by their very nature, are not likely to establish a proposition, unless and until viewed in conjunction with other pieces of evidence."

the Deutsche Bank Report *per se*. Furthermore, the relevant "discussion[s]" were not between the Government of Korea and Deutsche Bank (as an allegation of government intervention in Deutsche Bank's Report might suggest), but between the Government and creditors.

7.174 The second report, dated 25 August 2002, refers to the Deutsche Bank restructuring plan being "re-evaluate[d]" after "due diligence" by the "government" and KEB. This could be circumstantial evidence of intervention. However, this report does not contain any quotes attributed to particular individuals or entities, and its evidentiary value could not be said to be strong.

7.175 The third report, dated 26 August 2002, quotes a minority shareholder representative referring to media reports of government intervention in the contents of the Deutsche Bank Report. We note that this is hearsay, in the sense that the relevant minority shareholder representative him/herself is not quoted as stating that the Government had intervened in the Deutsche Bank Report. Moreover, we note that this report was published the day after the second report, and that the statements may well have been in reaction to that second, non-attributed, report.

7.176 The fourth report, dated 2 September 2002, refers to statements by "a spokesperson representing the administration and the creditors" to the effect that the FSC had informed creditors that they should sell Hynix. We note that these statements do not specifically refer to the Government interfering in the preparation and contents of the Deutsche Bank Report. They indicate only that the Government of Korea was of the opinion that Hynix should be sold.

7.177 The fifth report, dated 25 August 2002, refers to statements by unnamed observers to the effect that the Government "seems to be sticking to the option of selling" Hynix. We note that this report does not specifically refer to the Government interfering in the preparation and contents of the Deutsche Bank Report.

7.178 The sixth report, dated 12 September 2002, refers to comments by unnamed Hynix and creditor representatives to the effect that "the government asked for several corrections in the normalization plan". Although the comments are not attributed to named individuals, they are attributed to at least one named entity (*i.e.*, Hynix). This report refers expressly to government intervention in the preparation of what is referred to as "the normalization plan"[401].

7.179 The seventh report, dated 13 September 2002, refers to reports that KEB "was apparently dissatisfied with the report, and [that] the government requested Deutsche Bank to review the plan". This report is inconclusive, since it suggests that it was KEB, the lead creditor, that was dissatisfied with Deutsche Bank's draft Report. The evidentiary value of this report is not strong, as it does not attribute any statements to named entities or individuals.

7.180 The eighth report, dated 18 September 2002, quotes a Minister expressing his opinion at a seminar that Hynix should not be maintained as a going-concern. We note that this is not evidence of government involvement in the Deutsche Bank Report. It is simply evidence of the Minister's opinion about how Hynix should be treated in the future.

7.181 The ninth and last report, dated 3 October 2002, quotes a KDB official stating that the immediate sale of Hynix was impossible, and that it should be maintained as a going-concern. We note that this is not evidence of Government intervention in the preparation of the Deutsche Bank Report. It is simply evidence of KDB's opinion that Hynix should be maintained as a going concern. Furthermore, since KDB was a public body creditor of Hynix (and therefore directly involved in the December 2002 restructuring), there is nothing surprising in the fact that KDB had formed an opinion

[401] Neither party addressed the question of whether this reference to "the normalization plan" is a reference to the Deutsche Bank Report, or to something else. Whilst it is not clear to the Panel that "normalization plan" is a reference to the Deutsche Bank Report, we have assumed that it is such a reference.

on the restructuring. Accordingly, we fail to see how KDB's statement might properly suggest to the JIA some broader government intervention in the Deutsche Bank Report.

7.182 We recall that the JIA presented the abovementioned press reports as evidence that the Government of Korea had intervened in the preparation of the Deutsche Bank Report. However, out of the nine reports relied on by the JIA, only one (the sixth) suggests that the government did intervene in the Deutsche Bank Report. The remaining reports are either unsubstantiated (by reference to quotes from named individuals or entities), or do not refer to government intervention in the Deutsche Bank Report.[402] Some of the reports indicate that the Government of Korea was of the opinion that the restructuring should take a particular form (*i.e.*, sale). There is no suggestion in any of these reports that the Government then acted on its opinion and intervened in the preparation of the Deutsche Bank Report. In the face of so much reportage about Hynix, and the opinions of people concerned about its future, it is difficult to accept that there would not have been more evidence of intervention by the Government in the preparation of the Deutsche Bank Report than the single mention of intervention in "the normalization plan" in the sixth report. Furthermore, there is nothing in the other reports which might add weight to a finding of government intervention in the preparation of the Deutsche Bank Report, based on the sixth report. As such, we consider that the reports relied on by the JIA - whether read in isolation or as a whole - provide precious little support for a finding that the Government of Korea intervened in the preparation of the Deutsche Bank Report.

7.183 Nor do we consider that additional support is provided by the alleged admission of government intervention in the preparation of the Deutsche Bank Report by NACF. The JIA notes that NACF used the phrase "despite the intervention of the government" in its rebuttal arguments.[403] According to the JIA:

> NACF thereby admits that the Government of Korea intervened in the December 2002 Program. If there were such awareness, it would serve to substantiate that a detailed examination on the contents of the Deutsche Bank Report should have been conducted when making a commercial decision concerning the December 2002 Program.[404]

7.184 Korea denies that NACF had made any admission of Government involvement in the Deutsche Bank Report. Korea asserts that NACF had actually argued that:

> despite the intervention of the government, the conclusion of the Deutsche Bank Report remained "normalization of operation" of Hynix to be the top priority, and that participating in the debt restructuring based thereon, even if it took some time to accomplish, would be a more appropriate option than liquidation, because it would be impossible for unsecured creditors to recover more than 50% of their claims with the

[402] We note Korea's argument regarding KEB's statement that there were no changes between the draft and final versions of the report. We have examined Exhibit JPN-26, and find that the copy of the allegedly draft report provided by KEB in support of this statement was dated November 2002. That document therefore provides no indication of whether or not changes were made to the report at the time that the abovementioned press reports were made (August, September and October 2002). Accordingly, the JIA could properly have disregarded KEB's statement in analysing potential changes to the report during the period covered by the abovementioned press reports.

[403] We note that Japan did not refer to this issue in the context of the alleged intervention of the Government of Korea in the preparation of the Deutsche Bank Report. Japan referred to this issue in the context of the alleged substantive "discrepancies" in the Report (*see* para. 368 of Japan's First Written Submission, final bullet point). It is therefore in this context that we review this issue.

[404] *See* Annex 3 (Rebuttals and Surrebuttals), para. 528.

> Hynix liquidation value of [ ]%, and the debt-to-equity swap of 50% of unsecured claims would cause no losses whatsoever to NACF.[405]

7.185 Korea submits that the JIA and Japan have seized upon the phrase "despite the intervention of the government" as an alleged admission, whereas the obvious import of the NACF's argument was actually that any alleged intervention by the government had no effect on the analysis presented by Deutsche Bank.

7.186 Japan submits that the abovementioned NACF statement clearly indicates that the Government of Korea intervened in the terms and conditions of the December 2002 restructuring, and that the terms and conditions of that restructuring were changed.

7.187 It is possible that Korea may be correct in arguing that the thrust of NACF's argument was that any alleged government involvement did not affect Deutsche Bank's analysis. However, the language used by NACF might also properly have been understood by the JIA to mean that NACF was arguing that, although the government did intervene, it did not affect the substance of Deutsche Bank's analysis. The text employed by NACF is inconclusive.

7.188 In the absence of any other evidence of intervention, or evidence that the Government of Korea had the means to exercise influence over Deutsche Bank, we are unable to accept that an objective and impartial investigating authority might properly find that the Government of Korea intervened in the preparation of the Deutsche Bank Report on the basis of a single, non-attributed, press report indicating that the Government of Korea had done so, read in light of an inconclusive statement by one of the creditors.[406]

7.189 Furthermore, even if there had been sufficient evidence of government intervention in the Deutsche Bank Report, that should only have suggested to the JIA that creditors might have questioned the credibility of the Report, and therefore approached the substance of the Report with circumspection. Indeed, this was precisely the conclusion drawn by the JIA in respect of the alleged admission by NACF, in the sense that the JIA merely indicated that NACF should have conducted a "detailed examination"[407] of (rather than reject outright) the Deutsche Bank Report as a result of its possible suspicions of government intervention. The value of this slight evidence of intervention, as an element of establishing the non-commerciality of the Deutsche Bank Report, and then in turn establishing entrustment or direction, is made much less significant or irrelevant if the Report itself is not shown to have been rendered "non-commercial" by reason of any alleged intervention. As discussed in the following section of our Report, we have reviewed the alleged "discrepancies" in the Deutsche Bank Report identified by the JIA. We find that the JIA erred in identifying those "discrepancies". Without such "discrepancies", we see no reason to doubt that creditors could have had full confidence in the credibility and integrity of the Deutsche Bank Report. Furthermore, if we find, as we do, that the JIA was in error in concluding that the Report was not commercially reasonable, then the JIA's concern about NACF's statement, and what NACF should have done, necessarily falls away.

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[405] *See* Annex 3 (Rebuttals and Surrebuttals), para. 526.

[406] The JIA should benefit from any doubt in our minds regarding the quality of the evidence in the abovementioned press reports. However, those press reports were only capable of suggesting that the JIA should consider the issue of government intervention in the preparation of the Deutsche Bank Report, and not that such intervention actually occurred. Most of them do not even deal with the proposition that there was intervention. Whilst it was not necessary for the JIA to establish the perfect truth, it was also incumbent on the JIA to be objective and unbiased in its assessment of the evidence before it. There is no doubt in our minds that the alleged evidence of intervention was an insufficient "building block" in the analysis undertaken by the JIA, either of itself or when considered in the context of the other evidence which we have found to have been improperly assessed by the JIA.

[407] *See* Annex 3 (Rebuttals and Surrebuttals), para. 528.

7.190 For the above reasons, we consider that the JIA could not properly have impugned the independence of the Deutsche Bank Report.

The Substance of the Deutsche Bank Report

7.191 The JIA identified the following alleged "discrepancies" in the Deutsche Bank Report:

- The Deutsche Bank Report does not [[BCI]].[408]
- The Deutsche Bank Report concluded that [[BCI]] with respect to Hynix's going-concern values.[409]
- In comparing the liquidation values with the going-concern values, the Deutsche Bank Report [[BCI]].[410]
- Recovery rates [[BCI]].[411]
- The Deutsche Bank Report concluded that the proposal to sell off the memory division was [[BCI]].[412]

7.192 Japan also asserts that, in its rebuttal comments, Hynix voluntarily admitted that the Deutsche Bank Report had an error. The JIA found that, upon correction of the error acknowledged by Hynix, the collection rates of going-concern values would be [[BCI]] the rates in the Deutsche Bank Report.[413]

7.193 The JIA relied on such "discrepancies" to conclude that the Deutsche Bank Report did not establish the commercial reasonableness of the decisions of the Four Creditors to participate in the restructurings.[414] We shall examine each of these "discrepancies" in turn.

Liquidation Value

7.194 The first such "discrepancy" relates to the Deutsche Bank Report's alleged failure to properly support its conclusion about Hynix's liquidation value. The JIA found that:

> The evaluation of Hynix's liquidation value was made by [[BCI]], but according to the report, it evaluated [[BCI]]. The same report evaluated Hynix's liquidation value, [[BCI]]. In other words, the evaluation was lower than the asset value, which was premised that sales would be made in a certain period of time. The Deutsche Bank Report cites the factors that [[BCI]]. The report, however, does not [[BCI]] with regard to these factors.*[415] (* footnotes omitted)

7.195 The first part of this finding suggests that the JIA was concerned that [[BCI]] had initially opted for a lower liquidation value than it could have done (*i.e.*, [[BCI]]), and that Deutsche Bank

[408] *See* Annex 1 (Essential Facts), para. 343.
[409] *Ibid*.
[410] *Ibid*.
[411] *Ibid*.
[412] *Ibid*.
[413] *See* Annex 3 (Rebuttals and Surrebuttals), paras. 500-01.
[414] *See* Annex 1 (Essential Facts), para. 345.
[415] *See* Annex 1 (Essential Facts), para. 343, first bullet point. The JIA also addressed this issue at para. 489 of Annex 3 (Rebuttals & Surrebuttals).

[[BCI]]. However, since Deutsche Bank [[BCI]][416], any such concern regarding the liquidation value actually applied by Deutsche Bank [[BCI]].

7.196 Indeed, Japan has confirmed that the JIA was not concerned with the amount of the liquidation value applied by Deutsche Bank *per se*.[417] Instead, in respect of the latter part of the above finding by the JIA, Japan has explained that the real problem identified by the JIA was the fact that Deutsche Bank "suggested that the actual liquidation value could potentially be either higher or lower than the assessed liquidation value", without "[[BCI]]".[418]

7.197 First, we note that Deutsche Bank explicitly stated that its Report "[[BCI]]". Deutsche Bank therefore "[[BCI]]".[419] In addition, Deutsche Bank stated that it was not "[[BCI]]"[420] information contained in its Report. Such warnings seem to the Panel to be reasonable in the context of a restructuring, where time is of the essence. In light of these warnings, Hynix's creditors were fully aware that Deutsche Bank's analysis was not as thorough and complete as it might otherwise have been.[421]

7.198 Second, we have examined the factors[422] that, according to the Deutsche Bank Report, could [[BCI]] the actual liquidation value realized by Hynix's creditors in the event that Hynix were liquidated. They relate to process ([[BCI]]), execution ([[BCI]]), and the fact that a particular category of creditors might exercise certain rights against Hynix. In our view, such factors do not lend themselves to precise quantification. Given that the liquidation process might take from [[BCI]], and recalling the explicit warnings provided by Deutsche Bank, we do not consider that Deutsche Bank could reasonably have been expected to quantify [[BCI]] over such an extended period of time.

7.199 In light of the above, we find that the JIA had no reasonable, objective basis for suggesting that the Deutsche Bank's calculation of the liquidation value was a discrepancy which impugned the commerciality of the Report.

Going-Concern Scenarios

7.200 The second alleged "discrepancy" relates to the Report's treatment of four possible going concern scenarios, and which was to be preferred. The JIA found that:

> with respect to the going-concern value, the report shows [[BCI]].* Among them, [[BCI]]. Among those, [[BCI]]. In spite of that, the Deutsche Bank Report [[BCI]].*[423] (* footnotes omitted)

7.201 Deutsche Bank had calculated [[BCI]] going-concern values, based on [[BCI]]. The JIA criticised Deutsche Bank for focusing on one scenario ([[BCI]])[424], in which the going-concern value

[416] Japan acknowledges this point in its reply to Question 82 from the Panel (at para. 10).

[417] In response to Question 82 from the Panel (para. 11), Japan stated that the issue raised by the JIA did not concern the amount of the liquidation value, but rather the sufficiency of Deutsche Bank's analysis based on that liquidation value.

[418] *See* Japan's reply to Question 78 from the Panel.

[419] *See* [[BCI]].

[420] *Ibid*.

[421] To avoid any misunderstanding, this does not mean that the Panel considers Deutsche Bank's analysis to have been incomplete. It simply means that the Panel acknowledges that, in the pressured circumstances of a restructuring, it may not be realistic to expect the analysis to be as thorough as it might be in other circumstances.

[422] The JIA seems to query why Deutsche Bank should refer to these factors given that they were "[[BCI]]". In our view, Deutsche Banks's reference to the same factors as those identified by [[BCI]] could reasonably be explained by the fact that Deutsche Bank used the liquidation value calculated by [[BCI]].

[423] *See* Annex 1 (Essential Facts), para. 343, second bullet point.

[[BCI]] identified by Deutsche Bank ([[BCI]]). Japan asserts that Deutsche Bank should have assessed [[BCI]]. Korea submits that the Deutsche Bank Report had estimated Hynix's going concern value at [[BCI]] billion Won using "conservative" assumptions about DRAM pricing and Hynix's past track record to predict the likely yields with the new 15 micron process technology. However, to "stress test" the model, Deutsche Bank also generated separate estimates using a "worst case scenario" for pricing, and using yield rates far below Hynix's historical experience.[425] Under these "worst case scenarios" to "stress test" the model, Deutsche Bank found that Hynix's "going concern" value would be lower than the liquidation value that had been estimated by [[BCI]]. Korea states that Deutsche Bank specifically indicated that its estimate of a going-concern value of [[BCI]] billion Won was based on "conservative" projections, and that other, lower values, were calculated using "worst-case scenarios" intended to "stress test" the model. Korea asserts that an unbiased reader could hardly fail to tell which of those scenarios was considered more likely.

7.202 In order to seek clarification, the Panel addressed the following question to Korea: If "[[BCI]] was most likely to occur, why did DB identify [[BCI]]?"[426] Korea provided the following response:

> According to the Deutsche Bank report, [[BCI]] analysis was used as the basis for the [[BCI]] projections used to calculate Hynix's going-concern value under the [[BCI]] option.* The Deutsche Bank report refers to two separate scenarios prepared by [[BCI]] — a [[BCI]] case and a [[BCI]] case.* The [[BCI]] case assumed a [[BCI]] in DRAM prices in 2004. The [[BCI]] case assumed that the [[BCI]] would be delayed until 2006.* According to Deutsche Bank, the projected prices under [[BCI]] case were [[BCI]]*
>
> Deutsche Bank's primary calculation of Hynix's going-concern value under the [[BCI]] option was based on the [[BCI]] prepared by [[BCI]]. In addition, Deutsche Bank's primary calculation also assumed that Hynix would be able to implement new production technologies to achieve an [[BCI]] percent yield rate in accordance with its historical experience. Based on these two assumptions, Deutsche Bank calculated that Hynix's total going-concern value was [[BCI]] billion Won — which corresponded to a payout to [[BCI]] creditors of [[BCI]] billion Won.*
>
> In addition, the Deutsche Bank report also added its own [[BCI]] intended to [[BCI]] Hynix's business. These [[BCI]] scenarios differed from the primary calculation in two respects: (1) the [[BCI]] scenario assumed that there would be no [[BCI]] in DRAM prices in 2004 or 2006, and (2) the [[BCI]] scenario also assumed that Hynix would only achieve a [[BCI]] percent yield rate (and not the [[BCI]] percent yield rate achieved in the past) when the next generation of technology was implemented.*
>
> Based on [[BCI]] scenarios, Deutsche Bank calculated [[BCI]] for Hynix's going-concern value under the [[BCI]] option:
>
> (1) a calculation that assumed [[BCI]];
>
> (2) a calculation that assumed [[BCI]]; and
>
> (3) a calculation that assumed [[BCI]].

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[424] *See* [[BCI]], together with para. 197 of Korea's Second Written Submission and Korea's reply to Question 109 from the Panel. Japan has not challenged Korea's statement that the yield element of the conservative scenario was based on Hynix's track record.

[425] Korea refers in this regard to page 9 of the Deutsche Bank Report.

[426] *See* Question 109 from the Panel to Korea.

> Significantly, the Deutsche Bank Report indicated that the [[BCI]] was intended to [[BCI]].* (* footnotes (referring to Deutsche Bank Report) omitted)

7.203 Although Japan claimed[427] that Korea had failed to answer Panel Question 109, it did not dispute Korea's explanation of the bases for the different scenarios examined by Deutsche Bank. In particular, neither Japan nor the JIA has disputed that Deutsche Bank proceeded [[BCI]]. Nor have Japan or the JIA disputed that Deutsche Bank projected [[BCI]].

7.204 Furthermore, we note that [[BCI]]. Much of this information was provided by [[BCI]]. Using this information, we consider that Hynix's creditors had before them a Report which was based on [[BCI]], which were one critical factor in the analysis undertaken by the Deutsche Bank. [[BCI]], in the Deutsche Bank Report. [[BCI]]. Hynix's creditors were therefore able to assess for themselves whether the projections were reliable, and what was the likelihood of [[BCI]]. They would also have been able to establish for themselves that Deutsche Bank chose to base its assessment on one particular scenario because that scenario assumed [[BCI]], and was based on [[BCI]].

7.205 Although [[BCI]] had been prepared by Deutsche Bank, we consider that this was consistent with its statement that "[[BCI]]" for Hynix "[[BCI]]".[428] In light of this [[BCI]], Deutsche Bank might properly have considered itself obliged to prepare [[BCI]] for the creditors. However, having access to the information [[BCI]] were based, the creditors would have been able to establish for themselves that [[BCI]] that were less likely to materialize. Deutsche Bank itself made [[BCI]], and gave the creditors [[BCI]], and [[BCI]]. In these circumstances, the fact that Deutsche Bank [[BCI]], in our view does not mean that Hynix's creditors should not have trusted Deutsche Bank's analysis.

7.206 Accordingly, we find that the JIA had no reasonable, objective basis for condemning Deutsche Bank's failure to provide a more comprehensive explanation of its choice of going-concern scenario as a discrepancy which impugned the commerciality of the Report.

Rate of Recovery of the Liquidation Value

7.207 The third alleged "discrepancy" relates to the way the Deutsche Bank Report analysed the rate of return to creditors under the liquidation scenario. The JIA found that:

> As the liquidation value to be compared to the going-concern value ... , Deutsche Bank Report used [[BCI]].[429] (* footnotes omitted)

7.208 By way of clarification, Japan stated:

> The IA also pointed out that the denominator of the going-concern value used to calculate the recovery rate is not consistent with the denominator to calculate [[BCI]] percent recovery rate upon liquidation.* In calculating the recovery rate in the [[BCI]] scenario, [[BCI]]. However, the same debts are not included in the denominator in calculating the recovery rate for the [[BCI]] cases. Accordingly the recovery rate of [[BCI]] percent upon liquidation in the report is the ratio of the expected payback amount vis-à-vis [[BCI]]. The recovery rates for the [[BCI]] cases are the rates for [[BCI]]. When recalculated the recovery rates for [[BCI]] scenarios, these rates in [[BCI]] of the Deutsche Bank Report would be [[BCI]]. Thus, the IA found that, [[BCI]] comparison of the liquidation with the going-concern case could

[427] *See* Japan's Comments on Korea's Responses to the Panel's Questions Following the Second Substantive Meeting, paras. 4 – 8.
[428] *See* [[BCI]].
[429] *See* Annex 1 (Essential Facts), para. 343, third bullet point.

> not properly be made.* This improper comparison stems from the fact that [[BCI]] of the Deutsche Bank Report is wrong - the correct amount for the liquidation case is KRW [[BCI]] billion, not KRW [[BCI]] billion. The details of such errors are explained in Exhibit JPN-27. Korea has not addressed this imbalanced comparison of the recovery rates based on the going-concern value and the liquidation value except the background of the addition of the [[BCI]].[430] (* footnotes omitted)

7.209 In light of the above, we understand that the JIA identified three main errors in Deutsche Bank's analysis of the rate of return under the liquidation scenario. First, Deutsche Bank allegedly erred in choosing to apply a rate of [[BCI]] per cent, instead of [[BCI]] per cent. Second, Deutsche Bank allegedly erred in calculating the absolute amount of return that a rate of [[BCI]] per cent would have yielded. Third, the JIA found that the assumptions used to calculate the [[BCI]] per cent rate of return in respect of the liquidation value should also have been applied when calculating the rate of return under the going-concern value. We shall address each of the alleged errors in turn.

The choice of rate of return

7.210 According to Korea, the initial [[BCI]] Report had assumed that the distribution of Hynix's liquidation value would be based on the outstanding debts at the time of the December 2002 restructuring. Based on that assumption, [[BCI]] calculated that the [[BCI]] would recover [[BCI]] per cent of the overall liquidation value. Korea asserts that a [[BCI]] obtained by the creditors suggested, however, that [[BCI]]'s assumption was flawed. According to this opinion, if Hynix were liquidated, [[BCI]] for purposes of distributing Hynix's liquidation value among its creditors. Korea states that after such a reversal of the October 2001 debt-to-equity swap, Hynix would have a larger amount of debt outstanding, and the percentage of the total liquidation value available to [[BCI]] would therefore be smaller. Korea asserts that under this assumption, [[BCI]] would only recover [[BCI]] per cent of the overall liquidation value.

7.211 According to Korea, both the JIA and Japan have ignored the fact that the Deutsche Bank Report presented its calculations using both the [[BCI]] per cent figure and the higher [[BCI]] per cent recovery rate [[BCI]] on which it provided the comparison of expected pay-outs [[BCI]]. Korea asserts that [[BCI]]. [[BCI]] addressed the calculation of the pay-out under [[BCI]] scenario with the assumption of a [[BCI]] per cent recovery rate. [[BCI]] addressed the calculation of the pay-out under [[BCI]] scenario with the assumption of either a [[BCI]] or [[BCI]] per cent recovery rate.

7.212 Japan submits that Korea has misunderstood the JIA's assessment of the Deutsche Bank's estimate of Hynix's liquidation value. According to Japan, the JIA pointed out that the Deutsche Bank Report did not explain why it relied on a recovery rate of [[BCI]] per cent to assess the validity of liquidation value instead of the rate of [[BCI]] per cent. Japan asserts that these recovery rates would be the material issue for creditors in examining whether they would be better off, and that the Deutsche Bank Report therefore should have explained why it was applying the [[BCI]] per cent rate instead of the [[BCI]] or [[BCI]] per cent rates, rather than merely referring to these alternative rates in the[[BCI]]. Japan submits that the JIA correctly found that "such a material issue relating to creditors' interests should have been clearly stated,"[431] which the Deutsche Bank Report failed to do. Japan states that the JIA therefore reasonably found that there was a "strange handling of the liquidation value of Hynix provided in the Deutsche Bank Report".[432]

7.213 On the basis of Japan's argument, we do not understand Japan to contest Deutsche Bank's use of the [[BCI]] per cent rate. Instead, we understand that the JIA challenged Deutsche Bank's failure to

[430] *See* Japan's oral statement at the Second Substantive Meeting, para. 113.
[431] *See* Annex 3 (Rebuttals and Surrebuttals), para. 496.
[432] *See* Annex 3 (Rebuttals and Surrebuttals), para. 499.

explain why it applied this rate instead of other, alternative rates. The JIA addressed this issue at para. 496 of Annex 3 (Rebuttals and Surrebuttals) in the following terms:

> Hynix states that, because the December 2002 Program comprised restructuring measures carried out as part of the CRPA procedures, [[BCI]]. If the [[BCI]] that were extinguished by debt-to-equity swap or debt forgiveness under the October 2001 Program [[BCI]], it would substantially harm the interests of all creditors. Such a material issue relating to creditors' interests should have been clearly stated. The Deutsche Bank Report, however, did not refer to it. The report of [[BCI]] only states that [[BCI]], but no legal grounds were indicated.[433]

7.214 According to Japan, the JIA therefore found that the existence of such a [[BCI]] would be a "material issue", and that the Deutsche Bank Report had failed to discuss such a material issue. Japan asserts that if there were material risks associated with a particular valuation, such "should have been clearly stated" to permit the creditor banks to make an informed assessment of the risks and ultimately a decision. Japan also disputes Korea's argument that "the [[BCI]] clearly indicated that [[BCI]]"[434], since Japan states that the [[BCI]] was not submitted to the JIA.

7.215 In our view, the Deutsche Bank Report would have been expected to emphasise the existence of the [[BCI]] if it had applied one of the alternative rates (of [[BCI]] and [[BCI]] per cent) provided for in the [[BCI]]. However, since the Deutsche Bank adopted a more cautionary approach, and actually applied the [[BCI]] per cent rate in the table on page 12 of its Report, there was no "[[BCI]]" that creditors should have been informed of. In other words, if they took that table at face value, there would be no risks that they were unaware of, since the risk had already been factored into the applied rate of [[BCI]] per cent. Furthermore, note 5 to that table refers to "[[BCI]]" of the Deutsche Bank Report. Section 5 (on page 62) provides a breakdown of the [[BCI]] per cent rate of return, clearly indicating that the total amount of debt held by unsecured creditors is KRW [[BCI]] billion. As Japan did for the purpose of preparing its Exhibit JPN-27, Hynix's creditors would have readily been able to ascertain that this figure included [[BCI]]. The failure[435] to spell out (in the Deutsche Bank Report) why this debt had been included would not necessarily have called into question the validity of the Report, especially as the JIA found that [[BCI]], which was available to creditors, pointed out the nature of [[BCI]] (without providing the precise legal grounds).[436]

7.216 Japan also argues that it was not clear that the "[[BCI]] clearly indicated that [[BCI]]" because the relevant [[BCI]] had not been submitted to the JIA. We can find no reference to this issue in the JIA's Final Determination. In other words, there is no indication in the Final Determination that the JIA doubted that the [[BCI]] required [[BCI]].[437] It would therefore be inappropriate for us to accept this argument *ex post*. Furthermore, Japan has failed to demonstrate that, even if the JIA did have any doubts regarding the substance of the [[BCI]], it had requested a copy thereof.

7.217 In light of the above, we find that the JIA had no reasonable, objective basis for finding that the Deutsche Bank's choice of rate of return involved a discrepancy which impugned the commerciality of the Report.

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[433] *See* Annex 3 (Rebuttals and Surrebuttals), para. 496.

[434] *See* Korea's Responses to Panel Question 129, para. 67.

[435] On balance, it is not entirely clear to the Panel that [[BCI]] had not been made available to the creditors. At para. 202 of its Second Written Submission, Korea refers to the opinion having been "obtained by the creditors". Japan has not contested the factual accuracy of this statement. In light of our finding, it is not necessary for the Panel to pursue this matter further.

[436] *See* Annex 3 (Rebuttals and Surrebuttals), para. 496, including note 91.

[437] Although the JIA stated that "no legal ground[s] were indicated" (Annex 3 (Rebuttals and Surrebuttals), para. 496), the JIA did not register any doubt regarding the substantive accuracy of the legal advice at issue.

The absolute amount of return

7.218 Korea submits that Japan's argument that the Deutsche Bank Report erroneously calculated the absolute amount that a [[BCI]] per cent rate of return would have yielded constitutes *ex post* rationalization that we should reject.

7.219 Japan asserts that the calculation error was "clearly and fully described"[438] in the following extract from Annex 1 (Essential Facts):

> As the liquidation value to be compared to the going-concern value [[BCI]], Deutsche Bank Report used [[BCI]].[439]

7.220 We are unable to accept Japan's argument that this extract "clearly and fully described" the point made by Japan in these proceedings. The above extract is concerned primarily with the rate of return applied in the Deutsche Bank Report, rather than the absolute amount of return. While the last sentence of the extract does refer to [[BCI]]". In other words, it is a complaint that Deutsche Bank calculated [[BCI]]. It is not a complaint that, in applying [[BCI]], Deutsche Bank erroneously arrived at [[BCI]].[440] Japan's argument regarding the absolute amount of return calculated by Deutsche Bank [[BCI]] is not, therefore, "clearly and fully described" in the manner alleged by Japan. In these circumstances, we find that Japan's argument constitutes *ex post* rationalization that we decline to take into account.[441]

7.221 In light of the above, we find that the JIA had no reasonable, objective basis for finding that the Deutsche Bank used inappropriately different assumptions in calculating the going concern and liquidation values, and therefore that this did not involve a discrepancy which impugned the commerciality of the Report.

The asymmetric application of the assumptions underlying the [[BCI]] per cent rate of return

7.222 This issue concerns the alleged failure by Deutsche Bank to use [[BCI]]. Japan asserts that Deutsche Bank should have calculated the payout ratio under the [[BCI]] option based on the assumption that [[BCI]], as was the case for the calculation of Hynix's liquidation value. According to Japan, correction of this error would reduce the recovery rates for [[BCI]].

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[438] *See* Japan's Comments on Korea's Responses to the Panel's Questions After the Second Substantive Meeting, para. 49.

[439] *See* Annex 1 (Essential Facts), para. 343, third bullet point.

[440] In its Final Comments to the Panel, Korea argued that even if this issue had been raised by the JIA, it would not provide a basis for rejecting the Deutsche Bank Report because Deutsche Bank did not consider the returns under [[BCI]] that would accrue to [[BCI]] from the equity they held as a result of the October 2001 debt-equity swaps. In light of our finding that the JIA had not raised this issue, there is no need for us to consider Korea's additional argument.

[441] Japan seeks to have us consider its argument on the basis of a finding by the Appellate Body that "Article 22.5 [of the *SCM Agreement*] does not require the agency to cite or discuss *every* piece of supporting record evidence for each fact in the final determination" (Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164). Upon review, we find that the Appellate Body's finding would not require us to consider Japan's *ex post* rationalization. The Appellate Body in that case was dealing with a decision by the panel not to consider record *evidence* that was not explicitly included in the investigating authority's final determination. In our view, that factual situation is different from the one before us, where it is a question of the JIA having failed to include a *finding*, or *intermediate factual conclusion*, in its Final Determination. Such rationalization falls within the rubric of "reasons" referred to in Article 22.5. Furthermore, it is well established that it is inappropriate for panels to consider *ex post* rationalization. (*See*, for example, Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*: "A panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and *the explanations given by the authority in its published report*." (emphasis supplied))

7.223 Korea submits that the [[BCI]] clearly indicated that [[BCI]] for purposes of distributing Hynix's liquidation value among its creditors only if Hynix were liquidated. The [[BCI]] did not state that [[BCI]] in the event that the creditors chose the [[BCI]] option and Hynix was not liquidated. Instead, if the creditors chose the [[BCI]] option, the debt that was swapped for equity in the October 2001 restructuring would remain as equity. Furthermore, Korea asserts that the debts that were converted into equity in October 2001 were not debts in December 2002 — they were equity. According to Korea, that [[BCI]] into debts unless Hynix were liquidated — which would not occur if the creditors opted for the [[BCI]] option.

7.224 We note Korea's argument that the relevant [[BCI]] only called for [[BCI]] in the event that Hynix were liquidated in December 2002. Japan has not disputed this. Nor did the JIA challenge the substance of the [[BCI]]. There is no reason for us to doubt that the relevant [[BCI]] did not call for [[BCI]] in the event that Hynix were maintained as a going-concern in December 2002. We therefore see no reason why Deutsche Bank should have factored this [[BCI]]. As different legal obligations would apparently apply ([[BCI]]) depending on whether Hynix were liquidated or maintained as a going-concern in December 2002, we see no reason why those different obligations should not have been reflected in Deutsche Bank's calculation of the liquidation and going-concern values. Indeed, we consider that such an approach would have distorted Deutsche Bank's [[BCI]].

7.225 In light of the above, we find that the JIA had no reasonable, objective basis for finding that the Deutsche Bank's calculation of the absolute amount of return involved a discrepancy which impugned the commerciality of the Report.

Expected Recovery Under the Going-Concern Scenarios

7.226 The fourth alleged "discrepancy" involved the relevance of [[BCI]]. The JIA provided the following critique of [[BCI]]:

> Further, the recovery rate of unsecured claims at the end of 2006 would be [[BCI]]. Accordingly, the recovery rate [[BCI]]. In other words, [[BCI]]%, which is the recovery rate calculated by [[BCI]]. [442]

7.227 Korea asserts that the JIA's objection is based on a misunderstanding of the Deutsche Bank's calculation of the recovery under [[BCI]] scenario. Korea submits that the Deutsche Bank Report indicated that the December 2002 restructuring was projected to put Hynix in a position where it could service all of its outstanding debts (after the debt-to-equity swap) and provide an additional return to its shareholders. Korea asserts that the creditors would therefore be expected to recover the full amount of any debts they continued to hold after the restructuring plus whatever additional returns they earned on the equity they had received for participating in debt-to-equity swaps.

7.228 Korea submits that since the creditors had to swap half of their [[BCI]] into equity in the December 2002 restructuring, this meant that they would only be holding half as much [[BCI]] after the restructuring as they had before. Korea asserts that, as indicated in the Deutsche Bank report, the December 2002 restructuring was projected to put Hynix in a position where it could service all of its outstanding debts (after the debt-to-equity swap) and provide an additional return to its shareholders. According to Korea, therefore, the creditors would be expected to recover the full amount of any debts they continued to hold after the restructuring plus whatever additional returns they earned on the equity they had received for participating in debt-to-equity swaps. According to Korea, their recovery of the full amount of any [[BCI]] they continued to hold after the restructuring was, therefore, equivalent to the recovery of one-half of the amount of the debts they held before the restructuring. Korea states that the creditors could therefore expect to recover a minimum of [[BCI]], even if the equity they received in the debt-to-equity swaps had no value, plus [[BCI]] (which were not subject to

[442] Annex 1 (Essential Facts), para. 343, fourth indent.

the debt-to-equity swap). Korea states that if the equity were projected to have some value, their percentage recovery would be even higher. Korea submits that, taking all of these factors into consideration, the Deutsche Bank reached the figure of [[BCI]] per cent for recovery by creditors under [[BCI]] scenario.

7.229 Japan objects to Korea's reference to [[BCI]].[443] Other than that, however, Japan makes no rebuttal of Korea's arguments.[444]

7.230 We agree with Japan that the important figure for present purposes is the recovery rate for unsecured debt. However, this does not resolve the issue before us, as the Deutsche Bank recovery rate was properly limited [[BCI]]. (In other words, Deutsche Bank did not proceed on the basis of the [[BCI]]per cent figure cited by Korea.) Korea has provided a reasonable explanation, showing that the Deutsche Bank properly calculated the recovery rates for [[BCI]] scenarios. In particular, Korea has explained that Deutsche Bank could properly exclude [[BCI]]. Since Japan has failed to rebut Korea's explanation, we uphold Korea's argument that the JIA's criticism of the Deutsche Bank's methodology is unwarranted.[445]

7.231 In light of the above, we find that the JIA had no reasonable, objective basis for finding that the unsecured claims which had been converted into equity should have been taken up in the recovery rate calculations for the going concern scenarios, and that the JIA should not have considered that this impugned the commerciality of the Report.

Sale Value Versus Liquidation Value

7.232 The fifth "discrepancy" referred to by the JIA is a claimed lack of analysis in the Deutsche Bank Report of the comparative merits of a sale of Hynix's memory business and its liquidation. The JIA criticised the Deutsche Bank Report because [[BCI]][446] Japan clarified that the JIA's concern was that "Deutsche Bank did not explain reasons that [[BCI]]"[447]

7.233 Korea asserts that Japan's argument is based on a misreading of the Deutsche Bank Report. Korea asserts that the Report explicitly recognized that [[BCI]], explaining that:

> [[BCI]]
>
> – [[BCI]]:
>
> – [[BCI]]
>
> – [[BCI]]
>
> – [[BCI]]
>
> – [[BCI]].[448]

7.234 Korea submits that, in light of these risks, Deutsche Bank recommended that the creditors pursue [[BCI]].[449]

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[443] *See* para. 115 of Japan's oral statement at the Second Substantive Meeting.

[444] There is a reference to Deutsche Bank's calculation of [[BCI]] at para. 116 of Japan's oral statement at the second substantive meeting. However, that reference was made in respect of a separate "discrepancy" identified by the JIA, namely Hynix's alleged admission of an error in the Deutsche Bank Report. That issue is addressed *infra*.

[445] We note that the above finding by the JIA referred to [[BCI]]. We recall our finding that Deutsche Bank did not err in applying a liquidation recovery rate of [[BCI]].

[446] *See* Annex 1 (Essential Facts), para. 343, fifth bullet point.

[447] *See* Japan's oral statement at the second substantive meeting, para. 117.

[448] Korea refers in this regard to [[BCI]] of the Deutsche Bank Report.

7.235 Although the JIA asserts that Deutsche Bank "concluded that the proposal [[BCI]]" we note that this was not actually the conclusion reached by Deutsche Bank. Instead, [[BCI]]. Having reached this conclusion, in our view Deutsche Bank did not specify any [[BCI]].

7.236 Instead, Deutsche Bank proposed that [[BCI]]. In the event that [[BCI]], Deutsche Bank could have advised whether [[BCI]]. Again, though, that would not have been a [[BCI]]. Since Deutsche Bank rejected liquidation in favour of [[BCI]], it makes no sense to talk in terms of sale being preferred over [[BCI]]; [[BCI]] could be pursued [[BCI]].

7.237 The JIA has not identified any downside to Deutsche Bank keeping the [[BCI]] option alive in this way. However, as noted by Deutsche Bank, there was an upside to this proposal, in the sense that "[[BCI]]."[450]

7.238 In light of the above, we find that the JIA had no reasonable, objective basis for its conclusion that Deutsche Bank erred in its treatment of the sale and liquidation options respectively, and that this should not have been considered by the JIA as impugning the commerciality of the Report.

Admission of Error by Hynix

7.239 The final alleged "discrepancy" identified by the JIA was an error, said to be admitted by Hynix, which when corrected would have had [[BCI]]. The JIA found that:

> In its rebuttal, Hynix voluntarily admits that the Deutsche Bank Report had an error. Additionally, when recalculated based on the Hynix's assertion, the recovery rate of the unsecured claims comes to [[BCI]]%.* Given that Deutsche Bank states a recovery rate in units of [[BCI]]%, the explanation of Hynix which ignores such [[BCI]]% difference stating [[BCI]] is not reasonable. Moreover, if the assertion of Hynix were to be correct, the reliability of the totality of the recovery rate of [[BCI]]%, [[BCI]]%, [[BCI]]%, [[BCI]]% as presented in the Deutsche Bank Report would be weakened. In either case, even if the rebuttal by Hynix were assumed to be correct, it still could not precisely explain the basis the Deutsche Bank Report used in calculating the recovery rate. Therefore, the rebuttal by Hynix cannot be accepted.[451]
> (* footnote omitted)

7.240 Korea denies that Hynix admitted that the Deutsche Bank Report contained any analytical errors. Korea asserts that, in the course of explaining how the Deutsche Bank report calculated the expected recovery to the creditors, Hynix noted that there was a typographical error in one of the [[BCI]] set forth in [[BCI]] to the report. According to Korea, Hynix pointed out that [[BCI]] in question stated that a percentage figure had been calculated by dividing the expected recovery amount by total [[BCI]] debts, when it should have indicated that the percentage figure was calculated by dividing the expected recovery amount by the sum of [[BCI]] debts. Korea asserts that nothing in Hynix's comment suggested that there was an error in the Deutsche Bank Report's calculations or results. Korea submits that, to the contrary, Hynix's comment was intended to show that there was no error in the Deutsche Bank report's calculations. Korea states that an unbiased and objective investigating authority would have easily recognized the difference between a typographical error and an analytical mistake.

7.241 Japan asserts that the JIA reviewed Deutsche Bank's calculations in light of Hynix's explanation and found that there were still discrepancies between the results from the recalculation and the recovery rates shown in the Deutsche Bank Report. Japan argues that these discrepancies

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[449] Korea refers in this regard to [[BCI]] of the Deutsche Bank Report.
[450] *See* Deutsche Bank Report, [[BCI]].
[451] *See* Annex 3 (Rebuttals and Surrebuttals), para. 502.

called into question the reliability of the Deutsche Bank Report's valuations as of 2006, and would have affected the calculation of the recovery rates under each the going-concern scenarios. According to Japan, the JIA therefore reasonably found that "if the assertion of Hynix were to be correct, the reliability of the totality of the recovery rate of [[BCI]]%, [[BCI]]%, [[BCI]]%, [[BCI]]% as presented in the Deutsche Bank Report would be weakened."[452]

7.242 We have reviewed carefully the JIA's summary of Hynix's statement regarding this matter. According to the JIA, Hynix stated that:

> there is an error [[BCI]] in footnote (5) on page 13 of the report. It explains that [[BCI]].[453] (emphasis in BCI supplied)

7.243 We fail to see how the JIA could have concluded from this statement that Hynix had admitted that the Deutsche Bank Report contained any analytical errors. According to the JIA's summary of Hynix's argument, Hynix merely identified "an error [[BCI]]". (emphasis supplied) An error [[BCI]] is not the same as an error in the application of a formula. On the basis of a plain reading of the JIA's own description of Hynix's submission, we conclude that Hynix was simply stating that Deutsche Bank had noted that [[BCI]]. While Deutsche Bank may therefore have committed an unfortunate typographical error, there is no suggestion in Hynix's statement that Deutsche Bank committed the more serious analytical error of failing to [[BCI]] when performing the relevant calculation.[454] Deutsche Bank's calculation in this regard included [[BCI]], as Hynix pointed this out to the JIA in its submissions.

7.244 We note that both the JIA and Japan asserted that the correction of the error identified by Hynix would undermine the reliability of Deutsche Bank's going-concern valuations. We are not persuaded by this assertion as we have established that, in fact, Hynix had not identified any analytical error that required correction. In these circumstances, we are unable to accept that the error identified by Hynix– called into question the reliability of the Deutsche Bank Report's valuations. It was nothing more than a typographical error.

Conclusion

7.245 We have found that the JIA could not properly have rejected the Deutsche Bank Report on formal considerations regarding the independence of Deutsche Bank. We have also found that the JIA erred in its analysis of the substance of the Deutsche Bank Report. When these two findings are combined, we conclude that the JIA's determination that the Deutsche Bank Report did not provide the existing creditors with a proper commercial basis for participating in the December 2002 restructuring was not reasonable and objective.

Conclusion

7.246 For the above reasons, we reject Korea's arguments that the JIA erred in its analysis of the internal examinations of the October 2001 restructuring by the Four Creditors. However, we uphold Korea's arguments in respect of the December 2002 restructuring.

7.247 We recall that the JIA's rejection of the Deutsche Bank Report played a central role in its conclusion that the participation of the Four Creditors in the December 2002 restructuring was not commercially reasonable to the extent that it coloured the JIA's assessment of the Four Creditors' internal analyses of the restructuring. Given our conclusion that an objective and impartial

[452] *See* Annex 3 (Rebuttals and Surrebuttals), para. 502.
[453] *See* Annex 3 (Rebuttals and Surrebuttals), para. 500.
[454] We note that there was no suggestion by either the JIA or Japan that [[BCI]] should not have been included by Deutsche Bank.

investigating authority could not properly have rejected the Deutsche Bank Report on the grounds selected by the JIA, we must also conclude that the JIA could not properly have relied on the Deutsche Bank Report as a basis for concluding that the participation of the Four Creditors in the December 2002 restructuring was not commercially reasonable.

(e) The Participation of Other Creditors In The Same Transactions And On the Same Terms

(i) Main Arguments of Korea

7.248 Korea asserts that there were a number of Other Creditors who entered into the restructuring transactions at the same time and on the same terms as the banks that the JIA found to be acting under government entrustment or direction. The JIA made no finding that these Other Creditors were acting under government entrustment or direction. Korea notes that the majority of those institutions were never investigated or contacted by the JIA. According to Korea, the willingness of these Other Creditors to enter into the same transactions as the allegedly government-directed creditors completely refutes the JIA's claim that the creditors only entered into the transactions because of government pressure. [455]

(ii) Main Arguments of Japan

7.249 Japan submits that Korea's argument is without merit because it confuses the requirements for findings of "entrustment or direction" under Article 1.1(a)(1)(iv) and benefit under Article 1.1(b) and because it is based on a misreading of the JIA's factual determination. Japan asserts that, to the extent that Korea's argument suggests that the existence of other creditors provides evidence of a benchmark, which negates the proposition that a benefit was provided by the entrusted or directed creditors, Korea's argument is not relevant to the finding of entrustment or direction. According to Japan, the *SCM Agreement* separates the question of "entrustment or direction" under Article 1.1(a)(1)(iv) and benefit under Article 1.1(b). Japan also submits that the JIA found, applying facts available, that all banks participated in the October 2001 and December 2002 restructurings on the basis of non-commercial factors.

(iii) Evaluation by the Panel

7.250 In light of our conclusion that the JIA's reasoning did not properly support the finding that the Four Creditors were entrusted or directed to participate in the December 2002 restructuring,[456] we only evaluate Korea's argument regarding the role of Other Creditors in respect of the October 2001 restructuring.

7.251 Korea has made essentially the same argument in the context of its claim against the JIA's determination of benefit. In light of our evaluation of Korea's argument in that context, we reject

[455] Korea asserts at note 68 to its oral statement at the Second Substantive Meeting that Citibank's participation in the restructuring transactions on the same terms as the allegedly "entrusted or directed" banks provides further evidence that there was no entrustment or direction. Korea notes Japan's assertion that the JIA was justified in ignoring Citibank's participation in the restructurings (*see, e.g.*, Japan's Second Written Submission, para. 107), but states that all of the points raised by Japan were rebutted in the proceedings before the JIA. Korea refers in this regard to paras. 33, 36, 274, 314, 316, 430, and 547 of Annex 3 (Rebuttals and Surrebuttals). We are not prepared to review the JIA's determination in respect of Citibank on the basis of Korea's simple reference to arguments made by the Government of Korea and Hynix to the JIA. Korea has not even endorsed all of these arguments, let alone developed them in the context of Korea's claims in the present proceedings. We are not prepared to review the abovementioned section of Annex 3 (Rebuttals and Surrebuttals) and make relevant arguments on Korea's behalf. Accordingly, we make no findings regarding the JIA's determination of entrustment or direction on the basis of Korea's reference to the JIA's treatment of Citibank.

[456] *See* para. 7.254 *infra*.

Korea's argument that the participation of Other Creditors in the October 2001 restructuring precluded a finding that the Four Creditors were entrusted or directed by the Government of Korea. As we note in section E.6 *infra*, there was no evidence from Other Creditors on the JIA's record regarding the reasons why they participated in the October 2001 restructuring. There was no such evidence because Other Creditors failed to respond to the JIA's questionnaire.[457] There was, however, evidence (applicable through facts available) suggesting that the Other Creditors had participated in the October 2001 restructuring on the basis of non-commercial considerations,[458] just as the Four Creditors had done. Furthermore, given the JIA's finding of extensive government intervention in the October 2001 restructuring, the JIA could properly have concluded that there was also a credible possibility that the Other Creditors may have been acting under government entrustment or direction. As a result of the failure of certain Other Creditors to respond to the JIA's questionnaire, it was not possible for the JIA to exclude this possibility. In these circumstances, we do not consider that the JIA was required to overlook evidence of entrustment or direction of the Four Creditors simply because Other Creditors also participated in the October 2001 restructuring.

(f) Conclusion

7.252 For the above reasons, we reject Korea's claim that the JIA did not have a proper basis for finding that the Four Creditors were entrusted or directed by the Government of Korea to participate in the October 2001 restructuring, contrary to Article 1.1(a)(1)(iv) of the *SCM Agreement*.

7.253 Regarding the December 2002 restructuring, we note that the JIA's determination of entrustment or direction was based on "the totality of numerous items of evidence obtained".[459] We also note that the JIA began its summary of its determination of entrustment or direction regarding the December 2002 restructuring by referring to its finding that the Four Creditors' decisions to participate in that restructuring "were not based on commercial consideration[s]".[460] Commercial reasonableness therefore played an important role in the JIA's finding of entrustment or direction. As noted above, the JIA's finding that the Four Creditors' participation in the restructuring was not commercially reasonable was to a great extent based on its rejection of the Deutsche Bank Report. Our finding that the JIA erred in both its formal and substantive analysis of the Deutsche Bank Report therefore invalidates the JIA's finding that the Four Creditors' participation in the December 2002 was not commercially reasonable, revealing a fatal flaw in the JIA's determination of entrustment or direction. While the JIA also based its determination of entrustment or direction on evidence that the Government of Korea "was in a position to be able to exercise sufficient influence on" the Four Creditors, and that the Government of Korea "had the political intent to have Hynix survive", and "had been ascertaining at all times the progress of discussion of the December 2002 Program",[461] the JIA declined to find that such evidence in and of itself (*i.e.*, absent consideration that the restructuring was not commercially reasonable) demonstrated that the Government of Korea gave responsibility to the Four Creditors, or actually exercised any authority over the Four Creditors, in order to effectuate the December 2002 restructuring.[462] Since the JIA made no such finding, there is no basis for us to

[457] One Other Creditor, Kookmin, did reply to the JIA's questionnaire. Kookmin's reply indicated that it had participated in the October 2001 restructuring on the basis of the Anjin Accounting Report. We find elsewhere that the JIA dealt appropriately with evidence regarding the availability of the Anjin Report.

[458] For this reason, we disagree with Korea's assertion that there was "no information on the record providing any indication that the [Other Creditors] participated in the restructuring transactions for any reason other than a rational calculation of their own self-interest" (Korea's Second Written Submission, para. 226).

[459] *See* Annex 3 (Rebuttals and Surrebuttals), para. 20. *See* also para. 295 of Japan's First Written Submission.

[460] *See* Annex 1 (Essential Facts), para. 368.

[461] *See* Annex 1 (Essential Facts), para. 370.

[462] We note that the *EC – Countervailing Measures on DRAM Chips* panel referred (at para. 7.131) to "the absence of any convincing evidence of the commercial reasonableness of [the] investments" "in combination with the very important amount of government shareholding power" in upholding the investigating authority's determination of government entrustment or direction, thereby confirming that circumstantial

conclude whether or not the JIA could properly have relied on such evidence (absent consideration that the restructuring was not commercially reasonable) to make a determination of government entrustment or direction.[463] It is not our role to conduct a *de novo* examination of that issue by asking whether such a finding could have been made by the JIA.[464]

7.254 Accordingly, we uphold Korea's claim that the JIA did not have a proper basis for finding that the Four Creditors were entrusted or directed by the Government of Korea to participate in the December 2002 restructuring, contrary to Article 1.1(a)(1)(iv) of the *SCM Agreement*.

E. THE JIA'S DETERMINATION OF BENEFIT

1. Introduction

7.255 The *SCM Agreement* defines a subsidy as a financial contribution by a government or public body that confers a "benefit". Thus, having established that the October 2001 and December 2002 restructurings constituted financial contributions, the JIA was required to establish that they conferred a "benefit" in order to treat them as subsidies.

7.256 Although the concept of "benefit" is not defined in the *SCM Agreement*, it is now well established that benefit is determined by reference to the market. Thus, a benefit is conferred if the recipient receives a financial contribution on terms more favourable than those available to the recipient in the market.[465]

7.257 Accordingly, the JIA was required to determine whether the public bodies and the Four Creditors participated in the restructurings on terms more favourable than the market would have done. Korea claims that the JIA erred in making that determination.

7.258 In particular, Korea claims that Japan acted inconsistently with Articles 1.1(b) and 14 of the *SCM Agreement* because the JIA committed a number of errors in its determinations of the existence and amount of benefit conferred to Hynix by the October 2001 and December 2002 restructurings. Korea further claims that Japan's imposition of countervailing duties based on this "flawed analysis" was inconsistent with the requirements of 19.4 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*.

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evidence of a government's simple ability to exercise authority over a private body is not sufficient for a finding of entrustment or direction. There must be some additional evidence indicating that the government actually exercised that authority in order to effectuate a financial contribution.

[463] We understand Japan to agree with such an approach, as Japan has argued that "it is important to note the method in which the [JIA] made its findings of entrustment or direction" (*see* Japan's First Written Submission, para. 89). Japan refers in support to the statement of the Appellate Body in *US – Countervailing Duty Investigation on DRAMS* that a panel cannot "construct a case different from that put forward by the investigating authority." (*US – Countervailing Duty Investigation on DRAMS*, para. 151). Although Japan has also referred (*see* Japan's oral statement at the Second Substantive Meeting, para. 80) to the fact that the panel in *EC – Countervailing Measures on DRAM Chips* upheld the investigating authority's determination of entrustment or direction despite disagreeing with some element of the investigating authority's analysis, we note that it did so in "the absence of any convincing evidence of the commercial reasonableness of such investments" (para. 7.131). Given our finding that the JIA's determination on commercial reasonableness is unsound, it would not be appropriate for us to proceed in the same manner.

[464] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, para. 303 ("As we stated above, because a panel may not conduct a *de novo* Review of the evidence before the competent authority, it is the *explanation* given by the competent authority for its determination that alone enables panels to determine whether there has been compliance with the requirements of Article XIX of the GATT 1994 and of Articles 2 and 4 of the *Agreement on Safeguards*.")

[465] *See*, for example, *Canada – Aircraft*, Appellate Body Report, para. 157, and *EC – Countervailing Measures on DRAM Chips*, Panel Report, para. 7.175.

7.259 Japan asks the Panel to reject Korea's claim.

2. Applicable provisions

7.260 Article 1.1(b) provides that a subsidy shall be deemed to exist only where there is a financial contribution by a government or public body and "a benefit is thereby conferred".

7.261 Article 14 contains four sub-paragraphs, which set forth guidelines for calculating the benefit conferred by different types of financial contributions. Korea's claim pertains to paragraphs (a) and (b) of Article 14, which read as follows:

> For 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 (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 ...

7.262 Article 19.4 of the *SCM Agreement* provides:

> No countervailing duty shall be levied[51] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.
>
> [51] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

7.263 Article VI:3 of the *GATT 1994* provides in part:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation….

3. Main Arguments of Korea

7.264 Korea has made a number of arguments in support of its claim. We understand Korea's primary arguments to be that the JIA erroneously: (i) ignored relevant economic evidence demonstrating that commercial actors routinely enter into similar transactions with borrowers in Hynix's financial condition; (ii) improperly failed to determine whether the alleged government

direction of the restructurings made Hynix "better off"; (iii) concluded that the terms of the restructuring transactions between Hynix and certain Other Creditors did not constitute valid market benchmarks for the benefit analysis; and (iv) calculated the benefit conferred by the financial contributions without assigning any value to what Hynix exchanged in return and without taking into account the creditors' existing claims. We shall address each of these arguments in turn.

4. The relevance of the evidence relied on by the JIA

(a) Arguments of Korea

7.265 Korea's first argument is that the JIA ignored relevant economic evidence demonstrating that commercial actors routinely enter into similar transactions with borrowers in Hynix's financial condition. This argument concerns the evidence relied on by the JIA in establishing the existence of benefit. It is premised on Korea's economic arguments regarding the differences between the investment perspectives of new, outside investors and existing, inside investors. These arguments have been described more fully above.[466]

7.266 In its First Written Submission, Korea asserted that the JIA erred by examining whether the debt restructurings, rather than the government entrustment or direction of those restructurings, conferred a benefit. Korea argued that transactions entered into by private bodies — whether government directed or not — do not themselves constitute "financial contributions" under Article 1.1 of the *SCM Agreement*. Korea argued that "[i]nstead, it is the *government's action* of 'entrusting or directing' the private creditors that constitutes the 'financial contribution' under Article 1.1(a)."[467] According to Korea, "the issue is whether the alleged government involvement resulted in better restructuring transactions for Hynix than it would have been able to negotiate in the absence of government involvement".[468]

7.267 In order to seek clarification of Korea's argument, the Panel put Question 70 to Korea:

> At para. 229 of its First Written Submission, Korea argues that "the issue is whether the alleged government involvement resulted in better restructuring transactions for Hynix than it would have been able to negotiate *in the absence of government involvement*" (emphasis added). Is this a different way of saying that the JIA was required to compare the terms of the government-directed restructurings at issue with the terms that would have been available to Hynix *in the market*?

7.268 Korea replied:

> If the relevant "market" is properly defined as non-government-directed entities in the same position as Hynix's creditors, then it should not matter whether the relevant benchmark is defined as "restructuring transactions for Hynix than it would have been able to negotiate *in the absence of government involvement"* or as "the terms that would have been available to Hynix *in the market."* However, if the relevant "market" is improperly defined as non-government-directed entities in a different position — for example, investors that do not hold Hynix debt — then the two descriptions of the relevant benchmark would lead to different results.

7.269 Korea developed this argument further in its Second Written Submission. At para. 172, Korea states:

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[466] *See* para. 7.85 *supra*.
[467] *See* Korea's First Written Submission, para. 228.
[468] *See* Korea First Written Submission, para. 229.

> According to Japan, the JIA's conclusion on this issue was supported by Hynix's "disastrous and ever deteriorating financial state, its bad history of serving debt, the collapse of the stock price, and the reality that no new investors were willing to put funds into Hynix."* But such findings, if they ever were made, are simply irrelevant. Contrary to Japan's assumption, Hynix did not "raise" funds on the commercial market in the October 2001 and December 2002 restructurings. Instead, its existing debts were restructured in those transactions. The only issue is whether Hynix would have been able to obtain equivalent debt restructuring from creditors acting in accordance with the "usual practice" in the relevant market. On that issue, the JIA made no findings. (* footnote omitted)

(b) Arguments of Japan

7.270 Japan responded that, according to Article 1.1 of the *SCM Agreement*, it is the financial contributions resulting from the government entrustment or direction that must be found to have conferred the benefit, not the government entrustment or direction *per se*.

(c) Evaluation by the Panel

7.271 We understand Korea's basic argument to be that the JIA should have used non-government-directed entities in the same position as Hynix's creditors – *i.e.*, "inside" investors holding debt of little worth - as evidence that the restructurings at issue were commercially reasonable, and therefore did not confer a benefit. Korea's argument therefore comprises two elements. First, Korea complains that the JIA applied an *outside* investor standard, that is not relevant for the purpose of assessing whether a benefit was conferred by the actions of Hynix's *existing* creditors. Second, Korea complains that the JIA determined the existence of benefit without comparing what Hynix's creditors did with evidence of what non-entrusted or directed, market-based *inside* investors would have done.

7.272 We have already addressed the first element of Korea's argument. In particular, we have already found that the JIA applied both an inside and an outside investor standard when analyzing the commercial reasonableness of the decisions by creditors to participate in the October 2001 and December 2002 restructurings. The JIA did so because it explicitly accepted the "premise that existing creditors would possibly provide additional funding in order to maximize the recovery of credit."[469] The JIA also accepted that debt forgiveness by creditors might be "commercial" "[i]f such action is reasonably found to be unavoidable in order to maximize the debt recovery."[470]

7.273 The problem identified by Korea in the second element of its argument is that the JIA concluded that there was benefit as soon as it found that the actions of Hynix's creditors were not commercially reasonable, without verifying that (hypothetical) non-entrusted or directed inside investors acting on market principles would have acted any differently. In other words, Korea complains that the JIA did not establish its own market benchmark by which to ascertain whether or not a benefit was conferred on Hynix by its creditors. Korea submits that the JIA should have established this benchmark by reference to evidence of what "creditors acting in accordance with the 'usual practice' in the relevant market"[471] would have done. Korea asserts that, no matter the creditors' motivations for participating in the restructurings, the JIA could only conclude that a benefit was

[469] *See* Annex 3 (Rebuttals and Surrebuttals), para. 141. Despite references to this statement by Japan in its First Written Submission (*see* para. 379) and in subsequent submissions to the Panel (insert refs), Korea only acknowledged this statement in its final submission to the Panel after the Second Substantive Meeting (*see* Korea's Final Comments, para. 4). This statement appears to have been overlooked by Korea during the earlier stages of the Panel proceedings.

[470] *See* Annex 3 (Rebuttals and Surrebuttals), para. 429.

[471] *See* Korea's First Written Submission, para. 172.

conferred if the terms of the restructurings were shown to be more favourable than the terms that would have been offered by creditors following usual market practices. According to Korea:

> it does not matter whether Hynix's creditors actually made their decisions by flipping coins, tossing darts at a board, or consulting fortune-tellers. No matter how bizarre the JIA may have found the creditors' decision-making process, the restructuring transactions did not confer a benefit on Hynix as long as Hynix could have received equivalent terms from creditors following usual market practices.[472]

7.274 Korea asserts that a market-based inside investor would have participated in the restructurings because (1) it would have acquired an independent analysis before deciding what to do; and (2) that analysis would have demonstrated that Hynix's going concern value exceeded its liquidation value. Accordingly, Korea submits that there was no difference between what Hynix's creditors did and what market-based inside investors would have done. For this reason, Korea submits that no benefit was conferred on Hynix by the restructurings.

7.275 As noted above, it is now well established that the concept of benefit is defined by reference to the market, such that a financial contribution confers a "benefit" within the meaning of Article 1.1(b) of the *SCM Agreement* when it is made available on terms that are more favourable than the recipient could have obtained on the market. While an investigating authority must apply this standard on the basis of relevant evidence, there are no provisions in the *SCM Agreement* regarding the precise nature of the evidence on which an investigating authority must rely. The guidelines set forth in Article 14 of the *SCM Agreement* offer some guidance on the types of evidence that might be relevant. However, the Article 14 guidelines do not cover all eventualities. For example, Article 14(b) does not indicate how an investigating authority should establish the existence of benefit conferred by a loan in the event that there are no "comparable commercial loans which the firm could actually obtain on the market".[473]

7.276 In certain circumstances, an investigating authority might examine the existence of benefit by gathering available evidence of the terms that the market would have offered, and by comparing those terms with those of the financial contribution at issue. This is the approach advocated by Korea in the present case. In other circumstances, an investigating authority might rely on evidence of whether or not the financial contribution was provided on the basis of commercial considerations. This is the approach adopted by the JIA in the present case. In our view, both types of evidence are relevant in determining the existence of benefit. The first, because such evidence provides a market benchmark against which to determine whether or not the terms on offer were more favourable than those available from the market. The second, because evidence of reliance on non-commercial considerations indicates terms more favourable than those available from the market (as the market is presumed to operate on the basis of commercial considerations).[474] Depending on the particular circumstances of a case, an investigating authority might also rely on other types of evidence that could be equally relevant.[475]

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[472] *See* Korea's First Written Submission, para. 176.

[473] It is for this reason that the panel in *EC – Countervailing Measures on DRAM Chips* recognized that "an investigating authority is entitled to considerable leeway in adopting a reasonable methodology" (*EC – Countervailing Measures on DRAM Chips*, para. 7.213) for calculating the amount of benefit.

[474] We note that such an approach to determining the existence of benefit was upheld by the panel in *EC – Countervailing Measures on DRAM Chips*. That panel upheld the investigating authority's finding of benefit in respect of the October 2001 restructuring on the basis that the investigating authority had reasonably concluded that none of the non-entrusted / directed creditors had acted "in a commercially reasonable manner". (*EC – Countervailing Measures on DRAM Chips*, para. 7.209)

[475] An investigating authority might also be confronted with both types of evidence described above, and one type of evidence might not support the conclusion suggested by the other. For example, there might be evidence that, although the financial contribution was not provided on the basis of commercial considerations, it

7.277 In light of the above, we find that the JIA's determination of the existence of benefit was based on relevant economic evidence.[476] We therefore reject Korea's argument that the JIA improperly ignored relevant economic evidence simply because it failed to collect evidence of what (hypothetical) market-based inside investors would have done.

5. Commercial Reasonableness: Whether The Restructurings Made Hynix "Better Off"

(a) Arguments of Korea

7.278 Korea asserts that a financial contribution only confers a benefit if it makes the recipient "better off" than it otherwise would have been. Korea states that there was no question that the economic evidence indicated that it was commercially reasonable for Hynix's creditors to participate in the restructurings, since Hynix's going concern value exceeded its liquidation value at the time of both the October 2001 and December 2002 restructurings. Korea asserts that market operators would have participated in the restructurings under these circumstances. According to Korea, therefore, Hynix was not made "better off" by the creditors than it would have been by the market.

(b) Arguments of Japan

7.279 Japan asserts that benefit should be established from the perspective of Hynix, the recipient of the financial contributions, and not its creditors. Japan submits that the fact that Hynix was "better off" than it would otherwise have been absent the financial contribution is demonstrated by the evidence. Japan refers in particular to evidence that Hynix was not able to obtain financing from "a normal commercial perspective".[477]

(c) Evaluation by the Panel

7.280 We recall that the JIA assessed the commercial reasonableness of the October 2001 and December 2002 restructurings in the context of its determination of government entrustment or direction. We have already established that an investigating authority might properly rely on evidence of whether or not a financial contribution was commercially reasonable in determining whether or not that financial contribution confers a benefit in the meaning of Article 1.1(b) of the *SCM Agreement*.[478]

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would in fact have been provided by "creditors acting in accordance with the 'usual practice' in the relevant market". In such cases, the investigating authority would need to weigh the probative value of one type of evidence against the probative value of the other. This was not the case in the investigation at issue, however, since the JIA was not confronted with evidence that "creditors acting in accordance with the 'usual practice' in the relevant market" would have restructured Hynix on the same terms as the Four Creditors did. Nor, in our view (for the reasons set forth above), was the JIA required to collect such evidence. (Korea does not argue that the JIA was presented with evidence that "creditors acting in accordance with the 'usual practice' in the relevant market" would have restructured Hynix on the same terms as the Four Creditors did. Although the Government of Korea argued before the JIA that inside and outside creditors have different interests (*see* Annex 3 (Rebuttals and Surrebuttals, para. 136), it did not provide evidence of the terms on which "creditors acting in accordance with the 'usual practice' in the relevant market" would have restructured Hynix. Furthermore, the Government of Korea argued during the underlying investigation that the JIA should have regard to "the *actual* circumstances of creditor financial institutions" (*see* Annex 3 (Rebuttals and Surrebuttals, para. 136, emphasis supplied). The Government of Korea did not refer, during the underlying investigation, to evidence of what *hypothetical* market-based inside investors would have done.)

[476] We wish to emphasise that our finding in this regard concerns the JIA's determination of the existence of benefit. It does not concern the JIA's calculation of the amount of benefit, for quantification of the amount of benefit conferred by a financial contribution necessarily requires more than merely concluding that the financial contribution was not commercially reasonable.

[477] *See* Japan's First Written Submission, para. 412.

[478] As discussed above, we consider that the JIA applied both an outside and inside investor standard in considering the commercial reasonableness of the restructurings. We recall that the parties agree that the inside investor standard is an appropriate one. Accordingly, there is no need for us to make any findings on this issue.

We understand Korea's argument that the restructurings did not make Hynix "better off" to mean that Korea considers that the restructurings were commercially reasonable, and were therefore not made on terms more favourable than those available from the market.

7.281 The JIA concluded that the Four Creditors had failed to participate in the October 2001 restructuring on the basis of commercial considerations. We have rejected Korea's arguments challenging that conclusion. Since we uphold the JIA's finding that the October 2001 restructuring was not commercially reasonable[479], it follows that we also uphold the JIA's determination that the October 2001 restructuring conferred a benefit on Hynix.

7.282 Regarding the December 2002 restructuring, we recall our finding that the JIA did not properly establish that the participation of the Four Creditors was based on non-commercial considerations. In particular, we found that the JIA's erroneous analysis (in form and substance) of the Deutsche Bank Report invalidated the JIA's finding that the Four Creditors' participation in the December 2002 was not commercially reasonable.[480] Since the JIA determined benefit by reference to the market, and commercial reasonableness, it therefore follows that we reject the JIA's determination that the December 2002 restructuring conferred a benefit on Hynix.

6. The Use of Hynix's Non-Entrusted or Directed Creditors as Market Benchmarks

7.283 Korea asserts that a large number of Other Creditors, *i.e.*, creditors that had not been found by the JIA to have been entrusted or directed by the Government of Korea, participated in the October 2001 and December 2002 restructurings on the same terms as the Four Creditors that were found to have acted as the result of government entrustment or direction. Korea submits that private entities not acting under the entrustment or direction of the government constitute the "market", and therefore define the market outcome. According to Korea, the fact that these private entities participated in the transactions on the same terms as the government bodies and the allegedly government-directed banks indicates that the transactions did not confer a benefit on Hynix.

7.284 We recall that the JIA did not find that the Other Creditors had conferred any (financial contribution or) benefit on Hynix. Thus, Korea is not challenging any finding by the JIA that the Other Creditors themselves conferred a benefit. Rather, Korea's argument is addressing the potential impact of evidence regarding the Other Creditors on the JIA's determination that the participation of the Four Creditors conferred a benefit on Hynix. Korea's argument is therefore concerned with the JIA's treatment of the evidence on its record. Korea's basic argument is that evidence that Other (non-entrusted or directed) Creditors also participated in the restructurings should have trumped the evidence relied on by the JIA to find that the Four Creditors participated in the restructurings on non-market considerations (leading to a finding that the restructurings did not confer a benefit on Hynix).

7.285 In light of our conclusion that the JIA could not properly have determined that the Four Creditors participated in the December 2002 restructuring on the basis of non-commercial considerations, we only evaluate Korea's argument regarding the role of Other Creditors in respect of the October 2001 restructuring. The JIA made the following findings regarding the participation of Other Creditors in the October 2001 restructuring:

> Hynix had been saved from bankruptcy by the government's subsidies (KEIC's insurance on the D/A financing, the KDB Program and the May 2001 Program). The Investigating Authorities find that the October 2001 Program was implemented standing on the financial situation supported by such subsidies. As described above, it was commonly recognized in Korea at that time that the Government of Korea placed the promotion of normalization of Hynix, a major semiconductor enterprise, as

[479] *See* para. 7.244 *supra.*
[480] *See* para. 7.246 *supra*.

> one of its economic policies, and had the political intent to have Hynix survive. Furthermore, the Investigating Authorities find that the Government of Korea was deeply involved in the October 2001 Program. In addition, the selection of Options 2 and 3 had also been made before the release of the Arthur Andersen Report, which compares the going-concern value with the liquidation value that form the basis for selecting such options.[362] Therefore, the Investigating Authorities find that the financial contributions standing on such a situation do not constitute financing from the commercial market (*i.e.*, the market benchmark), even if the October 2001 Program included financial contributions which were not found to be a financial contribution based on the entrustment or direction of the government.[481]
>
> Note 362 reads:
> Of the interested parties to whom the Investigating Authorities had sent the questionnaire, the Investigating Authorities received no questionnaire responses from commercial banks that selected option 2 or 3 except for Kookmin Bank. Therefore, the Investigating Authorities have no choice but to rely on the determination of the commercial validity in their selection of these options on information from the banks that provided their responses, taking the fact of refusal to respond into account. Kookmin Bank responded at the on-the-spot investigation that "each bank made their decision independently whether to take the bailout measure in accordance with its internal rule, referring to the Arthur Andersen's material. Kookmin Bank also made its decision in the same manner." This response, however, is contradictory to the release date of the Arthur Andersen Report. The Kookmin Bank's response and other above-mentioned evidence show that each bank selected the option under the influence of external factors other than commercial factors. It is also reasonable to find that, given the fact that no banks relevant to the option 3 submitted their responses to the questionnaire, and given the information that the Investigating Authorities received from other sources discussed above, external factors were involved in the final repayment conditions of option 3.

7.286 In light of these findings, we understand that the JIA discounted the evidence that Other Creditors had also participated in the October 2001 restructuring because (1) the JIA found that the October 2001 restructuring was based on prior subsidies, and (2) the JIA found, on the basis of facts available, that the Other Creditors had acted on non-commercial considerations. We shall begin by examining the second element relied on by the JIA.

(a) The "non-commercial nature" of the behaviour of the Other Creditors

7.287 Korea asserts that Japan has offered no evidence to support its assertion that the JIA properly found that the Other Creditors' decisions to participate in the October 2001 restructuring were based on non-commercial considerations. Korea asserts that, when asked for such evidence by the Panel, the Japanese delegation actually referred to a passage in the JIA's determination addressing the Four Creditors that were found to have been influenced by government entrustment or direction - and not the "other" banks and the hundreds of other financial institutions that were never contacted by the JIA.[482]

7.288 We note that the JIA's finding regarding the commercial reasonableness of the decision of Hynix's Other Creditors to participate in the October 2001 restructuring was based on facts available,

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[481] *See* Annex 1 (Essential Facts), para. 299.

[482] Korea notes in this regard that the Japanese delegation directed the Panel to paragraphs 290 to 296 of Annex 1 (Essential Facts). Korea asserts that that passage is, however, focused solely on the question whether KEB, Woori Bank, Chohung Bank and NACF participated in the restructuring transactions as a result of government entrustment or direction.

as those Other Creditors contacted by the JIA (other than Kookmin) had failed to respond to its questionnaire. According to note 362 of Annex 1 (Essential Facts), set forth above, the available facts applied by the JIA pertained to the participation in the October 2001 restructuring of the banks that did reply to the JIA's questionnaire, namely the Four Creditors and Kookmin. It is for this reason that Japan would have referred to evidence regarding the Four Creditors in the circumstances described by Korea in the preceding paragraph.

7.289 We find elsewhere that the JIA was entitled to treat the Other Creditors as interested parties, and to apply facts available in accordance with Article 12.7 of the *SCM Agreement*.[483] The JIA was required to apply facts available in respect of the Other Creditors because none of the Other Creditors contacted by the JIA (except Kookmin) had responded to its questionnaire. In other words, there was no direct evidence on the JIA's record regarding the reasons why Other Creditors (other than Kookmin)[484] had participated in the October 2001 restructuring.

7.290 Thus, while there was no direct evidence demonstrating that the Other Creditors had participated in the October 2001 restructuring on the basis of commercial considerations, there was indirect evidence (applicable through facts available) suggesting that the Other Creditors had participated in that restructuring on the basis of non-commercial considerations,[485] just as the Four Creditors had done.

7.291 Given the JIA's finding of extensive government intervention in the October 2001 restructuring, there was obviously a risk that the Other Creditors may also have been acting under government entrustment or direction. As a result of the failure of Other Creditors to respond to the JIA's questionnaire, it was not possible for the JIA to exclude this possibility.[486] In these circumstances, we do not consider that the JIA erred in the treatment of the evidence before it. In particular, we do not consider that the JIA was obliged to assume (without evidence in support, and in the face of evidence to the contrary) that the Other Creditors had participated in the October 2001 restructuring on the basis of commercial considerations, and then use that assumption to trump evidence indicating that the Four Creditors had participated in the October 2001 restructuring on the basis of non-commercial considerations. In these circumstances, the mere participation of Other Creditors in the October 2001 restructuring (absent evidence establishing that their participation was based on commercial considerations) should not have precluded a finding by the JIA that the participation of the Four Creditors in that restructuring conferred a benefit on Hynix.

(b) Prior Subsidies

7.292 We recall that the JIA found in respect of the October 2001 restructuring that:

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[483] *See* section VII.I *infra*.

[484] Note 362 of Annex 1 (Essential Facts) indicates that the available direct evidence regarding Kookmin concerned its claim that it had relied on the Anjin Accounting Report as a basis for participating in the October 2001 restructuring. This direct evidence was therefore addressed by the JIA in its treatment of the Anjin Accounting Report, which the JIA found was only made available to creditors after they had already decided to participate in the October 2001 restructuring.

[485] For this reason, we disagree with Korea's assertion that there was "no information on the record providing any indication that the [Other Creditors] participated in the restructuring transactions for any reason other than a rational calculation of their own self-interest" (Korea's Second Written Submission, para. 226).

[486] In this regard, we note that much of the evidence of entrustment or direction relied on by the JIA in respect of the Four Creditors' participation in the October 2001 restructuring might equally have applied to the Other Creditors. If the JIA had also made a finding of entrustment or direction in respect of the Other Creditors, the argument presently being made by Korea would not arise. Given the non-responsiveness of Other Creditors, and the resultant absence of direct evidence regarding the motivations of the participation of Other Creditors in the restructurings, we do not see why Korea's argument should become decisive simply because the JIA decided not to make findings of entrustment or direction in respect of those Other Creditors (and thereby allowed Korea to make the argument that it is currently presenting).

> Hynix had been saved from bankruptcy by the government's subsidies (KEIC's insurance on the D/A financing, the KDB Program and the May 2001 Program). The Investigating Authorities find that the October 2001 Program was implemented standing on the financial situation supported by such subsidies. (...) Therefore, the Investigating Authorities find that the financial contributions standing on such a situation do not constitute financing from the commercial market (*i.e.*, the market benchmark), even if the October 2001 Program included financial contributions which were not found to be a financial contribution based on the entrustment or direction of the government.[487]

7.293 The Panel addressed Questions 28, 29, and 32 – 37 to Japan in order to clarify the rationale behind the JIA's determination. According to Japan, the facts show that Hynix was saved by prior and contemporaneous subsidies. Japan asserts that because Hynix's financial state was distorted by prior subsidies, so too was any benchmark based on Hynix's financial state.[488] Japan asserts that the financial state of Hynix was necessarily distorted because the very "existence of Hynix was the result of the prior subsidies", in the sense that Hynix could not have survived until the time of the October 2001 restructuring without prior subsidies. We therefore understand Japan to argue that there can be no market price for any financing of Hynix because, but for prior subsidies, there would not have been any Hynix debt or equity to be sold on the market.[489]

7.294 Korea asserts that past subsidies do not negate the commercial nature of subsequent transactions by commercial actors. According to Korea, Article 14 of the *SCM Agreement* requires investigating authorities to look to actual market transactions and practices as the benchmark for determining whether a benefit has been conferred. Korea submits that nothing in the *SCM Agreement* permits an investigating authority to second guess the market, or to disregard actual market behaviour based on the investigating authority's beliefs about what should have happened. Korea asserts that the JIA erroneously disregarded actual market transactions, because it considered them inconsistent with the hypothetical transactions that it believed hypothetically would have existed if certain past events had hypothetically not occurred.

7.295 We begin by acknowledging that there may be circumstances in which the market is distorted to such an extent that the pricing in that market may not be used for the purpose of establishing benefit. Thus, the Appellate Body found in *US – Softwood Lumber IV* that "in certain situations where government involvement in the market is substantial, the prices of private suppliers may be artificially suppressed because of the prices charged for the same goods by the government".[490] This is "because the government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular".[491] Furthermore, several panels have recognised that private participation in restructuring programmes might be influenced by government / public participation in those programmes. Thus, the panel in *EC – Countervailing Measures on DRAM Chips* found that "the behaviour of (...) market players [could be] so distorted by the government's intervention that they can no longer serve as the benchmark against which to measure

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[487] *See* Annex 1 (Essential Facts), para. 299.

[488] In response to Question 29 from the Panel, Japan asserted that "there was no 'non-distorted' market, *i.e.*, Hynix's financial situation without the distortion of subsidies".

[489] In response to Question 29 from the Panel, Japan asserted that "[t]he scale of the subsidies provided by the government may have an impact on the nature and extent of the distortion, as well as on the evidence required to demonstrate such distortion. In some cases, such as this one, the scale and timing of the subsidies is such that it is not just a question of impacting on the terms of the financing for example, but actually allowing the existence of such financing itself. In such cases, the evidence of distortion is clearly shown." Thus, Japan does not argue that the prior subsidies merely affected the terms of the restructurings. Rather, Japan asserts that there would not have been any restructurings but for the prior subsidies.

[490] *US – Softwood Lumber IV*, para. 94.

[491] *US – Softwood Lumber IV*, para. 93.

the alleged government distortion".[492] Similarly, the panel in *Korea – Commercial Vessels* found (with express reference to the Appellate Body's findings in *US – Softwood Lumber IV*) that "there could be circumstances in which a government influences the market to such an extent that it becomes distorted, so that private entities no longer operate pursuant to purely commercial principles".[493]

7.296 Japan has referred to the *US – Softwood Lumber IV* case in support of the JIA's reliance on prior subsidization. However, none of the Appellate Body or panel findings referred to above concerned the role of prior subsidization in distorting markets. Instead, they were concerned with distortion caused by present, or contemporaneous,[494] government involvement and intervention in markets. These cases therefore do not provide support for the JIA's determination.

7.297 In our view, prior subsidization of an object does not necessarily mean that the market price for that object is distorted. A buyer may be said to have paid a market price even though the object only exists because of prior subsidies. Indeed, this is the basic premise of consistent WTO rulings to the effect that the payment of fair market value for privatized entities does not confer a benefit. In *US – Countervailing Measures on Certain EC Products*, the Appellate Body confirmed that "[p]rivatization at arm's length and for fair market value may result in extinguishing the benefit."[495] Implicit in this finding is the notion that a privatization might take place "for fair market value". The fact that a state-owned entity, which only exists because of prior subsidization, may be privatized, or sold, "for fair market value" undermines Japan's argument that there can be no (fair) market price for an entity that existed, in the JIA's view, only because of prior subsidization.[496]

(c) Conclusion

7.298 While we have found that the JIA improperly relied on prior subsidization as a basis for discounting the participation of Other Creditors in the October 2001 restructuring, we have found that the JIA properly discounted the participation of Other Creditors on another basis. In particular, we have found that the JIA properly determined, on the basis of the available evidence, that the mere participation of Other Creditors in the October 2001 restructuring should not outweigh the evidence directly concerning the Four Creditors that indicated that they participated in the restructuring on the basis of non-commercial considerations. For these reasons, we uphold the JIA's determination that

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[492] *EC – Countervailing Measures on DRAM Chips*, note 171.

[493] *Korea – Commercial Vessels*, para. 7.434.

[494] We note that Japan's arguments refer to both "prior" and "contemporaneous" subsidization. However, we have not been able to locate, and Japan has not identified, any finding by the JIA regarding the role of "contemporaneous" subsidies. Japan's arguments on contemporaneous subsidization therefore constitute *ex post* rationalization which we decline to consider. Japan explicitly acknowledged that it had not made the type of analysis envisaged in the abovementioned Appellate Body and panel reports in response to Question 104, in which the Panel asked whether the JIA's reasoning was based in any way on the theory that Hynix's non-entrusted "financiers may have only joined in because of the predominant position of the primary financiers". Japan replied that "[t]he IA ... did not make [any] finding that participation by Hynix's other creditors in the October 2001 Program and the December 2002 Program was precondition[ed] on the financial contributions from four entrusted or directed banks in these Programs". Japan has not argued, for example, that Hynix's private creditors only participated in the restructurings because the participation of public bodies signalled to them that the Government of Korea was prepared to save Hynix at all costs.

[495] *US – Countervailing Measures on Certain EC Products*, para. 126.

[496] Furthermore, the JIA's acceptance of the inside investor standard implies that the JIA accepted that Hynix's existing creditors might behave in a commercially rational way, irrespective of the reasons why they were "inside" Hynix in the first place. Thus, the JIA appears to have accepted that Hynix's creditors may have acted in a commercially rational way, and forgiven debt or restructured loans, even though (according to the JIA) they had only previously lent money to Hynix in the form of subsidies. If this were not the case, there would have been no point in the JIA conducting a detailed examination of the commercial reasonableness of the Four Creditors' decisions to participate in the restructurings (by reference to their internal analyses and external reports). Accordingly, the JIA's reliance on prior subsidies to impugn the commercial rationale of the decisions of Other Creditors is inconsistent with the JIA's acceptance of the inside investor standard.

the participation of the Four Creditors in the October 2001 restructuring could confer a benefit on Hynix notwithstanding the participation of Other Creditors in the restructuring.

7. Calculation of the Amount of Benefit

(a) Main Arguments of Korea

7.299 Korea claims that the JIA erroneously calculated the benefit conferred by the financial contributions without assigning any value to what Hynix exchanged in return and without taking into account the creditors' existing claims. According to Korea, a proper analysis of these transactions requires consideration of all parts of the exchanges — not only the value of whatever the recipient received, but also the value of whatever the recipient gave in return. Korea suggests that the panel in *EC – Countervailing Measures on DRAM Chips* found that an investigating authority's analysis of a debt-to-equity swap cannot look only at the forgiveness of debt, and ignore the value of the equity provided in return.

7.300 Furthermore, Korea asserts that the JIA's benefit calculation in this case was flawed because the JIA analyzed the benefit from "deemed" transactions. Korea asserts that the JIA thereby overlooked Hynix's inability to repay at least part of its debts, and instead assumed that the restructuring involved transactions in which Hynix was able to, and actually did, repay its debts in full. Korea submits that the JIA then used the practices of investors considering transactions that did not and could not have occurred — *i.e.*, transactions in which the investors received full repayment of outstanding debts — as the benchmark for its benefit analysis. According to Korea, the JIA determined the value of the debt that the creditors exchanged in the debt equity swaps by multiplying the number of shares received by each creditor by the unit value assigned to each share in the debt-to-equity swaps. Korea asserts that the JIA took a different approach when it came to calculating the benefit of the equity infusions. In particular, it did not use the unit value assigned to each share in the debt-to-equity swaps in order to determine the value of the shares that Hynix issued to the banks. Korea asserts that, instead, the JIA took the position that those shares were worthless, because "Hynix's equity value was zero."[497] Korea submits that the JIA's approach was contradictory. According to Korea, if the JIA assumed that the shares had value for purposes of calculating the value of the loans given up by the creditors in the debt-to-equity swaps, then it had to assume that the shares had the same value for purposes of calculating the benefit of the debt-to-equity swap. Alternatively, Korea asserts that if the shares had zero value for purposes of the benefit calculation, and the value of the loans was determined from the value of the shares, then the value of the loans before they were swapped also had to be zero.

(b) Main Arguments of Japan

7.301 As a preliminary matter, Japan asserts that Korea's argument that Hynix's debts were at least in part worthless falls outside the terms of reference of the Panel because it was not an argument made before the JIA.[498]

7.302 Further, Japan asserts that none of the evidence on the JIA's record showed that the value of any loans was devalued at the time of the October 2001 and December 2002 restructurings. Japan asserts that Korea's arguments are therefore without supporting evidence. Regarding Korea's argument that the JIA incorrectly calculated the amount of benefit by reference to "deemed" transactions that, in reality, did not occur, Japan asserts that Korea fails to distinguish between the fact itself, *i.e.*, the nature of transactions, and the JIA's assessment of facts, *i.e.*, how to measure the benefit based on that fact.

[497] *See* Japan's Response to Second Panel Questions, para. 74.
[498] *See* Japan's oral statement at the Second Substantive Meeting, para. 83.

7.303 Regarding Korea's argument that the JIA calculated the amount of benefit without regard to the "usual practices"' of market participants, Japan asserts that the Government of Korea and interested parties refused to provide relevant information of financial restructuring of other companies similarly situated with Hynix, namely companies subject to the CRPA. Japan relies in this regard on a finding by the Appellate Body that, "when assessing an investigating authority's determination, a panel may not fault the agency for failing to take into account facts that it could not reasonably have known."[499] Japan also relies on Article 12.2 of the *SCM Agreement* to argue that an investigating authority's determination "can only be based on…. information and arguments" on its record. Japan asserts that Korea's complaint that the JIA should have made factual conclusions regarding benefit based on a potential "usual practice" in the absence of the necessary information is tantamount to a request to speculate in finding a "usual or normal practice" without any evidence on the record, and inconsistent with the provisions of Article 12.2 of the *SCM Agreement*.

(c) Evaluation by the Panel[500]

7.304 Regarding Japan's claim that Korea's argument that the relevant debts were worthless falls outside the Panel's terms of reference, we recall that a complaining party is not precluded from making arguments in WTO dispute settlement proceedings that it did not make before the investigating authority in the underlying investigation.[501] [502]

7.305 On substance, we note that Korea argues that the JIA failed to properly take account of the fact that Hynix was unable to repay all of its debt.[503] Korea also challenges the JIA's finding that the value of Hynix's equity was zero. In light of Korea's extensive argumentation regarding the differences between the investment perspectives of inside and outside investors in respect of insolvent

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[499] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 175.

[500] In light of our finding regarding the JIA's determination of the existence of benefit in respect of the December 2002 restructuring, it is not strictly necessary for us to consider the JIA's calculation of the amount of benefit conferred by that restructuring. We shall do so, though, for the sake of completeness.

[501] *See* Appellate Body Report, *US – Lamb*, para. 113.

[502] Japan cited *Egypt – Steel Rebar* in its submissions and answers given to the Panel as authority for the contrary proposition. In that report the Panel stated (at para. 7.105):

> It is not within our mandate to reverse through the dispute settlement process the consequences of those respondent's decisions made during the course of the investigation as to which arguments they would present.

However the context in which that statement was made is quite different to the context in which Japan sought to use it in these proceedings. In *Egypt – Steel Rebar*, Turkey argued before the Panel that the Egyptian investigating authority was obliged to undertake further fact-finding than the fact-finding it had actually undertaken in its investigation in order to meet the "positive evidence" standard in its determination of injury. The other factual evidence that Turkey argued the investigating authority should have taken into account had not been submitted by Turkey to the investigating authority, and was not on the investigating authority's record. Turkey did not seek to place that other factual evidence before the Panel, and would have been precluded from doing so. Instead Turkey argued that the investigating authority should have found that evidence itself, and that the failure to find that evidence meant that the positive standard had not been met. However the Panel found that the investigating authority had met the positive standard on the basis of the evidence on its record; that the evidence was properly directed towards the matters identified as being relevant to such a decision under the Anti-Dumping Agreement; and that the other factual evidence was not necessarily required to be considered in applying the relevant tests of injury under the Anti-Dumping Agreement. It was in those circumstances that the Panel declined to allow Turkey to argue against the merits of the investigating authority's decision on the basis submitted by Turkey.

[503] Korea's argument that the JIA calculated the amount of benefit on the basis of "deemed" transactions is related to its claim that the JIA improperly treated the October 2001 and December 2002 loan maturity extensions and debt-to-equity swaps as "direct transfers of funds" within the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement*. We rejected that claim for the reasons set forth at section K *infra*. However, our upholding of the JIA's treatment of these transactions as "direct transfers of funds" does not necessarily mean that we accept the JIA's calculation of the benefit resulting from those transactions.

companies (especially Korea's argument that outside investors would only invest if they expect to get all of their money back, whereas inside investors in insolvent companies already know that their debts will not be paid in full), we understand that Korea is essentially arguing that the JIA calculated the amount of benefit from the perspective of outside investors.

7.306 We note that the JIA calculated the amount of benefit resulting from the October 2001 restructuring in Section 2.8.5 of Annex 1 (Essential Facts). The JIA adopted the same approach for both new loans and extensions of loan maturities,[504] finding that:

> at the time of the October 2001 Program, there were no normal commercial loans that would be comparable to the loans granted by the creditor banks. Moreover, as examined above, the Investigating Authorities find that there were no investors who would additionally invest in or make loans to Hynix from a normal commercial perspective. Therefore, the Investigating Authorities calculate the benchmark interest rate in accordance with Formula 1 in 2.3.2.2.1 hereof, and obtain the difference between this amount and the actual interest amount paid for the new loan.[505]

7.307 On the basis of Japan's reply to Question 31 from the Panel, we understand that the JIA's reference to the "normal commercial perspective" relates to the perspective of new, outside investors.[506] Furthermore, Section 2.3.2.2.1 of Annex 1 (Essential Facts) describes the interest rate calculated using Formula 1 as the rate for "uncreditworthy companies". The creditworthiness of a company is established by reference to new, outside investors, on the basis of input from credit rating agencies.[507] Thus, having found that there were no new, outside investors who would invest in or make loans to Hynix, the JIA applied Formula 1, which is a market benchmark for outside investors. The JIA adopted the same approach in respect of the December 2002 extensions of loan maturities.[508]

7.308 The JIA similarly calculated the amount of benefit resulting from the October 2001 and December 2002 debt to equity swaps by reference to an outside investor standard:

> As described above, the Investigating Authorities find that at the time of the October 2001 Program, there were no investors who would additionally invest in or make loans to Hynix from a normal commercial perspective, and thus, there were no normal investments by private investors that can be reasonably compared to the equity infusions granted by the creditor banks. An investment under such a situation is not consistent with the usual investment practice of the private investors in Korea at that time. Because the situation at the time was such that a return on such investment could not be expected within a reasonable period of time, the amount of the subsidy is the full amount of the investment.[509]

7.309 Again, therefore, the JIA approached the issue from the "normal commercial perspective", *i.e.*, the perspective of the outside investor.

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[504] *See* Annex 1 (Essential Facts), paras. 103 and 306.

[505] *See* Annex 1 (Essential Facts), para. 302.

[506] We note Japan's assertion that the phrase "normal commercial perspective" has the same meaning as the equivalent phrase ("normal commercial point of view") discussed in Question 31 from the Panel.

[507] For example, the JIA referred to Hynix's "questionable" creditworthiness at para. 265 of Annex 1 (Essential Facts). On the basis of this, and other, considerations, the JIA found that there were no investors from "a normal commercial perspective", *i.e.*, from the outside investor perspective. This demonstrates that the concept of creditworthiness relates to the perspective of outside, rather than inside, investors.

[508] *See* para. 382 of Annex 1 (Essential Facts).

[509] *See* Annex 1 (Essential Facts), para. 310. *See* Annex 1 (Essential Facts), paras. 379 and 381, for the same approach in respect of the December 2002 debt-to-equity swaps.

7.310 We recall that the JIA explicitly accepted "the premise that existing creditors would possibly provide additional funding in order to maximize the recovery of credit".[510] In response to Question 98 from the Panel, Japan confirmed that, in accepting this premise, the JIA accepted "the notion that existing creditors might engage in restructuring measures that potential, outside investors would not". The JIA accepted that debt forgiveness by creditors might be "commercial" "[i]f such action is reasonably found to be unavoidable in order to maximize the debt recovery".[511] There is therefore no dispute between the parties that the inside investor standard constitutes a valid market benchmark in the context of the present case.[512] Nor is there any dispute between the parties that the investment perspectives of inside and outside investors differ. We find that an objective and impartial investigating authority, which itself has accepted that *existing* creditors might engage in restructuring measures that new, *outside* investors would not, could not properly calculate the amount of benefit conferred by restructurings undertaken by *inside* creditors on the basis of an exclusively *outside* investor benchmark.[513] Such an approach is premised on an internal inconsistency that undermines the validity and credibility of the JIA's benefit determination.[514]

7.311 Korea has also argued, and Japan has not denied, that the formula used by the JIA to calculate the amount of benefit of the debt-to-equity swaps is the formula used in other jurisdictions to calculate the subsidy benefits from outright grants.[515] Korea asserts that the panel in *EC – Countervailing Measures on DRAM Chips* found that an investigating authority's analysis of a debt-to-equity swap cannot look only at the forgiveness of debt, and ignore the value of the equity provided in return.

7.312 At para. 7.212 of the *EC – Countervailing Measures on DRAM Chips* report, the panel found that:

> 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

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[510] *See* para. 141, Annex 3 (Rebuttals and Surrebuttals).

[511] *See* Annex 3 (Rebuttals and Surrebuttals), para. 429.

[512] Accordingly, there is no need for us to make any findings on whether or not the inside investor perspective constitutes a valid market benchmark for the purpose of Articles 1.1(b) and 14 of the *SCM Agreement*. We shall instead consider whether or not the JIA applied that standard in an appropriate manner.

[513] Regarding the equity infusions, the JIA explained that it found that the situation at the time did not allow a return on investment within a reasonable period because of the finding "that the major issue in the October 2001 Program and December 2002 Program was not to recover the equity infusion, but to maximize the recovery of the credit remaining after the reduction and forgiveness" (Annex 3 (Rebuttals and Surrebuttals), para. 170). We have already noted the JIA's explicit acceptance of "the premise that existing creditors would possibly provide additional funding in order to maximize the recovery of credit". Having accepted that premise, we fail to see how the JIA could properly have assigned a value of zero to equity infused by Hynix's *existing* creditors on the basis that "the major issue in the October 2001 Program and December 2002 Program was not to recover the equity infusion, but to maximize the recovery of the credit." Indeed, the JIA itself acknowledged, and Japan confirmed, that an investment of zero value to *outside* investors might not necessarily have zero value to *inside* investors (*see* section E.7.(c) *infra*.).

[514] Japan submits that Korea's arguments overlook the discretion accorded to each WTO Member in having "considerable leeway in adopting a reasonable methodology" (*EC – Countervailing Measures on DRAM Chips*, para. 7.213). While we agree with the panel in *EC – Countervailing Measures on DRAM Chips* that investigating authorities do have considerable leeway in adopting methodologies for calculating benefit, the present issue does not concern the choice of methodologies. The JIA itself chose to determine benefit on the basis of an inside investor standard. The present issue concerns the consistency of the JIA's application of that standard. There is nothing in the report of the *EC – Countervailing Measures on DRAM Chips* panel to suggest that an investigating authority, having applied a particular benchmark when establishing the existence of benefit, may overlook that benchmark when calculating the amount of benefit (with the result that the amount of benefit is inflated).

[515] *See* Korea's First Written Submission, para. 132.

> 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.* (emphasis supplied)

7.313 We agree with this reasoning of the *EC – Countervailing Measures on DRAM Chips* panel. We note that the JIA did not explicitly treat the debt-to-equity swaps as grants. Nevertheless, the JIA did conclude that the value of the equity was zero. We recall that the JIA did so because "the major issue in the October 2001 Program and December 2002 Program was not to recover the equity infusion, but to maximize the recovery of the credit."[516] In doing so, the JIA addressed the issue from the perspective of Hynix's creditors, rather than from the position of Hynix itself. (It was Hynix's creditors that sought to maximize the recovery of their credit, not Hynix). Guided by the panel in *EC – Countervailing Measures on DRAM Chips*, we consider that such an approach erroneously overstates the amount of benefit conferred on the recipient, for it overlooks the perspective of the recipient, *i.e.*, Hynix, which must dilute the ownership of existing shareholders in return. We therefore find this to have been a further flaw in the JIA's calculation of the amount of benefit.

7.314 Before concluding, we note Japan's argument that the JIA did not have the information needed to apply an inside investor standard because the Government of Korea and other financial institutions failed to provide information regarding the financial restructuring of other companies under the CRPA. Given the calculation formula applied by the JIA, which (as shown above) focused entirely on the perspective of the outside investor, we are not persuaded that the JIA was forced to calculate the amount of benefit in the way it did because of a lack of information regarding the actions of inside investors in other restructurings. In particular, Japan has failed to identify any reference in the Final Determination to any need by the JIA to calculate the amount of benefit on the basis of facts available, *i.e.*, using an outside investor standard, because of a failure by interested parties to provide information regarding other restructurings under the CRPA.

7.315 For the above reasons, we uphold Korea's argument that the JIA improperly calculated the amount of benefit conferred by the October 2001 and December 2002 restructurings.

8. Conclusion

7.316 To conclude, we reject Korea's claim that the JIA's determination of the existence of benefit conferred by the October 2001 restructuring was inconsistent with Articles 1.1(b) and 14 of the *SCM Agreement.* However, we uphold Korea's claim that the JIA's determination of the existence of benefit conferred by the December 2002 restructuring was inconsistent with Articles 1.1(b) and 14 of the *SCM Agreement.* We also uphold Korea's claim that the JIA's calculation of the amount of benefit conferred by the October 2001 and December 2002 restructurings was inconsistent with Articles 1.1(b) and 14 of the *SCM Agreement.*

7.317 We note that Korea also made a claim under Article 19.4 of the *SCM Agreement* and Article VI:3 of the *GATT 1994.* That claim is dependent on its claims under Articles 1.1(b) and 14 of the *SCM Agreement*. To the extent that we reject those claims, there is no basis to find that Japan

[516] *See* Annex 3 (Rebuttals and Surrebuttals), para. 170.

violated *SCM* Article 19.4 and *GATT 1994* Article VI.3. To the extent that we uphold those claims, we do not consider it necessary to make a finding under those provisions.

F. ARTICLE 14 CHAPEAU / BENEFIT CALCULATION METHOD

7.318 Korea claims that Japan acted inconsistently with the *chapeau* of Article 14 of the *SCM Agreement*, which provides that:

> For 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.

7.319 Japan asks the Panel to reject Korea's claim.

1. Main Arguments of the Parties

7.320 Korea submits that the JIA calculated the amount of benefit conferred by the October 2001 and December 2002 restructurings using "methods" that were not properly "provided for" in Japan's national legislation or implementing regulations, *i.e.*, Japan's *Guidelines for Procedures Relating to Countervailing and Anti-dumping Duties* (the "*Guidelines*").

7.321 Japan argues that any complaint under the first of the three requirements set out in the *chapeau* of Article 14 is, by definition, an "as such" challenge to Japanese law. Japan submits that Korea has failed to meet the standards for an "as such" challenge set by the Appellate Body.[517]

7.322 Japan argues that Korea's claim is based on an erroneous interpretation of the *chapeau* of Article 14. According to Japan, the drafters of the *SCM Agreement* were careful not to be overly prescriptive about the methods by which Members can make a subsidy calculation. Japan argues that: (i) Korea's claim confounds the "method", which is set forth in the *Guidelines*, with the "application" of that method in this particular case; (ii) the methods provided for in the *Guidelines* are actually more detailed than the requirements of the *SCM Agreement*; (iii) the dictionary definition of the term "method" is broad, *i.e.* "a mode of procedure; a (defined or systematic) way of doing a thing", and the term "method" thus refers to "a general, systematic way of doing things rather than a specific detailed calculation program"; (iv) if the "guidelines" set forth in paragraphs (a) through (d) of Article 14 should not be interpreted as "rigid rules that purport to contemplate every conceivable factual circumstance,"[518] then it logically follows that the methods adopted by Members under Article 14 similarly cannot be "rigid rules"; (v) as the panel in *EC – Countervailing Measures on DRAM Chips* stated, an investigating authority "is entitled to considerable leeway" in adopting a reasonable methodology under Article 14;[519] and (vi) if the *SCM Agreement* did not provide for any flexibility in the methods to be provided in national legislation or implementing regulations, any novel subsidies

[517] Japan refers to Appellate Body Report, *United States –Oil Country Tubular Goods Sunset Reviews*, paras. 172-73 ("In our view, 'as such' challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. [...] We would therefore urge complaining parties to be *especially diligent* in setting out 'as such' claims in their panel requests as clearly as possible. In particular, we would expect that 'as such' claims state unambiguously the specific measures of municipal law challenged by the complaining party and the legal basis for the allegation that those measures are not consistent with particular provisions of the covered agreements. Through such straightforward presentations of 'as such' claims, panel requests should leave respondent parties in little doubt that, notwithstanding their own considered views on the WTO-consistency of their measures, another Member intends to challenge those measures, as such, in WTO dispute settlement proceedings." (emphasis original))

[518] Japan refers to Appellate Body Report, *US – Softwood Lumber IV*, para. 92.

[519] Japan refers to Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.213.

for which no authorities have any experience would not be subject to the disciplines of the *SCM Agreement*.

2. Is This an "As Such" Claim?

7.323 Japan asserts that Korea's claim under the chapeau to Article 14 is inadmissible, since it is an "as such" claim that was not included in Korea's Request for Establishment.

7.324 We agree with Japan that any claim against Japan's *Guidelines* "as such" would fall outside the Panel's terms of reference, since the *Guidelines* were not identified as a measure to be challenged in Korea's Request for Establishment. In our view, however, Korea's claim is not against the *Guidelines* "as such". Although Japan appears to have interpreted Korea's argument that "Japan's legislation and implementing regulations utterly fail to meet th[e] requirement"[520] (set forth in the chapeau to Article 14 of the *SCM Agreement*) as a claim against the legislation and implementing regulations *per se*, Korea has confirmed that the claim concerns the JIA's alleged *use* – in the investigation at issue - of a method not provided for in Japan's *Guidelines*. Thus, Korea stated at para. 40 of its Second Written Submission that "[t]he issue (...) is whether the methods actually 'used by' the JIA to calculate the alleged subsidy benefits in this case were provided for in Japan's 'national legislation or implementing regulations'." This is consistent with the description of this claim in Korea's Request for Establishment, which referred to the JIA "utiliz[ing] methods for calculating the benefit to the alleged recipient of the alleged financial contributions that were not specified in Japan's national legislation or implementing regulations."[521]

7.325 In light of the above, we reject Japan's argument that Korea has made an inadmissible claim against Japan's national legislation and implementing regulations "as such", because an "as such" claim has not been made.

3. Were the Methods Used by the JIA Provided For in Japan's Guidelines?

7.326 As a preliminary matter, we wish to address Japan's argument that the provisions of the *Guidelines* constitute "methods", and that the methods provided for in the *Guidelines* are actually more detailed than the requirements of the *SCM Agreement*. We do not consider that this argument resolves the issue presently before us, since Korea's claim is focused on the methods actually used by the JIA. Korea asserts that certain of the methods actually used by the JIA were provided for in the Final Determination, but not the *Guidelines*. If Korea were correct, then the use of those methods would be inconsistent with the preamble of Article 14, irrespective of whether or not the JIA also used *other* methods that were, or might have been, provided for in the *Guidelines*.

7.327 We recall that the panel in *EC – Countervailing Measures on DRAM Chips* found that "an investigating authority is entitled to considerable leeway in adopting a reasonable methodology" for calculating the amount of benefit.[522] In order to maintain the discretion that investigating authorities should properly enjoy when calculating benefit, the chapeau of Article 14 should not be misinterpreted to be overly stringent. In other words, investigating authorities should not be required to spell out all possible approaches to calculating benefit to the recipient in excessive detail. If they were, they might be prevented from adjusting their calculation methods to novel situations of alleged subsidization that had not been foreseen at the time they prepared their national legislation or implementing regulations. On the other hand, the chapeau of Article 14 provides for transparency and predictability. The level of detail required in setting forth "methods" must, therefore, be sufficient to satisfy the interests of transparency and predictability.

[520] *See* Korea's First Written Submission, para. 138.
[521] *See* document WT/DS336/5 (attached as Annex A-1), page 2, indent 8.
[522] *EC – Countervailing Measures on DRAM Chips*, para. 7.213.

7.328 We note that Japan has proposed a dictionary definition indicating that the word "method" means "a mode of procedure; a (defined or systematic) way of doing a thing".[523] Korea has not opposed the dictionary definition of the term "method" proposed by Japan. Since the parties agree on the definition proposed by Japan, we shall consider this definition in addressing Korea's claim.

7.329 We recall that the JIA calculated benefit amounts in respect of debt forgiveness, equity infusions and loans.[524] According to the JIA's Final Determination,[525] debt forgiveness is a non-recurring subsidy, the amount of which is allocated over several years, with interest. In the Final Determination, the JIA states that the total amount of benefit allocated to a given year was calculated using "Formula 2", whereby:

$$A_k = \frac{y/n + [y-(y/n)(k-1)]d}{1+d}$$

[where]

A_k: the amount of subsidy allocated to year k

y: the amount of subsidy

n: the useful life (year)

d: the discount interest rate

k: the year the subsidy is allocated to. The year of receipt=1, and $1<k<n$

7.330 In applying a "formula", the JIA essentially applied a mathematical rule. In doing so, we consider that the JIA applied "a mode of procedure; a (defined or systematic) way of doing a thing". Accordingly, we find that the JIA calculated the amount of subsidy resulting from debt forgiveness using a "method" in the meaning of the chapeau of Article 14.[526] That method was not provided for in Japan's *Guidelines*, which merely provide that "[i]n the case of forgiveness of a company's debt obligation, the amount of subsidy is the amount of the principal and/or interest that the government has forgiven." [527] The *Guidelines* contain no reference to the integers used in that Formula either in specific or broad terms. The JIA therefore used a method of calculating the amount of benefit that was not

[523] *See* Japan's First Written Submission, para. 528, citing the New Shorter Oxford Dictionary, page 1759.

[524] We recall our earlier finding that the JIA was entitled to treat debt-to-equity swaps as comprising new infusions of equity and loan maturity extensions as comprising new loans.

[525] *See* Annex 1 to the Final Determination, para. 102.

[526] We find support for this approach in the Report of the Appellate Body on *US – Countervailing Measures on Certain EC Products.* In that case, the Appellate Body considered the *gamma* and 'same person' methods to be "methods" within the meaning of the first sentence of the *chapeau* of Article 14:

> "... The Members of the WTO have anticipated in Article 14 of the *SCM Agreement* that the investigating authorities of WTO Members will use different "method[s]" to "calculate the benefit to the recipient" when determining the amount of countervailing duties that are imposed on an imported product to offset a subsidy. One such method used by the USDOC for the purpose of determining whether a "benefit" continues to exist following a change in ownership—the *gamma* method—was the subject of a previous dispute and a previous appeal. Another method is the "same person" method, which gives rise to this dispute and this appeal." (para. 128, underline emphasis supplied)

[527] *See* Article 13(1)(ii)A of the *Guidelines.*

provided for in its national legislation or implementing regulations, contrary to the chapeau of Article 14.

7.331 The JIA also applied Formula 2 to calculate the amount of benefit resulting from equity infusions.[528] We recall that Formula 2 is not provided for in the *Guidelines*.[529] Thus, for the reasons set forth above, we find that the JIA calculated the amount of benefit caused by equity infusions using a method not provided for in its national legislation or implementing regulations.

7.332 Regarding loans and loan maturity extensions, the JIA calculated the amount of benefit using a benchmark interest rate for non-creditworthy companies. The JIA did so on the basis of "Formula 1", whereby:

$$i_b = (1+i_f)[(1-q_n)/(1-p_n)]^{1/n} - 1$$

[where]

n: the repayment term of the loan

i_b: the interest rate for uncreditworthy companies (the benchmark interest rate)

i_f: the interest rate for creditworthy companies

p_n: the default rate of uncreditworthy companies within n years

q_n: the default rate of creditworthy companies within n years

7.333 Consistent with the analysis above in respect Formula 2, we find that Formula 1 is a "method" for the calculation of the amount of subsidy. This method was not provided for in Japan's *Guidelines*.[530] All that the *Guidelines* say, in relation to loans, is that if no *actual comparable loan is available* (to calculate the amount of the benefit) an "adequate amount of subsidy will be determined" after examining *reasonably comparable* commercial loans which are available in the market. However, as can be seen from Formula 1 (as set out above), the method used was quite different to the simplistic explanation in the *Guidelines*. Thus, we find that the JIA calculated the amount of benefit from loans and loan maturity extensions using a method that was not provided for in its national legislation or implementing regulations.

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[528] *See*, for example, para. 312 of Annex 1 (Essential Facts).

[529] Regarding equity infusions, Article 13(1)(iii)A provides that:

(a) In the case of a government-provided equity infusion, where a benefit is considered to have existed to the extent that the investment decision is inconsistent with the usual investment practice of private investors (e.g. private investors would not be able to invest under such investment conditions), including the practice for the provision of risk capital, the amount of subsidy is the amount of the balance of the government's investment over and above that of private investors under the similar investment conditions.

(b) If actual investment by private investors which is comparable to government investment is not available, an adequate amount of subsidy will be determined after examining circumstances whereby the government may make a reasonable return on the investment within a reasonable period, etc.

[530] Article 13(iv)A(b) of the *Guidelines* provides that "[i]f an actual commercial loan to the company which is comparable to a government-provided loan is not available, an adequate amount of subsidy will be determined after examining reasonably comparable commercial loans available in the domestic market".

7.334 For the above reasons, we uphold Korea's claim that, in calculating the amount of benefit, the JIA used methods that had not been provided for in Japan's national legislation or implementing regulations, contrary to the chapeau to Article 14 of the *SCM Agreement*.

G. ALLOCATION / CONTINUED EXISTENCE OF BENEFIT

7.335 Korea submits that Japan improperly levied a countervailing duty on imports entering in 2006 because, by Japan's own calculations, the alleged subsidies from the October 2001 restructuring had ceased to provide any benefit after 2005. Korea contends that Japan's imposition of countervailing duties was, therefore, inconsistent with the requirements of Articles 19.4 and 21.1 of the *SCM Agreement*.[531]

7.336 Article 19.4 of the *SCM Agreement* provides that:

> No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy *found to exist*, calculated in terms of subsidization per unit of the subsidized and exported product.[532]

7.337 Article 21.1 of the *SCM Agreement* provides that:

> A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

1. Main Arguments of Korea

7.338 Korea asserts that the subsidies allegedly received by Hynix in 2001 were all allocated by the JIA to the five-year period from 2001 to 2005. Korea states that the benefit from the October 2001 restructuring had therefore already expired at the time that countervailing duties were imposed in 2006.

7.339 Korea asserts that Article 19.4 of the *SCM Agreement* limits the duties to the subsidies that are found "to exist" — it does not permit duties to be imposed based on past subsidies that no longer "exist." Thus, a finding that subsidies existed at some time in the past (for example, during the investigation period) does not justify the imposition of countervailing duties, where those subsidies (or their benefits) no longer exist in the present.

7.340 Korea asserts that this conclusion is reinforced by the provisions of Article 19.1, which provides that an investigating authority "may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn." In other words, even if a subsidy was found to exist during the investigation period, no duty may be imposed if the subsidy is withdrawn, and thus ceases "to exist," prior to the final determination. According to Korea, the clear implication is that a countervailing duty may be imposed only where the subsidy — and its benefit — continues to exist at the time the decision to impose the duty is made. Korea argues that Article 21.1 of the *SCM Agreement* makes this requirement explicit, since it provides that "[a] countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury." Korea asserts that once the benefit of the subsidy has ceased, the duty is no longer "necessary to counteract subsidization," and may therefore not remain in force.

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[531] While Korea's Request for Establishment, First Written Submission and Second Written Submission refer to violations of Articles 19 and 21 of the *SCM Agreement* generally, para. 92 of its oral statement at the first substantive meeting explicitly states that Korea is alleging violations of Article 19.4 and 21.1 specifically. Korea confirmed the more restrictive scope of its claim in response to Question 127 from the Panel.

[532] Footnote omitted, emphasis added.

7.341 Korea denies that it has claimed that the imposition of countervailing duties requires a separate and distinct calculation of subsidies, apart from the determination of subsidization made by the investigating authority in its investigation. Korea submits that, instead, it contends only that the imposition of the duties must be consistent with the previous calculation that resulted in the subsidy determination.

2. Main Arguments of Japan

7.342 According to Japan, Korea's argument on the imposition period of countervailing duties does not follow from the *SCM Agreement* and should be rejected. Japan argues that the JIA found and calculated the amount of subsidies that existed at the time of the period of investigation, as required under Articles 19.1 and 19.4. Japan argues that there is no provision in the *SCM Agreement* that requires a determination of the imposition period in advance, or provides that an "allocation period" of a subsidy defines such imposition period. According to Japan the provision of Article 19.2 — "all requirements for imposition have been fulfilled" — clarifies that the imposition of countervailing duties under Article 19 is a separate and distinct phase that occurs after the determination of subsidization. Japan argues that an investigating authority may impose a countervailing duty only after it determines that the countervailable subsidy "was bestowed" during the period of investigation, from the information gathered with respect to a period of investigation, and that there is no additional obligation, as Korea insists, to determine that the subsidy "is being bestowed" at the time of the imposition of the duties.

7.343 Japan submits that Article VI:3 of the *GATT 1994*, which authorizes the imposition of duties on a "subsidy determined to have been granted," further clarifies that an imposition of countervailing duties shall be based on a determination which necessarily precedes the imposition of the duty. Articles 10 and 11.1 of the *SCM Agreement* recognize that investigating authorities must conduct an investigation following multiple steps to determine the subsidization and injury; as a corollary of the time that is necessary to comply with these requirements, the imposition of countervailing duties concern the amount of subsidy found to exist in the period of investigation. According to Japan, the Appellate Body has confirmed[533] that the investigating authority's determination of the conditions for the imposition of a trade remedy may be based on a past period, *i.e.*, the period of investigation.[534]

7.344 Japan submits that Korea's alleged determination method is practically impossible to apply, and would, therefore, render inutile the right of importing Members to have recourse to Part V of the *SCM Agreement*.

7.345 Japan notes that Article 10 of the *SCM Agreement* provides that countervailing duties may only be imposed pursuant to investigations. Japan contends that, recognizing the inherent period of time necessary to conduct a countervailing investigation in accordance with the terms of the *SCM Agreement*, the *SCM Agreement* provides the investigating authorities up to eighteen months after initiation of the investigation to confirm the existence of a countervailable subsidy and injury caused by it.[535] Japan asserts that the *SCM Agreement* also recognizes the need to confirm the accuracy of the information collected by the investigating authorities,[536] including through investigations in the territory of the Member under investigation.[537] Japan asserts that investigating authorities must comply with multiple procedural formalities to ensure the transparency of the

[533] Japan refers to Appellate Body Report, *Mexico-Anti-Dumping Measures on Rice*.

[534] Japan also refers to Panel Report, *EC – Tube or Pipe Fittings*, para. 7.102, "[w]e are of the view that a finding that dumping exists during a recent past IP is a finding of 'present' dumping for the purposes of the Agreement."

[535] Japan refers in this regard to *SCM Agreement*, Article 11.11.

[536] Japan refers in this regard to *SCM Agreement*, Article 12.5 ("[T]he authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by the interested Members or interested parties upon which their findings are based.").

[537] Japan refers in this regard to *SCM Agreement*, Article 12.6.

investigation and to ensure that parties are afforded due process through the provision of a summary of the "essential facts which form the basis for the decision whether to apply definitive measures,"[538] the provision of opportunities for the presentation of evidence considered relevant by interested Members and all interested parties[539], and the provision of formal public notice and written reports explaining the investigating authorities' decision.[540] Japan states that investigating authorities must also provide multiple opportunities for consultations with the Member being investigated.[541]

7.346 According to Japan, it is a corollary of the time that is necessary to comply with these requirements, that the imposition of countervailing duties under Article 19.4 of the *SCM Agreement* would concern the amount of subsidy found to exist during the period of investigation. Japan asserts that if Korea's interpretation of Article 19 were accepted, investigating authorities would not be able to conduct investigations and issue determinations as required under the *SCM Agreement*. Japan argues that if the investigating authorities had to determine the existence and degree of the subsidies as of the date of the final determination, the authorities technically would not be able to issue the final determination in compliance with these procedural requirements.

7.347 Japan also asserts that, to determine the existence of the countervailable subsidy, including the consideration of *de minimis* subsidization levels, for example, the investigating authorities must measure the degree of the subsidy per unit of the import. Japan asserts that, in order to do so, the investigating authority must collect the information of the total value of products to which the subsidy was conferred (to calculate the denominator), and the amount of subsidy (to calculate the numerator). Japan submits that to collect such information and make the necessary calculation as of the date of the final determination would be virtually impossible.

7.348 Japan asserts that Article 21.1 of the *SCM Agreement* is not applicable in the present case, as it applies only to reviews of existing countervailing measures, not the imposition of new countervailing measures.

3. Evaluation by the Panel

7.349 Korea's claim concerns the imposition of countervailing duties to offset the injurious effects of non-recurring[542] subsidies resulting from the October 2001 restructuring. In order to evaluate Korea's claim, we must determine whether the JIA was precluded by Articles 19.4 and 21.1 of the *SCM Agreement* from relying on its determination that the October 2001 subsidies conferred a benefit during the 2003 period of investigation as a justification for imposing[543] countervailing duties on imports in 2006.

7.350 At the outset, we reject Korea's claim insofar as it is based on Article 21.1 of the *SCM Agreement*. In our view, this provision applies once countervailing duties have been imposed.

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[538] Japan refers in this regard to *SCM Agreement*, Article 12.8.

[539] Japan refers in this regard to *SCM Agreement*, Article 12.1. Japan also refers to *SCM Agreement*, Article 12.10 ("The authorities shall provide opportunities for industrial users of the product under investigation . . . to provide information which is relevant to the investigation . . . .").

[540] Japan refers in this regard to *SCM Agreement*, Article 22.

[541] Japan refers in this regard to *SCM Agreement*, Articles 13 and 19.1.

[542] Japan acknowledges that the October 2001 restructuring provided non-recurring subsidies at para. 154 of its Second Written Submission. The JIA itself referred to equity infusions and debt forgiveness as non-recurring subsidies (*see* Annex 1 (Essential Facts), paras. 98 and 102). Although Japan argued that subsidies resulting from loan maturity extensions and new loans are recurring subsidies (in response to Question 96 from the Panel), in our view one-off loans are more properly treated as non-recurring subsidies.

[543] We note that Article 19.4 of the *SCM Agreement* refers to the levy of countervailing duties, rather than the imposition thereof. In a prospective countervailing duty system, such as that applied by Japan, we see no need to distinguish between the levy and imposition of countervailing duties. Furthermore, Japan has not denied that it levied countervailing duties in 2006.

It does not govern duty imposition *per se*. Consistent with the title of Article 21, which reads "*Duration and Review of Countervailing Duties and Undertakings*", Article 21.1 concerns the duration of countervailing measures, ensuring that they "remain in force" only as long as, and to the extent, necessary. The focus, therefore, is on the amount of time that a duty may *remain* in force, rather than the circumstances under which that duty initially *entered into* force. We therefore agree with the Appellate Body's analysis of this provision as imposing disciplines regarding the "continued application" of countervailing duties, which apply "after the imposition" thereof.[544]

7.351 Regarding Article 19.4 of the *SCM Agreement*, there is no disagreement between the parties that an investigating authority must establish the existence of subsidization before levying any countervailing duties. This is because Article 19.4 refers explicitly to a subsidy having been "found to exist". The question is whether subsidization must be "found to exist" at the time of imposition, or whether a determination that a subsidy was "found to exist" during some prior period suffices. In our view, the ordinary meaning of the phrase "found to exist" does not resolve this issue. We therefore turn to relevant context for guidance.

7.352 We consider that Article 19.1 provides relevant context for resolving this issue, since it provides that countervailing duties may be imposed once it is established that "subsidized imports are causing injury". In light of the present tense used in this provision, we understand this to mean that countervailing duties may be imposed if subsidized imports, *i.e.*, imports that are presently subsidized, are presently causing injury. This interpretation is entirely consistent with the purpose of countervailing duties, which is to "offset[] any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise".[545] There would be no subsidy to offset, and therefore no basis for imposing countervailing duties, if the imports at the time of duty imposition were not found to be subsidized.

7.353 Japan asserts that a finding of subsidization in respect of a past period of investigation suffices for the imposition of countervailing duties. Japan refers in this regard to Article VI:3 of the *GATT 1994*, which refers to the subsidy "*determined to have been granted*, directly or indirectly, on the manufacture, production or export of [the imported] product" (emphasis supplied). Japan also refers to a statement by the panel in *US – Lead and Bismuth II* that "a countervailing duty may only be imposed on an imported product if it is demonstrated that a (countervailable) subsidy *was bestowed* directly or indirectly on the manufacture, production or export of that merchandise" (emphasis supplied). While Japan relies on these sources because of their use of the past tense, we do not consider that the use of the past tense is necessarily at odds with a finding that countervailing duties are imposed to offset the injurious effects of present subsidization. This is because the fact that a non-recurring subsidy was formally *bestowed* in the past does not necessarily mean that that subsidy does not continue to *confer a benefit* in the present.[546]

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[544] At para. 70 of its Report in *United States – Carbon Steel*, the Appellate Body found:

> Turning to the immediate context of Article 21.3, we observe the title to Article 21 of the *SCM Agreement* reads "Duration and Review of Countervailing Duties and Undertakings". The first paragraph of Article 21 stipulates that a countervailing duty "shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury". We see this as a general rule that, *after the imposition* of a countervailing duty, the *continued application* of that duty is subject to certain disciplines. These disciplines relate to the duration of the countervailing duty ("only as long as … necessary"), its magnitude ("only … to the extent necessary"), and its purpose ("to counteract subsidization which is causing injury"). Thus, the general rule of Article 21.1 underlines the requirement for periodic review of countervailing duties and highlights the factors that must inform such reviews. (emphasis supplied)

[545] *SCM Agreement*, note 36.

[546] We note that the term "countervailing duty" is similarly defined using the past tense, in the sense that note 36 to the *SCM Agreement* refers to "a special duty levied for the purpose of offsetting any subsidy

7.354 We note that Article VI of the *GATT 1994* was referred to by the panel in *EC – Tube or Pipe Fittings* when it found, in the context of anti-dumping, that "the point [of anti-dumping duties] is to offset present dumping."[547] Likewise, the Appellate Body found in *Mexico – Anti-Dumping Measures on Rice* that "the conditions to impose [an anti-dumping duty] are to be assessed with respect to the current situation".[548] In light of the *Declaration On Dispute Settlement Pursuant to the Agreement On Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*, which provides for "the consistent resolution of disputes arising from anti-dumping and countervailing duty measures", it is entirely reasonable and appropriate to interpret Article VI:3 of the *GATT 1994*, and the provisions of the *SCM Agreement*, in a way that recognizes that the point of countervailing duties is to offset present subsidization.

7.355 In light of these contextual considerations, we conclude that Article 19.4 of the *SCM Agreement* provides that countervailing duties may only be imposed if there is present subsidization at the time of duty imposition.

7.356 The obligation to establish present subsidization does not mean that investigating authorities are prevented from establishing the existence of subsidization (and injury and causing) by reference to data taken from a past period of investigation. To the contrary, given the need for investigating authorities to issue questionnaires, collect reliable and verifiable data, process and verify that data, and safeguard the due process rights of interested parties, investigating authorities have no choice but to establish the existence of subsidization (and injury) on the basis of past periods of investigation. Thus, countervailing duties may be imposed on the basis of the investigating authority's review of a past period of investigation. We are not suggesting that an investigating authority is somehow required to conduct a new investigation at the time of imposition, in order to confirm the continued existence of the subsidization found to exist during the period of investigation. That would defeat the very purpose of using periods of investigation in the first place.

7.357 However, the use of a past period of investigation does not negate the need for an investigating authority to be satisfied that there is present subsidization. Rather, the historical data from the period of investigation "is being used to draw conclusions about the current situation,"[549] "[b]ecause the conditions to impose [a duty] are to be assessed with respect to the current situation".[550] In this sense, the situation during the period of investigation is used as a proxy for the situation pertaining "current[ly]", at the time of imposition. In the case of non-recurring[551] subsidies, if the review of the period of investigation indicates that the subsidy will no longer exist at the time of imposition, the existence of subsidization during the period of investigation will not suffice to demonstrate "current" subsidization at the time of imposition.

7.358 In the present case, the JIA used a past period of investigation to establish the existence of subsidization. That period of investigation covered the year 2003. The JIA's determination of subsidization in 2003 was made based on an allocation of the benefit conferred by certain of the non-recurring subsidies provided by the October 2001 restructuring from 2001 to 2005. If the JIA had imposed countervailing duties in 2004, or 2005, its determination in respect of the period of

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bestowed directly or indirectly upon the manufacture, production or export of any merchandise". Again, though, the fact that the formal bestowal of a subsidy occurred in the past does not necessarily preclude the possibility that imports continue to benefit from this subsidy in the present.

[547] *EC – Tube or Pipe Fittings*, para. 7.102.

[548] *Mexico – Anti-Dumping Measures on Rice*, Report of the Appellate Body, para. 165.

[549] *Mexico – Anti-Dumping Measures on Rice*, Report of the Panel, para. 7.58.

[550] *Mexico – Anti-Dumping Measures on Rice*, Report of the Appellate Body, para. 165.

[551] We recall that the present case concerns non-recurring subsidies provided through the October 2001 restructuring. Our findings would not necessarily apply to investigations of recurring subsidies, which by nature lend themselves to a different type of analysis.

investigation would have established that there was "current[ly]" subsidization in either of those two years, as benefit from those subsidies was still being conferred in those years. This is because, in investigating the period of investigation, the JIA had allocated the benefit of 2001 subsidies over the period 2001 to 2005. Once the JIA sought to impose countervailing duties in 2006, however, its finding of subsidization in respect of those subsidies for the period of investigation no longer demonstrated that there was "current[ly]" subsidization. This is because one important element of the JIA's determination in respect of the period of investigation was that certain of the 2001 subsidies needed to be allocated, and would no longer confer any benefit in 2006.

7.359 Japan denies that, in analyzing the period of investigation, the JIA made any finding regarding the existence of subsidization in 2006. In particular, Japan denies that the JIA had fully allocated the benefit from certain non-recurring subsidies over the period 2001 to 2005. Japan asserts that the JIA determined that the amount of the October 2001 subsidy to be allocated to the period of investigation was one-fifth of the originally granted amount of the non-recurring subsidy, and nothing more.

7.360 On our review of the JIA's determination, we do not think that it is correct to say that the JIA did not find that the subsidy would be of a certain amount, each year, for five years. We note that the JIA allocated the benefit conferred by certain of the non-recurring subsidies provided by the October 2001 restructuring using the formula set forth in section 2.3.2.2.2 of Annex 1 (Essential Facts). One of the integers in that formula is "n", which corresponds to "the useful life" of the subsidized production facilities. The JIA had determined that the duration of "n" should be five years, in accordance with certain provisions of Korean tax law.[552] In our view, the use of a five-year allocation period is a finding (even if only implicit) that the benefit will expire after a period of five years.[553] The JIA's determination does not suggest that there might continue to be a subsidy after the period over which the benefit conferred by that (non-recurring) subsidy has expired.[554]

4. Conclusion

7.361 In light of the above considerations, and having regard to the JIA's decision to allocate the benefit conferred by certain of the non-recurring subsidies resulting from the October 2001 restructuring from 2001 to 2005, we find that Japan imposed countervailing duties in 2006 on imports which the JIA itself had found were not subsidized at the time of imposition. Accordingly, in respect of those non-recurring subsidies whose benefit was allocated using the abovementioned Formula 2, we conclude that Japan levied countervailing duties "in excess of the amount of the subsidy found to exist", contrary to Article 19.4 of the *SCM Agreement*.

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[552] *See* Annex 1 (Essential Facts), para. 99 and footnote 96.

[553] For this reason, we are not persuaded by Japan's arguments regarding the practical difficulties resulting from an obligation on investigating authorities to determine the existence of subsidization at the time of imposition. We have already noted that investigating authorities may use past periods of investigation, and that their findings in respect of such periods of investigation may be used for a proxy the situation at the time of imposition. The point, though, is that an investigating authority's determination in respect of subsidization during the period of investigation may indicate that there will not be (or is not) subsidization at the time of imposition. If that is the case, countervailing duties may not be imposed on the basis of the investigating authority's determination of subsidization during the period of investigation.

[554] We note Japan's argument that the useful life of production facilities may change over time, such that the allocation factor ("n") might also change, thereby affecting the calculation of the residual amount of benefit. While we do not exclude the possibility that the allocation factor might change, Japan has not presented any evidence to suggest that the five-year allocation period initially applied by the JIA had changed by the time that Japan imposed countervailing duties in 2006. In the absence of any such evidence, the JIA's finding that the benefit conferred by the October 2001 restructuring would expire at the end of 2005 remained valid.

H. SPECIFICITY

7.362 Korea claims that Japan acted inconsistently with Article 2 of the *SCM Agreement* because the JIA improperly failed to consider whether the October 2001 and December 2002 restructurings were made using the same procedures and on the same terms that were generally available to other companies in a similar condition.

7.363 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". Although Korea does not specify the paragraph(s) or sub-paragraph(s) of Article 2 forming the basis of its claim, Japan confirmed in response to Question 48 from the Panel that the JIA had made a finding of *de jure* specificity within the meaning of Article 2.1(a) of the *SCM Agreement*. Article 2.1(a) provides:

> 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.

1. Main Arguments of Korea

7.364 Korea asserts that the JIA failed to consider whether the restructuring transactions "were made using the same procedures and on the same terms that were generally available to other companies in a similar condition".[555] According to Korea: (i) the same basic rules that governed Hynix's restructurings — as embodied in the Workout Agreement and later in the Corporate Restructuring Promotion Act — were the same as the rules that governed the restructuring of other Korean companies; (ii) the type of reports by financial experts that were relied upon in the Hynix restructurings were also relied upon in the restructurings of other Korean companies; (iii) there is no evidence that the terms of the Hynix restructuring transactions were any more favourable to Hynix than the terms of other restructurings involving similarly situated companies in Korea; and (iv) there is no evidence that the role of the government and the government-directed banks in the Hynix restructuring was any different from their role in the thousands of similar situations occurring in Korea at the same time. Korea contends that, by focusing microscopically on Hynix, the JIA missed the broader picture. Korea submits that, in the absence of evidence that the role of the government and the government-directed banks in the Hynix restructuring was any different from their role in the thousands of similar situations occurring in Korea at the same time, the JIA's determination cannot be upheld.

7.365 According to Korea, the JIA's determination is not saved by the fact that the JIA considered the restructurings, and not the CRPA, to be the relevant programme for purposes of the specificity analysis. Neither Japan nor the JIA presented "positive evidence" demonstrating why the restructurings, and not the CRPA, constituted the relevant programme. If the restructuring programmes reflected only the normal operation of the CRPA, then the JIA should have considered the CRPA, and not the restructurings, as the relevant programme. By focusing on the specific restructurings to find specificity, the JIA assumed what it was supposed to "substantiate" with "positive evidence".

7.366 Furthermore, Korea asserts that the approach taken by the JIA in this case would effectively read the specificity requirement out of the *SCM Agreement*. Korea states that investigating authorities

[555] *See* Korea's First Written Submission, para. 283, sixth indent.

would, for example, no longer need to show that government-provided loan programmes were limited to specific enterprises in law or in fact, as Article 2 of the *SCM Agreement* might appear to require. According to Korea, the investigating authorities could simply state that their focus was on "specific transactions with a specific corporation," and avoid any discussion of the overall programme under which the loans were made.

2. Main Arguments of Japan

7.367 Japan relies on the finding of the panel in *EC – Countervailing Measures on DRAM Chips* that the May 2001 and October 2001 Programs conferred subsidies specific to Hynix. According to Japan, that panel's findings on this issue are persuasive and apply with equal force in the present dispute, and that panel's analysis applies equally to the December 2002 restructuring.[556] With respect to Korea's argument that the "legal framework" that governed Hynix's restructurings was the same as the rules that governed the restructuring of other Korean companies, Japan notes that the JIA did not find that the CRPA was itself a government subsidy programme, and argues that whether or not other companies might have availed themselves of the CRPA is therefore irrelevant. Japan also disputes the relevance of Korea's argument that Hynix was not treated any more favourably than any other Korean companies going through restructuring. According to Japan, whether or not Hynix received more favourable treatment than other companies going through restructuring may be relevant to the question of whether the measures conferred a benefit, but not to whether the measures were specific under Article 2. Japan considers that statements made by certain interested parties in their responses to the JIA's subsidy questionnaire demonstrate that the October 2001 and December 2002 Programs were specific to Hynix. Japan also alleges that during the investigation, the Government of Korea and other interested parties refused to submit information on other companies subject to CRPA.

3. Findings of the JIA

7.368 The JIA made the following finding of specificity in respect of the October 2001 restructuring:

> The Investigating Authorities find that the October 2001 Program is specific within the meaning of Article 2 of the *SCM Agreement* because the October 2001 Program was a bailout measure for a specific company, *i.e.*, Hynix.[557]

7.369 The JIA made an identical finding in respect of the December 2002 restructuring.[558] In response to comments by KEB, JIA made the following additional statement on the specificity of the October 2001 restructuring:

> The October 2001 Program was a specific measure by the government for the support of Hynix, and clearly has specificity as provided in Article 2 of the *SCM Agreement*. Additionally, the rebuttal by KEB cannot be accepted unless the CRPA itself is considered as a government subsidy system. Because the Investigating Authorities have not found that the CRPA itself qualifies as a governmental subsidy system, the rebuttal cannot be accepted.[559]

4. Evaluation by the Panel

7.370 The main issue raised by Korea is whether or not the JIA properly assessed specificity at the level of the individual restructurings, rather than at the level of the CRPA. Korea argues that "[i]f the

[556] Japan refers to Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.231.
[557] *See* Annex 1 (Essential Facts), para. 301.
[558] *See* Annex 1 (Essential Facts), para. 378.
[559] *See* Annex 3 (Rebuttals and Surrebuttals), para. 444.

restructuring programs reflected only the normal operation of the CRPA, then the JIA should have considered the CRPA, and not the restructurings, as the relevant program".[560]

7.371 Faced with a very similar argument, the *EC – Countervailing Measures on DRAM Chips* panel made the following finding in respect of the finding by the European Communities that *inter alia* the October 2001 restructuring was specific:

> 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 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*.[561] (emphasis in original)

7.372 We agree with this finding. In our view, there was sufficient evidence on the JIA's record indicating that the CRPA merely provided the procedural framework within which the October 2001 and December 2002 restructurings took place, rather than actually determining the terms of those restructurings. In other words, the restructurings did not "reflect only the normal operation of the CRPA", as alleged by Korea. Thus, at note 303 to Annex 1 (Essential Facts), the JIA observed that, according to Article 1 of the CRPA, the purpose of the CRPA is "to facilitate the ordinary corporate restructuring under the market functions by (1) enhancing the accounting transparency of enterprises and setting the systems for efficiently managing credit risks by the financial institutions, while (2) prescribing matters necessary to make the corporate restructuring facilitated swiftly and smoothly." While Article 1 refers to procedural matters such as enhanced transparency and facilitation,[562] there is no indication that the purpose of the CRPA was to determine the substantive terms under which companies are to be restructured. Instead, evidence on the JIA's record indicated that the substantive terms of restructurings were the prerogative of the Councils for Creditor Financial Institutions, which were set up for each restructured company separately.[563] Korea has not identified any record evidence indicating that the terms of the restructurings were determined by the provisions of the CRPA *per se*.[564] For this reason, we are not persuaded by Korea's argument that the October 2001 and December 2002 restructurings "reflected only the normal operation of the CRPA".

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[560] *See* Korea's Second Written Submission, para. 250.

[561] *See EC – Countervailing Measures on DRAM Chips*, Panel Report, para. 7.231.

[562] Accordingly, the JIA referred to the CRPA as providing the "institutional framework" for the restructurings. *See*, for example, para. 271 of Annex 1 (Essential Facts).

[563] We refer in this regard to the record evidence set forth at paras. 446 and 447 of Japan's First Written Submission.

[564] To the contrary, Korea emphasises the company-specific nature of the restructuring process. Thus, Korea notes the complex nature of the analysis of whether or not the going concern value of the relevant company exceeds its liquidation value, necessitating recourse to outside consultants (*see*, for example, Korea's First Written Submission, paras. 99 and 100), and requiring creditors to assess the company's operational

7.373 Furthermore, we recall that we have upheld the JIA's determination of entrustment or direction in respect of the October 2001 restructuring. The JIA's determination was based, in part, on an intermediate factual conclusion that the Government of Korea had the political intent to save a single company, Hynix, from insolvency. In general, subsidies which are provided pursuant to government entrustment or direction motivated by an intent to save a single company from insolvency might reasonably be found to be specific to that company.

7.374 In reviewing Korea's claim, we have given careful consideration to Korea's argument that the JIA's approach to specificity would mean that investigating authorities would no longer need to show that programmes were specific, but could focus instead on specific transactions under those programmes. As a general matter, though, if an investigating authority were to focus on an individual transaction, and that transaction flowed from a generally available support programme whose normal operation would generally result in financial contributions on pre-determined terms (that are therefore not tailored to the recipient company), that individual transaction would not, in our view, become "specific" in the meaning of Article 2.1 simply because it was provided to a specific company. An individual transaction would be "specific", though, if it resulted from a framework programme whose normal operation (1) does not generally result in financial contributions, and (2) does not pre-determine the terms on which any resultant financial contributions might be provided, but rather requires (a) conscious decisions as to whether or not to provide the financial contribution (to one applicant or another), and (b) conscious decisions as to how the terms of the financial contribution should be tailored to the needs of the recipient company.

7.375 For the above reasons, we conclude that the JIA properly found that the October 2001 and December 2002 restructurings were tailored for, and therefore specific to, Hynix. We therefore reject Korea's claim accordingly.

I. INTERESTED PARTIES

1. Arguments

(a) Korea

7.376 Korea claims that the JIA acted inconsistently with Article 12 of the *SCM Agreement* by treating a number of financial institutions that provided financing to Hynix as "interested parties" and then making findings on the basis of facts available, rather than creditor-specific information for the individual financial institutions, when some of those institutions failed to provide information requested by the JIA. Korea argues that, by its terms, Article 12.7 of the *SCM Agreement* applies only when an "interested party" fails to provide necessary information, and does not permit the use of facts available when parties who are not "interested parties" fail to provide requested information. According to Korea, only parties with an interest in the outcome of an investigation can be treated as "interested parties".

7.377 According to Korea, an "interested party" must by definition have an "interest" in something. The fact that an investigating authority is "interested" in a particular entity might make the entity a "party of interest", but does not make that entity an "interested party" in ordinary English usage. Korea notes that the *SCM Agreement* does not explicitly define the types of "interests" that would be sufficient to treat an entity as an "interested party." Nevertheless, Korea argues, the scope of

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strengths and weaknesses (*see* Korea's First Written Submission, para. 93). Korea also explains that, once the decision to restructure debt is made, the creditors must decide how the loss will be distributed (*see* Korea's First Written Submission, para. 22). Thereafter, Korea notes that "further complications" arise when shareholder and management interests enter the equation (*see* Korea's First Written Submission, para. 40). In the absence of any evidence from Korea, it is simply untenable that all of these variables are governed by the "normal operation" of the CRPA.

cognizable "interests" is readily apparent from the *SCM Agreement*. Korea submits that all of the entities that are specifically identified as "interested parties" in Article 12.9 of the *SCM Agreement* are directly affected by the outcome of investigations, and therefore have a clear "interest" in the conduct of the proceedings. Korea argues that the language of the second sentence of Article 12.9 permitting investigating authorities to "allow" certain entities to participate in investigations as interested parties makes sense only where the entities have requested to participate in the proceeding. Korea contends that Articles 12.3 of the *SCM Agreement*, which presupposes that "interested parties" must have a "case" to present to the investigating authorities, and Article 12.8 of the *SCM Agreement*, which requires that investigating authorities provide "interested parties" with an adequate opportunity to "defend their interests", would make no sense if the term "interested parties" were defined to include entities that had no "interests" in the proceeding, and thus no "case" to present. Finally, Korea argues that the provisions of the *SCM Agreement* regarding "facts available" would be patently unfair and violate procedural due process if the parties who do have an interest in the outcome of the case could have their interests prejudiced by the non-responsiveness of entities that have no interest in the outcome of the case.

7.378 Korea contends that while the financial institutions that were creditors of Hynix had a financial interest in Hynix at one point, it is not clear that any of those institutions had a continuing financial interest in Hynix at the time of the JIA's investigation, and it is also not clear that whatever interest they may have had in Hynix translated into an interest in the outcome of the JIA's investigation. In these circumstances, Korea argues, the JIA failed to establish a factual foundation for concluding that any of the financial institutions to which it sent questionnaires had an interest in the outcome of the investigation.

(b) Japan

7.379 Japan claims that Korea has failed to present a *prima facie* case that the inclusion of Hynix's creditors was inconsistent with any provision of the *SCM Agreement* or the *GATT 1994*, and that Korea's claim should be rejected.

7.380 According to Japan, "interested parties" include any parties "having an interest or involvement in matters which are subject to the investigation".[565] Japan contends that Korea's argument that a party must have an interest in the outcome of the investigation in order to be designated as an "interested party" cannot be sustained in light of the provisions of Article 12.9 of the *SCM Agreement* and the context of the entire *SCM Agreement*. Japan agues that the ordinary meaning of "interested parties" is broad enough to encompass any party "having an interest or involvement; not impartial."[566] Japan submits that the definition of "interested parties" in Article 12.9(i) and (ii) is indicative and not exhaustive, and the last sentence of Article 12.9 clarifies that the investigating authorities in a countervailing duty investigation retain the discretion to include domestic or foreign parties as interested parties. According to Japan, Korea's interpretation would actually exclude entities specifically listed in Article 12.9 from being included as "interested parties" in certain circumstances. Japan claims that Article 23 of the *SCM Agreement* implies that there may be interested parties that are not "directly and individually affected by the administrative actions". Japan argues that Korea's interpretation would lead to investigating authorities facing unreasonable difficulty in collecting information and finding facts.

2. Evaluation by the Panel

7.381 The JIA considered that it was reasonable to include sixteen financial institutions that provided financing to Hynix as "interested parties" in the investigation.[567] The JIA sent

[565] *See* Japan's First Written Submission, para. 551.
[566] Japan refers in this regard to the Concise Oxford Dictionary, p. 737.
[567] *See* Annex 3 (Rebuttals and Surrebuttals), paras. 29 and 39.

questionnaires to these financial institutions.[568] When some of those institutions failed to respond to the questionnaires or otherwise did not provide the information requested, the JIA made certain findings in the Final Determination on the basis of facts available.[569]

7.382 The use of facts available in countervailing duty investigations is governed by Article 12.7 of the *SCM Agreement*, which provides that:

> In 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. (emphasis supplied)

7.383 The circumstances under which an investigating authority may make its determination on the basis of facts available are limited, by the terms of Article 12.7, to cases in which an interested Member or "interested party" refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation.

7.384 Article 12.9 of the *SCM Agreement* provides that:

> For the purposes of this Agreement, "interested parties" shall include:
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> (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and
>
> (ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.
>
> This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

7.385 This claim raises two issues. First, must an investigating authority establish that a party has an interest in the outcome of an investigation in order to include that party as an "interested party" in the investigation? If so, did the JIA properly establish that the financial institutions it included as "interested parties" had an interest, or may have had an interest, in the outcome of the investigation? We will address these issues in turn.

7.386 We note at the outset that neither Article 12.9 nor any other provision of the *SCM Agreement* states that an investigating authority must establish that a party has an interest in the outcome of an investigation in order to include that party as an "interested party". The lack of any such requirement in the text of the *SCM Agreement* serves, in our view, as an indication that no such requirement exists. However, we recognize that such silence does not exclude the possibility that such a requirement might exist by necessary implication, and it is still necessary for us to give meaning to the term "interested party".[570] Korea argues such a requirement arises by implication from the ordinary meaning of the term "interested party", from the types of parties specifically listed in Article 12.9(i) and (ii), from the use of the term "allowing" in the second sentence of Article 12.9, from the nature of

[568] *See* Annex 1 (Essential Facts), para. 12. The JIA only treated the 16 creditors to which it sent its questionnaire as "interested parties".

[569] The JIA did not apply facts available in respect of any creditors that it had not defined as "interested parties".

[570] Appellate Body Report, *US – Carbon Steel*, para. 65.

the rights provided for in Articles 12.3 and 12.8, and from Article 12.7. We will examine these contentions in turn.

7.387 According to Korea, an "interested party" must by definition have an "interest" in something. Korea also submits that the fact that an investigating authority is "interested" in a particular entity might make the entity a "party of interest", but does not make that entity an "interested party" in ordinary English usage. We note that the term "interested" means, among other things, "having an interest or involvement".[571] We agree that an interested party must by definition have an "interest" or "involvement" in something in order to be an "interested party". However, we do not believe that "something" must, by definition, be the outcome of the investigation. We consider that a party may be an interested party when it was engaged, or involved, in the matter under investigation to such an extent that it has an interest in that matter. It is entirely plausible, therefore, that the "something" might instead be the alleged subsidies at issue in a countervailing duty investigation, in the sense that a party was involved in the provision of such subsidies.[572]

7.388 Korea argues that all of the entities that are specifically identified as "interested parties" in Article 12.9(i) and (ii) are directly affected by the outcome of investigations, and therefore have a clear interest in the conduct of the proceedings. Assuming that Article 12.9(i) and (ii) identify certain categories or classes of parties that would be directly affected by the outcome of investigations, there is nothing in Article 12.9 to suggest that the meaning of "interested parties" should be restricted to the types of parties identified in Article 12.9(i) and (ii). The first sentence of Article 12.9 provides that "interested parties" "shall include" those parties referred to in Article 12.9(i) and (ii), and thus establishes certain minimum requirements. The second sentence of Article 12.9 then immediately clarifies that "[t]his list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties." We do not think that Articles 12.9(i) and (ii) are an exclusive list of parties who can be taken to be "interested parties". In our view, the fact that sub-paragraphs (i) and (ii) identify the most obvious instances where parties will be "interested" does not mean that other forms of interest should be excluded from the category of "interested parties". One cannot derive from a selection (in sub-paragraphs (i) and (ii)) of the most obvious examples of "interested party" that less obvious examples should not also be treated as "interested parties". We are therefore unable to accept Korea's argument that Article 12.9(i) and (ii) give rise to the necessary implication that "interested parties" must by definition have an interest in the outcome of an investigation.

7.389 Furthermore, we note that the interest of any particular party in the outcome of an investigation can be specific to it, and that parties have diverse "interests". Nor do we appreciate how Korea's formulation of the test, *viz* that a party must have an interest in the outcome of the investigation to be an "interested party", is capable of differentiating between parties with different interests. One might try to overcome this by applying adjectives such as "direct" or "significant" to the word "interest", however that only underlines the proposition that one party's interest can be different to that of another party.

7.390 In response to a question from the Panel, Korea suggested that the use of the word "allowing" in the second sentence of Article 12.9 implies that there must be a request from a party before it can be included as an "interested party". We disagree. The term "allowing" in the second sentence of Article 12.9 could be understood as referring to a Member allowing, through national legislation or implementing regulations, certain parties to participate in investigations as interested parties. The

[571] Concise Oxford Dictionary, p. 737.

[572] In this connection we note that footnote 9 of the *Tokyo Round Subsidies Code* defined the term "interested party" as follows: "Any 'interested signatory' or 'interested party' shall refer to a signatory or a party *economically affected by the subsidy in question*." (emphasis added) The fact that the drafters of the *SCM Agreement* decided not to include this definition may reflect an intent of the drafters to define the term "interested parties" more broadly for the purposes of the *SCM Agreement.*

term "allowing" could equally be understood as referring to an investigating authority allowing such entities to be included as interested parties following a request or suggestion to that effect from an applicant. In addition, as Japan noted in response to the same question from the Panel, there are a variety of provisions in the *SCM Agreement* which include the phrase "upon request,"[573] and given that the drafters of the *SCM Agreement* explicitly used the phrase "upon request" where a request is required or contemplated, the lack of the use of this phrase in Article 12.9 supports the interpretation that the inclusion of a party as an interested party is not predicated on a request.[574]

7.391 Korea argues that Articles 12.3[575] and 12.8[576] of the *SCM Agreement* presuppose that "interested parties" must have a "case" to present and "interests to defend", which would make no sense if the term "interested parties" were defined to include entities that had no "interests" in the proceeding. In our view, Articles 12.3 and 12.8 relate to interested parties *participating in an investigation*. Interested parties participating in an investigation will generally have a "case" to present and "interests to defend". However, Articles 12.1.2[577] and 12.2[578] of the *SCM Agreement* presuppose that there are interested parties that do *not* participate in an investigation. Following the logic of Korea's argument, such interested parties would not be "interested parties". This is inconsistent with the terms of Articles 12.1.2 and 12.2. We are therefore unable to accept Korea's argument that Articles 12.3 and 12.8, which relate to interested parties participating in an investigation, give rise to the implication that "interested parties" must by definition have an interest in the outcome of an investigation.

7.392 Moreover, we believe that prior Appellate Body and panel reports relating to Article 12.7, the provision of the *SCM Agreement* governing the use of facts available, undermine rather than support Korea's contention that only parties with an interest in the outcome of the investigation may be included as "interested parties". In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body

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[573] For example, Article 21.2 of the SCM Agreement, first sentence, provides that: "The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, *upon request by any interested party* which submits positive information substantiating the need for a review." (emphasis added)

[574] As regards Article 12.9, we would further note that, if only parties with an interest in the outcome of an investigation may be included as "interested parties", the second sentence of Article 12.9 would instead read:

> This list shall not preclude Members from allowing domestic or foreign parties *known to the investigating authorities to have an interest in the investigation* other than those mentioned above to be included as interested parties.

This is not how Article 12.9 was drafted.

[575] Article 12.3 provides that: "The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 4, and that is used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information."

[576] Article 12.8 provides that: "The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests."

[577] Article 12.1.2 provides that: "Subject to the requirement to protect confidential information, evidence presented in writing by one interested Member or interested party shall be made available promptly to other interested Members or *interested parties participating in the investigation*." (emphasis added)

[578] Article 12.2 provides that: "Interested Members and interested parties also shall have the right, upon justification, to present information orally. Where such information is provided orally, the interested Members and interested parties subsequently shall be required to reduce such submissions to writing. Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and *interested parties participating in the investigation*, due account having been given to the need to protect confidential information." (emphasis added)

explained that Article 12.7 "is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation."[579] In *EC – Countervailing Measures on DRAM Chips*, the panel observed that "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*."[580] Thus, previous Appellate Body and panel reports have underscored the important role that Article 12.7 serves in ensuring that investigating authorities are able to obtain the information necessary to make proper determinations. Requiring an investigating authority to establish that a party has an interest in the outcome of an investigation as a precondition for treating that party as an "interested party" could preclude investigating authorities from making proper determinations. In our view, the scope of the right of investigating authorities to include parties as "interested parties" in investigations must be interpreted with a view to ensuring that investigating authorities are able to obtain the "necessary information" needed to arrive at a determination.[581] Therefore, we do not believe that Article 12.7 gives rise to the necessary implication that an investigating authority must establish that a party has an interest in the outcome of an investigation in order to include that party as an "interested party" in the investigation.

7.393 Korea argues that the provisions of the *SCM Agreement* governing the use of facts available would be patently unfair and violate procedural due process if the parties who do have an interest in the outcome of the case could have their interests prejudiced by the non-responsiveness of entities that have no interest in the outcome of the case. We do not see how this argument supports Korea's contention that only those parties with an interest in the outcome of the investigation can be included as "interested parties". Rather, we see this argument as relating to the circumstances under which an investigating authority may use facts available to make findings in respect of one interested party based on the failure of a third party to provide necessary information. In certain cases, an investigating authority might be required to seek information from third parties that are not designated as "interested parties". In the event that such third parties do not respond to the investigating authority's enquiries, the investigating authority would still need to reach its conclusions on the basis of the evidence on the record. The use of facts on the record in such cases is not punitive. It is simply reflective of the investigating authority's need to complete its investigation.

7.394 For the foregoing reasons, we are not persuaded that only those parties with an interest in the outcome of an investigation can be included as "interested parties" in an investigation.[582] Accordingly, we do not consider it necessary or appropriate to rule on whether the JIA properly

[579] Appellate Body Report in *Mexico – Anti-Dumping Measures on Rice*, para. 293.

[580] Panel Report in *EC – Countervailing Measures on DRAM Chip*, para. 7.61.

[581] In our view, this consideration carries considerable weight in cases involving entrustment or direction, where the relevant information may be held only by the third parties who have been allegedly been entrusted or directed.

[582] Even if the phrase "interested party" were interpreted to mean parties with an interest in the outcome of the investigation, we recall that the JIA had identified the relevant Other Creditors as interested parties at the very beginning of its investigation, for the purpose of identifying entities to which it should send its questionnaire. At that time, the JIA had information indicating that the relevant Other Creditors were, or had been, creditors of Hynix, and could possibly have become shareholders in Hynix through the debt-to-equity swaps in the two restructurings at issue. As Korea itself argues, the exact status of the Other Creditors was "not clear" (*see* para. 161 of Korea's First Written Submission). In these circumstances, at the very least the JIA was entitled to treat these Other Creditors as interested parties for the purpose of distributing its questionnaire. The Other Creditors might then, in their responses, have provided the JIA with information indicating that they no longer had an interest in the outcome of the investigation. They did not do so. In these circumstances, we consider that the JIA could properly have continued to treat these Other Creditors as interested parties for the remainder of the investigation. Furthermore, the Other Creditors may be said to be interested in the outcome of the investigation in less direct ways, in the sense that the matters under investigation, which included the commercial reasonableness of their investment decisions, could potentially impugn their commercial reputations.

established that the financial institutions it included as "interested parties" had an interest, or may have had an interest, in the outcome of the investigation.

7.395 Korea has not challenged the JIA's inclusion of the financial institutions as "interested parties" on any other grounds. Nor has Korea made a claim in respect of the JIA's choice of the 16 creditors selected to receive the questionnaire (and subsequently treated as "interested parties").[583]

7.396 Korea has argued that the JIA improperly applied facts available, and improperly made adverse inferences due to inadequate cooperation by interested parties. Regarding adverse inferences, the Panel asked Korea to "indicate precisely, with citations, which 'adverse inferences' Korea is referring to in this claim."[584] In response, Korea submitted a list identifying the JIA's use of "facts available."[585] The phrase "adverse inference" is not used in Part V of the *SCM Agreement*. In using that term, we understand Korea to be referring to a situation where an investigating authority applies facts available in a way that is deliberately detrimental to the interests of the party at issue. Making an adverse inference is therefore not the same as applying facts available. Thus, citing instances of the application of facts available is not the same as referring to adverse inferences. Since Korea made no attempt to explain how the JIA allegedly derived adverse inferences from the use of facts available identified by Korea, we consider that Korea has failed to substantiate any claim regarding the JIA's alleged use of adverse inferences.[586]

7.397 Regarding the JIA's allegedly improper use of facts available, Korea has not substantiated any arguments as to why the use of facts available in any given instance was improper. We presume that Korea therefore relies on a general argument that the use of facts available was improper because the entities in respect of which facts available were applied did not constitute "interested parties". This argument fails, for we have already rejected Korea's argument that the relevant Other Creditors did not constitute "interested parties".

7.398 Accordingly, we find that Korea has failed to establish that the JIA acted inconsistently with Article 12 of the *SCM Agreement* by including certain financial institutions as "interested parties", and using facts available for those financial institutions that failed to provide information.

J. CAUSATION OF INJURY

1. Arguments

(a) Korea

7.399 Korea claims that the JIA acted inconsistently with Articles 15.5 and 19.1 of the *SCM Agreement* by failing to demonstrate that the allegedly subsidized imports were, "through the effects of subsidies", causing injury within the meaning of the *SCM Agreement*. Korea argues that it is not sufficient for an investigating authority to demonstrate that the volume of subsidized imports has increased, or that the subsidized imports have caused prices to decrease, or even that the subsidized imports have caused material harm to the domestic industry. According to Korea, Article 15.5, read together with footnote 47, requires a demonstration that the volume or price of the

[583] Although Korea did make a number of references to the manner in which the 16 creditors were selected during the course of these proceedings, there is no separate claim (under Article 12.1, for example) regarding this matter in our terms of reference.

[584] *See* Question 56 from the Panel.

[585] *See* Attachment 2 to Korea's Second Written Submission.

[586] Korea referred to other alleged adverse inferences at note 144 of its First Written Submission. For the most part, those references concern measures other than the two restructurings at issue in these proceedings. Furthermore, where those references do concern the October 2001 or December 2002 restructurings, they are simple references to instances where the JIA applied facts available. As noted above, applying facts available is not the same as drawing adverse inferences.

subsidized imports, and the resulting impact on the domestic industry, was affected by the alleged subsidies in a manner sufficient to cause injury. If an investigating authority cannot demonstrate on the basis of positive evidence that the alleged subsidies alter the volume or price of the imports, then there is no basis for finding that the injury caused by the imports occurred "through the effects of the subsidy."

7.400 Korea argues that since footnote 47 appears after the word "effects", and not after the phrase "of the subsidies", footnote 47 cannot be used to define the entire phrase "the effect of the subsidies". Korea submits that the "through the effects of subsidies" language in Article 15.5 should be interpreted as requiring the same type of causation analysis that has been developed under the "effect of the subsidy" language in Article 6.3 of the *SCM Agreement*. According to Korea, an interpretation of Article 15.5 that does not require a causal link between the subsidies and the volume or price of the subsidized imports would improperly render the "through the effects of subsidies" language in that provision inutile. Korea argues that the Panel should not follow the approach taken in the *US – Norwegian Salmon (CVD)* case, in which a GATT panel rejected a similar argument based on similar text of the *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade* (hereinafter the "*Tokyo Round Subsidies Code*").

7.401 Korea notes that the JIA did not dispute Korea's interpretation of the requirements of Article 15.5 during the course of the JIA investigation. Korea argues that the JIA failed, however, to demonstrate that the effect of the imports would have been any different in the absence of the subsidies. Korea recalls the JIA's conclusion that any harm caused by Hynix's exports was necessarily a result of the subsidy, because Hynix would not have been in operation, and thus would not have been able to export, in the absence of subsidies. Korea argues that the JIA's conclusion was, however, based on a "fundamental legal error".[587] According to Korea, there is no reason to believe that, if Hynix had filed for bankruptcy, it would have ceased operations. Korea argues that in all likelihood, the bankruptcy of Hynix would simply have resulted in corporate reorganization proceedings before the Korean courts.

(b) Japan

7.402 Japan claims that the JIA demonstrated that the allegedly subsidized imports were, "through the effects of subsidies", causing injury within the meaning of the *SCM Agreement*, and that Korea's claims under Articles 15.5 and 19.1 should be rejected.

7.403 Japan argues that footnote 47 defines the meaning of the term "through the effects of subsidies" by reference to the analyses of subsidized imports conducted under Articles 15.2 and 15.4 of the *SCM Agreement*. Japan argues that the second and third sentences of Article 15.5 equate the terms "effects of subsidies" with "effects of the subsidized imports". Japan submits that Korea's interpretation of Article 15.5 is contradicted by Appellate Body and panel reports clarifying that there are no specific methodologies for investigating authorities to determine effects of subsidized imports under Articles 15.2 and 15.5. Japan argues that this interpretation does not render Article 15.5 redundant. According to Japan, there are fundamental differences between Article 6.3 and Article 15.5 that preclude the "through the effects of subsidies" language in Article 15.5 from being interpreted as requiring the same type of causation analysis that has been developed under the "effect of the subsidy" language in Article 6.3 of the *SCM Agreement*. Japan submits that Korea's interpretation is contradicted by Article 11.2 of the *SCM Agreement*, which also refers to the "effects of the subsidies".

7.404 Japan further argues that, in any event, the JIA concluded that any harm caused by Hynix's exports was necessarily a result of the subsidy, because Hynix would not have been in operation, and thus would not have been able to export, in the absence of subsidies.

[587] *See* Korea's First Written Submission, para. 279.

2. Evaluation by the Panel

7.405 The JIA found that there was material injury as provided in Article 15.1 of the *SCM Agreement* and that the subsidized imports had caused such material injury to the domestic industry "through the effects of subsidies" as provided in Article 15.5 of the *SCM Agreement*.[588] With respect to the issue of the "effects of subsidies", the JIA found, under the heading "The Effects of the Subsidies on Imports of the Subject Products", as follows:

> As examined in Chapter 2, Hynix was in a financial situation such that it could not raise funds from the commercial market. The subsidies provided by the Government of Korea to Hynix enabled Hynix to maintain and continue its production and export of DRAM products. As the result, the Investigating Authorities find that Hynix significantly increased its volume of the exports to Japan of the subject products, sold large volumes of products at low prices in Japan's domestic market, and thereby caused the price of domestic products to fall.[589]

7.406 The assessment of causation of injury in countervailing duty investigations is governed by Article 15.5 of the *SCM Agreement*, which provides that:

> It must be demonstrated that the subsidized imports are, through the effects[47] 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. Factors which may be relevant in this respect include, inter alia, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.
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> [47] As set forth in paragraphs 2 and 4.

7.407 Article 19.1 of the *SCM Agreement* provides that:

> If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.

7.408 This claim raises two issues. First, do Articles 15.5 and 19.1 require that an investigating authority demonstrate that the volume and price effects of the subsidized imports and the consequent impact on these imports on the domestic industry, as set forth in Articles 15.2 and 15.4, are "the effects of subsidies"? If so, did the JIA properly demonstrate that the volume and price effects of the

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[588] Annex 1 (Essential Facts), para. 609.

[589] Annex 1 (Essential Facts), para. 550. In response to comments, the JIA reiterated its finding: "Hynix had been saved from bankruptcy because of subsidies. Thus, the subsidies enabled Hynix to continue production and continue exporting. … the importation of subject products itself was due to the effect of subsidies." (Annex 3 (Rebuttals and Surrebuttals), para. 740)

subsidized imports were the effects of the subsidies received by Hynix? We will address these issues in turn.

7.409 The issue of whether an assessment of causation of injury should relate to injury caused by "subsidization" or to injury caused by "subsidized imports" is a methodological issue with significant implications.[590] We will begin by examining the ordinary meaning of the first sentence of Article 15.5 and footnote 47. Next, we consider the context of that provision, which includes the second and third sentences of Article 15.5, the other provisions of Article 15, as well as Articles 11.2 and Article 6.3 of the *SCM Agreement*. After having considered the ordinary meaning and context of the first sentence of Article 15.5, we proceed to address Korea's argument that an interpretation of Article 15.5 that does not require a causal link between the subsidies and the volume or price of the subsidized imports would improperly render the "through the effects of subsidies" language in that provision inutile.

7.410 We begin with the ordinary meaning of the terms at issue. The first sentence and accompanying footnote of Article 15.5 state that:

> It must be demonstrated that the subsidized imports are, through the effects[47] of subsidies, causing injury within the meaning of this Agreement.
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> [47] As set forth in paragraphs 2 and 4.

7.411 Article 15.2[591] of the *SCM Agreement* requires consideration of whether there has been a significant increase in subsidized imports, and the effect of the subsidized imports on prices. Article 15.4[592] of the *SCM Agreement* requires an examination of the impact of the subsidized imports on the domestic industry. In our view, the ordinary meaning of the first sentence of Article 15.5 and its accompanying footnote is to define the phrase "through the effects of subsidies" to mean the effects of subsidized imports ("[a]s set forth in Articles 15.2 and 15.4"). Korea argues that the term "through the effects of subsidies" in Article 15.5 read in conjunction with the accompanying footnote requires a demonstration that the volume and price effects of the subsidized imports (as set forth in Article 15.2) and the consequent impact on these imports on the domestic industry (as set forth in Article 15.4), are "the effects of subsidies". Thus, Korea argues that it must be demonstrated that the *subsidies* have caused the increased volume and/or price effects of the subsidized imports (Article 15.2) that have in turn had an impact on the domestic industry. In other words, Korea contends that it must be demonstrated that the *subsidies* are causing injury *through the effects of subsidized imports*. In our

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[590] Panel Report, *Brazil –Desiccated Coconut*, para. 251.

[591] Article 15.2 provides that: "With 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. With 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."

[592] Article 15.4 provides that: "The 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."

view, Article 15.5 cannot be read in this way, as paragraphs 2 and 4 of Article 15 drive the reader towards a consideration of the effects of the subsidized imports, and not the effect of the subsidy.[593]

7.412 We note that the GATT panel in *US – Norwegian Salmon CVD*[594] examined the first sentence and accompanying footnote of Article 6:4 of the Tokyo Round Subsidies Code, which were virtually identical to the first sentence and accompanying footnote of Article 15.5.[595] In that case, Norway argued that the "through the effects of the subsidy" language in Article 6:4 required a demonstration that the volume and price effects of the subsidized imports and the consequent impact on these imports on the domestic industry, as set forth in Articles 6:2 and 6:3 of the *Tokyo Round Subsidies Code*, were "the effects of the subsidy". The panel rejected Norway's argument. The panel found that the virtually identical terms of the *Tokyo Round Subsidies Code* "made it clear that 'the subsidized imports' were at the centre of the causation analysis required under this provision."[596] Korea claims that in *US – Hot-Rolled Steel*, the Appellate Body rejected the "general approach to causation issues" adopted by the *US – Norwegian Salmon CVD* panel.[597] We find nothing in the Appellate Body Report in *US – Hot-Rolled Steel* rejecting the *US – Norwegian Salmon CVD* panel's findings with respect to the "through the effects of the subsidy" language.

7.413 The context of the first sentence of Article 15.5 confirms that the focus of the causation analysis under Article 15.5 is on "the effects of the subsidized imports", and not the "subsidies". The second sentence of Article 15.5 requires that "[t]he 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." (emphasis supplied) The third sentence of Article 15.5, which concerns non-attribution, provides that "[t]he 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*." (emphasis supplied)

7.414 We find further contextual support for our reading of the first sentence of Article 15.5 in Article 15.1 of the *SCM Agreement*. Article 15.1 contains the "overarching provision that sets forth a Member's fundamental, substantive obligation" in respect of injury determinations that "informs the more detailed obligations in succeeding paragraphs".[598] Article 15.1 provides that:

> 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." (emphasis added, footnote omitted).

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[593] On one view, Korea's interpretation would effectively reverse the sequence of the terms "the subsidized imports" and "subsidies" in this provision, so as to read:

> It must be demonstrated that *subsidies* are, through the effects[47] of *the subsidized imports*, causing injury within the meaning of this Agreement.

[47] As set forth in paragraphs 2 and 4.

[594] We do not refer to this *GATT* case as binding precedent. We refer to it because the discussion of the issues in that case sheds light on the substance of the issue presently before us.

[595] Article 6:4 used the term "through the effects of the subsidy" while Article 15.5 uses the term "through the effects of subsidies". Apart from the different enumeration of the SCM Agreement and the Tokyo Round Subsidies Code, the accompanying footnotes are identical.

[596] GATT Panel Report, *US – Norwegian Salmon CVD*, para. 335.

[597] Korea refers to *US –Hot-Rolled Steel*, para. 226

[598] Appellate Body Report, *Thailand – H-Beams*, para. 106; Panel Report, *US – Softwood Lumber VI*, para. 7.27; Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.217; Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 96.

7.415 As noted, Article 15.2 refers to "the *effect of the subsidized imports* on prices". Article 15.3,[599] which concerns cumulation, refers again to "the *effects of the imports*". As noted, Article 15.4 requires an examination "of the *impact of the subsidized imports* on the domestic industry". Article 15.6[600] addresses the issue of how "[t]he *effect of the subsidized imports*" is to be assessed. With respect to Article 15.7, the Appellate Body considers that "Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement* combine positive requirements—that such a determination 'be based on facts' and show how a 'clearly foreseen and imminent' change in circumstances would lead to further dumped/*subsidized imports* causing injury in the near future—with an express prohibition of a determination based 'merely on allegation, conjecture or remote possibility'."[601]

7.416 Article 11.2 of the *SCM Agreement* provides further contextual support for our interpretation of the "through the effects of subsidies" language in Article 15.5. Article 11.2 provides that an application for the initiation of a countervailing duty investigation "shall include sufficient evidence of the existence of *(a)* a subsidy and, if possible, its amount, *(b)* injury within the meaning of Article VI of *GATT 1994* as interpreted by this Agreement, and *(c) a causal link between the subsidized imports and the alleged injury*." (emphasis added) Article 11.2 then provides that the application shall contain such information as is reasonably available to the applicant on the following:

> (iv) evidence that alleged injury to a domestic industry is caused by *subsidized imports through the effects of the subsidies*; *this evidence includes* information on the evolution of the volume of the allegedly subsidized imports, the *effect of these imports on prices* of the like product in the domestic market and the consequent *impact of the imports* on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15. (emphasis added)

7.417 Thus, according to Article 11.2, information relating to the volume effects, the price effects, and the consequent impact of the *subsidized imports* serves as evidence that injury is caused by the subsidized imports *through the effects of subsidies*.

7.418 Korea submits that the "through the effects of subsidies" language in Article 15.5 should be interpreted as requiring the same type of causation analysis that has been developed under the "effect of the subsidy" language in Article 6.3[602] of the *SCM Agreement*. We do not see how the terms of

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[599] Article 15.3 states: "Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product."

[600] Article 15.6 states: "The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided."

[601] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 96.

[602] Article 6.3 provides that:

> Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:
> (a) *the effect of the subsidy* is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

Article 6.3 or prior panel reports interpreting this provision support Korea's interpretation of Article 15.5. As the Panel in *US – Upland Cotton* stated:

> In view of the contrast in the text, context, legal nature and rationale of the provisions in Part III of the *SCM Agreement* relating to a multilateral assessment as to whether a Member is causing, through the use of any subsidy, "adverse effects" in the form of "serious prejudice to the interests of another Member" and Part V of the Agreement relating to obligations of a Member in conducting a unilateral countervailing duty investigations, we decline to transpose directly the quantitative focus and more detailed methodological obligations of Part V into the provisions of Part III of the *SCM Agreement*.[603]

7.419 That panel further found, on the basis of an analysis similar to our own, that "[t]hese references in Articles 5(c) and 6.3(c) to the "effect of the subsidy" contrast with the language used in the countervailing duty provisions in Part V of the Agreement."[604]

> (b) *the effect of the subsidy* is to displace or impede the exports of a like product of another Member from a third country market;
> (c) *the effect of the subsidy* is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;
> (d) *the effect of the subsidy* is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted. (emphasis added)

[603] Panel Report, *US – Upland Cotton*, para. 7.1177.

[604] Panel Report, *US – Upland Cotton*, para. 7.1227. The Panel in *US – Upland Cotton* noted:

> "For example, Article 15 of the *SCM Agreement* deals with the determination of injury in a countervailing duty investigation. Article 15.1 requires a determination of injury to 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." (emphasis added, footnotes omitted). Article 15.2 states, in part: "... With 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." (emphasis added) Similar additional references to the "effects of the imports"; "impact of the subsidized imports", "the effect of the subsidized imports" also exist in Article 15. Article 15.5 stipulates:
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> "It 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." (emphasis added, footnotes omitted).

Other provisions in Part V of the *SCM Agreement* contain similar references to "through the effects of the subsidy, subsidized imports are causing injury..." e.g. Article 19.1."

(Panel Report, *US – Upland Cotton*, footnote 1346)

7.420 Finally, we disagree with Korea's contention that our interpretation of Article 15.5 renders the "effects *of subsidies*" language in Article 15.5 inutile. Article VI:6(a) of the *GATT 1994* provides that:

> No Member shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another Member unless it determines that *the effect of the dumping or subsidization*, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry. (emphasis added)

7.421 We first note that one of the purposes of the *SCM Agreement* is to interpret and clarify concepts in Article VI of the *GATT 1994*.[605] As the Panel in *Brazil – Desiccated Coconut* explained:

> It is significant, however, that Article 32.1 refers to the *SCM Agreement* as interpreting Article VI of GATT 1994. Article VI of GATT 1994 sets forth a series of core concepts central to WTO regulation of countervailing measures (e.g., subsidy, material injury, domestic industry). These concepts are, however, expressed in only the most general terms, and are thus susceptible of a wide range of interpretations. In our view, the Tokyo Round SCM Code and its successor the *SCM Agreement* were developed in part to lend greater precision and predictability to the rights and obligations under Article VI.[606] (emphasis original)

7.422 We also note that Article VI of the *GATT 1994* (including but not limited to Article VI:6(a) thereof) and the *SCM Agreement* establish *cumulative* obligations. Article 10 of the *SCM Agreement* requires that Members take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance "with the provisions of Article VI of *GATT 1994* and the terms of this Agreement." As the Appellate Body explained in *Brazil – Desiccated Coconut*:

> From reading Article 10, it is clear that countervailing duties may only be imposed in accordance with Article VI of the GATT 1994 and the *SCM Agreement*. A countervailing duty being a specific action against a subsidy of another WTO Member, pursuant to Article 32.1, it can only be imposed "in accordance with the provisions of GATT 1994, as interpreted by this Agreement". The ordinary meaning of these provisions taken in their context leads us to the conclusion that the negotiators of the *SCM Agreement* clearly intended that, under the integrated *WTO Agreement*, countervailing duties may only be imposed in accordance with the provisions of Part V of the *SCM Agreement* and Article VI of the GATT 1994, taken together.[607]

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[605] We note that the full title of the Tokyo Round Subsidies Code was the "*Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*". The preamble to the Code clarified that the parties to the Code had agreed to its terms desiring, *inter alia*, "to apply fully and to interpret the provisions of Articles VI, XVI and XXIII" of the GATT, and to "elaborate rules for their application in order to provide greater uniformity and certainty in their implementation". The full title of the *SCM Agreement* was shortened from the "*Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*" to the "*Agreement on Subsidies and Countervailing Measures*". As the Appellate Body explained in *Brazil – Desiccated Coconut*, the reason for the change was that the *SCM Agreement* "contains a set of rights and obligations that go *well beyond merely applying and interpreting* Articles VI, XVI and XXIII of the GATT 1947" (Appellate Body Report, *Brazil – Desiccated Coconut*, page 17). We note that Article 11.2 of the SCM Agreement refers to injury "within the meaning of Article VI of GATT 1994 *as interpreted by this Agreement*", (emphasis supplied) and that Article 32.1 of the *SCM Agreement* refers to the provisions of GATT 1994 "*as interpreted by this Agreement*". (emphasis supplied)

[606] Panel Report, *Brazil – Desiccated Coconut*, para. 238.

[607] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 16.

7.423 With all of the foregoing in mind, we believe that the "through the effects of subsidies" language in Article 15.5 serves the function of clarifying that "*the effect of … subsidization*" language in Article VI:6(a) of the *GATT 1994* means *the effect of subsidized imports* (as set forth in Articles 15.2 and 15.4 of the *SCM Agreement*). We believe that, in the absence of such clarification, *i.e.*, if the words "through the effects of subsidies" were not included in Article 15.5 and defined in footnote 47, the cumulative application of Article VI:6(a) and Article 15.5 of the *SCM Agreement* may have led to a certain degree of uncertainty as to whether or not a separate "through the effect of subsidization" analysis was required by virtue of Article VI:6(a) of the *GATT 1994*.[608]

7.424 For these reasons, we find that Article 15.5 does not require that an investigating authority demonstrate that the volume and price effects of the subsidized imports and the consequent impact on these imports on the domestic industry, as set forth in Articles 15.2 and 15.4, are "the effects of subsidies". Neither party has made any separate arguments in respect of Article 19.1. Neither party has suggested that the phrase "through the effects of the subsidy" in Article 19.1 could be interpreted differently from the phrase "through the effects of subsidies" in Article 15.5, and we see no basis for doing so. We therefore find that Article 19.1 does not require that an investigating authority demonstrate that the volume and price effects of the subsidized imports and the consequent impact on these imports on the domestic industry, as set forth in Articles 15.2 and 15.4, are "the effects of subsidies". It is therefore unnecessary for us to rule on the issue of whether the JIA properly demonstrated that the volume and price effects of the subsidized imports and the consequent impact on these imports on the domestic industry were the "effects of subsidies" allegedly received by Hynix.

7.425 We therefore find that Korea has failed to establish that the JIA acted inconsistently with Articles 15.5 and 19.1 of the *SCM Agreement* by failing to demonstrate that the allegedly subsidized imports were, "through the effects of subsidies", causing injury within the meaning of the *SCM Agreement*.

K. DIRECT TRANSFER OF FUNDS

1. Arguments

(a) Korea

7.426 Korea claims that the JIA acted inconsistently with Article 1.1(a) of the *SCM Agreement* by improperly finding that the October 2001 and December 2002 restructuring transactions involved a "direct transfer of funds". Korea recalls that the JIA treated the modification of the terms of pre-existing loans (including extensions of the maturities of existing loans, reductions of the interest rates on existing loans, and conversion of interest to principal) and debt-to-equity swaps as transactions involving a "direct transfers of funds". Korea argues that transactions that merely change the terms of existing claims, and do not involve the provision of money to the alleged subsidy recipient, cannot be characterized as transactions involving a "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i).

7.427 Korea argues that a "direct transfer of funds" under Article 1.1(a)(1)(i) requires, at a minimum, that there be a "transfer" of "funds". In this regard, Korea relies on dictionary definitions of the term "transfer" as meaning a "conveyance from one person to another of property" and of the term "funds" as meaning "money." Korea argues that in order for there to be a "transfer" of "funds,"

[608] As the Panel in *Brazil – Desiccated Coconut* observed, "it is evident to the Panel that Article VI of GATT 1994 in isolation could be interpreted differently from Article VI in conjunction with either the Tokyo Round SCM Code or the SCM Agreement. Further, the application of Article VI of GATT 1994 in isolation with respect to this issue could result in obligations on an investigating country which are more stringent than those imposed by Article VI in conjunction with either the Tokyo Round SCM Code or the SCM Agreement." (Panel Report, *Brazil – Desiccated Coconut*, para. 251).

money must therefore change hands, and that if money does not change hands, there is not "a direct transfer of funds". According to Korea, this conclusion is reinforced by an analysis of the language of the French and Spanish texts of Article 1.1(a)(1)(i).

7.428 Korea argues that the examples of direct transfers of funds included in sub-paragraph (i) of Article 1.1(a)(1) do not imply that any and all transactions that involve debt or equity constitute "direct transfers of funds" in the absence of an actual "transfer of funds." Rather, the reference to "grants, loans, and equity infusion" in Article 1.1(a)(1)(i) serves only to clarify that all "direct transfers of funds" by a government constitute "financial contributions," regardless of what the recipient gives back to the government in return.

7.429 Korea argues that there is no "transfer" of "funds" when a creditor agrees only to modify terms of existing loans or to exchange existing loans for equity in the borrower. Korea argues that there is "no conveyance of money" when a lender agrees to extend the maturities of existing loans, or to reduce the interest rates on existing loans. According to Korea, in those transactions, a creditor holding existing claims against the borrower agrees to modify the nature of those claims, without providing any money to the borrower. Korea submits that the same logic applies to debt-to-equity swaps: in such transactions, the lender exchanges one set of claims on the company (as embodied in the loan agreement) for a different set of claims (as embodied in share-ownership).

7.430 Korea rejects Japan's argument that a broad definition of the term "transfer of funds" is needed to prevent circumvention of the *SCM Agreement*'s disciplines on subsidies. According to Korea, that argument is based on the false assumption that extensions of loan maturities and debt-to-equity swaps could never be considered "financial contributions" if they are not classified as "direct transfers of funds." Korea argues that the modification of the terms of existing loans and debt-to-equity swaps that provide a "financial contribution" to the recipient might be classified as "foregone revenue" within the meaning of paragraph (ii) of Article 1.1(a)(1). In response to a question from the Panel, Korea submits that although sub-paragraph (ii) concerns "*government* revenue", a decision by a private creditor to forego revenue as a result of government entrustment or direction would fall under paragraph (iv), because the private creditors' action would be a "type of function illustrated in paragraph (ii)" of Article 1.1(a)(1). In other words, if the private creditors had been government bodies, the extensions of loan maturities and debt-to-equity swaps undertaken by the private creditors would have fallen in the category of "government revenue that is otherwise due is foregone or not collected". Korea submits that in this case, however, the JIA did not make the factual findings required to support a determination that the transactions resulted in any revenue being "foregone" by the creditors.

7.431 Korea further argues that no revenue otherwise due was in fact "foregone" in the restructuring transactions at issue in the investigation for two reasons. First, the creditors' decision to allow Hynix to delay payment, as long as Hynix agreed to pay additional interest on the outstanding amounts for the additional period, did not constitute revenue "foregone". Second, the modification of the terms of existing loans and debt-to-equity swaps, and debt forgiveness agreed to by Hynix's creditors in the restructurings, did not result in the creditors receiving a lesser amount than they would have if Hynix had been liquidated, and there was therefore no revenue "foregone".

7.432 Korea recalls that for the purpose of calculating the amount of the subsidy when the maturity of a loan is extended, the JIA deemed that the existing liability is repaid and a new loan is granted at the time the extension is made, and that for the purpose of calculating the amount of the subsidy when a debt is swapped for equity, the JIA deemed that the existing liability is repaid and a new equity infusion is provided at the time of the debt-to-equity swap. According to Korea, the JIA's entire analysis was premised on its finding that Hynix was insolvent and could not repay its existing debts, and given that premise, it was plainly inconsistent for the JIA also to assume that Hynix had, in each transaction, repaid all of its existing debts in full, before receiving new "transfers of funds" from its creditors.

(b) Japan

7.433 According to Japan, Korea's restrictive interpretation of the term "transfer of funds" in Article 1.1(a)(1)(i) is inconsistent with the ordinary meaning of the term "funds", is at odds with the meaning to be given to that term in its context, and would frustrate the object and purpose of the *SCM Agreement*. Japan recalls that the panel in *Korea – Commercial Vessels* rejected a very similar argument by Korea in that case.[609]

7.434 Japan submits that dictionary definitions[610] of the word "funds" support the conclusion that the ordinary meaning of the term "funds" encompasses more than just "money". Japan adds that even the term "money" itself is not limited to "real cash", but includes as well "property, possessions, resources, etc., viewed as having exchangeable value or a value expressible in terms of monetary units" or more directly, "financial gains." Thus, according to Japan, the ordinary meaning of "funds" includes not only money, but all financial resources, which have monetary or exchangeable value or provide financial gains.

7.435 Japan argues that the broader reading of the term "funds" to include "financial resources" having "monetary or exchangeable value" is confirmed by the illustrative list of direct transfers of funds included in Article 1.1(a)(1)(i), which includes "grants, loans, and equity infusion." Japan relies upon the statement by the panel in *Korea-Commercial Vessels* that "[t]he fact that the listed kinds of direct transfers of funds (grants, loans and equity infusions) are identified as only examples clearly indicates that there may well be other types of instruments that would equally constitute direct transfers of funds in the sense of Article 1.1(a)(1)(i)".[611] As context, Japan also relies on the Appellate Body's conclusion that "the concept of subsidy defined in Article 1 of the *SCM Agreement* captures situations in which something of economic value is transferred by a government to the advantage of a recipient".[612]

7.436 Japan argues that an overly restrictive reading of the terms of Article 1.1(a)(1)(i) would frustrate the object and purpose of the *SCM Agreement*. Japan argues that an interpretation which would restrict the terms "transfer of funds" to acts of "conveying money", excluding extension of credit through the substantial modification of terms of existing loans or an exchange into equity of the monetary value equivalent to the existing debt, would open the door to abuse and offer an easy way of circumventing the disciplines of the *SCM Agreement*.

7.437 Japan submits that transactions modifying the terms of existing loans fall squarely within the scope of "direct transfers of funds" contemplated under Article 1.1(a)(1)(i). Japan submits that as a practical matter, such changes to the terms of loans amount to a re-issuance of the loan as the terms of the original loan are extinguished and replaced with new terms. Japans submits that a debt-to-equity swap also clearly involves a "transfer of funds", since Article 1.1(a)(1)(i) specifically provides for "equity infusion" as an example of a direct transfer of funds, and a debt-to-equity swap is one method of making an equity infusion.

7.438 In the light of foregoing, Japan considers Korea's arguments regarding "government revenue foregone" irrelevant.

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[609] Japan refers to Panel Report, *Korea-Commercial Vessels*, para. 7.413.

[610] Japan refers to definitions taken from the Concise Oxford English Dictionary (10th ed. 2002) and the Oxford English Dictionary (2nd ed. 1989).

[611] Japan refers to Panel Report, *Korea-Commercial Vessels*, para. 7.412.

[612] Appellate Body Report, *US – Softwood Lumber IV*, para. 51.

2. Evaluation by the Panel

7.439 This claim raises the issue of whether the modification of loan repayment terms (including extensions of the maturities of existing loans, reductions of the interest rates on existing loans, and conversion of interest to principal) and debt-to-equity swaps can be characterized as transactions involving a "direct transfers of funds" within the meaning of Article 1.1(a)(1)(i). In addressing this claim, we do not exclude that certain of the relevant transactions might be covered simultaneously by different sub-paragraphs of Article 1.1(a)(1).[613] The issue before us, though, is not whether the modification of loan repayment terms and debt-to-equity swaps might also be treated, for example, as government revenue foregone. The issue is whether the JIA erred in treating such transactions as "direct transfers of funds".

7.440 The parties have presented a number of dictionary definitions regarding the ordinary meaning of the terms "transfer" and "funds". On the basis of Korea's Final Comments to the Panel, we consider that there is ultimately no dispute between the parties regarding the basic meaning of the word "funds". In particular, we understand Korea to accept that the term "funds" might be defined more broadly than it initially suggested in its First Written Submission, to mean the "money or other financial assets that might be counted in a person's 'capital'".[614] This is very similar to the definition proposed by Japan. We do not disagree that this is the ordinary meaning of the term "funds".[615]

7.441 Korea acknowledges the basic agreement between the parties on the meaning of the term "funds", and argues that "the critical question is whether the transaction in question involves a 'transfer' of money or other monetary assets from the government or government-directed entity to the recipient."[616] According to Korea, "in debt forgiveness, debt-to-equity swaps, or extensions of loan maturities, there is no transfer of money or other monetary resources from the government or government-directed entity to the recipient. Instead, there is only a relinquishment or modification of the claims that were held by the government or government-directed entity by virtue of a prior loan."[617]

7.442 We do not accept that the relinquishment or modification of claims may not, in certain circumstances, be treated as the transfer of new claims, giving rise to new rights and obligations. For example, once one analyses what actually occurs in the transaction, the modification of an existing loan may properly be treated as the transfer of new rights to the recipient of the modified loan. The borrower's old rights no longer exist. They have been replaced by new rights. In this sense, the modified loan may properly be treated as a new loan. Thus, the modification of a loan through debt forgiveness involves the transfer of new rights to the borrower, who is now liberated of the obligation to repay the debt, and instead has the right to use the money for free. Similarly, the modification of a loan through an extension of the loan maturity involves the transfer of new rights to the borrower, who is now entitled to borrow the money for a longer period of time. Since the new rights that are transferred in such transactions have monetary value, and may be counted in a (legal or natural) person's capital, we consider that such transactions may properly be treated as "direct transfers of

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[613] In this regard, we note that the Appellate Body stated at para. 113 of its Report in *US – Countervailing Measures on Certain EC Products* that: "[A] transfer of funds could be provided directly from the government to the legal person that is the producer of the subsidized product, or it could be provided indirectly, say, through an income tax concession to the natural persons that own the firm (inasmuch as they invest in the legal person's productive activities). In both cases, the cost of raising capital for the legal person that is the producer would be reduced." This would appear to suggest that an income tax concession could, in certain circumstances, be treated both as a direct transfer of funds and as revenue foregone.

[614] *See* Korea's Final Comments, para. 22.

[615] We note that the Appellate Body has similarly found that subsidies generally involve transactions where "something of economic value" is transferred. *See*, for example, Appellate Body Report, *US – Softwood Lumber IV*, para. 51.

[616] *See* Korea's Final Comments, para. 23.

[617] *See* Korea's Final Comments, para. 23.

funds" in the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement*. We apply the same analysis to debt-to-equity swaps, for the relinquishment and modification of claims inherent in such transactions similarly results in new rights, or claims, being transferred to the former debtor.

7.443 Furthermore, we note that in *Korea-Commercial Vessels*, Korea advanced essentially the same argument that it advances here. In that case, Korea argued that the debt-to-equity swaps, interest rate reductions, interest forgiveness and interest deferral at issue did not constitute "financial contributions" because there was "no transfer of pecuniary value" to the companies under workout or corporate reorganization.[618] The panel rejected Korea's argument, and found that all of those transactions involved a "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i):

> 7.411 We are not persuaded by Korea's arguments that debt-for-equity swaps and interest reductions and deferrals are not financial contributions. In the first place, we recall that there is a financial contribution in the sense of Article 1.1(a)(1)(i) of the *SCM Agreement* if there is a "direct transfer of funds", and that grants, loans and equity infusions are listed only as three possible examples of such transfers. Thus, we view Article 1.1(a)(1) as identifying in its respective subparagraphs the kinds of instruments or transactions that could be considered to be "financial contributions". Of course these instruments would only be covered by the Agreement if they were made "by a government or public body", and they would only be subsidies covered by the Agreement if they both conferred a benefit and were specific. Thus, the concept of financial contribution is but one in a set of cumulative, and independent, elements all of which must be present for a measure to be regulated by the *SCM Agreement.*
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> 7.412 We find the examples listed in Article 1.1(a)(1)(i) to be illuminating in respect of the scope of the term "direct transfer of funds". Most importantly, considering the "medium of exchange" in the listed examples, we note that all of the examples involve transfers of money ("funds"), as opposed to in-kind transfers (of goods or services, in the sense of Article 1.1(a)(1)(iii)). The fact that the listed kinds of direct transfers of funds (grants, loans and equity infusions) are identified as only examples clearly indicates that there may well be other types of instruments that would equally constitute direct transfers of funds in the sense of Article 1.1(a)(1)(i).
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> 7.413 Turning to the particular cases of the transactions involved in the restructuring, we find that all of them are of the same nature as those explicitly listed in Article 1.1(a)(1)(i). First we note that interest reductions and deferrals are similar to new loans, as they involve a renegotiation / extension of the terms of the original loan. We see no reason why loans would constitute financial contributions while interest reductions and deferrals would not. Further, we consider that interest / debt forgiveness is comparable to a cash grant, as funds that were previously provided as a loan, against interest, are now provided for free, given the removal of the repayment obligation. All of these transactions therefore constitute direct transfers of funds in the sense of Article 1.1(a)(1)(i) of the *SCM Agreement*. Regarding debt-for-equity swaps, we note that equity infusions are explicitly listed as a type of direct transfer of funds in Article 1.1(a)(1)(i). Since we have also found that debt forgiveness constitutes a direct transfer of funds, we see no reason why a combination of equity infusion and debt forgiveness should fall outside the scope of that provision. The reason why creditors agree to such transactions (*i.e.*, whether or not it is in order to preserve going concern value) is not relevant to the issue of whether or not the transactions constitute financial contributions. Rather, it relates to the issue of benefit

[618] *Korea-Commercial Vessels*, para. 7.408.

> (in the sense of whether or not creditors operating on market principles would have undertaken such transactions on the same terms).
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> ….
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> 7.420 ... Equity infusions and debt-for-equity swaps have the same effect, in the sense that equity changes hands against consideration in both cases (and subsidization arises if the amount of consideration is less than the market would have provided). Also, a debt/equity swap comprises an element of equity infusion.

7.444 We agree with this analysis by the panel in *Korea – Commercial Vessels*. We agree in particular that it is appropriate to look beyond the simple form of a transaction, and analyze its effects, in determining whether or not a transaction constitutes a "direct transfer of funds".[619]

7.445 Finally, we note that a central element in Korea's claim is its argument that the JIA's finding of "direct transfers of funds" was based on a "legal fiction"[620] that did not exist.[621] Korea asserts that

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[619] We note that the Appellate Body would appear to agree that, in establishing the existence of a financial contribution, investigating authorities may properly consider the consequences of the relevant transactions: [W]e disagree with Canada's submission that the granting of an intangible right to harvest standing timber cannot be *equated with* the act of providing that standing timber. By granting a right to harvest, the provincial governments put particular stands of timber at the disposal of timber harvesters and allow those enterprises, exclusively, to make use of those resources. Canada asserts that governments do not supply felled trees, logs, or lumber through stumpage transactions. In our view, this assertion misses the point, because felled trees, logs and lumber are all distinct from the "standing timber" on which the Panel based its conclusions. Moreover, what matters, for purposes of determining whether a government "provides goods" in the sense of Article 1.1(a)(1)(iii), is *the consequence of the transaction*." (*US – Softwood Lumber IV*, para. 75, emphasis supplied, footnote omitted.)

[620] *See* Korea's Second Written Submission, para. 55.

[621] We note that the "legal fiction" alleged by Korea actually reflected the way that Hynix itself viewed the transactions:

> [Hynix] With regard to the debt-to-equity swap in the December 2002 Program, upon reasonable interpretation of the accounting standards of the country subject to the investigation, the SCM Agreement, Guidelines, etc., either the timing of receipt of the subsidy should be considered as having been in 2002, or it should be found that a subsidy does not exist. In the unlikely event that the December 2002 Program is found to be subsidy, it would be appropriate that the Government of Japan treated the benefit from the debt-to-equity swap resulting from the programme, as having been received in 2002. Micron's opinion is inappropriate because it lacks understanding of the fact that the *debt-to-equity swap encompasses the concept of disappearance of debt*, not the issuance of stocks itself; it is an incorrect assertion for the sole purpose of extending the effective period of the subsidy and is not based on either the SCM Agreement or Japanese domestic law. In other words, in this case, Hynix would not be receiving any benefit from the issuance of stocks, but conversely, it would have to bear the obligation of paying dividends to shareholders in conjunction with the issuance of stocks. According to the Guidelines 13(1)(iii), in this case, *it can be said* that the investment is being provided by *transferring*, so to speak, existing claims to debtor, and the *transfer of claims* itself was established in the resolution that was made by the Council for Creditor Financial Institutions in December 2002. As the *transfer* was reflected in the FY 2002 financial statements of Hynix, the Government of Japan should maintain its finding of fact in the Essential Facts that the debt-to-equity swap pertaining to the December 2002 Program was received in 2002.
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> - On 30 December 2002, the creditor financial institutions made a resolution on a debt restructuring proposal that included converting 50 per cent of unsecured claims to equity. As it was enforceable by the law, CRPA, the resolution took immediate effect. After that resolution was made, the creditor financial institutions could do no more than simply choose the method of the debt-to-equity swap. With adoption of the plan set forth in the resolution, *the obligations borne by Hynix in connection with the subject claims disappeared*, and even the creditor financial institutions could no longer exercise their rights as creditors against Hynix. Particularly, as section 2. (e) (2) in 30 December 2002 proposal by the Council for Creditor Financial Institutions states that "interest on claims subject to the debt-to-

the JIA simply "deemed" the relevant transactions to constitute (1) repayments followed by (2) new transfers to the borrower, thereby ignoring the fact that, in reality, Hynix was insolvent and could not repay its debts. This argument suggests that the real problem underlying Korea's Article 1.1(a)(1)(i) claim is the fact that the JIA failed to consider the substance of the transactions from the perspective of the inside investor, *i.e.*, the investor who could not expect full repayment of its debt. This issue is properly addressed elsewhere, in the context of our evaluation of the JIA's calculation of the amount of benefit.[622]

7.446 For the above reasons, we find that the JIA could properly characterize the modification of loan repayment terms (including extensions of the maturities of existing loans, reductions of the interest rates on existing loans, and conversion of interest to principal) and debt-to-equity swaps as transactions involving a "direct transfers of funds" within the meaning of Article 1.1(a)(1)(i).[623]

L. CHANGE IN OWNERSHIP

1. Claim

7.447 Korea claims that Japan acted inconsistently with Articles 10, 14, 19, and 21 of the *SCM Agreement*, on the basis that Japan imposed and maintained countervailing duties without determining whether a benefit continued to exist following the changes in the ownership of Hynix that resulted from the October 2001 and December 2002 restructurings.

7.448 Japan submits that the Panel should reject Korea's claim and argument.

2. Arguments

(a) Korea

7.449 Korea claims that the debt-to-equity swaps undertaken in the October 2001 and December 2002 restructurings worked a fundamental change in the ownership of Hynix.

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equity swap generated after the date of this resolution shall be exempted," the creditor financial institutions that agreed to the debt-to-equity swap could no longer exercise any rights whatsoever in connection with their claims after the date of the resolution.

- The *fact that debt disappeared after the debt-to-equity swap* is also shown from the fact that *debt decreased by a total of approximately KRW 2.2 trillion as a result of the posting of the amount of the debt-to-equity swap based on the December 2002 Program into a capital adjustment item on its balance sheet as of 2002*, and also as a result of a *reduction of short-term loans, long-term loans, corporate bonds, and other loans on the 2002 balance sheet*. After the resolution on the December 2002 Program, there existed absolutely no appended conditions that could modify the debt-to-equity swap. The series of procedures that were taken after the date of the resolution as referred to in the Micron opinion all relates to the stock issuance format, which has no effect to the debt-to-equity swap effective as of December 2002. The resolution by the creditor financial institutions in December 2002 itself is an agreement by the creditor financial institutions to convert 50 per cent of the value of unsecured claims to Hynix stocks. Because of this agreement, Hynix was able to eliminate the debt from its 2002 audited financial statements and simultaneously post the corresponding amount as a capital adjustment item. *Then, the existing debt of the creditor financial institutions was posted as repaid as of 30 December 2002, and posted in a capital adjustment item in the accounting treatment.* (Annex 3 (Rebuttals and Surrebuttals), para. 555, emphasis supplied).

We further note that the parties' replies to Question 128 from the Panel indicate that both Hynix and the creditors recorded the debt-to-equity swaps as debt repayments and equity infusions, consistent with the JIA's treatment of these transactions.

[622] *See* section VII.E.7(c) *supra*.

[623] Whether a benefit was thereby conferred, and measuring the amount of that benefit, are separate issues subject to separate disciplines in the *SCM Agreement*.

7.450 Korea recalls the Appellate Body's finding, in *US – Countervailing Measures On Certain EC Products*, that where there is a change in the ownership of a company at fair market value, the investigating authorities must consider whether the subsidies received before the change in ownership continued to provide a benefit after the ownership change. Korea recalls that the Appellate Body also held that a change in ownership in a transaction at "fair market value" creates a rebuttable presumption that the benefits of the subsidy have been extinguished. Korea recalls the Appellate Body's finding that the failure of the investigating authorities in that case to consider whether the subsidies received before the change in ownership continued to provide a benefit after the ownership change was inconsistent with Articles 10, 14, 19, and 21.

7.451 Korea argues that the JIA failed to consider whether the subsidies allegedly provided to Hynix continued to provide benefits "following the change in ownership wrought by the debt-to-equity swaps", and that the JIA's determination was therefore inconsistent with Articles 10, 14, 19, and 21.

(b) Japan

7.452 Japan argues that Korea's change in ownership argument is presented without any analysis or explanation on how Articles 10, 14, 19, and 21 support its conclusion, and that Korea has thus failed to establish a *prima facie* case.

7.453 Japan disputes the relevance of the Appellate Body's findings in *US – Countervailing Measures On Certain EC Products*, arguing that the present case is completely different from the specific situation in which a subsidy was presumed to extinguish through a change in ownership from another perspective. Japan argues that the debt-to-equity swaps under the October 2001 and December 2002 debt restructurings do not meet any of the conditions established by the Appellate Body. Japan argues that Korea has presented no argument or evidence regarding a change in ownership after the findings of benefit under each Program. According to Japan, the issue of a change in ownership is whether a subsidy continues to provide a benefit after a transfer of all or substantially all the property of the recipient of the subsidy (*i.e.*, through privatization) through an arm's length transaction at fair market value.

7.454 Japan further submits that Korea is repeating an argument which has already been rejected by the panel in *Korea – Commercial Vessels*.[624]

7.455 Japan also argues that the provisions of Articles 1.1(a)(1)(i) and 14(a) of the *SCM Agreement* clearly contradict an interpretation that an equity infusion that amounts to a subsidy simultaneously extinguishes the benefit therein.

3. Evaluation by the Panel

7.456 We consider that the application of WTO case law regarding the pass-through of pre-privatization subsidies would be inapposite in the present case. Korea argues that "where there is a change in the ownership of a company at fair market value, the investigating authorities must consider whether the *subsidies received before the change in ownership* continued to provide a benefit after the ownership change."[625] Since the change in ownership alluded to by Korea took place as a result of the October 2001 and December 2002 restructurings respectively, Korea's argument would therefore concern benefit conferred by subsidies allegedly received *before* the changes in ownership. The present case, though, concerns the countervailability of subsidies that were allegedly provided *by*

[624] Japan refers to Panel Report, *Korea – Commercial Vessels*, para. 7.419.
[625] *See* Korea's First Written Submission, para. 261, emphasis supplied.

the changes of ownership themselves. This issue was not addressed by the WTO case law on pass-through of pre-privatization subsidies.[626]

7.457 The only possible significance of the WTO case law regarding pass-through during privatization concerns the principle that the presumption against pass-through arises when a *market price* is paid for the privatized entity.[627] In other words, this case law indicates that benefit is to be assessed by reference to the market, and that no benefit is conferred when a market price is paid. If the October 2001 and December 2002 restructurings were made on market terms, those restructurings would not have conferred a benefit (and there would be no need for Korea to rely on the WTO case law on change in ownership). If the restructurings were not made on market terms, they would have conferred a benefit (and the WTO case law on change in ownership would not change that result, for the presumption against pass-through of benefit from prior subsidies only applies when the privatization takes place on market terms).

7.458 For the above reasons, we reject Korea's claim that Japan acted inconsistently with Articles 10, 14, 19, and 21 of the *SCM Agreement*, on the basis that Japan imposed and maintained countervailing duties without determining whether a benefit continued to exist following the changes in the ownership of Hynix that resulted from the October 2001 and December 2002 restructurings.

M. ARTICLE 32.1

1. Claim

7.459 Korea claims that, as a consequence of Japan's violation of other provisions of the *SCM Agreement*, Japan's imposition of countervailing duties on imports of DRAMS from Korea was not consistent with the requirements of Article 32.1 of the *SCM Agreement*.

7.460 Japan submits that the Panel should reject Korea's claim and argument.

2. Applicable provision

7.461 Article 32.1 provides that:

> "No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." (footnote omitted)

3. Arguments

(a) Korea

7.462 Korea does not present any independent arguments in respect of its claim under Article 32.1.

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[626] We agree with the treatment of a similar argument by the panel in *Korea – Commercial Vessels* ("Korea relies on WTO case-law concerning the changes in ownership in the context of privatizations to argue that a financial contribution, like benefit, must be conferred on a legal or natural person, rather than on productive operations / assets. We are not persuaded that such case-law is relevant, however, since this is not a case involving privatization. In those privatization cases, the alleged subsidy took place prior to privatization, and the question was whether the benefit from those earlier subsidies was extinguished upon the change in-ownership. The change in ownership in those cases was undertaken at arm's length, and for fair market value. In the present case, however, the change in ownership is the alleged subsidy." (para. 7.419))

[627] The Appellate Body has confirmed that "[p]rivatization at arm's length and for fair market value *may* result in extinguishing the benefit. Indeed, we find that there is a rebuttable presumption that a benefit ceases to exist after such a privatization." (*US – Countervailing Measures on Certain EC Products*, para. 127 (emphasis in original)).

(b) Japan

7.463 Japan notes that Korea did not present an independent argument on the inconsistency with Article 32.1. Japan finds support in several Appellate Body reports for the proposition that a violation of Article 32.1 is necessarily dependent on a finding that the Member otherwise acted inconsistently with its obligations under the *SCM Agreement*. Japan submits that, as the alleged inconsistency under Article 32.1 is entirely consequential to the other errors alleged but not substantiated by Korea, this allegation should also be dismissed.

4. Evaluation by the Panel

7.464 This claim is dependent on other claims made by Korea. Given our finding regarding the inconsistency of the JIA's determination of government entrustment or direction and the existence of benefit in respect of the December 2002 restructuring, and the JIA's calculation of the amount of benefit in respect of both the October 2001 and December 2002 restructurings, 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 32.1 of the *SCM Agreement*.

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In light of the above findings, we *reject* Korea's claims that:

a. Japan improperly found government "entrustment or direction" of the Four Creditors to participate in the October 2001 restructuring, contrary to Article 1.1(a)(1)(iv) of the *SCM Agreement*;

b. Japan improperly found that the October 2001 restructuring conferred a benefit on Hynix, contrary to Articles 1.1(b) and 14 of the *SCM Agreement*;

c. Japan improperly treated certain Hynix creditors as "interested parties", and improperly applied facts available and made adverse inferences, contrary to Articles 12.7 and 12.9 of the *SCM Agreement*;

d. Japan improperly found that the October 2001 and December 2002 restructurings constituted "direct transfer[s] of funds", contrary to Article 1.1(a)(1)(i) of the *SCM Agreement*;

e. Japan improperly determined that the October 2001 and December 2002 restructurings were specific, contrary to Article 2 of the *SCM Agreement*;

f. Japan improperly failed to determine whether or not a benefit continued to exist following changes in the ownership of Hynix as a result of the October 2001 and December 2002 restructurings; and

g. Japan's determination improperly failed to demonstrate that the subsidized imports were, through the effects of subsidies, causing injury, contrary to Article 15.5 of the *SCM Agreement*;

8.2 In light of the above findings, we *uphold* Korea's claims that:

a. Japan improperly found government "entrustment or direction" of the Four Creditors to participate in the December 2002 restructuring, contrary to Article 1.1(a)(1)(iv) of the *SCM Agreement*;

b. Japan improperly found that the December 2002 restructuring conferred a benefit on Hynix, contrary to Articles 1.1(b) and 14 of the *SCM Agreement*;

c. Japan improperly calculated the amount of benefit conferred by the October 2001 and December 2002 restructurings, contrary to Articles 1.1(b) and 14 of the *SCM Agreement*;

d. Japan improperly used methods to calculate the amount of benefit to the recipient that were not provided for in its national legislation or implementing regulations, contrary to the *chapeau* of Article 14 of the *SCM Agreement*; and

e. Japan improperly levied countervailing duties in 2006 to offset some of the subsidies provided by the October 2001 restructuring, even though the JIA only found that some of those subsidies applied from 2001 through to 2005, contrary to Article 19.4 of the *SCM Agreement*;

8.3 In light of the above findings, we *decline to rule* separately on Korea's claims that:

a. Japan acted inconsistently with Articles 1 and 2 of the *SCM Agreement* by reversing the burden of proof and basing its findings of "financial contribution" and "benefit" on the absence of evidence;

b. Japan improperly imposed countervailing duties on the basis of a flawed analysis of benefit, contrary to Article 19.4 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*; and

c. Japan improperly imposed countervailing duties contrary to Article 32.1 of the *SCM Agreement*.

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 Japan has acted inconsistently with the provisions of the *SCM Agreement*, it has nullified or impaired benefits accruing to Korea under that Agreement.

8.5 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)

8.6 We therefore recommend that the Dispute Settlement Body request Japan to bring its measure into conformity with its obligations under the *SCM Agreement*.[628]

[628] Korea initially submitted (at para. 48 of its Second Written Submission, and in response to Question 54 from the Panel) that, since the JIA did not use methods that are consistent with the first sentence of Article 14 to calculate the benefit to Hynix, the requirements of Article 1.1 were not met and no countervailing duties should have been imposed. Korea stated that the Panel should therefore recommend that Japan immediately rescind the countervailing duties it has imposed. At the Second Substantive Meeting, and in response to Question 119 from the Panel, Korea clarified that it was only asking the Panel to recommend that Japan bring its measures into conformity. Accordingly, there is no need for us to address Korea's initial request that we recommend that Japan immediately rescind the countervailing duties it has imposed.

8.7 Korea has asked the Panel to suggest that the countervailing duty measures imposed by Japan on imports of DRAMS from Korea be immediately rescinded, and that any countervailing duties collected by Japan on such imports be refunded forthwith. In this regard, we note that Article 19.1 goes on to provide that:

> [i]n addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

8.8 We thus consider that Article 19.1 would allow us to make the suggestion requested by Korea. However, we have found various violations of Japan's obligations under the *SCM Agreement*, which may necessitate differing responses in order to bring the measure concerned into conformity with Japan's obligations under the *SCM Agreement*. In our view, the modalities of the implementation of our recommendation are, in the first place, for Japan to determine. We therefore decline to make the suggestion requested by Korea.

ANNEX A

REQUEST FOR THE ESTABLISHMENT
OF A PANEL BY KOREA

WORLD TRADE ORGANIZATION

WT/DS336/5
19 May 2006

(06-2460)

Original: English

**JAPAN – COUNTERVAILING DUTIES ON
DYNAMIC RANDOM ACCESS MEMORIES FROM KOREA**

Request for the Establishment of a Panel by Korea

The following communication, dated 18 May 2006, from the delegation of Korea to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 27 January 2006, the Government of Japan ("Japan") imposed countervailing duties on imports of Dynamic Random Access Memories ("DRAMS") from Korea, as announced in Cabinet Order No. 13 and Ministry of Finance Notice No. 35, published respectively in Issue No. 4264 and Special Issue No. 17 of the Official Gazette dated 27 January 2006.

The Government of Korea ("Korea") considers the countervailing duties imposed by Japan against DRAMS from Korea to be inconsistent with Japan's obligations under the relevant provisions of the GATT 1994, and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). As a result, Korea requested consultations with Japan 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 14 March 2006 concerning the countervailing measures of Japan. The consultations were held with Japan in Geneva on 25 April 2006. These consultations failed to resolve the dispute between the parties.

As a result of the failure to resolve the dispute, 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 Japan's countervailing measures against DRAMS from Korea. Korea requests that the panel make findings that Japan has acted inconsistently with its obligations under Articles 1, 2, 10, 11, 12, 14, 15, 19, 21, 22 and 32 of the SCM Agreement, as well as Articles VI:3 and X:3 of the GATT 1994. Specifically, Korea makes claims under the following:

1. Article 1.1 of the SCM Agreement because, *inter alia*, Japan failed to demonstrate the existence of a financial contribution by 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*, Japan failed to demonstrate that every private financial institution involved in its subsidy investigation was under the direction or entrustment of Korea.

3. Articles 1.1 and 14 of the SCM Agreement because, *inter alia*, Japan failed to demonstrate that a benefit was conferred upon the respondent Hynix Semiconductor, Inc., ("Hynix"), given available market benchmarks and the circumstances of financial restructuring.

4. Articles 1.1 and 14 of the SCM Agreement because, *inter alia*, the analyses of the "commercial rationality" of loans and other investments in Hynix, and the other analyses related to the determination of the financial contribution and benefit to Hynix, that were undertaken by Japan are inconsistent with Japan's obligations under the SCM Agreement.

5. Article 2 of the SCM Agreement because, *inter alia*, Japan did not properly establish that all of the alleged subsidies were specific to Hynix on the basis of positive evidence.

6. Articles 1 and 2 of the SCM Agreement because, *inter alia*, Japan imposed an improper burden of proof on Hynix and Korea; reached conclusions without adequate evidentiary basis, and thereby failed to base its decisions on affirmative, objective, and verifiable evidence.

7. Article 12 of the SCM Agreement because, *inter alia*, Japan improperly treated entities that had no interest in the investigation as "interested parties," improperly applied "facts available" instead of considering the information on the record, and improperly made adverse inferences against the interests of Hynix due to allegedly inadequate cooperation by other interested parties or by other entities that were not under Hynix's control and that were not obligated to participate in the investigation.

8. Article 14 of the SCM Agreement because, *inter alia*, Japan utilized methods for calculating the benefit to the alleged recipient of the alleged financial contributions that were not specified in Japan's national legislation or implementing regulations and that were not applied in a manner that was transparent and adequately explained.

9. Articles 14 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 because, *inter alia*, Japan failed to properly measure the benefit in accordance with the principles of the SCM Agreement, which resulted in countervailing duties levied in excess of the amount allowed under the SCM Agreement and the GATT 1994.

10. Article 15 of the SCM Agreement because, *inter alia*, Japan improperly found material injury caused by the allegedly subsidized imports without proper evidentiary or legal foundations.

11. Article 15.5 and 19.1 of the SCM Agreement because, *inter alia*, Japan's determination failed to demonstrate that the allegedly subsidized imports were, through the effect of the alleged subsidies, causing injury within the meaning of the SCM Agreement.

12. Articles 10 and 32.1 of the SCM Agreement because, *inter alia*, the countervailing duties imposed by Japan against DRAMS originating in Korea were not in accordance with the relevant provisions of the SCM Agreement or the relevant provisions of GATT 1994.

13. Articles 10, 14, 19, and 21 of the SCM Agreement because, *inter alia*, Japan imposed and maintained countervailing duties without determining whether a benefit continued to exist following changes in the ownership of Hynix.

14. Articles 19 and 21 of the SCM Agreement because, *inter alia*, Japan improperly levied a countervailing duty on imports when there was no longer a benefit from the alleged subsidies, and the duty was not necessary to counteract subsidization.

15. Articles 10, 11, 12, 14, 15, 22, and 32.1 of the SCM Agreement and Articles VI:3 and X:3 of the GATT 1994 because Japan, *inter alia*, failed to conduct a thorough and complete investigation, and failed to conduct its investigation and make determinations in accordance with fundamental substantive and procedural requirements.

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 special meeting of the Dispute Settlement Body on 30 May 2006.

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