WORLD TRADE ORGANIZATION

WT/DS296/AB/R
27 June 2005

(05-2728)

Original: English

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

AB-2005-4

Report of the Appellate Body

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Ceramic Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, 6241
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Argentina – Textiles and Apparel	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R, DSR 1998:III, 1033
Brazil – EEC Milk	GATT Panel Report, *Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community* ("*Brazil – EEC Milk*"), adopted 28 April 1994, BISD 41S/II/467
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, as upheld by the Appellate Body Report, WT/DS70/AB/R, DSR 1999:IV, 1443
Canada – Dairy	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057
Canada – Dairy (Article 21.5 – New Zealand and US)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001, DSR 2001:XIII, 6829
Canada – Dairy (Article 21.5 – New Zealand and US II)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003
EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027

Short Title	Full Case Title and Citation
US – Countervailing Duty Investigation on DRAMS	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, 21 February 2005
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003
US – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, 5767
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Lamb	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, DSR 2001:IX, 4051
US – Softwood Lumber IV	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
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248AB/R, WT/DS249AB/R, WT/DS251AB/R, WT/DS252AB/R, WT/DS253AB/R, WT/DS254AB/R, WT/DS258AB/R, WT/DS259AB/R, adopted 10 December 2003
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Definition
Addendum	WT/DS296/1/Add.1, Addendum to Korea's request for consultations, WT/DS296/1
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
CRA	Agreement of Financial Institutions for Promoting Corporate Restructuring (Corporate Restructuring Agreement)
CRPA	Corporate Restructuring Promotion Act
CVDs	countervailing duties
Direction of Credit Memorandum	Direction of Credit Memorandum, C-580-851, 31 March 2003, for *Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea* (Exhibit US-8 submitted by the United States to the Panel)
DRAMS	dynamic random access memory semiconductors (DRAMS) and memory models containing DRAMS
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
FSC	Financial Supervisory Commission
GATT 1994	*General Agreement on Tariffs and Trade 1994*
GOK	Government of Korea
Hynix	Hynix Semiconductor, Inc.
ILC Draft Articles	International Law Commission's Draft Articles on Responsibility of States for internationally wrongful acts, Report of the ILC on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), chp. IV.E.2
Issues and Decision Memorandum	Issues and Decision Memorandum, C-580-851, 16 June 2003, for *Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, United States Federal Register, Vol. 68, No. 120 (23 June 2003), p. 37122 (Exhibit GOK-5 submitted by Korea to the Panel)
KDB	Korea Development Bank
KFB	Korea First Bank

Abbreviation	Definition
Micron	Micron Technology, Inc.
Panel Report	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, 21 February 2005
Samsung	Samsung Electronics Co., Ltd
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
Tokyo Round Subsidies Code	*Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade*
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
Vienna Convention	*Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
Working Procedures	*Working Procedures for Appellate Review*, WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea

AB-2005-4

Present:

Abi-Saab, Presiding Member
Janow, Member
Taniguchi, Member

United States, *Appellant/Appellee*
Korea, *Appellant/Appellee*

China, *Third Participant*
European Communities, *Third Participant*
Japan, *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, *Third Participant*

I. Introduction

1. The United States and Korea each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* (the "Panel Report").[1] The Panel was established to consider a complaint by Korea against the United States regarding the imposition of countervailing duties ("CVDs") on DRAMS and memory models containing DRAMS[2] from Korea, following an investigation by the United States Department of Commerce (the "USDOC") and the United States International Trade Commission (the "USITC").

2. The CVD investigation was initiated in November 2002, in response to a petition filed by Micron Technology, Inc. ("Micron").[3] The Korean companies investigated included Hynix Semiconductor, Inc. ("Hynix") and Samsung Electronics Co., Ltd. ("Samsung").[4] The Government of

[1]WT/DS296/R, 21 February 2005.

[2]Hereinafter, these products will be referred to collectively as "DRAMS".

[3]*Notice of Initiation of Countervailing Duty Investigation: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, United States Federal Register, Vol. 67, No. 229 (27 November 2002), p. 70927 (Exhibit GOK-2 submitted by Korea to the Panel).

[4]The countervailable subsidy rate determined for Samsung was 0.04 per cent, which is below the *de minimis* level of two per cent. Accordingly, the USDOC made a negative finding of subsidization with respect to Samsung. (*Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, United States Federal Register, Vol. 68, No. 120 (23 June 2003), p. 37122, at p. 37124 (Exhibit GOK-5 submitted by Korea to the Panel))

Korea (the "GOK") participated in the investigation as an interested party. The USDOC published a final subsidy determination on 23 June 2003[5], concluding that Hynix had received financial contributions from the GOK by virtue of, *inter alia*, the GOK's entrustment or direction of Hynix's creditors to maintain the financial viability of Hynix.[6] The USDOC determined that Hynix's countervailable subsidy rate was 44.29 per cent.[7]

3. The USITC published a preliminary injury determination on 27 December 2002 and a final injury determination on 11 August 2003.[8] In its final injury determination, the USITC concluded that the United States DRAMS industry had been materially injured by reason of imports of subsidized DRAMS from Korea. On the basis of these subsidy and injury determinations by the USDOC and the USITC, respectively, the USDOC issued a CVD order on 11 August 2003, imposing CVDs of 44.29 per cent on Hynix, which would be paid by importers as cash deposits at the same time as they would normally deposit estimated customs duties.[9]

4. Before the Panel, Korea alleged that the United States acted inconsistently with its obligations under Articles 1, 2, 10, 12, 14, 15, 19, 22, and 32 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"), as well as under Article VI:3 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").[10]

5. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 21 February 2005, the Panel concluded that:

---

[5]*Final Affirmative Countervailing Duty Determination*, *supra*, footnote 4, amended as *Notice of Amended Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, United States Federal Register, Vol. 68, No. 144 (28 July 2003), p. 44290 (Exhibit GOK-6 submitted by Korea to the Panel).

[6]Issues and Decision Memorandum, for *Final Affirmative Countervailing Duty Determination*, *supra*, footnote 4, dated 16 June 2003 (the "Issues and Decision Memorandum"), pp. 61-62 (Exhibit GOK-5 submitted by Korea to the Panel).

[7]*Notice of Amended Final Affirmative Countervailing Duty Determination, supra*, footnote 5, p. 44290, at p. 44291.

[8]*DRAMs and DRAM Modules from Korea*, Investigation No. 701-TA-431 (Preliminary), USITC Pub. 3569 (December 2002) (Exhibit GOK-9 submitted by Korea to the Panel); *DRAMs and DRAM Modules from Korea*, Investigation No. 701-TA-431 (Final), USITC Pub. 3616 (August 2003) (Exhibit GOK-10 submitted by Korea to the Panel).

[9]*Notice of Countervailing Duty Order: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, United States Federal Register, Vol. 68, No. 154 (11 August 2003), p. 47546 (Exhibit GOK-8 submitted by Korea to the Panel). Because of the USDOC's finding of *de minimis* subsidization with respect to Samsung, imports from Samsung were excluded from the CVD order and therefore not subject to CVDs. (*Ibid.*)

[10]Panel Report, para. 3.1.

> ... the [US]DOC's *Final Subsidy Determination*, the [US]ITC's *Final Injury Determination*, and the *Final Countervailing Duty Order* based thereon, are inconsistent with Articles 1, 2 and 15.5 of the *SCM Agreement*. We therefore conclude that the [United States] is in violation of those provisions of the *SCM Agreement*.[11]

6. The Panel rejected Korea's claims that the United States acted inconsistently with Articles 2[12], 12.6, 15.2, 15.4, and 15.5[13] of the *SCM Agreement*.[14] Moreover, the Panel did "not consider it necessary to address" certain additional claims made by Korea under Articles 1 and 2 of the *SCM Agreement*, or the claims Korea made pursuant to Articles 10, 14, 15.1, 19.4, 22.3, and 32.1 of the *SCM Agreement* and Article VI:3 of the GATT 1994.[15] In the course of its examination of Korea's claims, the Panel also dismissed a request by the United States that the Panel reject Korea's claims against the CVD order because Korea's request for consultations did not meet the requirements of Article 4.4 of the *Understanding on Rules and Procedures Governing the Settlement of disputes* (the "DSU").[16]

7. In the light of its findings, the Panel recommended that the United States "bring the [US]DOC's *Final Subsidy Determination*, the [US]ITC's *Final Injury Determination*, and the [US]DOC's final [CVD] order, into conformity with the *SCM Agreement*".[17]

8. On 29 March 2005, the United States notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal[18] pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[19] On 11 April 2005, Korea notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to

---

[11]Panel Report, para. 8.1.

[12]The Panel rejected Korea's claim pursuant to Article 2 of the *SCM Agreement* insofar as it concerned the USDOC's finding of specificity in relation to the alleged subsidies provided by public bodies. (Panel Report, para. 7.208) With respect to other creditors, however, the Panel agreed with Korea that the USDOC's subsidy determination did not satisfy the requirements of Article 2.

[13]The Panel rejected Korea's claim that the United States acted inconsistently with Article 15.5 of the *SCM Agreement* because the USITC "failed to demonstrate the requisite causal link between subject imports and injury". (Panel Report, para. 8.2)

[14]*Ibid*.

[15]*Ibid*., para. 8.3.

[16]*Ibid*., paras. 7.410 and 7.415.

[17]*Ibid*., para. 8.4.

[18]WT/DS296/5 (attached as Annex I to this Report).

[19]WT/AB/WP/5, 4 January 2005.

paragraph 4 of Article 16 of the DSU, and filed a Notice of Other Appeal[20] pursuant to Rule 23(1) of the *Working Procedures*. On 5 April 2005, the United States filed an appellant's submission.[21] On 13 April 2005, Korea filed an other appellant's submission.[22] On 25 April 2005, Korea and the United States each filed an appellee's submission.[23] On the same day, China, the European Communities, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, each filed a third participant's submission.[24]

9. The oral hearing in this appeal was held on 11 May 2005. The participants and third participants presented oral arguments (with the exception of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu) and responded to questions posed by the Members of the Division hearing the appeal.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by the United States – Appellant*

1. Request for Consultations under Article 4.4 of the DSU

10. The United States appeals the Panel's finding that Korea's request for consultations met the requirements of Article 4.4 of the DSU. According to the United States, Korea's request for consultations failed to provide the legal basis for the complaint with respect to the CVD order. The United States therefore requests the Appellate Body to reverse the Panel's finding.

11. The United States argues that it is "not credible"[25] to assert that, by referring to the fact that it had filed a prior request for consultations on one set of alleged measures, Korea satisfied its obligation to provide an indication of the legal basis for its complaint with respect to the CVD order, which was identified only in the second request for consultations. The United States further contends that Korea cited numerous provisions in its first request for consultations and that the United States could not have been "supposed to guess which provision(s) applied to the [CVD] order".[26] In addition, the United States maintains that Korea refused to identify the provision(s) of a covered agreement with which it considered the CVD order to be inconsistent, even when specifically asked to do so by the

[20]WT/DS296/6 (attached as Annex II to this Report).

[21]Pursuant to Rule 21 of the *Working Procedures*.

[22]Pursuant to Rule 23(3) of the *Working Procedures*.

[23]Pursuant to Rules 22 and 23(4) of the *Working Procedures*.

[24]Pursuant to Rule 24(1) of the *Working Procedures*.

[25]United States' appellant's submission, para. 143.

[26]*Ibid*.

United States after the filing of the second request for consultations. In the United States' submission "the requirements of Article 4.4 are minimal, [but] they cannot be ignored."[27]

2. Interpretation of Article 1.1(a)(1)(iv) of the *SCM Agreement*

12. The United States claims that the Panel incorrectly interpreted the terms "entrusts" and "directs" in Article 1.1(a)(1)(iv) of the *SCM Agreement*[28] and then applied that erroneous interpretation to its assessment of the record evidence. According to the United States, the Panel's interpretation of the terms "entrusts" and "directs" is inconsistent with the ordinary meanings of these terms. The proper interpretation of "entrusts" and "directs" would have considered the multiple meanings of these terms found in their dictionary definitions. In the United States' view, had the Panel looked to these meanings, it would have arrived at an understanding of "entrusts" and "directs" that takes account of the full range of government actions that fall within the ordinary meanings of these terms, namely: a government investing trust in a private body to carry out a task; a government giving responsibility to a private body to carry out a task; a government informing or guiding a private body as to how to carry out a task; a government regulating the course of a private body's conduct; as well as a government delegating or commanding a private body to carry out a task. The Panel, however, disregarded these definitions and settled on a definition of "entrusts" and "directs" as "delegation" and "command"[29], respectively. The United States alleges that this narrow interpretation fails to recognize the numerous means by which a government may provide subsidies through private bodies.

13. The United States submits that the Panel also failed to consider sufficiently the context of the terms "entrusts" and "directs", because the use of the term "practice" in Article 1.1(a)(1)(iv) clearly implies that entrustment or direction cannot be limited to an official or formal program, but also must include broader "practices". The United States argues that the context also makes clear that the negotiators did not intend that governments would be able to evade the subsidy disciplines by using other means—that is, means that differ "in no real sense"[30] from those normally used by governments—of granting subsidies. In the United States' view, the words "in no real sense" as used in Article 1.1(a)(1)(iv) suggest that the drafters were seeking to avoid circumvention of the obligation

---

[27]United States' appellant's submission, para. 144.

[28]Article 1.1(a)(1)(iv) of the *SCM Agreement* states that a financial contribution exists where:

> 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[.]

[29]Panel Report, para. 7.31.

[30]Article 1.1(a)(1)(iv) of the *SCM Agreement*.

not to provide prohibited subsidies. This understanding, according to the United States, would support an interpretation of "entrusts" and "directs" that gives effect to their full range of meanings so as not to permit subsidization in any form by governments through private bodies. The United States further asserts that the Panel's interpretation is not supported by the object and purpose of the *SCM Agreement* because the Panel's reading of Article 1.1(a)(1)(iv) would cover an unduly limited range of government subsidization achieved through the actions of private bodies.

14. Finally, the United States contends that the Panel's narrow interpretation of "entrusts" and "directs" permeates the rest of its analysis. The United States points to several of the Panel's findings as examples of errors resulting from this interpretation, including the Panel's analyses of Prime Minister's Decree No. 408, meetings between Hynix creditors and GOK officials, and Kookmin Bank's prospectus for the United States Securities and Exchange Commission. Taken together, these findings undermine the Panel's ultimate conclusion of inconsistency with Article 1.1(a)(1)(iv). Therefore, the United States requests the Appellate Body to reverse the Panel's findings with respect to its interpretation of "entrusts" and "directs", as well as the Panel's conclusions based on that interpretation.

3. Review of the USDOC's Evidence of Entrustment or Direction

(a) *The Panel's "Probative and Compelling" Evidentiary Standard*

15. The United States argues that the Panel erroneously applied a "probative and compelling" evidentiary standard in its review of the USDOC's subsidy determination and requests the Appellate Body to reverse the Panel's findings setting forth its evidentiary standard and the subsequent findings based on the application of that standard.

16. According to the United States, there is no basis in the *SCM Agreement*, the DSU, or any other covered agreement for the Panel's finding that evidence of entrustment or direction "must in all cases be probative and compelling".[31] The United States recognizes that provisions of various covered agreements set forth a number of evidentiary standards, such as "positive evidence"[32], "relevant evidence"[33], or "sufficient evidence".[34] The United States also recalls the Appellate Body's interpretation of the term "positive evidence" in *US – Hot-Rolled Steel* that "[t]he word 'positive'

[31]Panel Report, para. 7.35.

[32]Article 3.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*").

[33]Articles 3.5 and 5.2 of the *Anti-Dumping Agreement*; Articles 42 and 50.1(b) of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*.

[34]Articles 5.3, 5.6, 5.8, 10.7, and 12.1 of the *Anti-Dumping Agreement*; Article 5.4 of the *Agreement on Textiles and Clothing*.

means [...] that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible."[35] The United States contends, however, that this requirement does not translate into an evidentiary standard of "probative and compelling".

17. Referring to the definition of the term "compelling", the United States argues that a standard of "compelling" evidence would appear to require evidence that "forces" or "obliges" a fact-finder to reach a particular conclusion, or evidence that is "overwhelming"[36] or "irrefutable".[37] In the United States' view, such a standard cannot be reconciled with the decision of the Appellate Body in *US – Lamb*[38], according to which a panel's duty is to determine whether an investigation authority provided a reasoned and adequate explanation as to why the evidence led to a particular conclusion, rather than whether that conclusion was based on probative and compelling evidence.

(b) *The Panel's Approach to the Evidence*

(i) Reviewing the Totality of the Evidence

18. The United States alleges that the Panel erred by assessing the USDOC's determination of entrustment or direction on the basis of each piece of evidence in isolation, without considering the totality of the evidence. In the United States' submission, this approach necessarily led to a finding of insufficiency of the evidence underlying the USDOC's determination. Therefore, the United States requests the Appellate Body to reverse the Panel's findings as to the individual pieces of evidence, as well as those findings that were the product of the Panel's erroneous approach.[39]

19. The United States observes that the Panel indicated that it would adopt the same approach in examining the evidence as did the USDOC, "rel[ying] on the totality of the evidence before it, without attaching particular importance to one or several evidentiary factors".[40] However, the United States argues, the Panel Report reveals that the Panel in fact assessed whether each piece of evidence, *in and of itself*, demonstrated entrustment or direction, rather than assessing whether the evidence in its entirety supports the finding of entrustment or direction.[41]

---

[35]United States' appellant's submission, para. 51 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 192).

[36]*Ibid*., para. 49 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 458).

[37]*Ibid*.

[38]*Ibid*., para. 54 (referring to Appellate Body Report, *US – Lamb*, para. 103).

[39]*Ibid*., para. 73.

[40]*Ibid*., para. 58 (quoting Panel Report, para. 7.45).

[41]*Ibid*.

20. In particular, the United States alleges that the Panel employed this "piecemeal approach"[42] at several points in its analysis of the USDOC's finding on entrustment or direction. The United States points to the Panel's examination of various items of evidence relied on by the USDOC—including the Public Funds Oversight Act, Prime Minister's Decree No. 408, and Kookmin Bank's prospectus for the United States Securities and Exchange Commission—as examples of the Panel's failure to consider the evidence in its totality.[43] The United States further alleges that, even where the Panel claimed to consider pieces of evidence in a broader context, it "marginalized"[44] this evidence, as in the Panel's failure to appreciate the relevance of GOK ownership or control of the dominant Hynix creditors.[45] Therefore, the United States requests the Appellate Body to reverse those findings that were based on the Panel's error of reviewing in isolation pieces of evidence supporting the USDOC's determination of entrustment or direction.

(ii) Circumstantial Evidence

21. The United States alleges that the Panel effectively required every piece of evidence to be *direct* evidence of entrustment or direction and thereby precluded legitimate inferences drawn from circumstantial and secondary evidence. The United States therefore requests the Appellate Body to reverse the Panel's findings affected by its "legally erroneous"[46] analytical framework.

22. As an example of the Panel's error, the United States refers to the Panel's discussion of the GOK's coercion of Hana Bank, where the Panel stated that "[a]n objective and impartial investigating authority would not have treated a simple reference to a footnote in an article as *sufficient* proof of such a significant issue as government entrustment or direction."[47] The United States argues that this statement reveals the Panel's failure to recognize that the value of a piece of circumstantial evidence is not in its *sufficiency*, but rather, in "the inferences created, together with other pieces of evidence, regarding the existence of a particular fact or set of facts".[48]

23. The United States contends that instead of "fixating" on whether certain individual pieces of evidence were dispositive of entrustment or direction, the Panel should have drawn from the totality of circumstantial evidence that "the GOK had an established practice, purpose, and process for

[42]United States' appellant's submission, para. 65.

[43]*Ibid*., paras. 60-67.

[44]*Ibid*., para. 69.

[45]*Ibid*., para. 68.

[46]*Ibid*., para. 85.

[47]*Ibid*., para. 76 (quoting Panel Report, para. 7.129). (emphasis added by the United States)

[48]*Ibid*. (footnote omitted)

entrusting and directing Hynix's creditors".[49] In doing so, it should have given special attention to "the GOK's longstanding policy of supporting Hynix; the GOK's powerful influence over Hynix's creditors as a consequence of, *inter alia*, the significant GOK ownership interests in the Korean financial sector; and the utter lack of any commercial basis for assisting Hynix."[50]

24. The United States submits that the Panel's treatment of circumstantial evidence differs sharply from the way prior panels and the Appellate Body have assessed circumstantial evidence. In addition to the panel reports in *Argentina – Textiles and Apparel* and *Canada – Aircraft*, the United States points to the statement of the Appellate Body in *Canada – Aircraft* that "inferences derived may be inferences of law: for example the *ensemble* of facts found to exist warrants the characterization of a 'subsidy'".[51] According to the United States, circumstantial evidence is particularly relevant to establishing a financial contribution under Article 1.1(a)(1)(iv). Direct evidence of government entrustment or direction is difficult for outside parties to obtain because such information typically will be treated by the exporting government or foreign parties as confidential. As a result, the United States submits, the Panel's failure to appreciate the circumstantial evidence on which the USDOC relied effectively established an evidentiary requirement that is "virtually impossible" to meet in cases involving government entrustment or direction.[52]

(iii) Burden of Proof

25. The United States argues that the manner in which the Panel assessed the evidence in the present case effectively led to an improper shift in the burden of proof from Korea to the United States and, therefore, requests the Appellate Body to reverse the Panel's findings that resulted from this error. According to the United States, the Panel recognized—in accordance with prior WTO decisions—that Korea bears the burden of proof as the complaining party. However, the United States alleges, the Panel analyzed pieces of evidence in isolation, required that each piece of evidence be "compelling", and disregarded inferences drawn from circumstantial evidence, thereby requiring the United States to produce a "smoking gun"[53] document that itself would be dispositive of entrustment or direction. Because the Panel did not find such a "smoking gun", the United States submits, it concluded that the USDOC had not demonstrated entrustment or direction. Requiring the United States to justify the USDOC's determination with evidence of a "smoking gun"—instead of

[49]United States' appellant's submission, para. 80.

[50]*Ibid*., para. 79. (footnotes omitted)

[51]*Ibid*., para. 82 (quoting Appellate Body Report, *Canada – Aircraft*, para. 198). (original emphasis)

[52]*Ibid*., para. 83.

[53]*Ibid*., para. 87.

requiring Korea to establish how the evidence could not collectively support a finding of entrustment or direction—amounted to a shift in the burden of proof from Korea to the United States.

(iv) *Ex post* Rationalization

26. The United States submits that the Panel erroneously characterized the United States' reliance on certain record evidence during the Panel proceedings as *ex post* rationalizations and consequently erred in declining to consider this evidence when assessing the USDOC's finding of entrustment or direction. Accordingly, the United States requests the Appellate Body to reverse the Panel's findings regarding *ex post* rationalization as well as the conclusions that resulted from these findings.

27. The United States acknowledges that some panels have rejected arguments and reasoning on the grounds that they constituted *ex post* rationalizations.[54] However, the United States argues, in those cases, panels objected to the introduction of new *reasoning*, whereas, in this case, the United States merely provided to the Panel additional evidentiary support relating to reasoning that had *already been employed* in the USDOC's published determination. Specifically, the United States submits that each of these items of evidence—such as the article in the *Dong-A Daily*, entitled "'Gangster-Style' Solution for Hynix", which the Panel refused to consider[55]—related directly to the reasoning of the USDOC regarding certain factual inferences underlying the USDOC's finding of entrustment or direction, and thus, do not constitute *ex post* rationalizations.

28. In support of this argument, the United States refers to Article 22.5 of the *SCM Agreement*, which provides that an agency's published determination at the end of a CVD investigation "shall contain ... all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". In the United States' view, this provision addresses what must be contained in a final determination and, by its plain language, does not require an investigating authority "to cite to every piece of record evidence that supports its reasons for the imposition of final measures".[56] Therefore, the United States contends, nothing in the *SCM Agreement* permits a panel to disregard record evidence, even when not cited in the final determination, provided that it is not being introduced to support new reasoning. By concluding to the contrary, the United States argues, the Panel impermissibly limited the evidence on which a Member may rely under Article 22.5 of the *SCM Agreement*, in contravention of Articles 3.2 and 19.2 of the DSU.

[54]United States' appellant's submission, para. 89 (referring to Panel Report *Argentina – Ceramic Tiles*, para. 6.27; and Panel Report, *Guatemala – Cement II*, para. 8.245).

[55]Panel Report, para. 7.88.

[56]United States' appellant's submission, para. 91.

29. The United States additionally points to a GATT panel decision applying Article 2.15 of the *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade* (the "*Tokyo Round Subsidies Code*"), which is "quite similar" to Article 22.5 of the *SCM Agreement*.[57] That panel decision recognized that a panel was not precluded, by virtue of Article 2.15, from considering evidence not included in a published determination, provided that it could reasonably be inferred that the agency had relied on such evidence. The United States also refers to the Appellate Body Report in *US – Upland Cotton*. In that case, the Appellate Body, in the context of the panel's application of Article 6.3 of the *SCM Agreement*, found no error where the panel did not refer to every item of evidence provided by the parties to the dispute because it had found certain items less significant for its reasoning than others.[58] In the United States' view, similar reasoning should apply in this case so as not to require an investigating authority to cite every item of supporting evidence from the agency's record.

30. Finally, the United States argues that the USDOC did, in fact, explicitly cite, in its Direction of Credit Memorandum[59], some of the articles that the Panel refused to take into account, such as articles in the *Korea Economic Daily*, *Euromoney*, and the *Korea Times*. The United States submits that the Direction of Credit Memorandum had been referenced in the USDOC's determination in support of the USDOC's finding of entrustment or direction. Therefore, according to the United States, the Panel erred in basing its refusal to take these articles into consideration on the fact that they had not been cited in the USDOC's published determination.

(c) *The Panel's Failure to Comply with Article 11 of the DSU*

(i) Non-record Evidence

31. The United States contends that the Panel improperly relied on evidence that was not on the record before the USDOC and that, in so doing, the Panel engaged in an impermissible *de novo* review of the USDOC's subsidy determination in violation of Article 11 of the DSU. The United States accordingly requests the Appellate Body to reverse those findings of the Panel that were based on the erroneous use of non-record evidence.

32. Referring to the Appellate Body Report in *US – Cotton Yarn* and the panel report in *Egypt – Steel Rebar*, the United States submits that reliance on non-record evidence constitutes a *de novo*

[57]United States' appellant's submission, para. 92 (referring to GATT Panel Report, *Brazil – EEC Milk*, paras. 286-287).

[58]*Ibid*., para. 93 (quoting Appellate Body Report, *US – Upland Cotton*, para. 446).

[59]Direction of Credit Memorandum for *Countervailing Duty Investigation*: *Dynamic Random Access Memory Semiconductors from the Republic of Korea*, dated 31 March 2003 (Exhibit US-8 submitted by the United States to the Panel).

review and results in a violation of Article 11 of the DSU. Additionally, the United States relies on Article 12.2 of the *SCM Agreement*, which provides, in relevant part, that a "decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority".

33. The United States points, in particular, to the findings of the Panel contained in paragraphs 7.63, 7.91, and 7.155 of the Panel Report. In the United States' submission, each of these findings was expressly based on the Panel's finding that certain creditors of Hynix exercised mediation rights in connection with the October 2001 restructuring. However, the United States argues, there was no evidence on the record of the USDOC that certain Hynix creditors did, in fact, engage in mediation and thereby avoid the restructuring terms established by the dominant GOK-owned and -controlled creditors. According to the United States, the only evidence of such mediation was submitted by Korea in the course of the Panel proceedings, and not by any interested party to the USDOC during the CVD investigation.

34. With regard to the Panel's conclusion that Article 29(5) of the Corporate Restructuring Promotion Act (the "CRPA") should have put the USDOC on notice about the possibility of mediation, the United States contends that, absent evidence on the record from Hynix or the GOK regarding "*actual instances of mediation*", the USDOC was in no position to consider how such mediation would affect its findings.[60] In the United States' view, a reference to the *possibility* of mediation alone does not constitute record evidence that mediation did take place.

35. Moreover, the United States argues, the USDOC, in the course of the investigation, asked specific questions regarding the CRPA and the different options provided to Hynix's creditors at the time of the October 2001 restructuring. Notwithstanding this request for information, the United States submits, "neither Hynix nor the GOK ever mentioned anything about mediation".[61] Furthermore, the United States asserts, neither Hynix nor the GOK ever mentioned in their submissions to the USDOC that mediation had in fact taken place.

36. The United States disagrees with the Panel's finding that a statement in Hynix's 2001 Audit Report indicated that the mediation provisions had been invoked and that this should have put the USDOC on notice that a request for mediation had been filed.[62] In the United States' view, the referenced excerpt to the Hynix 2001 Audit Report did not indicate that mediation had occurred, only

[60]United States' appellant's submission, para. 109. (original emphasis)

[61]*Ibid*., footnote 156 to para. 108.

[62]*Ibid*., para. 111 (referring to Panel Report, paras. 7.85-7.86).

that certain banks had "raised objections"[63], without clarifying the relationship, if any, between the "raising of objections" and the recourse to mediation.

(ii) Standard of Review

37. The United States submits that, in addition to the individual Panel errors listed above[64], the cumulative effect of these errors also constitutes a violation of Article 11 of the DSU. The United States asserts that it was appropriate for the USDOC to examine the evidence in its totality, to rely on circumstantial and secondary evidence, and to draw reasonable inferences from this evidence. The Panel's task in reviewing the USDOC's determination was to decide whether the USDOC properly established the facts and evaluated them in an unbiased and objective way, and whether the USDOC, given the totality of the record evidence, including circumstantial evidence, could have found entrustment or direction. In the United States' submission, however, the individual errors committed by the Panel led it to substitute a "new analytic framework" for that used by the USDOC, redefine the scope and structure of the USDOC's analysis, and reweigh the USDOC's evidence.[65] In so doing, the United States argues, the Panel failed to follow the proper standard of review and thereby exceeded the bounds of its discretion under Article 11 of the DSU. The United States, therefore, requests the Appellate Body to reverse the Panel's conclusions stemming from its improper application of the standard of review.

4. Benefit and Specificity

38. The United States appeals the Panel's findings regarding the USDOC's determination of benefit and specificity. The United States observes that the Panel found the USDOC's benefit determination to be inconsistent with Article 1.1(b) of the *SCM Agreement*, and its specificity determination to be inconsistent with Article 2 of the *SCM Agreement* insofar as it relates to alleged subsidies by creditors not identified by the USDOC as public bodies. The United States submits that these findings are based *solely* on the Panel's erroneous conclusion that the USDOC's determination of GOK entrustment or direction of certain Hynix creditors is inconsistent with Article 1.1(a)(1)(iv) of the *SCM Agreement*. Accordingly, the United States requests the Appellate Body to reverse the Panel's findings on benefit and specificity.

[63]United States' appellant's submission, para. 111 (quoting 2001 Hynix Audit Report, p. 40 (Exhibit US-125 submitted by the United States to the Panel)). The Panel also quoted the Hynix 2001 Audit Report at paragraph 7.85 of the Panel Report.

[64]*Supra*, Section II.A.3(a)-(c)(i).

[65]United States' appellant's submission, para. 119.

B. *Arguments of Korea – Appellee*

1. Request for Consultations under Article 4.4 of the DSU

39. Korea submits that the United States' appeal regarding the request for consultations is not properly before the Appellate Body because the United States' Notice of Appeal does not sufficiently identify the alleged errors of law and legal interpretations as required by Rule 20(2)(d) of the *Working Procedures*. Korea argues that subparagraph (i) of Rule 20(2)(d) would be rendered redundant, in the light of subparagraphs (ii) and (iii), if it were sufficient for an appellant to state merely what the panel holds, and claim simply that it disagrees. In its Notice of Appeal, the United States failed to offer "the least bit of description of what the [United States] considers to be the legal error".[66] Korea, therefore, requests the Appellate Body to dismiss this claim of the United States.

40. In the alternative, Korea argues that the United States' claim regarding Article 4.4 of the DSU should be dismissed because Korea's request for consultations did satisfy the requirements of that provision. Korea refers to its request for consultations, dated 30 June 2003[67], and to the addendum to this request, dated 18 August 2003 (the "Addendum").[68] Korea disagrees with the United States that Korea did not indicate the legal provisions with which the CVD order is alleged to be inconsistent. Korea submits that the 18 August 2003 document made clear that it was an "addendum" to the 30 June 2003 request for consultations and that, therefore, the same violations set out in the initial request were being alleged in the Addendum with respect to the CVD order. Korea further argues that the CVD order is "dependent" on the final determinations of the USDOC and the USITC and is effectively a "ministerial function without discretion".[69] In Korea's view, it follows that the legal basis for the complaint as to the CVD order is identical to the legal basis for the complaint as to the underlying determinations. Therefore, Korea submits that its request for consultations and Addendum met the requirements of Article 4.4 of the DSU and requests the Appellate Body to dismiss the United States' appeal of this issue.

2. Interpretation of Article 1.1(a)(1)(iv) of the *SCM Agreement*

41. Korea contests the United States' challenge to the Panel's interpretation of Article 1.1(a)(1)(iv) of the *SCM Agreement*, and therefore submits that the interpretation should be upheld by the Appellate Body. In particular, Korea argues that the Panel's interpretation of the terms "entrusts" and "directs" was consistent with the ordinary meanings of these terms. Korea recalls that

[66]Korea's appellee's submission, para. 230.

[67]WT/DS296/1 (attached as Annex III to this Report).

[68]WT/DS296/1/Add. 1 (attached as Annex IV to this Report).

[69]Korea's appellee's submission, para. 242.

the Panel agreed with the panel in *US – Export Restraints* that "entrustment" and "direction" contain an element of "delegation" and "command". Korea contends that the definitions of the terms "entrusts" and "directs" proposed by the United States were chosen selectively and that, in so choosing, the United States arrives at an overly broad reading of these terms. Korea presents several examples applying the definitions suggested by the United States, arguing that such examples reveal that these definitions incorporate a broader range of government action than contemplated by the *SCM Agreement*.

42. Korea further submits that the Panel's proper understanding of the context of the terms "entrusts" and "directs" supports its interpretation. Korea rejects the United States' reading of the term "practice" in Article 1.1(a)(1)(iv) as implying that entrustment or direction cannot be limited to an official programme, but may also include broader "practices". Korea argues that "[t]he term 'practices' refers to *what* is being entrusted or directed, not *whether* such types of governmental activities have been so entrusted or directed".[70] Similarly, Korea disagrees with the United States' assertion that by equating "entrusts" and "directs" with "delegation" and "command", the Panel did not take account of the "full range of methods"[71] by which a government might provide a subsidy. Korea submits that, although there may be a broad range of the *types* of financial transactions covered by Article 1.1(a)(1), that is a "distinct matter" from determining whether such transactions can be *attributed* to the Member's government due to entrustment or direction by the government to a private body.[72]

43. Korea agrees with the United States that the *SCM Agreement* aims to discipline subsidies offered by governments. In Korea's view, under the United States' interpretation, a Member would be allowed to countervail a *private body's* actions that are not affirmatively entrusted or directed by the government. This would "turn the SCM Agreement from a pro-competitive agreement to a tool of gross protectionism".[73]

44. Korea responds to the various examples submitted by the United States with a view to demonstrating the Panel's application of its interpretation of the terms "entrusts" and "directs" to the facts of this case. In Korea's view, the Panel's findings referred to by the United States are not based on an improper reading of Article 1.1(a)(1)(iv); the Panel found instead that the USDOC had improperly relied on evidence to support conclusions that do not logically follow from the evidence. Korea further emphasizes that the Panel agreed with the United States on the principal legal issues

[70]Korea's appellee's submission, para. 43. (original emphasis)

[71]*Ibid*., para. 48 (quoting United States' appellant's submission, para. 37).

[72]*Ibid*., para. 50.

[73]*Ibid*., para. 52.

relating to the interpretation of Article 1.1(a)(1)(iv) and that, in fact, the United States is "trying to appeal factual issues under the guise of spurious legal claims".[74] Korea, therefore, requests the Appellate Body to uphold the Panel's findings claimed by the United States to be based on the Panel's erroneous interpretation of Article 1.1(a)(1)(iv).

3. Review of the USDOC's Evidence of Entrustment or Direction

(a) *The Panel's "Probative and Compelling" Evidentiary Standard*

45. Korea contests the United States' claim that the Panel impermissibly created a new legal standard for evaluating evidence by requiring evidence to be "probative and compelling". Korea submits that the term "probative and compelling" is not a new legal standard, but rather, a description of the type of circumstantial evidence that would be sufficient to establish entrustment or direction.

46. In Korea's view, the Panel addressed the question whether an investigating authority could properly base its finding of entrustment or direction on circumstantial evidence, or whether direct evidence was required to sustain such a finding. Korea notes that the Panel found that an agency may rest its finding of entrustment or direction on circumstantial evidence, and argues that the Panel's statement at issue must be understood in this particular context. Korea contends that the Panel should be understood to have found that the further away from direct evidence one moves, the more important it is that the circumstantial evidence be persuasive. When assessing what sort of evidence could be considered persuasive in this context, the Panel required the evidence to be "probative and compelling". Therefore, Korea submits, the Panel employed these terms merely to give a description of the quality or type of evidence that was required in the specific circumstances of the present case, without purporting to define a new evidentiary standard under the *SCM Agreement*.

47. Furthermore, Korea alleges that the United States mischaracterizes the evidentiary standard articulated by the Panel by reading the Panel's description of "probative and compelling" evidence to require "overwhelming"[75] or "irrefutable" evidence.[76] Based on dictionary definitions of "probative" and "compelling", as well as synonyms for "compelling", Korea concludes that evidence can be regarded as "probative and compelling" if it has a "quality of proof and [has] fitness to induce conviction of truth".[77] Korea submits that the Panel followed this standard in finding that there was

---

[74]Korea's appellee's submission, para. 53.

[75]*Ibid*., para. 86 (quoting United States' appellant's submission, para. 49; in turn quoting *The New Shorter Oxford English Dictionary*, *supra*, footnote 36, Vol. 1, p. 458).

[76]*Ibid*. (quoting United States' appellant's submission, para. 49).

[77]*Ibid*., para. 98 (quoting Black's Law Dictionary, 7th edn, B.A. Garner (ed.) (West Group, 1999), p. 628).

adequate evidence that Korea First Bank ("KFB") had been coerced by reason of alleged verbal threats from an official from the Financial Supervisory Service, even though the sole evidence for this finding consisted of a single newspaper report. Therefore, Korea concludes, if there is any criticism of the Panel in its examination of the evidence, it is that the Panel "set the bar too low".[78]

(b) *The Panel's Approach to the Evidence*

(i) Reviewing the Totality of the Evidence

48. Korea challenges the United States' allegation that the Panel evaluated the evidence in a manner that required that each piece of evidence, *in and of itself*, demonstrate entrustment or direction. Korea submits that, although the Panel did look at individual pieces of evidence, it did not state that each piece of evidence, *in and of itself*, had to demonstrate entrustment and direction. Korea points instead to instances in which the Panel explicitly stated that it viewed a piece of evidence "in conjunction with" other evidentiary factors.[79]

49. Moreover, according to Korea, if the Panel found that a piece of evidence was of little or no evidentiary value—in the sense that it did not support the conclusion that the USDOC derived from it, or that it was contradicted, or that it was inaccurate—there would be no merit in taking into account several such pieces of evidence as a whole. In other words, Korea submits, "[i]t is a mathematical truism that no matter how many zeros and negative numbers one adds together, the sum can never be a positive number."[80] Korea further alleges that, by arguing that the Panel reviewed the evidence in an improper manner, the United States attempts to re-argue on appeal the specific facts of the case.

50. Korea contests the examples of Panel findings cited by the United States in support of its allegation. Korea submits that a correct reading of the Panel's reasoning does not reveal the Panel to have required each piece of evidence, *in and of itself*, to establish entrustment or direction. Instead, according to Korea, these examples reflect the Panel's finding that several pieces of evidence relied upon by the USDOC were not probative, that is, they did not support the conclusion of entrustment or direction that the USDOC sought to draw on the basis of that evidence. In Korea's view, the United States' appeal amounts to a disagreement with the Panel's weighing of the evidence, which does not provide a permissible basis for appeal.

[78]Korea's appellee's submission, para. 109.

[79]*Ibid*., para. 111 (quoting Panel Report, paras. 7.56 and referring to paras. 7.63, 7.168, and 7.177).

[80]*Ibid*., para. 114.

(ii) Circumstantial Evidence

51. Korea argues that, contrary to the United States' submission, the Panel did not effectively require every piece of evidence to be *direct* evidence of entrustment or direction. Accordingly, Korea requests the Appellate Body to uphold the findings challenged by the United States on the basis that the Panel erred in its assessment of the USDOC's circumstantial evidence.

52. Korea asserts that the Panel did, in fact, accept circumstantial and secondary evidence. In support of its argument, Korea submits that the Panel found entrustment or direction of KFB on the basis of a single newspaper article, which was "both secondary and circumstantial" evidence.[81] Because the Panel considered such evidence in its analysis, as the United States requested, Korea submits that there is no basis for the United States' appeal.

53. In Korea's submission, the Panel did not reject evidence because it was circumstantial or secondary evidence, but rather, because much of the evidence was inaccurate, illogical, or simply not probative. For example, in response to the United States' argument that the Panel did not properly assess the evidence regarding GOK coercion of Hana Bank, Korea submits that the Panel Report does not indicate that the basis for finding this evidence insufficient was its circumstantial nature. Rather, in Korea's view, this evidence was rejected because the record showed that the USDOC had not itself examined the evidence submitted before the Panel, instead having relied on a mere *citation* of that evidence contained in a footnote of another document.

54. Korea submits that the Panel's examination of circumstantial evidence in the present case is consistent with prior panel decisions, in particular, with the panel reports in *Argentina – Textiles and Apparel* and *Canada – Aircraft*, cited by the United States in support of its appeal. Korea asserts that these two cases essentially stand for the same proposition ultimately accepted by the Panel in this dispute at the urging of the United States, namely, that a Member may establish the existence of certain conditions on the basis of circumstantial rather than direct evidence. In Korea's view, the Panel's articulation of a "probative and compelling" requirement for the evidence does not diminish a Member's right to rely on circumstantial evidence because the "probative and compelling" requirement "exists whether or not the evidence is circumstantial or direct".[82]

(iii) Burden of Proof

55. Korea submits that the United States' claim—that the Panel's assessment of the USDOC's determination led to a shift in the burden of proof from Korea to the United States—is "baseless" and

[81]Korea's appellee's submission, para. 164. (emphasis omitted)

[82]*Ibid*., para. 173.

should be rejected by the Appellate Body.[83] Korea disagrees with the United States' contention that the Panel required the United States to produce a "smoking gun".[84] Korea asserts that, rather than looking for each piece of evidence in isolation to be dispositive of entrustment or direction, the Panel assessed whether an objective and impartial investigating authority could reasonably have relied on the USDOC's evidence "*as a part* of building a finding of entrustment or direction".[85] Reliance on such evidence, Korea argues, was in any event found by the Panel to be inappropriate because the evidence was typically not relevant to the inference or conclusion it was meant to support and, therefore, was neither probative nor compelling. In Korea's view, the Panel's refusal to accept unquestioningly the United States' assertions as to the relevance of certain evidence does not constitute an improper allocation of the burden of proof to the United States.

(iv) *Ex post* Rationalization

56. Korea submits that the Panel correctly identified evidence submitted by the United States as *ex post* rationalizations and requests the Appellate Body to uphold the Panel's findings refusing to consider such evidence. Referring to Article 22.5 of the *SCM Agreement*, Korea contends that an investigating authority must cite, in its published determination, *every* piece of record evidence that supports the agency's reasons for the imposition of final measures. Korea submits that the United States' argument—that a panel must accept any evidence not being submitted to support new *reasoning*—is not consistent with the plain text of Article 22.5. Korea points, in particular, to the requirement that the published determination contain "*all* relevant information" in support of its view that evidence not cited by the agency—and, therefore, presumably not "relevant"—may not subsequently be relied on by that Member in WTO dispute settlement proceedings.

57. Korea contends that the United States' reliance on a GATT panel decision is misplaced because that decision was under the *Tokyo Round Subsidies Code*, which differs significantly in pertinent respects from the *SCM Agreement.* Korea notes that, whereas the *Tokyo Round Subsidies Code* obliged an investigating authority to include "all issues of fact and law" in its published determination[86], the *SCM Agreement* requires the inclusion of "all relevant information".[87] Korea maintains that this difference in language suggests that, whatever may have been the understanding of this obligation under the *Tokyo Round Subsides Code*, the plain language of the *SCM Agreement* now

[83]Korea's appellee's submission, heading II.E.

[84]*Ibid*., para. 176 (quoting United States' appellant's submission, para. 87).

[85]*Ibid*., para. 175. (original emphasis)

[86]Article 2.15 of the *Tokyo Round Subsidies Code.*

[87]Article 22.5 of the *SCM Agreement*.

requires that *every* piece of information upon which the investigating authority relied in making its determination be contained in the agency's published determination.

58. Korea submits that the United States' reliance on the Appellate Body decision in *US – Upland Cotton* is similarly "inapposite".[88] According to Korea, the section of that Appellate Body Report cited by the United States considers the question whether a panel evaluating the consistency of a measure with a particular provision needs to "address"[89] each piece of evidence or each argument raised by the parties, or whether it suffices, instead, for a panel to explain the reasoning underlying its conclusions. This issue, in Korea's view, has "nothing to do with"[90] the requirement in Article 22.5 of the *SCM Agreement* that the agency's determination contain "all relevant information".

59. Furthermore, Korea disagrees with the United States' assertion that the newspaper and journal articles disregarded by the Panel were cited by the USDOC in the Direction of Credit Memorandum. Korea submits, first, that certain of the articles implicated by this issue on appeal are not included among the citations in that document. In addition, according to Korea, the Direction of Credit Memorandum is merely a list of citations that does not contain any *discussion* of the evidence listed and, therefore, cannot establish that the documents were in fact taken into account by the USDOC so that contradictions and nuances found therein could be reasonably and adequately explained by the agency. Finally, Korea asserts that the date of the Direction of Credit Memorandum, which is the same date as that of the USDOC's preliminary subsidy determination[91], as well as the fact that no reference is made to materials supporting the *respondent's* arguments, suggest that it was drafted "at the last second ... to support a decision already reached without reliance on the articles".[92]

(c) *The Panel's Failure to Comply with Article 11 of the DSU*

(i) Non-record Evidence

60. Korea submits that the Panel did not base its findings on non-record information and, therefore, requests the Appellate Body to uphold the respective findings of the Panel as well as the Panel's conclusions that the United States contends resulted from this alleged error. The United States bases its argument on the premise that the record evidence shows only that creditors had the *possibility* of going to mediation in connection with the October 2001 restructuring, not, as the Panel

[88]Korea's appellee's submission, para. 186.

[89]*Ibid*. (quoting Appellate Body Report, *US – Upland Cotton*, para. 446).

[90]*Ibid*.

[91]*Preliminary Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, United States Federal Register, Vol. 68, No. 66 (7 April 2003), p. 16766 (Exhibit GOK-4 submitted by Korea to the Panel).

[92]Korea's appellee's submission, para. 193.

found, that certain creditors *exercised* mediation rights. In Korea's view, however, the Panel's analysis did not rest on the fact that certain creditors did engage in mediation. Instead, according to Korea, the Panel faulted the USDOC for not conducting further inquiry on this issue, given that Article 29(5) of the CRPA, which was on the record, explicitly provided for the option of mediation to determine appraisal rights.[93]

61. Korea also challenges the United States' argument that the record evidence does not establish that certain Hynix creditors *exercised* their rights to pursue mediation. Korea argues that the Panel linked Article 29(5) of the CRPA to other pieces of evidence, which together could support the Panel's understanding that mediation did take place.[94] Korea refers, in particular, to the Panel's discussion of the Hynix 2001 Audit Report, which states that three creditors "raised objections" to the terms of reimbursement "[b]ased on" the CRPA.[95] Korea submits that this language was properly understood by the Panel to indicate recourse to mediation by certain creditors of Hynix.

62. Finally, Korea contends that the United States fails to recognize that the Panel pointed also to contradictory evidence from one of the USDOC's own experts. According to Korea, the Panel quoted the USDOC's expert as acknowledging that "certain creditors were able to act independently within the framework of the CRPA".[96] Because the USDOC did not even take this statement into account in its explanation, Korea argues, the Panel properly concluded that the record evidence put the USDOC on notice as to certain creditors' recourse to mediation in connection with the October 2001 restructuring.

63. Korea concludes that there was evidence on the record that mediation occurred pursuant to the authority of the CRPA and, therefore, that the Panel did not impermissibly base its findings on non-record information, in violation of Article 11 of the DSU.

(ii) Standard of Review

64. Korea challenges the United States' contention that the cumulative effect of the alleged errors that the Panel made in its review of the evidence constitutes a separate violation of Article 11 of the DSU. Korea argues that the United States adds no new arguments when it alleges a separate violation of Article 11 of the DSU, relying instead on its previous claims relating to the totality of the evidence,

[93]Korea's appellee's submission, para. 198.

[94]*Ibid*., para. 200.

[95]*Ibid*., para. 201 (quoting Hynix 2001 Audit Report, *supra*, footnote 63, p. 40; also quoted in Panel Report, para. 7.85). (Korea's emphasis omitted)

[96]*Ibid*., para. 210 (quoting Panel Report, footnote 98 to para. 7.87; in turn quoting Issues and Decision Memorandum, *supra*, footnote 6, p. 55).

circumstantial and secondary evidence, the burden of proof, and the Panel's alleged use of non-record evidence.[97] Having already established the absence of any basis for these claims, Korea requests the Appellate Body to dismiss the United States' additional claim as to the Panel's application of the standard of review under Article 11 of the DSU.

4. Benefit and Specificity

65. Korea submits that the United States' sole argument with regard to benefit and specificity is that the Panel based its conclusions on its allegedly erroneous findings with respect to GOK entrustment or direction.[98] Because the Panel correctly found the USDOC's determination of entrustment or direction to rest on insufficient evidence, Korea contends that the Appellate Body should dismiss the United States' claims relating to benefit and specificity.

C. *Claim of Error by Korea – Other Appellant*

66. Korea appeals the Panel's finding that a private body, KFB, was entrusted or directed by the GOK to undertake a financial contribution within the meaning of Article 1.1(a)(1)(iv) of the *SCM Agreement*. Korea contends that this finding was premised on the Panel's erroneous understanding that there could be entrustment or direction under Article 1.1(a)(1)(iv) when the action that the private body was supposed to "carry out"—in this case the participation in the Fast Track Debenture Programme—never took place. Korea maintains that KFB did not "carry out" the allegedly entrusted action and that, accordingly, the Panel was incorrect in finding that an objective and impartial investigating authority could have found that there was entrustment or direction of KFB to participate in the Fast Track Debenture Programme.[99] Korea further asserts that its appeal focuses on the Panel's interpretation of Article 1.1(a)(1)(iv) and that, although Korea disagrees with the Panel's *factual* finding that there was coercion by the GOK with respect to KFB, it is not challenging this factual finding on appeal.[100]

67. According to Korea, the Panel's interpretation of Article 1.1(a)(1)(iv)—that a private body may be entrusted to take an action even when the action never occurs—is legally and logically incorrect. Korea submits that the terms "entrusts" and "directs" cannot be read in isolation from the remainder of Article 1.1(a)(1)(iv), in particular, the requirement that the private body "carry out" one of the functions identified in Article 1.1(a)(i) through (iii). Korea submits that Article 1.1(a)(1)(iv) further requires that the private body engage in a "practice" of a governmental type and that a

[97]Korea's appellee's submission, para. 215.

[98]*Ibid*., para. 226.

[99]*Ibid*., paras. 15-16.

[100]*Ibid*., para. 4.

"practice" is the *application* of a plan, not simply the plan itself.[101] In Korea's view, to read "entrusts" and "directs" without regard to these subsequent terms in the same provision "makes no linguistic or logical sense".[102]

68. Korea finds support for its reading of Article 1.1(a)(1)(iv) in the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*, which established that only overt government *actions* or *omissions* may constitute a "measure" that can be challenged in WTO dispute settlement proceedings.[103] Korea argues that in the absence of such action or omission—in this case, the participation of KFB in the Fast Track Debenture Programme—there can be no basis for the Panel's finding of entrustment or direction.

69. Korea additionally refers to Article 8 of the International Law Commission's Draft Articles on State Responsibility.[104] Korea explains that Article 8, which is entitled "*Conduct directed or controlled by a State*", provides that private conduct shall be attributed to a State only "if the person[] or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[105] Korea finds "striking" the similarity of wording in the reference to "carrying out" a conduct and submits that the requirement of conduct taking place in order to establish State responsibility is a matter of "common sense".[106] Consequently, Korea requests the Appellate Body to reverse the Panel's finding that the GOK had entrusted or directed KFB to participate in the Fast Track Debenture Programme.

D. *Arguments of the United States – Appellee*

70. The United States submits that the Panel correctly found, based upon press accounts of GOK threats directed at KFB, that it was reasonable for the USDOC to conclude that there was GOK entrustment or direction in respect of KFB.

---

[101]Korea's other appellant's submission, para. 20.

[102]*Ibid*., para. 18.

[103]*Ibid*., para. 21 (referring to Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 81).

[104]International Law Commission's Draft Articles on Responsibility of States for internationally wrongful acts, Report of the ILC on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), chp. IV.E.2 ("ILC Draft Articles").

[105]Korea's other appellant's submission, para. 25 (quoting ILC Draft Articles, *supra*, footnote 104, Article 8). (Korea's emphasis omitted)

[106]*Ibid*., para. 26.

71. The United States argues that Korea has misunderstood the analysis and findings of the Panel. In the United States' view, the Panel addressed GOK coercion and threats against Hynix creditors as evidence of entrustment or direction generally, rather than specifically in relation to the Fast Track Debenture Programme. The United States asserts that the Panel explicitly clarified in footnote 136 to paragraph 7.117 of the Panel Report that it would also consider, in a subsequent portion of the Panel Report, "[t]he issue of the evidentiary value of the coercion of KFB in respect of the alleged entrustment or direction of other private creditors".[107] Thus, according to the United States, the action entrusted or directed to KFB, properly understood, is KFB's participation in the broader bailout of Hynix, which action was in fact "carr[ied] out".

72. The United States considers "axiomatic" Korea's argument that "an act by a private body cannot be attributed to the government unless there is an act by the private body to attribute."[108] According to the United States, the existence of such acts by private bodies was not in dispute before the Panel, as the Panel itself recognized in footnote 42 to paragraph 7.27 of the Panel Report. In the United States' view, Korea "confuse[s]"[109] the question of "entrust[ment] or direct[ion]", in the first part of Article 1.1(a)(1)(iv), with that of whether one of the functions identified in Article 1.1(a)(1)(i) through (iii) has been "carr[ied] out" by the private body, as required by the subsequent part of Article 1.1(a)(1)(iv). Therefore, the United States requests the Appellate Body to uphold the Panel's finding as to the GOK's entrustment or direction of KFB.

E. *Arguments of the Third Participants*

1. China

73. China agrees with the Panel's interpretation of the terms "entrusts" and "directs" as well as with the "probative and compelling" standard adopted by the Panel. With regard to the interpretation of the terms "entrusts" and "directs", China contends that, pursuant to Article 31 of the *Vienna Convention on the Law of Treaties*[110] (the "*Vienna Convention*"), the decision-maker begins the interpretive process with the ordinary meaning, but does not end its inquiry there. Looking beyond the terms "entrusts" and "directs" to the other language in Article 1.1(a)(1)(iv) of the *SCM Agreement*,

[107]Panel Report, footnote 136 to para. 117 (referred to in United States' appellee's submission, para. 5).

[108]United States' appellee's submission, para. 6 (referring to Korea's other appellant's submission, para. 26).

[109]*Ibid*., para. 7.

[110]Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

China submits that the term "directs", when followed by "to" and a verb, can be interpreted only to mean "give a formal order or command to".[111]

74. Furthermore, in China's view, there is no support in Article 31 of the *Vienna Convention* or in WTO jurisprudence for the view, implicitly advanced by the United States, that in ascertaining the ordinary meaning of a certain term, *all* possible meanings listed in a dictionary should be taken into account. A proper understanding of the terms "entrusts" and "directs" reveals that these terms do not include "vague concepts"[112] such as the meanings proffered by the United States.

75. China disagrees with the United States that the Panel articulated and adopted a new "probative and compelling" evidentiary standard. China maintains that the Panel adopted and applied the general standard of review based on Article 11 of the DSU, as specified by the Appellate Body in *US – Lamb*. China submits that, even though the Panel did mention that "the evidence of entrustment or direction must in all cases be probative and compelling"[113], this does not amount to a "special" evidentiary standard because the Panel's statements purporting to apply this standard are only "general in nature".[114]

2. European Communities

76. The European Communities agrees with the United States that the Panel (i) erred in its interpretation of the terms "entrusts" and "directs" in Article 1.1(a)(1)(iv) of the *SCM Agreement*; (ii) applied an improper standard of review; (iii) impermissibly shifted the burden of proof; and (iv) incorrectly refused to consider certain United States evidence on the ground of *ex post* rationalization. With regard to the interpretation of "entrusts" and "directs", the European Communities submits that the Panel reformulated these terms in a restrictive way, in particular by limiting their meanings to "affirmative action[s]" of "delegation" and "command" as set out in the panel report in *US – Export Restraints*. The Panel then applied this reformulated understanding to the facts of the present case. The European Communities maintains that this constitutes legal error as the factual circumstances in the present case are fundamentally different from those in *US – Export Restraints*.

77. The European Communities agrees with the United States that, in applying the restrictive and very specific language of that panel report, the Panel incorrectly discarded some of the ordinary

[111]China's third participant's submission, para. 5 (quoting Panel Report, *US – Export Restraints*, para. 8.28).

[112]*Ibid*., paras. 13, 14, 16, and 20.

[113]*Ibid*., para. 25 (quoting Panel Report, para. 7.35).

[114]*Ibid*.

meanings of the words "entrusts" and "directs", which meanings were recognized by the *US – Export Restraints* panel. In particular, the European Communities maintains that a government can entrust one or more private bodies to carry out not only a specific task—such as the payment of funds to a particular firm—but also to carry out a more general task—such as a public policy objective.[115] The European Communities contends that, although the Panel recognized that leaving discretion to a private body is not necessarily at odds with entrustment or direction of the private body, the Panel failed to fully appreciate this point in its analysis of the facts of the case.

78. The European Communities agrees with the United States that the conclusions of the USDOC were reasonable and that the Panel impermissibly engaged in a *de novo* review of the USDOC's determination. The European Communities submits that, by considering the facts and evidence only in isolation, without assessing the weight of the individual facts when taken together, the Panel effectively applied a "different methodological approach" from that adopted by the investigating authority.[116] The European Communities maintains that the Panel's sole task was to determine whether or not the conclusion of the USDOC with respect to "entrustment" or "direction" was "so outlandish, so unreasonable, so lacking in objectivity"[117] that it left no choice for the Panel but to rule against the investigating authority. Instead, the Panel examined whether certain facts, on their own, were decisive of the question of entrustment or direction and, finding that they were not, failed to include them in its weighing of all the facts in question collectively. In doing so, according to the European Communities, the Panel conducted its own independent assessment of GOK entrustment or direction of Hynix's creditors.

79. Furthermore, the European Communities agrees with the United States that the Panel effectively shifted the burden of proof from Korea to the United States through its erroneous review of the USDOC's evidence. In this respect, the European Communities agrees with the United States that the Panel's "probative and compelling" evidentiary standard has no basis in the *SCM Agreement* or any other covered agreement, and that such standard essentially requires the investigating authority to produce a "smoking gun".[118] Furthermore, the European Communities emphasizes the importance of circumstantial evidence in subsidies investigations, and that the Panel's approach improperly limits an investigating authority's ability to rely on such evidence. The European Communities asserts that, as the complaining party, Korea bore the burden of establishing a *prima facie* case and that, as such, if certain events—such as meetings with GOK officials—had no connection with entrustment or

[115]European Communities' third participant's submission, para. 10.

[116]*Ibid*., para. 20.

[117]*Ibid*., para. 19.

[118]*Ibid*., para. 23.

direction, Korea should have been required to produce certain exculpatory evidence, which could have been only in its control.[119]

80. Finally, the European Communities agrees with the United States that it is appropriate for a Member to provide additional details and evidence of the elements on which its findings were based, provided that the Member does not seek to alter the reasoning set out in the agency's decision. In the European Communities' view, the submission of record evidence relied upon but not cited in the agency's decision does not constitute the introduction of new reasoning, because such evidence is merely an additional part of a factual or legal finding *already articulated* in the agency's decision.[120]

3. Japan

81. Japan agrees with the United States that the Panel (i) erred in the interpretation and application of the terms "entrusts" and "directs" in Article 1.1(a)(1)(iv) of the *SCM Agreement*; (ii) applied an erroneous "probative and compelling" evidentiary standard; (iii) improperly assessed the probative value of each item of evidence separately; and (iv) erred in disregarding evidence not specifically mentioned in the USDOC's determination.

82. With regard to the interpretation of the terms "entrusts" and "directs", Japan submits that the Panel did not base its analysis on the full range of meanings of these terms, but rather interpreted these terms in an overly narrow manner to mean only "delegation" and "command". According to Japan, the Panel failed to recognize that the terms "entrusts" and "directs" "encompass a wide range of acts", including "a government's offer to a person to do *something*".[121]

83. In relation to the standard of review, Japan agrees with the United States that the Panel erred in requiring evidence to be "probative and compelling". Japan contends that nothing in the *SCM Agreement* or the DSU provides a legal basis for the Panel's standard. Indeed, Japan argues, the proper evidentiary standard for this case is found in Article 11 of the DSU, which requires a panel to determine only whether "an objective assessment of evidence on the record reasonably allows the conclusion reached by the authority."[122] The use of any other standard for the examination of an investigating authority's evidence, in Japan's view, amounts to legal error.

[119]European Communities' third participant's submission, para. 25.

[120]*Ibid*., para. 26.

[121]Japan's third participant's submission, para. 5. (original emphasis)

[122]*Ibid*., para. 9.

84. Japan further contends that the Panel erroneously considered that each item of evidence, *in and of itself*, must be probative of entrustment or direction. Japan notes that the Panel correctly recognized that the USDOC relied on the totality of the evidence before it to determine entrustment or direction. The Panel erred, however, in subsequently considering that it "must consider the [US]DOC's assessment of the probative value of each evidentiary factor separately".[123] Instead, Japan submits, the Panel's task under Article 11 of the DSU was simply to find whether the USDOC's conclusion was supported by evidence on the record *as a whole*. Reviewing the evidence in its entirety is particularly important in cases, such as the present dispute, where the evidence by its nature would be circumstantial because "[a]n individual piece of circumstantial evidence shows a limited aspect of the entire picture."[124] According to Japan, the Panel's failure to evaluate the evidence in its totality resulted in several findings that are inconsistent with Article 11 of the DSU and Article 1.1 of the *SCM Agreement*.

85. Japan also argues that the Panel erred in rejecting certain evidence submitted by the United States on the ground that the USDOC did not explicitly refer to such evidence in its published subsidy determination. Japan contends that neither Article 11 of the DSU, nor any other provision of the DSU or the *SCM Agreement*, obliges the authority to discuss in its determination "each and every reason and fact" on which the authority based its conclusion, or precludes a Member from relying before a panel on record evidence that was not explicitly referred to in the investigating authority's determination.[125] Japan finds support for its view in the Appellate Body decisions in *Thailand – H-Beams* and *EC – Tube or Pipe Fittings*, which explained that a panel's obligation under Article 17.6(i) of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") to review the agency's fact-finding does not prevent the respondent Member from relying before a panel on facts that are not discernible from the published determination. Japan submits that, given the similar obligation of panels to review facts under Article 11 of the DSU, the rationale of these decisions applies equally in the present case to permit the United States to rely on the evidence improperly rejected by the Panel.

4. Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu

86. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu agrees with the Panel's interpretation of the terms "entrusts" and "directs" in Article 1.1(a)(1)(iv) of the *SCM Agreement* and submits that, contrary to the United States' assertion, the Panel did not erroneously apply a special evidentiary standard. The Separate Customs Territory of Taiwan, Penghu, Kinmen,

[123]Japan's third participant's submission, para. 12 (quoting Panel Report, para. 7.45).

[124]*Ibid*., para. 14.

[125]*Ibid*., para. 25.

and Matsu contends that the interpretation of the terms "entrusts" and "directs" suggested by the United States "blurs the line" between a subsidy captured by the provisions of the *SCM Agreement*, on the one hand, and the "general administrative discretion"[126] of Members to adopt WTO-consistent practices to regulate or influence their industries or markets, on the other hand. In contrast, the Panel's interpretation of "entrusts" and "directs" ensures that government actions under Article 1.1(a)(1)(iv) are differentiated from more routine government interventions in the marketplace.

87. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu disagrees with the United States' claim that the Panel erroneously applied a "probative and compelling" evidentiary standard. Pointing to the Panel's own description of what it meant by the term "probative and compelling"—namely, that the evidence "demonstrate" entrustment or direction[127]—the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu maintains that the Panel's application of this standard does not impose additional obligations on investigating authorities. In the view of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, the Panel's characterization falls within its discretion as the trier of fact, and is merely "an extension of Article 11 of the DSU".[128] The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu asserts that, even though the Panel could have elaborated further on its understanding of the "probative and compelling" standard, it agrees with that standard and requests the Appellate Body to take its views into account should the Appellate Body "feel the need to further elaborate on this standard".[129]

III. Issues Raised in This Appeal

88. The following issues are raised in this appeal:

(a) whether the Panel erred in finding that Korea's request for consultations did not fail to indicate the legal basis for the complaint in relation to the United States Department of Commerce's (the "USDOC's") countervailing duty ("CVD") order, as required by Article 4.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU");

[126]Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, para. 3.

[127]*Ibid*., para. 6 (quoting Panel Report, paras. 7.35 and 7.46).

[128]*Ibid*., para. 7.

[129]*Ibid*., para. 8.

(b) as regards the USDOC's finding of entrustment or direction:

(i) whether the Panel erred in interpreting Article 1.1(a)(1)(iv) of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"), in particular:

(A) in finding that, in order to constitute entrustment or direction under Article 1.1(a)(1)(iv), "the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction)"; and

(B) in finding that the evidence was "sufficient for an objective and impartial investigating authority to properly find government entrustment or direction in respect of KFB", notwithstanding that Korea First Bank ("KFB") did not carry out the activity allegedly entrusted or directed by the Government of Korea (the "GOK");

(ii) whether the Panel erred in its review of the USDOC's finding of entrustment or direction under Article 1.1(a)(1)(iv) of the *SCM Agreement*, in particular:

(A) in finding that evidence of entrustment or direction must be "probative and compelling";

(B) in failing to examine the USDOC's evidence in its totality, and instead, requiring that individual pieces of evidence, in and of themselves, establish entrustment or direction by the GOK of the creditors of Hynix Semiconductors, Inc. ("Hynix");

(C) in declining to consider certain evidence on the record of the underlying investigation but not cited by the USDOC in its published determination;

(D) in failing to comply with its obligations under Article 11 of the DSU by finding that "the mediation provisions [of the Corporate Restructuring Promotion Act ("CRPA")] had actually been invoked by three creditors in respect of the October 2001 restructuring", in the absence of supporting evidence on the record of the underlying investigation; and

(E) in failing to apply the proper standard of review and, therefore, failing to comply with its obligations under Article 11 of the DSU; and, consequently,

(iii) whether the Panel erred in finding that the USDOC's determination of GOK entrustment or direction of certain of Hynix's creditors is inconsistent with Article 1.1(a)(1)(iv) of the *SCM Agreement*;

(c) whether the Panel erred in finding that the USDOC's benefit determination is inconsistent with Article 1.1(b) of the *SCM Agreement*; and

(d) whether the Panel erred in finding that the USDOC's determination of specificity, insofar as it relates to subsidies provided by virtue of GOK entrustment or direction of certain of Hynix's creditors, is inconsistent with Article 2 of the *SCM Agreement*.

IV. Consultations

A. *Introduction and Relevant Procedural Background*

89. We begin with the United States' assertion that the Panel erred by failing to reject Korea's claims against the USDOC's CVD order on the grounds that Korea did not provide, in its request for consultations, the legal basis for its complaint against this measure, as required by Article 4.4 of the DSU.

90. Before examining the United States' appeal, we set out the relevant procedural history of the dispute. Korea requested consultations with the United States, for the first time, on 30 June 2003.[130] In its request for consultations, Korea referred to the preliminary and final subsidy determinations of the USDOC and to the preliminary injury determination of the United States International Trade Commission (the "USITC"). The request also indicated the provisions of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") and the *SCM Agreement* with which Korea considered "these determinations" to be inconsistent.[131] Consultations were held on 20 August 2003.[132]

91. On 18 August 2003, Korea submitted an addendum to its request for consultations (the "Addendum"), which stated:

---

[130]WT/DS296/1 (attached as Annex III to this Report).

[131]The request refers to Articles 1, 2, 10, 11, 12, 14, 17, 22, and 32.1 of the *SCM Agreement* and to Articles VI:3 and X:3 of the GATT 1994.

[132]According to the United States, the consultations "were limited to the preliminary and final determinations of the [US]DOC". (United States' appellant's submission, para. 134)

> With reference to document WT/DS296/1 ... circulated on 8 July 2003 [the original request for consultations], my authorities have instructed me to request further consultations with the Government of the United States ... with regard to the [USITC's] final determination of material injury, ... and the [USDOC's] final [CVD] order... . Both of these actions relate to the same underlying measures at issue in our previous request for consultations.[133]

This language was followed by a list of provisions with which Korea considered "these determinations" to be inconsistent.[134] Another round of consultations was held on 1 October 2003, prior to which Korea and the United States exchanged correspondence indicating that they disagreed about the conformity of Korea's request for consultations with Article 4.4 of the DSU.[135] Korea submitted a request for the establishment of a panel on 19 November 2003.[136] The request identified the USDOC's CVD order and stated that it "was the result" of the USDOC's final CVD determination and of the USITC's final material injury determination. The United States objected to the establishment of a panel on the grounds that the parties had not held consultations on the CVD order.[137] The Panel was established on 23 January 2004.[138]

92. The United States requested the Panel to reject Korea's claims in respect of the USDOC's CVD order.[139] According to the United States, Korea failed to comply with the requirements of Article 4.4 of the DSU because it did not provide "any indication of the legal basis of its complaint" in

---

[133]WT/DS296/1/Add.1 (attached as Annex IV to this Report), p. 1.

[134]Each item on the list identified a paragraph of Article 15 of the *SCM Agreement* with which "these determinations" were allegedly inconsistent.

[135]In its letter accepting further consultations, the United States noted Korea's alleged failure to provide the legal basis for its complaint in respect of the USDOC's CVD order. (United States' appellant's submission, para. 136 (referring to letter from the Ambassador and Permanent Representative of the United States to the WTO to the Ambassador and Permanent Representative of the Republic of Korea to the WTO, dated 28 August 2003 (Exhibit US-2 submitted by the United States to the Panel))) Korea responded by letter, explaining that the bases for its complaint were "found in both of [its] consultation requests", and that "under U.S. law, the [CVD] order cannot be imposed without affirmative determinations by both" the USDOC and the USITC. (Letter from the Ambassador and Permanent Representative of the Republic of Korea to the WTO to the Ambassador and Permanent Representative of the United States to the WTO, dated 8 September 2003 (Exhibit US-3 submitted by the United States to the Panel)) According to the United States, during the consultations, "the parties agreed to disagree concerning the conformity of Korea's consultation request with Article 4.4 of the DSU" and "the United States declined to engage in any discussions regarding the [CVD] order." (United States' appellant's submission, para. 137)

[136]WT/DS296/2 (attached as Annex V to this Report).

[137]The United States observes that "[a]t the meeting of the [DSB] at which Korea's request was first considered, the United States objected to the establishment of a panel on the grounds that Korea's panel request sought to cover matters on which the parties had not consulted" and "described Korea's failure to comply with Article 4.4 of the DSU and the resulting absence of consultations with respect to the [USDOC's CVD] order". (United States' appellant's submission, para. 138 (referring to WT/DSB/M/159, paras. 32-38 (Exhibit US-5 submitted by the United States to the Panel)))

[138]Panel Report, para. 1.5.

[139]*Ibid*., para. 7.410.

respect of the CVD order.[140] The Panel disagreed, noting that Korea's second request for consultations referred to Korea's first request for consultations.[141] This reference, in the Panel's view, was "sufficient for the second request to be read in light of the first request" and consequently, "in addition to the provisions of the *SCM Agreement* set forth (in a non-exhaustive manner) in Korea's second request for consultations, its claims in that document should also be read in light of the provisions of the *SCM Agreement* and *GATT 1994* set out in" the original request.[142] The Panel concluded that "the totality of these provisions provides sufficient 'indication of the legal basis for the complaint' within the meaning of Article 4.4 of the *DSU*."[143]

93. The United States appeals this Panel finding. According to the United States, "it is not credible to assert that by simply referring to the fact that it had filed a prior consultation request on one set of alleged measures, Korea satisfied its obligation to provide an indication of the legal basis for its complaint with respect to a different measure."[144] It adds that, given that Korea cited many provisions in its first request for consultations, the United States could not have been expected "to guess which provision(s) applied to the [CVD] order".[145] "At a minimum", the United States explains, Article 4.4 requires "an indication of at least one provision with which a measure is considered to be inconsistent".[146] For these reasons, the United States submits, the Panel should have rejected Korea's claims in respect of the CVD order.

94. Korea requests the Appellate Body to dismiss the United States' appeal with respect to this issue on the grounds that the Notice of Appeal did not meet the requirements of Rule 20(2)(d) of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[147] In Korea's submission, the United States' Notice of Appeal does not identify the "alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel" as required by Rule 20(2)(d)(i); instead, the Notice of Appeal "repeats a [United States] version of what the Panel stated and says the [United States] disagrees".[148] In any event, Korea asserts, the Panel was correct in declining the United States' request to reject Korea's claim in respect of the CVD order. Korea explains that "[b]ecause the [CVD] order is wholly dependant on the administrative determinations and is

[140]Panel Report, para. 7.410.

[141]*Ibid*., para. 7.414.

[142]*Ibid*., para. 7.415.

[143]*Ibid*. (footnote omitted)

[144]United States' appellant's submission, para. 143.

[145]*Ibid*.

[146]*Ibid*., para. 144.

[147]Korea's appellee's submission, para. 228.

[148]*Ibid*., para. 230.

effectively a ministerial function without discretion, it follows that the legal claims of the underlying determinations are identical to the legal claims with respect to the [CVD] order."[149]

B. *Sufficiency of the United States' Notice of Appeal*

95. Before turning to the United States' claim relating to Korea's request for consultations, we address Korea's assertion that the United States' Notice of Appeal does not meet the requirements of Rule 20(2)(d) of the *Working Procedures* in respect of this claim. Rule 20(2) provides, in relevant part:

> A Notice of Appeal shall include ...
>
> (d) a brief statement of the nature of the appeal, including:
>
> (i) identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel;
>
> (ii) a list of the legal provision(s) of the covered agreements that the panel is alleged to have erred in interpreting or applying; and
>
> (iii) without prejudice to the ability of the appellant to refer to other paragraphs of the panel report in the context of its appeal, an indicative list of the paragraphs of the panel report containing the alleged errors.

96. In its Notice of Appeal, the United States indicates that it seeks review of:

> ... the Panel's legal conclusion that, with respect to the [US]DOC [CVD] order, Korea's consultation request provides a sufficient indication of the legal basis of the complaint within the meaning of Article 4.4 of the DSU. This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations.[10]

[10]Panel Report, paragraphs 7.414-7.415.

97. Korea alleges that the United States' Notice of Appeal does not identify the alleged errors in the issues of law covered in the Panel Report and legal interpretations developed by the Panel. We disagree. Although Korea is correct that the United States' Notice of Appeal simply tracks the Panel's finding[150], nevertheless, the Notice of Appeal states that the alleged error of the Panel is the finding

[149]Korea's appellee's submission, para. 242.

[150]The Panel found that "the totality of these provisions [referred to in Korea's request for consultations and the Addendum] provides sufficient 'indication of the legal basis for the complaint' within the meaning of Article 4.4 of the *DSU*." (Panel Report, para. 7.415) (footnote omitted)

that Korea's request for consultations provides sufficient indication of the legal basis for the complaint; it mentions that Article 4.4 of the DSU is the relevant legal provision, and it indicates the paragraphs of the Panel Report where this finding is made. Thus, the United States' Notice of Appeal provides adequate notice to Korea of the "nature of the appeal" in order to allow it to know the case to which it must respond.[151] In our view, this is sufficient, in this case, for purposes of Rule 20(2)(d) of the *Working Procedures*.

C. *Does Korea's Request for Consultations Fulfil the Requirements of Article 4.4 of the DSU?*

98. Having disposed of Korea's objection regarding the United States' Notice of Appeal, we examine the United States' claim on appeal. The requirements that apply to a request for consultations are set out in Article 4.4 of the DSU, which provides, in relevant part:

> Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

99. As observed above[152], Korea's initial request for consultations did not refer to the CVD order, which was not in existence at the time the request was made. In the Addendum to its request for consultations, Korea sought "further consultations" with regard to the USITC's final injury determination and the USDOC's CVD order. The Addendum referred to the original request for consultations and expressly indicated that both the USITC's final affirmative injury determination and the CVD order "relate to the same underlying measures at issue in our previous request for consultations".[153] The United States considers that this language does not permit a conclusion that the claims asserted in the initial request for consultations apply also to the CVD order, which is referred to only in the Addendum.

100. We disagree. The Addendum expressly refers to the initial request for consultations. It is clear that the Addendum was intended to be read together with the original request for consultations; indeed, that is the very nature of an addendum. Moreover, we recall that Korea explains that, under United States law, "the [CVD] order is wholly dependant on the administrative determinations and is effectively a ministerial function without discretion".[154] According to Korea, "it follows that the legal

---

[151]Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 62; Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 344.

[152]*Supra*, para. 90.

[153]WT/DS296/1/Add.1 (attached as Annex IV to this Report), p. 1.

[154]Korea's appellee's submission, para. 242.

claims of the underlying determinations are identical to the legal claims with respect to the [CVD] order."[155] At the oral hearing, the United States confirmed that this is an accurate description of a CVD order under United States law. In these circumstances, it should have been apparent that the allegations of inconsistency, set forth by Korea in the original request for consultations and in the Addendum in relation to the USDOC's subsidy determination and the USITC's injury determination, applied also to the CVD order. Nor can it be said that the United States was expected "to guess which provision(s) applied to the [CVD] order".[156] Accordingly, we find that it was reasonable for the Panel to conclude that the "totality" of the provisions in Korea's initial request for consultations and in the Addendum provides, with respect to the USDOC's CVD order, a sufficient indication of the legal basis for the complaint within the meaning of Article 4.4.[157]

101. For these reasons, we *uphold* the Panel's finding, in paragraph 7.415 of the Panel Report, that Korea's request for consultations did not fail to indicate the legal basis for the complaint in relation to the USDOC's CVD order, as required by Article 4.4 of the DSU.

V. Interpretation of Article 1.1(a)(1)(iv) of the *SCM Agreement*

A. *Introduction*

102. We examine next the United States' and Korea's contentions that the Panel incorrectly interpreted Article 1.1(a)(1)(iv) of the *SCM Agreement*.

103. In the course of its analysis of Korea's claim under Article 1.1(a)(1)(iv), the Panel stated that it "agree[d] with the *US – Export Restraints* panel that '[i]t follows from the ordinary meanings of the two words "entrust" and "direct" that the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction).'"[158]

104. The United States asserts that the Panel's interpretation of the terms "entrusts" and "directs" is erroneous because it fails to "take[] account of the full range of government actions that fall within the ordinary meaning[s] of th[ese] term[s]".[159] In response, Korea argues that the Panel's interpretation of

[155]Korea's appellee's submission, para. 242.

[156]United States' appellant's submission, para. 143.

[157]Panel Report, para. 7.415.

[158]*Ibid*., para. 7.31 (quoting Panel Report, *US – Export Restraints*, para. 8.29).

[159]United States' appellant's submission, para. 24. The European Communities and Japan support the United States' position. (European Communities' third participant's submission, para. 3; Japan's third participant's submission, para. 2)

the terms "entrusts" and "directs" is "appropriate" and, consequently, should be upheld by the Appellate Body.[160]

105. Korea's challenge relates to a different aspect of the Panel's interpretation of Article 1.1(a)(1)(iv). In particular, Korea appeals the Panel's finding that certain evidence relied on by the USDOC was "sufficient for an objective and impartial investigating authority to properly find government entrustment or direction in respect of KFB".[161] According to Korea, this finding is a consequence of the Panel's incorrect interpretation that an affirmative finding of entrustment or direction under Article 1.1(a)(1)(iv) is possible, even though the act that the private body was allegedly entrusted or directed to carry out was never undertaken.[162] The United States requests the Appellate Body to uphold the Panel's finding that the USDOC had a sufficient factual basis to conclude that there was entrustment or direction by the GOK with respect to KFB.[163]

B. *Article 1.1(a)(1)(iv) of the SCM Agreement*

1. The Meaning of the Terms "Entrusts" and "Directs"

106. Article 1.1 lays down when a "subsidy" shall be deemed to exist for purposes of the *SCM Agreement*, namely, when (i) there is a "financial contribution by a government or any public body", and (ii) "a benefit is thereby conferred".[164] This part of the appeal is concerned with the "financial contribution" element of the definition of a "subsidy".[165] Article 1.1(a)(1) of the *SCM Agreement* states that there is a financial contribution by a government or any public body 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);

---

[160]Korea's appellee's submission, heading II.A. China and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu also assert that the United States' appeal should be rejected. (China's third participant's submission, para. 20; Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, para. 3)

[161]Panel Report, para. 7.117. (footnote omitted)

[162]Korea's other appellant's submission, para. 4.

[163]United States' appellee's submission, para. 9.

[164]We note that, pursuant to Articles 1.1(a)(2) and 1.1(b) of the *SCM Agreement*, a subsidy shall also be deemed to exist if "there is a form of income or price support in the sense of Article XVI of the GATT 1994" and "a benefit is thereby conferred". This case does not raise the issue of subsidies granted in the form of income or price support.

[165]We examine the United States' appeal of the Panel's finding relating to "benefit" in Section VII of this Report.

> (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[.] (footnote omitted)

107. Article 1.1(a)(1) makes clear that a "financial contribution" by a government or public body is an essential component of a "subsidy" under the *SCM Agreement*. No product may be found to be subsidized under Article 1.1(a)(1), nor may it be countervailed, in the absence of a financial contribution. Furthermore, situations involving exclusively private conduct—that is, conduct that is not in some way attributable to a government or public body—cannot constitute a "financial contribution" for purposes of determining the existence of a subsidy under the *SCM Agreement*.

108. Paragraphs (i) through (iv) of Article 1.1(a)(1) set forth the situations where there is a financial contribution by a government or public body. The situations listed in paragraphs (i) through (iii) refer to a financial contribution that is provided *directly* by the government through the direct transfer of funds, the foregoing of revenue, the provision of goods or services, or the purchase of goods.[166] By virtue of paragraph (iv), a financial contribution may also be provided *indirectly* by a government where it "makes payments to a funding mechanism", or, as alleged in this case, where a government "entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) ... which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments". Thus, paragraphs (i) through (iii) identify the types of actions that, when taken by private bodies that have been so "entrusted" or "directed" by the government, fall within the scope of paragraph (iv). In other words, paragraph (iv) covers situations where a private body is being used as a proxy by the government to carry out one of the types of functions listed in paragraphs (i) through (iii). Seen in this light, the terms "entrusts" and "directs" in paragraph (iv) identify the instances where seemingly private conduct may be attributable to a government for purposes of determining whether there has been a financial contribution within the meaning of the *SCM Agreement*.

109. With this in mind, we turn to examine the meanings of the terms "entrusts" and "directs" in Article 1.1(a)(1)(iv). We recall that the Panel stated that it "agree[d] with the *US – Export Restraints* panel that '[i]t follows from the ordinary meanings of the two words "entrust" and "direct" that the action of the government must contain a notion of delegation (in the case of entrustment) or command

[166]Like the *SCM Agreement*, we use the term "government" to refer to "a government or any public body within the territory of a Member", unless otherwise noted.

(in the case of direction).'"[167] In so doing, the Panel effectively replaced the terms "entrusts" and "directs" with two other terms, "delegation" and "command", whose scope it did not define, and went no further in clarifying the meaning of any of these terms.[168] The United States asserts that the Panel "failed to give full meaning and effect to the treaty terms at issue".[169] It points out that the dictionary definitions of the term "entrust" include "[i]nvest with a trust; give (a person, etc.) the responsibility for a task ... [c]ommit the ... execution of (a task) to a person".[170] The United States also notes that the dictionary definitions of "direct" include "[c]ause to move in or take a specified direction; turn towards a specified destination or target"; "[g]ive authoritative instructions to; to ordain, order (a person) *to do*, (a thing) *to be done*; order the performance of"; and "[r]egulate the course of; guide with advice".[171] The United States, therefore, would have us adopt an interpretation of the terms "entrusts" and "directs" that includes all the dictionary definitions of these terms.

110. The term "entrusts" connotes the action of giving responsibility to someone for a task or an object.[172] 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[173], "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.

---

[167]Panel Report, para. 7.31 (quoting Panel Report, *US – Export Restraints*, para. 8.29).

[168]The Panel's subsequent discussion of the context and the object and purpose of the terms "entrusts" and "directs" focused on whether Article 1.1(a)(1)(iv) requires that the government action allegedly constituting entrustment or direction be explicit. (*Ibid.*. 7.36-7.41)

[169]United States' appellant's submission, para. 28.

[170]*Ibid*., para. 19 (quoting *The New Shorter Oxford English Dictionary*, *supra*, footnote 36, Vol. 1, p. 831.

[171]*Ibid*., para. 20 (quoting *The New Shorter Oxford English Dictionary*, *supra*, footnote 36, Vol. 1, p. 679. (original italics)

[172]The Spanish and French versions of the *SCM Agreement* use the verbs "encomendar" and "charger", respectively, which have similar meanings. The *Diccionario de la lengua española* defines "encomendar" as:

> Encargar a alguien que haga algo o que cuide de algo o de alguien.

(*Diccionario de la lengua española*, 22nd edn (Real Academia Española, 2001), p. 612)

Le Nouveau Petit Robert defines "charger" as:

> Revêtir d'une fonction, d'un office. … commettre, déléguer, préposer (à).

(*Le Nouveau Petit Robert*, P. Varrod (ed.) (Dictionnaires Le Robert, 1993), p. 403)

[173]United States' appellant's submission, para. 24; United States' response to questioning at the oral hearing.

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 the term "directs" is reinforced by the Spanish and French versions of the *SCM Agreement*, which use the verbs "ordenar"[174] and "ordonner"[175], respectively.[176] 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.

112. Paragraph (iv) of Article 1.1(a)(1) further states that the private body must have been entrusted or directed to carry out *one of the type of functions* in paragraphs (i) through (iii). As the panel in *US – Export Restraints* explained, this means that "the scope of the actions ... covered by subparagraph (iv) must be the same as those covered by subparagraphs (i)-(iii)".[177] A situation where the government entrusts or directs a private body to carry out a function that is outside the scope of paragraphs (i) through (iii) would consequently fall outside the scope of paragraph (iv). Thus, we agree with the *US – Export Restraints* panel that "the difference between subparagraphs (i)-(iii) on the one hand, and subparagraph (iv) on the other, has to do with the identity of the *actor*, and not with the nature of the *action*."[178] In addition, we must not lose sight of the fact that Article 1.1(a)(1)(iv)

---

[174]The *Diccionario de la lengua española* defines "ordenar" as:

> Mandar que se haga algo. … Encaminar y dirigir a un fin.

(*Diccionario de la lengua española*, *supra*, footnote 172, p. 1105)

[175]*Le Nouveau Petit Robert* defines "ordonner " as:

> Prescrire par un ordre. … adjurer, commander, dicter, enjoindre, prescrire.

(*Le Nouveau Petit Robert*, *supra*, footnote 172, p. 1795)

[176]In this respect, we recall Article 33(3) of the *Vienna Convention*, which provides that "[t]he terms of the treaty are presumed to have the same meaning in each authentic text."

[177]Panel Report, *US – Export Restraints*, para. 8.53.

[178]*Ibid*. (original emphasis)

requires the participation of the government, albeit indirectly. We therefore agree with Korea that there must be a demonstrable link between the government and the conduct of the private body.[179]

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.[180] 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).[181] 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.[182] 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".[183] Thus, government "entrustment" or

[179]Korea's appellee's submission, para. 22. We note that the conduct of private bodies is presumptively not attributable to the State. The Commentaries to the ILC Draft Articles explain that "[s]ince corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority". (Commentaries to the ILC Draft Articles, *supra*, footnote 104, Article 8, Commentary (6), pp. 107-108); see also Korea's appellee's submission, paras. 58-59)

[180]Appellate Body Report, *US – Softwood Lumber IV*, para. 52.

[181]Korea's and the United States' responses to questioning at the oral hearing. The United States asserts, however, that a policy pronouncement may be relevant evidence for demonstrating entrustment or direction.

[182]In contrast to Article 1.1(a)(1)(iv) of the *SCM Agreement*, Article 11.3 of the *Agreement on Safeguards* uses the term "encourage". It reads:

> Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1.

Paragraph 1 refers to voluntary export restraints, orderly marketing arrangements, or any other similar measures on the export or import side.

[183]Panel Report, *US – Export Restraints*, para. 8.31.

"direction" cannot be inadvertent or a mere by-product of governmental regulation.[184] 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."[185]

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".[186] 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.

---

[184]In interpreting the phrase "payments … financed by virtue of governmental action" in Article 9.1(c) of the *Agreement on Agriculture*, the Appellate Body has stated that "[g]overnments are constantly engaged in regulation of different kinds in pursuit of a variety of objectives." It further explained that where regulation merely enables payments to occur, "the link between the governmental action and the financing of the payments is too tenuous for the 'payments' to be regarded as '*financed* by virtue of governmental action' … within the meaning of Article 9.1(c). Rather, there must be a tighter nexus between the mechanism or process by which the payments are *financed*, even if by a third person, and governmental action." (Appellate Body Report, *Canada – Dairy* (*Article 21.5 – New Zealand and US*), para. 115 (original emphasis); see also Appellate Body Report, *Canada – Dairy* (*Article 21.5 – New Zealand and US II)*, para. 131)

[185]Appellate Body Report, *US – Softwood Lumber IV*, footnote 35 to para. 52. The Appellate Body referred to the following discussion of the panel in *US – Export Restraints*:

> [the] negotiating history [of Article 1 of the *SCM Agreement*] demonstrates ... that the requirement of a financial contribution from the outset was intended by its proponents precisely to ensure that not all government measures that conferred benefits could be deemed to be subsidies. This point was extensively discussed during the negotiations, with many participants consistently maintaining that only government actions constituting financial contributions should be subject to the multilateral rules on subsidies and countervailing measures.

(Panel Report, *US – Export Restraints*, para. 8.65 (quoted in Appellate Body Report, *US – Softwood Lumber IV*, footnote 35 to para. 52))

[186]Appellate Body Report, *US – Softwood Lumber IV*, para. 64. (footnote omitted)

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.[187] 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.[188]

2. The United States' Appeal

117. The United States alleges that, by equating "entrustment" and "direction" with "delegation" and "command", the Panel failed to interpret those treaty terms in accordance with the customary rules of interpretation codified in the *Vienna Convention on the Law of Treaties*.[189] In this respect, the United States submits that, had the Panel properly interpreted "entrusts" and "directs", it would have recognized that these terms also encompass:

> ... a government investing trust in a private body to carry out a task, a government giving responsibility to a private body to carry out a task, a government informing or guiding a private body as to how to carry out a task, [and] a government regulating the course of a private body's conduct[.][190]

The United States refers to several findings[191] allegedly demonstrating that the Panel applied an incorrect interpretation of Article 1.1(a)(1)(iv), and that "the Panel's erroneous interpretation of ... Article 1.1(a)(1)(iv) affected its entire analysis of the [US]DOC's findings concerning the Hynix bailout."[192]

---

[187]Korea's response to questioning at the oral hearing.

[188]The Commentaries to the ILC Draft Articles similarly state that "it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that conduct controlled should be attributed to it". (Commentaries to the ILC Draft Articles, *supra*, footnote 104, Article 8, Commentary (5), p. 107) (footnote omitted)

[189]*Supra*, footnote 110.

[190]United States' appellant's submission, para. 24.

[191]*Ibid*., paras. 40-46.

[192]*Ibid*., para. 46. (footnote omitted)

118. As Korea explains[193], the issue raised on appeal by the United States—that is, the range of government actions that constitute entrustment or direction—was not the main interpretative issue before the Panel. Instead, the Panel was considering whether entrustment or direction needs to be demonstrated on the basis of explicit (as opposed to implicit) government acts only. On this issue, the Panel essentially agreed with the United States and held that Article 1.1(a)(1)(iv) does not "require[] an investigating authority to demonstrate an explicit government action addressed to a particular entity, entrusting or directing a particular task or duty".[194] In the course of its analysis, the Panel "agree[d] with the *US – Export Restraints* panel that '[i]t follows from the ordinary meanings of the two words "entrust" and "direct" that the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction).'"[195] We explained earlier that the terms "entrusts" and "directs" in Article 1.1(a)(1)(iv) are not limited to "delegation" and "command", respectively. In our view, there may be other means by which governments can give responsibility to or exercise authority over a private body that may not fall within the terms "delegation" and "command", if these terms are strictly construed. We note that the Panel initially used the expression "a notion of" delegation or command.[196] This suggests that the Panel was using the terms "delegation" and "command" with a certain degree of flexibility. However, the Panel's repeated use of the terms "delegation" and "command", without qualification, in its subsequent analysis, could give the impression that the terms "entrusts" and "directs" correspond strictly to "delegation" and "command". We do not consider that these words, on their own, convey what we understand by "entrusts" or "directs", as used in Article 1.1(a)(1)(iv), for the terms "delegation" and "command", as we have explained above, are too narrow. Therefore, we *modify* the Panel's interpretation of Article 1.1(a)(1)(iv) of the *SCM Agreement*, set out in paragraph 7.31 of the Panel Report, to the extent that it may be understood as limiting the terms "entrusts" and "directs" to acts of "delegation" and "command".

119. The United States' request, that the Appellate Body review the Panel's application of Article 1.1(a)(1)(iv) to the particular facts of this case[197], is examined in the next Section of this Report.[198]

---

[193]Korea's appellee's submission, paras. 24-25.

[194]Panel Report, para. 7.42.

[195]*Ibid*., para. 7.31 (quoting Panel Report, *US – Export Restraints*, para. 8.29).

[196]*Ibid*. As the United States points out, however, the Panel did not consistently use the phrase "the notion of" in the paragraphs that followed. (United States' appellant's submission, para. 21 (referring to Panel Report, paras. 7.33-7.35))

[197]United States' appellant's submission, para. 46.

[198]See *infra*, Section VI.

3. Korea's Cross-appeal

120. We turn to Korea's cross-appeal, which challenges the Panel's finding that certain evidence referred to by the USDOC was "sufficient for an objective and impartial investigating authority to properly find government entrustment or direction in respect of KFB".[199] This finding was made in the context of the Panel's examination of the USDOC's reference to alleged threats by the GOK against KFB and another two Korean banks.[200]

121. Korea pointed out to the Panel that "ultimately KFB declined to participate in the Fast Track [Debenture] Programme, and in fact did not participate in the Fast Track [Debenture] Programme, and exercised its appraisal rights in the October restructuring."[201] "KFB's actions", according to Korea, "are hardly consistent with the [United States'] theory of coercion from the [GOK]."[202] The Panel did not find Korea's argument relevant because "[its] analysis at [that] stage [was] concerned first and foremost with the acts of the GOK, rather than private entities' reaction to those acts."[203]

122. On appeal, Korea asserts that the Panel's conclusion regarding entrustment or direction of KFB rests on an incorrect interpretation of Article 1.1(a)(1)(iv) of the *SCM Agreement*. Korea explains that a finding of entrustment or direction under Article 1.1(a)(1)(iv) requires that the private body *carry out* one of the functions listed in that provision.[204] "Mere direction without action", Korea submits, is not sufficient.[205] Korea adds that, in this case, KFB did not carry out the action it was allegedly entrusted or directed to carry out and, therefore, the Panel's finding of entrustment or direction in respect of KFB is incorrect.[206]

123. The United States responds to Korea's appeal by explaining that the Panel's finding in respect of KFB does not relate specifically to KFB's participation in the Fast Track Debenture Programme.[207] It states that "[t]he fact that KFB did not participate in the Fast Track [Debenture] Program was never in dispute."[208] The United States further explains that "the GOK's threats and coercive behavior

[199]Panel Report, para. 7.117. (footnote omitted)

[200]*Ibid*., para. 7.107.

[201]*Ibid*., para. 7.108.

[202]*Ibid*.

[203]*Ibid*., footnote 136 to para. 7.117.

[204]Korea's other appellant's submission, para. 18.

[205]*Ibid*., para. 29.

[206]Korea does not challenge "the Panel's factual determination that there was [government] coercion with respect to KFB". (*Ibid*., para. 4)

[207]United States' appellee's submission, para. 5.

[208]*Ibid*. (footnote omitted)

occurred *because of* 'KFB's failure to participate in the Fast Track [Debenture] Programme.'"[209] The Panel record confirms that KFB participated in the financial transactions that preceded and followed the Fast Track Debenture Programme.[210] We do not read the Panel's finding that the evidence was sufficient to demonstrate GOK entrustment or direction of KFB as necessarily related exclusively to the Fast Track Debenture Programme. Thus, even assuming *arguendo* Korea is correct that a finding of entrustment or direction requires that the function so entrusted or directed be carried out, we are not persuaded that the basis for the Panel's finding is as narrow as that alleged by Korea.

124. In any event, a finding of entrustment or direction, by itself, does not establish the existence of a financial contribution. Where a government entrusts or directs a private body—by giving responsibility to or exercising its authority over the private body—it is likely that the function that is allegedly entrusted or directed will indeed be carried out. The private body's refusal to carry out the function may be evidence that the government did not give it responsibility for such function, or that the government did not exercise the requisite authority over it such that the private body did not heed the government.[211] It does not, however, on its own, mean that the private body was not entrusted or directed. Depending on the circumstances, a private body may decide not to carry out a function with which it was so entrusted or directed, despite the possible negative consequences that may follow.

125. Still, this does not mean that it is possible to make a finding of a financial contribution under Article 1.1(a)(1)(iv) where a private body does not carry out the function allegedly entrusted or directed to it. Failure by the private body to carry out one of the functions of the types listed in paragraphs (i) through (iii) means that nothing of economic value has been transferred from the grantor to the recipient.[212] Simply put, if the private body has not carried out the function allegedly entrusted or directed to it, nothing will have changed hands. Therefore, there is no financial contribution and, consequently, there would be no right to apply countervailing measures.

126. For these reasons, we *uphold* the Panel's finding, in paragraph 7.117 of the Panel Report, that the evidence was "sufficient for an objective and impartial investigating authority to properly find government entrustment or direction in respect of KFB".

---

[209]United States' appellee's submission, para. 5 (quoting Panel Report, para. 7.117). (original emphasis; footnote omitted)

[210]See, for example, Panel Report, para. 7.114; and Figure US-4 submitted by the United States to the Panel.

[211]We explained earlier that in most cases government entrustment or direction would include a threat or inducement. (See *supra*, para. 116)

[212]See Appellate Body Report, *Canada – Dairy*, para. 87, where the Appellate Body explained that "a 'subsidy' involves a transfer of economic resources from the grantor to the recipient for less than full consideration."

VI. The Panel's Review of the USDOC's Evidence

A. *Introduction*

127. We consider next the Panel's examination of the evidence underlying the USDOC's finding of entrustment or direction. After providing a general interpretation of Article 1.1(a)(1)(iv) of the *SCM Agreement*, the Panel turned to the evidence relied upon by the USDOC in order to determine whether it was sufficient to support the USDOC's finding of entrustment or direction. Based on its review of the evidence, the Panel concluded that the USDOC "could not properly have found that there was sufficient evidence to support a generalized finding of entrustment or direction with respect to private bodies spanning multiple creditors and multiple transactions over the period of investigation."[213] Accordingly, the Panel concluded that the USDOC's subsidy determination is inconsistent with Article 1.1(a)(1)(iv) of the *SCM Agreement*.[214]

128. The United States alleges multiple errors in the Panel's application of Article 1.1(a)(1)(iv) to the facts of this case, in particular, with respect to the Panel's review of the USDOC's evidence. First, the United States claims that the Panel erred in applying an "evidentiary standard"[215] that required evidence of entrustment or direction to be "probative and compelling".[216] Secondly, the United States argues that the Panel erred in its approach to the examination of the USDOC's evidence under Article 1.1(a)(1)(iv), because it failed to consider the USDOC's evidence in its totality, disregarded the inferences reasonably drawn from circumstantial evidence, and, as a consequence, effectively shifted the burden of proof from Korea to the United States.[217] Thirdly, the United States argues that the Panel erroneously refused to admit certain evidence submitted by the United States during the panel proceedings on the ground that arguments based on such evidence constituted "*ex post* rationalizations".[218]

129. In addition to these allegations of error in the Panel's application of Article 1.1(a)(1)(iv), the United States contends that the Panel failed to comply with its obligations under Article 11 of the DSU by relying on evidence that was not on the record of the USDOC during the investigation.[219] Finally, the United States claims that the aforementioned errors, taken together, give rise to a separate

---

[213]Panel Report, para. 7.177.

[214]*Ibid*., para. 7.178.

[215]United States' appellant's submission, para. 47.

[216]*Ibid*. (referring to Panel Report, paras. 7.35 and 7.46).

[217]*Ibid*., paras. 58-87.

[218]*Ibid*., para. 94 (referring to, *inter alia*, Panel Report, paras. 7.88, 7.102, and 7.141).

[219]*Ibid*., para. 101.

and additional ground of error under Article 11 of the DSU because of the Panel's failure to apply the proper standard of review to its examination of the USDOC's finding of entrustment or direction.[220]

130. Before beginning our analysis, we briefly describe the USDOC's finding of entrustment or direction, as contained in its subsidy determination, to facilitate the subsequent discussion of the Panel's review of the USDOC's evidence. We then address each of the above allegations of error by the United States. Finally, we consider the implications of our analysis for the Panel's conclusion regarding the USDOC's finding of entrustment or direction.

B. *The USDOC's Finding of Entrustment or Direction*

131. In its subsidy determination, the USDOC found that numerous financial institutions, both public as well as private bodies, participated in financial transactions related to Hynix. For the purpose of this determination, the USDOC distinguished between public bodies[221], government-owned and -controlled private creditors, and private creditors not owned or controlled by the GOK.[222] The Panel maintained this distinction in its analysis, adopting the categorization of Group A, B, and C creditors put forward by the United States.[223] Accordingly, Hynix's public body creditors were referred to as Group A creditors, and included the Korean Development Bank ("KDB"), the Industrial Bank of Korea, and other "specialized" banks.[224] The GOK-owned or -controlled private creditors, which were found by the USDOC not to be public bodies[225], were referred to as Group B creditors; these included the Korea Exchange Bank and KFB.[226] Private entities in which the GOK had much smaller, or even non-existent shareholdings, were referred to as Group C creditors[227]; among these creditors were KorAm Bank, Hana Bank, and Kookmin Bank.[228] We use the same categories herein.

---

[220]United States' appellant's submission, para. 119.

[221]In its determination, the USDOC referred to public bodies as "government authorities". (United States' response to Question 3 posed by the Panel at the First Panel Meeting, Panel Report, p. E-37, para. 10 and footnote 9 thereto) See also Issues and Decision Memorandum, *supra*, footnote 6, pp. 15-17.

[222]See Issues and Decision Memorandum, *supra*, footnote 6, p. 49.

[223]Panel Report, para. 7.8 (referring to Figure US-4 submitted by the United States to the Panel).

[224]United States' response to Question 3 posed by the Panel at the First Panel Meeting, Panel Report, p. E-37, para. 10 and footnote 9 thereto.

[225]Some of Hynix's creditors were treated by the USDOC as Group B creditors despite the fact that the GOK held a 100 per cent ownership interest. The Panel noted that, in its view, the USDOC might have been entitled to treat these 100 per cent-owned firms as "public bodies", but having refused to so classify them, the USDOC was required to establish entrustment or direction with respect to such creditors. (Panel Report, footnote 29 to para. 7.8 and footnote 80 to para. 7.62)

[226]Panel Report, para. 7.8; United States' responses to Questions 4-6 posed by the Panel at the First Panel Meeting, Panel Report, p E-38, para. 17.

[227]Panel Report, para. 7.8; United States' responses to Questions 4-6 posed by the Panel at the First Panel Meeting, Panel Report, p E-38, para. 19.

[228]Figure US-4 submitted by the United States to the Panel.

132. In its analysis of entrustment and direction, the USDOC examined, in particular, four financial transactions. The first was an 800 billion won syndicated bank loan (the "December 2000 syndicated loan") extended to Hynix at the end of 2000 in order to finance short-term debt that was coming due in early 2001.[229] The second financial transaction was the KDB Fast Track Debenture Programme, which was also designed to address the liquidity crisis caused by maturing bonds in the same time period. The USDOC's Issues and Decision Memorandum describes this programme as follows:

> Under the Fast Track program, which was administered by the KDB, companies selected to participate in this program first had to redeem 20 percent of their bonds that were maturing in 2001; the remaining 80 percent of the maturing bonds were purchased by the KDB, and were subsequently replaced with new bonds issued by the participating companies. Of the bonds purchased by the KDB that were replaced by new issues, 10 percent of the new bonds issued were kept by the KDB, 20 percent of each new issue was purchased by the company's creditors (a blanket waiver was issued by the GOK in order to allow the creditors to exceed their loan exposure limits), and the remaining 70 percent of each new issue was bundled with other bonds and sold as [Collateralized Bond Obligations] or [Collateralized Loan Obligations] (which were partially guaranteed by the [Korea Credit Guarantee Fund]).[230]

133. The third financial transaction was a restructuring programme agreed between Hynix and its creditors in May 2001 (the "May 2001 restructuring"). A group of 17 major creditors formed a creditors' council (the "May 2001 Creditors' Council"), based on the debt restructuring process established in June 1998 by the Corporate Restructuring Agreement (the "CRA"), which was "an informal agreement that comprised 210 [Korean] financial institutions".[231] The May 2001 Creditors' Council agreed to an overall restructuring plan for Hynix, involving the rescheduling and refinancing of Hynix's debt through maturity extensions and short-term debt instruments, as well as the issuance of convertible bonds and Global Depository Shares.[232]

134. The fourth financial transaction identified by the USDOC was another restructuring programme, developed in view of Hynix's "continuing financial troubles" and the downturn in the

---

[229]Issues and Decision Memorandum, *supra*, footnote 6, p. 19.

[230]*Ibid*., p. 23.

[231]*Ibid*., p. 19.

[232]Issues and Decision Memorandum, *supra*, footnote 6, p. 20. We understand that the references in the Issues and Decision Memorandum to Global Depository Shares relate to company shares offered for sale globally, that is, in multiple markets around the world, by virtue of receipts that are issued by banks in several countries and that evidence the shareholder's ownership interest in that company. (See P. Moles and N. Terry, *The Handbook of International Financial Terms* (Oxford University Press, 1999), p. 256)

DRAMS[233] market, and adopted by Hynix and its creditors in October 2001 (the "October 2001 restructuring").[234] This restructuring plan was formulated under the CRPA, a codification under Korean law of the corporate workout methods utilized informally under the CRA. The creditors' council governing this restructuring plan (the "October 2001 Creditors' Council") provided Hynix's creditors with three options: (i) extend new loans to Hynix; (ii) convert a certain amount of Hynix's debt into equity, with a portion of the debt being forgiven; or (iii) exercise appraisal rights[235], with a portion of the debt being forgiven. As a result of this restructuring, almost 3 trillion won of Hynix's debt was converted to equity, 1.45 trillion won in debt was forgiven, and Hynix was issued new loans as well, having other loans refinanced or their terms extended.[236]

135. The USDOC drew three factual inferences from the evidence on the record before it: (i) the GOK maintained a policy of supporting Hynix's financial restructuring and thereby avoiding the firm's collapse[237]; (ii) the GOK exercised the control or influence over Hynix's creditors necessary to implement this policy[238]; and (iii) the GOK at times used this control/influence to "pressure" or coerce Hynix's creditors to continue supporting the financial restructuring of the firm.[239] On the basis of these inferences, the USDOC arrived at a conclusion of entrustment or direction covering virtually all of Hynix's creditors and their participation in any or all of the four financial transactions examined:

> [T]he GOK has entrusted or directed financial institutions to carry out the GOK subsidy program to bail out Hynix. In so doing, the GOK both entrusted and directed various GOK financial institutions. As outlined above, the GOK gave authoritative instructions and directives to financial institutions, and made it well known that it fully backed the bailout program. Moreover, once the Hynix Creditors' Council was formed and had a majority of GOK-owned or controlled banks, the GOK entrusted those banks with continuing the

[233]Dynamic random access memory semiconductors (DRAMS) and memory models containing DRAMS are herein collectively referred to as "DRAMS".

[234]Issues and Decision Memorandum, *supra*, footnote 6, p. 20.

[235]The exercise of appraisal rights involved a creditor seeking not to continue financing Hynix, which would have its Hynix debt purchased by the other Hynix creditors at a price determined either through consultation or with the assistance of an accounting firm. (See *infra*, paras. 169-170)

[236]Issues and Decision Memorandum, *supra*, footnote 6, p. 20.

[237]*Ibid*., pp. 49-50. See also United States' first written submission to the Panel, para. 37; and United States' second written submission to the Panel, para. 10.

[238]Issues and Decision Memorandum, *supra*, footnote 6, pp. 50-59. See also United States' first written submission to the Panel, para. 37; and United States' second written submission to the Panel, para. 10.

[239]Issues and Decision Memorandum, *supra*, footnote 6, pp. 57 and 60-61. See also United States' first written submission to the Panel, para. 37; and United States' second written submission to the Panel, para. 10. In its Issues and Decision Memorandum, the USDOC also categorized the second and third inferences under one broader finding that "evidence on the record establishes a pattern of practices on the part of the GOK to act upon that policy to entrust or direct lending decisions as part of the restructuring." (Issues and Decisions Memorandum, *supra*, footnote 6, p. 49)

> bailout process to its conclusion. Accordingly, we find that the GOK's entrustment or direction to these institutions allowed the GOK to execute its bailout policy program, thus providing a financial contribution to Hynix ... .[240]

C. *"Probative and Compelling" Evidentiary Standard*

136. We begin our analysis with the United States' challenge to the Panel's alleged articulation and application of an erroneous "evidentiary standard".[241] Having agreed with the United States in finding that entrustment or direction need not be determined on the basis of explicit acts, the Panel nevertheless cautioned:

> [T]he evidence of entrustment or direction must in all cases be *probative and compelling*. Thus, whatever the nature or form of the affirmative acts of delegation or command at issue, the evidence must demonstrate that each private entity allegedly providing, or participating in, a financial contribution was entrusted or directed by the government to do so.[242] (emphasis added; footnote omitted)

Subsequently, at the outset of its examination of the USDOC's evidence of entrustment or direction, the Panel reiterated its understanding that "such evidence [be] probative and compelling, in the sense that it demonstrates that each of the private creditors participating in the financial contributions was entrusted or directed to do so."[243]

137. The United States challenges the Panel's requirement that the evidence underlying the USDOC's determination of "entrustment" or "direction" must be "probative and compelling". The United States agrees that evidence, by its very nature, must be "probative"[244], but argues that the standard of "compelling" evidence is not contained in either the *SCM Agreement* or the DSU. The term "compelling" is understood by the United States to refer to evidence of such weight as to require the decision-maker to arrive at one given conclusion.[245] According to the United States, by applying such a standard, the Panel effectively required the USDOC to have "overwhelming" or "irrefutable"

---

[240]Issues and Decision Memorandum, *supra*, footnote 6, pp. 61-62. Based on its findings in previous investigations, the USDOC determined that "the lending and credit practices of Citibank are not directed by the GOK." (*Ibid.*, p. 17)

[241]United States' appellant's submission, para. 47.

[242]Panel Report, para. 7.35.

[243]*Ibid.*, para. 7.46.

[244]United States' appellant's submission, footnote 56 to para. 48.

[245]*Ibid.*, paras. 48-49.

evidence that "force[d]" or "oblige[d]" it to find entrustment or direction.[246] Korea submits that the term "compelling", in the context in which it was used by the Panel, is more properly understood in a sense similar to "probative", merely to describe evidence tending to persuade the decision-maker of a certain conclusion.[247] Korea therefore contests the United States' characterization of the Panel's "probative and compelling" statement as a new evidentiary standard, arguing instead that it merely describes the "quality of evidence" needed to establish entrustment or direction.[248]

138. We agree with the participants[249] that neither the *SCM Agreement* nor the DSU explicitly articulates a standard for the evidence required to substantiate a finding of entrustment or direction under Article 1.1(a)(1)(iv).[250] Article 12 of the *SCM Agreement*¸ entitled "Evidence", specifies in paragraph 2 that a decision of the investigating authority as to the existence of a subsidy "can only be based on" evidence on the record of that agency; this applies equally to evidence used to support a finding of a financial contribution under Article 1.1(a)(1)(iv).[251] Beyond this requirement, however, we see 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.

139. The Panel explained that, in using the terms "probative" and "compelling", it was expressing the view that the total evidence relied upon by an agency must "demonstrate" entrustment or direction with respect to each private body in a given financial contribution.[252] In so stating, the Panel, in our view, did not require that the evidence relied upon by the USDOC be "irrefutable"[253], nor did it require the evidence to be of such quality or quantity so as to "force"[254] the USDOC to arrive at a finding of entrustment or direction. Indeed, after reviewing the USDOC's evidence, the Panel concluded that the USDOC "could not properly have found that there was sufficient evidence to

---

[246]United States' appellant's submission, para. 49 (quoting *The New Shorter Oxford English Dictionary*, *supra*, footnote 36, Vol. 1, p. 458; and *Oxford Dictionary of English*, C. Soanes and A. Stevenson (eds) (Oxford University Press, 2004) 2nd edn, p. 352).

[247]Korea's appellee's submission, paras. 96-97.

[248]*Ibid*., para. 82.

[249]Korea's and the United States' responses to questioning at the oral hearing.

[250]In contrast, Article 15.1 of the *SCM Agreement* provides that a "determination of injury … shall be based on positive evidence".

[251]Other provisions of the *SCM Agreement* relevant to a finding of entrustment or direction similarly suggest the investigating authority is to "base" its finding on evidence, but they do not clarify further the nature or quantum of evidence required to support such a finding. (See Articles 12.5, 12.8, 22.4, and 22.5 of the *SCM Agreement*)

[252]Panel Report, paras. 7.35 and 7.46.

[253]United States' appellant's submission, para. 49 (referring to *Oxford Dictionary of English*, *supra*, footnote 246, p. 352).

[254]*Ibid*. (quoting *The New Shorter Oxford English Dictionary*, *supra*, footnote 36, p. 458).

support [its] finding of entrustment or direction."[255] It appears to us, on balance, that the Panel did not apply the term "compelling" in the manner suggested by the United States; had it done so, it would have erroneously imposed a qualitative standard higher than that contemplated by the *SCM Agreement*. Rather, the Panel properly examined whether the USDOC's evidence could support its conclusion. Thus, we do not read the Panel to have imposed an "evidentiary standard"[256] beyond what we have found in the *SCM Agreement*.[257]

140. Therefore, we *find* that the Panel *did not err* in finding, in paragraphs 7.35 and 7.46 of the Panel Report, that the evidence underlying the USDOC's finding of entrustment or direction must be "probative and compelling", to the extent the Panel understood these terms to require only that the evidence demonstrate entrustment or direction.

D. *The Panel's Approach to the Evidence*

141. We turn now to the United States' allegation that the Panel employed an erroneous approach under Article 1.1(a)(1)(iv) to its review of the USDOC's evidence. In particular, the United States alleges, first, that the Panel's approach fails to appreciate that the USDOC's conclusion rested on the *totality* of the evidence.[258] Secondly, according to the United States, the Panel's approach impermissibly restricts the ability of the agency to draw legitimate inferences from circumstantial evidence, because it effectively requires examining whether each piece of evidence constitutes direct evidence of entrustment or direction.[259] Thirdly, the United States submits that the Panel's improper approach to examining the evidence effectively shifted the burden of proof from Korea to the United States, because the Panel appeared not to have considered seriously any evidence that did not amount to a "smoking gun".[260]

142. At the outset of its examination, the Panel acknowledged the factual underpinnings of the USDOC's finding—that is, the GOK policy to save Hynix, the ability of the GOK to control or influence Hynix's creditors, and the pressure put on those creditors by the GOK—and structured its

---

[255]Panel Report, para. 7.177. (emphasis added)

[256]United States' appellant's submission, para. 47.

[257]We note that third participants China and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu similarly understand the Panel not to have imposed additional obligations on Members merely by requiring evidence to be "probative and compelling". (China's third participant's submission, para. 25; Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, para. 7)

[258]United States' appellant's submission, paras. 58-73.

[259]*Ibid*., paras. 74-85.

[260]*Ibid*., para. 87.

analysis along the lines of these factual premises.[261] The Panel also observed that the USDOC had based its finding on the *totality* of the evidence, "without attaching particular importance to one or several evidentiary factors".[262] The Panel determined that it would follow the "same approach" to the evidence.[263] We understand that, in so doing, the Panel implicitly accepted the reasonableness of this approach.

143. In our view, the Panel was correct in deciding to follow the agency's approach to the examination of the evidence. Despite its stated intention, however, the Panel followed a different approach, which we examine below.

1. Examining Individual Pieces of Evidence

144. Notwithstanding the USDOC's reliance on the *totality* of the evidence, the Panel maintained that "[i]n order to" follow the same approach, it was required to assess the "probative value of each evidentiary factor separately".[264] Accordingly, with respect to each of the factual underpinnings of the USDOC's finding of entrustment or direction[265], the Panel examined *individually* the pieces of evidence on which the USDOC relied to support the particular premise.

145. We see no error, in principle, in a panel's review of individual pieces of evidence under Article 1.1(a)(1)(iv), even where the investigating authority draws its conclusion from the *totality* of the evidence. Indeed, in our view, in many cases a panel will be able to examine the sufficiency of the evidence supporting an investigating authority's conclusion of entrustment or direction only by looking at each individual piece of evidence.

[261]See Panel Report, para. 7.45 and Section VII.C.1(b), sub-sections (i)-(iii).

[262]*Ibid*., para. 7.45.

[263]*Ibid*.

[264]*Ibid*.

[265]*Supra*, para. 135.

146. We find that the Panel erred, however, in the *manner* in which it reviewed the individual pieces of evidence. We note, first, that the Panel often appeared to examine whether each piece of evidence, viewed *in isolation*, demonstrated entrustment or direction. For example, the USDOC found relevant that the Financial Supervisory Commission (the "FSC") had increased the credit limits placed on banks providing loans to a single borrower so that additional funds could be provided to Hynix.[266] The Panel disagreed:

> Even though the [United States] may be correct in arguing that certain creditors would not have been able to participate in the syndicated loan without the loan limit waiver, we do not consider that the [US]DOC could properly have *inferred from this that creditors were entrusted or directed* to participate in the syndicated loan. ... The [United States] also argues that entrustment or direction to the banks to assist Hynix would be meaningless if the banks were legally precluded from complying with the GOK's directives. While this may be the case, this does not mean that *there is government entrustment or direction every time that a loan limit waiver is provided*.[267] (emphasis added)

We do not read the USDOC to have inferred *solely from the waiver of loan limits* that entrustment or direction had taken place. Nor do we consider that the USDOC's reliance on this evidence suggests that "there is government entrustment or direction every time that a loan limit waiver is provided", for this would follow only if the USDOC had based its finding of entrustment or direction *exclusively* on the waivers of loan limits.

147. Similarly, the USDOC also relied on documents provided during verification meetings to find that an FSC vice-chairman[268] had attended a meeting of the May 2001 Creditors' Council "to urge creditor banks to execute the resolutions made by creditors".[269] This evidence was relied on by the USDOC in support of its understanding that the GOK had applied pressure on Hynix's creditors to participate in the financial restructuring of the firm. The Panel dismissed the relevance of this evidence:

---

[266]Issues and Decision Memorandum, *supra*, footnote 6, p. 51.

[267]Panel Report, para. 7.101.

[268]The Panel observed that Korea disputed this fact, claiming instead that the meeting had been attended by an official of the Financial Supervisory Service, which was "not a governmental organization, but a special public corporation affiliated with FSC [and] functioning as an executive arm of the FSC". The Panel found that it did not need to resolve this disagreement because of its "finding regarding the DOC's treatment of this issue". (Panel Report, footnote 166 to 7.141) Similarly, given the basis for our finding of error in the Panel's approach to reviewing individual pieces of evidence, we do not need to resolve this factual disagreement of the participants.

[269]Issues and Decision Memorandum, *supra*, footnote 6, p. 60 (quoting *GOK Verification Report*, p. 19 (Exhibit US-12 submitted by the United States to the Panel)).

> [T]he fact that a regulatory authority attends a meeting of creditors at the request of the lead creditor in order to urge – and not instruct – creditor banks to execute resolutions made by creditors would not allow an investigating authority to properly conclude that such *attendance amounted to governmental entrustment or direction* of creditors to participate in the restructuring.[270] (original underlining; italics added)

The USDOC did not advance the view that the attendance of the FSC official, in and of itself, "amounted to" entrustment or direction. In arriving at this conclusion, the Panel essentially faulted the USDOC for drawing a certain inference from a single piece of evidence, where, in fact, the agency did no such thing.

148. The USDOC had also pointed in its determination to internal documents from Kookmin Bank to support a link between the GOK policy to save Hynix and the actions of creditors in the bailout of the firm.[271] One of those documents identified nine reasons for Kookmin Bank's participation in the December 2000 syndicated loan[272], including one referring to a GOK policy relating to the role of financial institutions in the restructuring of troubled firms.[273] The Panel observed that the United States did not contest that the other eight stated reasons for Kookmin Bank's participation related to commercial considerations, and then addressed the significance of the ninth reason as follows:

> [T]he above statement appears to refer to an overarching government policy relating to financial institutions participating in remedial restructuring, rather than affirmative government acts of delegation or command made pursuant to GOK's stated policy to save Hynix. ... *A determination of government entrustment or direction requires more than finding that private bodies act with regard to generalized governmental policy requests.*
>
> ... [A]n objective and impartial investigating authority could not properly have determined that conduct with an ostensibly commercial rationale should be attributed to a government *simply on the basis of* a reference to a generalized governmental policy request. As noted above, we do not consider that the mere existence of a government policy is *sufficient to establish* government entrustment or direction.[274] (emphasis added; footnote omitted)

---

[270]Panel Report, para. 7.141.

[271]Issues and Decision Memorandum, *supra*, footnote 6, p. 59.

[272]*Supra*, para. 132.

[273]Panel Report, para. 7.167. The reason relating to the GOK policy cannot be quoted because Korea identified it before the Panel as business confidential information. (See *ibid.*, para. 7.166 and footnote 188 thereto)

[274]*Ibid.*, paras. 7.167-7.168.

The Panel overlooks the fact that the USDOC did not find entrustment or direction "simply on the basis of" the one non-commercial reason supporting Kookmin Bank's decision to participate in the December 2000 syndicated loan. It is no doubt true, as the Panel states, that the fact that eight commercial reasons are provided to support the Kookmin Bank loan may affect the emphasis given by the agency to the ninth (non-commercial) reason. It is equally true, however, as the Panel failed to recognize, that that ninth reason could reasonably take on greater meaning when viewed in the light of other corroborating evidence.

149. In each of the above instances, the Panel appears to have implicitly required that entrustment or direction be *established*, or *determined*, or *inferred*, solely on the basis of the particular piece of evidence examined. Furthermore, these are not isolated statements, but rather, reflect a view of the Panel that is evident throughout its analysis.[275] This is troubling, especially as the Panel itself initially recognized that at no point in the USDOC's determination did the agency contend that any individual piece of evidence, in isolation, would be sufficient for its finding of entrustment or direction.

150. In our view, having accepted an investigating authority's approach, a panel normally should examine the probative value of a piece of evidence in a similar manner to that followed by the investigating authority. Moreover, 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.[276] 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.[277] 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.

---

[275]See, for example, Panel Report, paras. 7.62, 7.77-7.78, 7.129, 7.141, and 7.167-7.168.

[276]We note that the European Communities makes a similar observation:

> By considering the facts and evidence <u>in isolation only,</u> and also failing to consider the weight of the individual facts taken together the panel effectively applied a different methodological approach from that adopted by the investigating authority.

(European Communities' third participant's submission, para. 20) (original underlining)

[277]We agree with the United States, and third participants the European Communities and Japan, that this approach is particularly relevant in cases of entrustment or direction under Article 1.1(a)(1)(iv), where much of the evidence that is publicly-available, and therefore readily accessible to interested parties and the investigating authority, will likely be of a circumstantial nature. (United States', the European Communities', and Japan's responses to questioning at the oral hearing) Moreover, strictly speaking, entrustment or direction is not a pure fact. It is, rather, a *legal* assessment based on a proven set of facts.

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.[278] 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[279], panels may not conduct a *de novo* review of agency determinations.

152. In this case, as we observed above[280], 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.

2. Examining the Totality of the Evidence

153. The Panel ended its examination of the USDOC's evidence, in paragraphs 7.175 to 7.178 of the Panel Report, with a "global review of all the reasoning set forth by the [US]DOC". The Panel summarized its several earlier findings on the individual pieces of evidence and, on the basis of this "global review", concluded that the USDOC "could not properly have found that there was sufficient

[278]This is not to say that a panel is prohibited from examining whether the agency has given a reasoned and adequate explanation for its determination, in particular, by considering other inferences that could reasonably be drawn from—and explanations that could reasonably be given to—the evidence on record. Indeed, a panel must undertake such an inquiry. (See *infra*, para. 186)

[279]We address *infra*, in sub-section G, the implications of the Panel's approach to the evidence for its application of the proper standard of review.

[280]*Supra*, para. 135.

evidence to support a generalized finding of entrustment or direction with respect to private bodies spanning multiple creditors and multiple transactions over the period of investigation."[281]

154. We note, first, that the Panel's discussion of the *totality* of the evidence appears to be primarily a summation of errors that the Panel found in the course of its review of the individual pieces of evidence. Such errors undoubtedly would affect an examination of the *totality* of the evidence, as these pieces would constitute the evidence the Panel would consider as a whole in assessing the evidentiary support of the USDOC's finding of entrustment or direction. Nevertheless, what is absent from the Panel's "global" assessment, in our view, is a consideration of the *inferences* that might reasonably have been drawn by the USDOC on the basis of the *totality* of the evidence.[282] As we have already observed[283], individual pieces of circumstantial evidence are unlikely to establish entrustment or direction; the significance of individual pieces of evidence may become clear only when viewed together with other evidence. In other words, a piece of evidence that may initially appear to be of little or no probative value, when viewed in isolation, *could*, when placed beside another piece of evidence of the same nature, form part of an overall picture that gives rise to a reasonable inference of entrustment or direction. Although the USDOC relied on such an approach—and the Panel, not finding it unreasonable, stated its intention to emulate it—the Panel stopped short of assessing the evidence on such a global basis.

155. A few examples from the Panel Report will illustrate the Panel's error. Although the Panel found sufficient evidentiary support for the USDOC's determination that the GOK pursued a policy to ensure the financial viability of Hynix[284], the Panel did not find meaningful the USDOC's reliance on Kookmin Bank's 2001 and 2002 prospectuses filed with the United States Securities and Exchange Commission, in which Kookmin Bank stated:

> We expect that all loans made pursuant to government policies will be reviewed in accordance with [Kookmin Bank's] credit review policies. However, we cannot assure you that government policy will not influence [Kookmin Bank] to lend to certain sectors or in a manner in which [Kookmin Bank] otherwise would not in the absence of the government policy.[285]

[281]Panel Report, para. 7.177.

[282]As a result of its approach to the individual pieces of evidence, (see *supra*, paras. 144-152), several pieces of evidence erroneously deemed irrelevant by the Panel were not part of the Panel's "global review".

[283]*Supra*, para. 150.

[284]Panel Report, para. 7.51.

[285]Kookmin Bank Prospectus (10 September 2001), p. 24, Exhibit US-45 submitted by the United States to the Panel (quoted in Issues and Decision Memorandum, *supra*, footnote 6, p. 58).

> We expect that all loans made pursuant to government policies will be reviewed in accordance with our credit review policies. However, government policy may influence us to lend to certain sectors or in a manner in which we otherwise would not in the absence of the government policy.[286]

In its determination, the USDOC stated:

> The timing of the September 2001 [United States Securities and Exchange Commission] prospectus ... clearly links the statements about government influence over bank lending decisions to the [period of investigation]. Moreover, the plain reading of these documents, along with documents examined at verification, connect the government's influence over [Kookmin Bank] and the government objective to rescue Hynix from financial collapse.[287]

In our view, the admission by Kookmin Bank that "government policy" might lead it to extend loans that it otherwise might not offer, and the existence of a GOK policy to save Hynix, should have prompted the Panel to consider, as did the USDOC, whether the Kookmin Bank prospectuses might carry greater relevance than initially believed when the Panel examined them in isolation.

156. The Panel also found that evidence of coercion with respect to Hana Bank, a Group C creditor, would be of limited evidentiary value towards the USDOC's finding of entrustment or direction, because the evidence related to pressure placed on Hana Bank to provide funds to Hyundai Petrochemical, not to Hynix.[288] The USDOC had noted in its determination:

> [T]he [Financial Supervisory Service] threatened to fine Hana Bank if it failed to provide emergency liquidity to [Hyundai Petrochemical], which was a part of the Hyundai Group that was going through the workout process. Hana Bank was also an important Hynix creditor. Moreover, while [the cited newspaper article] discusses [Hyundai Petrochemical], as we outlined above, the GOK's policies during this period were aimed at the corporate and financial restructuring of the entire Hyundai Group, including Hynix' predecessor, HEI, which was part of that group.[289]

Although we see no error in the Panel raising questions initially about the evidentiary value of coercion taking place with respect to financial transactions involving a beneficiary other than Hynix, its subsequent failure to consider the value of this evidence in conjunction with other pieces of

---

[286]Kookmin Bank Prospectus (18 June 2002), p. 22, Exhibit US-46 submitted by the United States to the Panel (referred to in Issues and Decision Memorandum, *supra*, footnote 6, p. 58).

[287]Issues and Decision Memorandum, *supra*, footnote 6, p. 58.

[288]Panel Report, para. 7.127.

[289]Issues and Decision Memorandum, *supra*, footnote 6, p. 61.

evidence constitutes legal error. Specifically, the Panel did not take into account in this context the fact that a GOK policy existed specifically with respect to Hynix, and that Kookmin Bank (another Group C creditor) acknowledged making loans in pursuit of government policy. If the GOK was pursuing a policy to prevent the failure of Hynix, and if the GOK had previously shown a willingness to coerce private banks (Group C creditors in the Hynix context) into participating in other Hyundai Group restructurings, the Panel should have at least considered whether, in the light of these facts, it was reasonable to conclude that coercion was also likely to have taken place with respect to loans for Hynix. And, having so considered, the Panel might have had a more complete basis for evaluating whether it was reasonable to find entrustment or direction in respect of Group C creditors. The Panel's failure to approach the evidence in its totality, however, precluded such a possibility.

157. We do not raise these questions to suggest that, had the Panel conducted a proper analysis of the evidence under Article 1.1(a)(1)(iv), it would have discovered sufficient evidentiary support for the USDOC's finding of entrustment or direction. Nor do we seek to re-evaluate the evidence before the Panel; that is not our task. Rather, we are speaking about the method used by the Panel to assess the evidence. In our view, when an investigating authority relies on the totality of circumstantial evidence, 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. Having failed to undertake such an assessment, the Panel could not have arrived at a proper conclusion as to the sufficiency of the evidence underlying the USDOC's finding of entrustment or direction.

158. In sum, we are of the view that, in analyzing the USDOC's evidence under Article 1.1(a)(1)(iv), the Panel assessed the relevance of many individual pieces of evidence by examining whether *each* of them was sufficient to establish entrustment or direction. In so doing, the Panel failed to appreciate the circumstantial nature of the USDOC's evidence and to consider the relevance of that evidence for the particular inferences the USDOC sought to draw. This error, in turn, contributed to various findings of the Panel dismissing or discounting individual pieces of evidence relied on by the USDOC. Furthermore, in its "global" examination of the evidence, the Panel failed to consider that pieces of evidence, especially circumstantial evidence, might become more significant when viewed in their totality. For these reasons, we *find* that the Panel *erred* in failing to examine the USDOC's evidence in its totality, and requiring, instead, that individual pieces of evidence, in and of themselves, establish entrustment or direction by the GOK of Hynix's creditors.

E. *Admissibility of Evidence*

159. In the course of making submissions before the Panel, the United States at several points attempted to rely on evidence that, although contained in the record of the CVD investigation, had not been *cited* in the USDOC's decision. The Panel refused to consider this evidence on the ground that submission of such evidence constituted "*ex post* rationalization" on the part of the United States.[290] The United States acknowledges that Members may not defend the decisions of their investigating authorities on the basis of a rationale not set out in those decisions.[291] The United States contends, however, that the Panel misunderstood the scope of this prohibition against "*ex post* rationalization".[292] According to the United States, this prohibition limits only a Member's right to raise before a panel new *reasons* as the basis for its investigating authority's challenged decision, but not the right to rely during panel proceedings on *evidence* that, although contained in the record of the investigating authority, is not explicitly referred to in its decision.[293]

160. Korea argues that, in requiring that "all relevant information on the matters of fact and law" be included in an investigating authority's published determination, Article 22.5 of the *SCM Agreement* supports the Panel's decision to refuse to consider the evidence submitted by the United States.[294] Korea asserts that "all relevant information" includes *any* evidence on which the agency relies to support its decision.[295] Thus, in Korea's view, the United States' understanding that only "new reasoning"[296] may properly be rejected by panels is inconsistent with the "clear" text of Article 22.5.[297]

---

[290]Panel Report, paras. 7.88, 7.102, and 7.141. See also paras. 7.116 and 7.121.

[291]United States' appellant's submission, paras. 90 and 93.

[292]*Ibid*., para. 90.

[293]The United States does not appeal the Panel's conclusion of *ex post* rationalization with respect to a new factual argument advanced by the United States before the Panel. The United States argued before the Panel that the GOK had disciplined various credit rating agencies for giving Hynix a low credit rating. This was advanced in support of the USDOC's determination that the GOK exercised control or influence over Hynix's creditors. The Panel found that the USDOC had not referred in its determination to the coercion of credit rating agencies and, therefore, argument and evidence relating to such coercion "[fell] outside the scope of [the Panel's] proceedings." (Panel Report, para. 7.135)

[294]Article 22.5 of the *SCM Agreement* provides, in relevant part:

> A public notice of conclusion ... of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty ... shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures[.]

[295]Korea's appellee's submission, paras. 183-184.

[296]*Ibid*., para. 185 (quoting United States' appellant's submission, para. 93).

[297]*Ibid*.

161. There is no doubt that a Member may not seek to defend its agency's decision on the basis of evidence not contained in the record of the investigation. Indeed, neither participant seeks to argue otherwise.[298] Moreover, Korea acknowledges that the evidence relevant to this aspect of the United States' challenge was part of the USDOC's record and was disclosed to the parties during the CVD investigation.[299]

162. Article 1.1(a)(1)(iv), the provision under which the Panel examined the USDOC's subsidy determination, provides that there is a financial contribution by a government or public body where:

> ... 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 [.]

The provision, on its face, does not speak to the evidence that a Member may (or must) adduce before a panel to demonstrate "entrustment" or "direction". The Panel itself did not explain what it understood by a prohibition on "*ex post* rationalization", nor on what basis such a prohibition would limit a Member's right to present *evidence*—as opposed to reasoning—in dispute settlement proceedings.

163. Korea suggests that Article 22.5 of the *SCM Agreement* provides the basis for the Panel's exclusion of the United States' evidence, particularly as it requires an investigating authority's final determination to contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". We note, first, that the Panel itself did not seek to justify its treatment of the United States' evidence on the basis of Article 22.5. Moreover, Korea does not allege that the facts for which the evidence at issue here was introduced were not set out in the USDOC's final determination.[300] Nor does Korea allege that those facts set out in the final determination were asserted without citation of *any* supporting evidence. Indeed, Korea could not so allege because the USDOC's final determination *did* set out those facts and *did* seek to support those

[298]United States' appellant's submission, para. 102; Korea's appellee's submission, para. 196.

[299]Korea's response to questioning at the oral hearing.

[300]The facts for which the United States sought to submit the excluded evidence were: (i) the influence held by the GOK over Hynix's creditors by virtue of the CRPA (Panel Report, paras. 7.72-7.74); (ii) decisions taken during the Economic Ministers' meetings that facilitated the extension of further credit to Hynix (*Ibid.*, para. 7.102); (iii) pressure applied to KFB by the GOK (*Ibid.*, para. 7.115); (iv) pressure applied to KorAm Bank by the GOK (*Ibid.*, para. 7.121); and (v) attendance by FSC officials at a meeting of Hynix creditors. (*Ibid.*, para. 7.141 and footnote 161 to para. 7.138)

facts by referring to record evidence, even if not the precise evidence the Panel refused to consider.[301] Thus, insofar as it relates to the evidence at issue here, the USDOC's final determination provided Korea with notice of the factual bases of the finding of entrustment or direction, as well as notice of certain record evidence underlying each of those facts.

164. In these circumstances, we are of the view that Article 22.5 does not require the agency to cite or discuss *every* piece of supporting record evidence for each fact in the final determination.[302] Therefore, even assuming *arguendo* that Article 22.5 of the *SCM Agreement* could provide the basis for a panel's exclusion of evidence, we see no reason why it would support such exclusion in this case.[303]

165. In the light of the above, we find no basis for the Panel's exclusion of the United States evidence in question. That evidence was on the record of the investigation and it was not put before the Panel in support of a new reasoning or rationale. We therefore *find* that the Panel *erred*, in paragraphs 7.88, 7.102, 7.116, 7.121, and 7.141 of the Panel Report, in declining to consider certain record evidence not cited by the USDOC in its published determination.

F. *Non-record Evidence*

166. We consider now whether, as the United States alleges[304], the Panel erred in relying on evidence that was not on the record before the USDOC in the underlying CVD investigation. We first set out the uncontested facts relating to this issue and then examine the Panel's approach.

167. As noted above, one of the factual conclusions established by the USDOC in support of its finding of entrustment or direction was that the GOK had the ability to control or influence Hynix's

[301]See Issues and Decision Memorandum, *supra*, footnote 6, pp. 53-55 (discussing the influence held by the GOK over Hynix's creditors by virtue of the CRPA); *ibid.*, pp. 50-52 (discussing the Economic Ministers' meetings); *ibid.*, pp. 60-61 (discussing pressure applied to KFB by the GOK); *ibid.*, p. 60 (discussing pressure applied to KorAm Bank by the GOK); *ibid.*, p. 60 (discussing attendance by FSC officials at a meeting of Hynix creditors).

[302]On this point, Japan expressed the view that "no provision of the DSU or the SCM Agreement requires that an [investigating] authority discuss each and every individual item of evidence, which the authorit[y] assessed, or was supportive of its conclusion, in a particular determination." (Japan's third participant's submission, para. 30)

[303]We recall that previous decisions of the Appellate Body have addressed, in the context of the *Anti-Dumping Agreement*, the evidence a panel may consider when reviewing decisions of investigating authorities. (See Appellate Body Report, *Thailand – H-Beams*, paras. 109-110; and Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 131-132)

[304]United States' appellant's submission, para. 100.

creditors.[305] One of the mechanisms examined by the USDOC, through which the GOK allegedly exercised control or influence over Hynix's creditors, was the CRPA.

168. According to the USDOC, under the CRPA, those creditors holding at least 75 per cent of a firm's outstanding debt could set the restructuring terms for *all* of that firm's creditors.[306] Article 29 of the CRPA established a mechanism whereby those creditors that did not agree to the restructuring terms could be bought out by the remaining creditors.[307] The price at which the dissenting creditors' debt would be bought was to be determined by consultations between the dissenting creditors and the remaining creditors.[308] Article 29(5) of the CRPA provided that, if consultations did not result in an agreed price:

> ... the mediation committee ... shall make a decision on the price of purchase or redemption of claims and conditions thereof. In such case, the mediation committee shall take into consideration the price computed by an accounting specialist selected under a consultation between the council and opposing creditors[.][309]

169. The restructuring terms established by the October 2001 Creditors' Council provided Hynix's creditors with three options, the third of which provided that:

> ... creditors that did not agree to either new loans [Option 1] or the debt-to-equity conversion [Option 2] could exercise their appraisal rights for all of their secured debt and 25 percent of the unsecured debt based on Hynix' liquidation value (as established by an external consultant), and have the remainder of the debt forgiven.[310]

170. Thus, under the third option ("Option 3"), creditors that declined to provide new loans to Hynix and declined to convert their debt to equity in Hynix could exercise their appraisal rights and be bought out by the other creditors on the October 2001 Creditors' Council. The GOK and Hynix pointed out to the USDOC during the investigation that, in fact, three[311] creditors had exercised

---

[305]*Supra*, para. 135.

[306]Issues and Decision Memorandum, *supra*, footnote 6, p. 55.

[307]Article 29(1) of the CRPA, Exhibit GOK-22(c) submitted by Korea to the Panel.

[308]Article 29(4) of the CRPA, Exhibit GOK-22(c) submitted by Korea to the Panel.

[309]Article 29(5) of the CRPA, Exhibit GOK-22(c) submitted by Korea to the Panel.

[310]Issues and Decision Memorandum, *supra*, footnote 6, p. 20.

[311]At the oral hearing, Korea stated that, although the 2001 Hynix Audit Report referred to *three* creditors that exercised their rights to mediation, the correct number was four, as the GOK and Hynix submitted to the USDOC. (Issues and Decision Memorandum, *supra*, footnote 6, p. 61) Korea suggested at the oral hearing that the reference to three creditors in the 2001 Hynix Audit Report reflected an error in translation. We need not resolve this discrepancy for purposes of resolving this issue and refer throughout our discussion to *three* creditors.

Option 3 and had "severed their ties from Hynix and the restructuring process in October 2001".[312] The USDOC responded in its determination that, notwithstanding those creditors' lack of participation, the GOK's alleged ability to control or influence Hynix's creditors remained by virtue of the fact that "the terms on which these creditor banks terminated their relationship with Hynix were dictated by the banks that mattered in this case, namely the [Group A and B] creditors."[313]

171. The Panel found that the USDOC had not explained how the restructuring terms were "set"[314] by Group A and B creditors, notwithstanding that Article 29(5) of the CRPA provided the "possibility"[315] for dissenting creditors to avoid these restructuring terms and be bought out by other creditors at a price determined through mediation. The Panel asserted that "there was also evidence on the [US]DOC's record indicating that the mediation provisions had actually been invoked by three creditors in respect of the October 2001 restructuring."[316] Therefore, the Panel determined that the evidence on record was sufficient to "bring into question" the USDOC's conclusion that the terms of the October 2001 restructuring were established by the Group A and B creditors.[317]

172. The United States challenges the Panel's finding that certain creditors of Hynix "actually ... invoked"[318] their right to mediation under the CRPA. According to the United States, the evidence on the record before the USDOC contained no information relating to the *exercise* of mediation rights by the three creditors.[319] The United States submits that the only basis for the Panel's finding that certain creditors exercised their mediation rights was evidence submitted by Korea to the Panel but never provided to the USDOC.[320] By arriving at a conclusion on the basis of non-record evidence, the United States argues, the Panel acted inconsistently with its obligations under Article 11 of the DSU.[321]

173. Korea argues that the United States misstates the Panel's finding, which Korea understands to be that the USDOC had not undertaken a sufficient inquiry with respect to the participation of certain creditors in the October 2001 restructuring.[322] This finding, according to Korea, was based not only

---

[312]Issues and Decision Memorandum, *supra*, footnote 6, p. 61.

[313]*Ibid*.

[314]Panel Report, para. 7.84 (quoting Issues and Decision Memorandum, *supra*, footnote 6, p. 55).

[315]*Ibid*.

[316]*Ibid*., para. 7.85.

[317]*Ibid*., para. 7.87.

[318]*Ibid*., para. 7.85.

[319]United States' appellant's submission, paras. 108-111.

[320]*Ibid*., paras. 112-114.

[321]*Ibid*., para. 117.

[322]Korea's appellee's submission, para. 198.

on "actual incidents of mediation", as discernible from the 2001 Hynix Audit Report, but also on Article 29(5) of the CRPA and the opinion of one of the USDOC's experts.[323] With respect to the 2001 Hynix Audit Report, Korea notes that the excerpt from this document made clear reference to mediations under the CRPA, and then provided that, "[b]ased on this clause", three creditors "raised objection[s]".[324] On this basis, Korea submits, the USDOC should have understood that the raising of objections, in connection with the future payout by Hynix, necessarily implied recourse to mediation by those creditors.

174. Although the United States characterizes the error of the Panel as its reliance on non-record evidence, we note that the Panel explicitly agreed with the United States that its "review of the [US]DOC's determination should be confined to facts actually recorded on the [US]DOC's record of investigation."[325] The Panel insisted that its finding was based exclusively on "evidence on the [US]DOC's record"[326], namely the 2001 Hynix Audit Report. The issue raised by the United States' appeal, therefore, is not whether the evidence was contained in the record, but rather, whether the evidence contained in the record should have "indicate[d]" to the USDOC "that three of the four creditors exercising appraisal rights under option 3 actually exercised their right to seek mediation in respect of the October 2001 restructuring."[327]

175. The United States brings its challenge under Article 11 of the DSU, which requires that a panel "make an objective assessment of the matter before it". The Appellate Body has stated previously 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.[328] A panel must therefore limit its examination to the facts that the agency should have discerned from the evidence on record. Where a panel reads evidence with the "benefit of hindsight", it fails to consider how the evidence should have fairly been understood at the time of the investigation, and thereby fails to make an "objective assessment" in accordance with Article 11 of the DSU.[329]

---

[323]Korea's appellee's submission, paras. 198-199 and 210.

[324]*Ibid*., para. 203.

[325]Panel Report, para. 7.84.

[326]*Ibid*., para. 7.85.

[327]*Ibid*., para. 7.82.

[328]See Appellate Body Report, *US – Cotton Yarn*, para. 78.

[329]*Ibid*.

176. We turn now to the evidence relied upon by the Panel. The Panel pointed to a single paragraph in Hynix's 2001 Audit Report, which was on the record of the investigation, as the basis for finding that the USDOC should have been aware that three creditors had resorted to mediation after exercising their appraisal rights under Option 3.[330] That paragraph states:

> According to [the CRPA], any creditor financial institution who is dissatisfied with the creditor banks resolution is entitled to apply for mediation to Mediation Committee. Based on this clause, three creditor banks, including Korea First Bank, raised objection to the terms of reimbursement of remaining debts after debt to equity swap and debt exemption, five-year debentures with no interest. Accordingly, [Hynix] recognized 80,100 million [won] of other payables as current liabilities.[331]

177. This excerpt does not indicate explicitly that three creditors participated in a mediation. Nor does it state that a mediation in fact occurred, or that it was the mediation (rather than, for example, an agreement with the October 2001 Creditors' Council) that resulted in the payout of over 80 billion won. All that one can glean from this paragraph is that three creditors raised objections to the terms of reimbursement and that 80 billion won was "recognized". During the oral hearing, Korea insisted that this paragraph made clear that mediation had taken place, and explained that, under the CRPA, the "rais[ing]" of "objections" necessarily resulted in recourse to mediation.[332] In our view, however, it is not evident from a reading of Article 29(5) of the CRPA[333], the legal basis for the exercise of appraisal rights, that the raising of "objections" automatically results in mediation proceedings. Furthermore, at no point in its responses to questions during the oral hearing was Korea able to identify where *in the record* such an explanation could be found. Thus, we do not read the record evidence as supporting the Panel's conclusion that the USDOC should have understood the "rais[ing]" of "objections" to include the recourse to mediation by three Hynix creditors.

178. Moreover, we note that, during the investigation, the USDOC asked Hynix about creditors exercising rights under Option 3—that is, those creditors that "did not exchange their convertible

---

[330]Although the Panel also referred to Article 29(5) of the CRPA and the testimony of one of the USDOC's experts, the Panel did not find that either of these pieces of evidence could have informed the USDOC about the recourse to mediation—rather than the "possibility" of such recourse—by three Hynix creditors. (Panel Report, para. 7.84 and footnote 98 to para. 7.87)

[331]Hynix Audit Report (2001), p. 40 (Exhibit US-125 submitted by the United States to the Panel) (quoted in Panel Report, para. 7.85).

[332]Korea's response to questioning at the oral hearing.

[333]*Supra*, para. 168.

bonds for the new convertible bonds with an obligation of conversion".[334] The USDOC also asked Hynix, in a supplemental questionnaire, more specifically about how appraisal rights were exercised under Option 3.[335] In neither response did Hynix indicate that mediation had even been requested, much less that it had taken place.[336] Therefore, faced with no mention of mediation in response to questions, and given the wording of Article 29(5) of the CRPA, the USDOC, in our view, should not have been expected to read Hynix's 2001 Audit Report as indicating the recourse to mediation by three Hynix creditors.

179. In our view, therefore, the Panel erroneously concluded that the USDOC should have made a factual inference from evidence on the record that would not reasonably have suggested such an inference. We therefore *find* that the Panel failed to "make an objective assessment of the matter before it", as required by Article 11 of the DSU, by finding, in paragraph 7.85 of the Panel Report, that "the mediation provisions [of the CRPA] had actually been invoked by three creditors in respect of the October 2001 restructuring", in the absence of supporting evidence on the record of the underlying investigation.

---

[334]In its questionnaire, the USDOC had asked:

> For each creditor that did not exchange their convertible bonds for the new convertible bonds with an obligation of conversion, if applicable, provide the value of these convertible bonds as recorded in Hynix's capital adjustment account, if they were so recorded.

(Hynix's response to the USDOC Questionnaire, 28 January 2003, p. 60 (Exhibit US-129 submitted by the United States to the Panel))

Hynix responded:

> Four banks refused to participate in the second financial restructuring .... This decision meant that they would not extend new loans to Hynix, nor would they agree to exchange their debt holdings for equity. Instead, they exercised appraisal rights against their debt holdings. This included conversion of their debt holdings (loans and bonds) into debentures, with no coupon interest rate and a five year maturity for 100% of their secured loans and 25.46% of their unsecured loans based on Hynix's liquidation value[.]

(*Ibid.*)

[335]In its supplemental questionnaire to Hynix, the USDOC had asked:

> Please explain in greater detail the final plan option which allowed creditors to exercise appraisal rights. Explain how that process worked and on what basis the appraisal rights were exercised[.]

(USDOC Supplemental Questionnaire to Hynix, 11 February 2003 (Exhibit US-130 submitted by the United States to the Panel) Question 54, p. 10)

[336]Korea's response to questioning at the oral hearing.

G. *Standard of Review*

180. We turn now to the United States' allegation that the Panel failed to examine the USDOC's subsidy determination consistently with the applicable standard of review. The Panel began its analysis by observing that Article 11 of the DSU sets forth the applicable standard of review. On the basis of this provision and the Appellate Body's discussion on standard of review in *US – Lamb*, the Panel stated:

> [W]e consider that our standard of review is to determine whether the [US]DOC and [the US]ITC evaluated all relevant factors, and provided a reasoned and adequate explanation of how the facts support their determination. In doing so, we shall consider whether an objective and impartial assessment of all relevant facts on the record could properly support the [US]DOC and [the US]ITC's determinations of subsidization and injury respectively. In other words, we shall determine whether an objective and impartial investigating authority, looking at the same evidentiary record as the [US]DOC and [the US]ITC, could properly have reached the same conclusions as did those agencies. In applying this standard of review, we are conscious that we must not conduct a *de novo* review of the evidence on the record, nor substitute our judgment for that of the [US]DOC or [the US]ITC.[337]

181. The United States does not contest the Panel's articulation of the standard of review based on *US – Lamb*. The United States contends, instead, that the errors alleged in sub-sections C through F above, viewed collectively, amount to error in the Panel's *application* of the proper standard of review prescribed by Article 11 of the DSU, and as clarified by the Appellate Body in *US – Cotton Yarn* and *US – Lamb*.[338] Korea contends that the Panel properly engaged in the "in-depth review"[339] contemplated by the Appellate Body decision in *US – Lamb*, and that, as is evident from a review of the challenged Panel findings in this case, the United States' appeal is based on "partial or chopped and twisted quotations from the Panel Report".[340]

---

[337]Panel Report, para. 7.3.

[338]United States' appellant's submission, para. 119; United States' response to questioning at the oral hearing.

[339]Korea's appellee's submission, para. 214.

[340]*Ibid*.

182. Article 11 of the DSU sets out the proper standard of review to be applied by panels when examining Members' subsidy determinations.[341] That provision states, in relevant part:

> [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.

183. The Appellate Body has observed that, with respect to a panel's review, in accordance with Article 11, of facts established by an investigating authority:

> ... a panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the competent authorities.[342]

184. The Panel and both participants[343] have recognized that the Appellate Body has in the past elaborated on the standard of review mandated by Article 11 with respect to factual and legal issues in the context of claims under the *Agreement on Safeguards*.[344] The standard of review articulated by the Appellate Body in the context of agency determinations under that Agreement is instructive for cases under the *SCM Agreement* that also involve agency determinations.[345] Nevertheless, we recall that an "objective assessment" under Article 11 of the DSU must be understood in the light of the obligations of the particular covered agreement at issue in order to derive the more specific contours of the appropriate standard of review.[346] In this respect, we are especially mindful, in this appeal, of Articles 12, 19, and 22 of the *SCM Agreement*.

185. We have noted above that Article 12.2 requires that an investigating authority's determination of entrustment or direction be "based on" evidence.[347] We also note that, under Article 19.1, countervailing duties may be imposed only where the investigating authority has "determin[ed]", *inter alia*, the "existence" of a subsidy. The existence of a subsidy is "determined", in turn, by reference to

---

[341]Appellate Body Report, *US – Lead and Bismuth II*, para. 51.

[342]Appellate Body Report, *US – Steel Safeguards*, para. 299 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 121).

[343]Panel Report, paras. 7.2-7.3; United States' appellant's submission, footnote 181 to para. 123; Korea's appellee's submission, paras. 213-214.

[344]See, for example, Appellate Body Report, *US – Lamb*, paras. 103 and 106.

[345]In this respect, we note that disputes under the *Agreement on Safeguards* as well as the *SCM Agreement* are subject only to the standard of review in Article 11 of the DSU, whereas the *Anti-Dumping Agreement* contains a specific standard of review in Article 17.6, which must be applied in conjunction with Article 11 of the DSU for disputes arising under the *Anti-Dumping Agreement*. (Appellate Body Report, *US – Hot-Rolled Steel*, para. 55)

[346]See, for example, Appellate Body Report, *US – Lamb*, para. 105; and Appellate Body Report, *US – Cotton Yarn*, paras. 75-78.

[347]*Supra*, para. 138.

the definition of "subsidy" set out in Article 1.[348] Finally, Article 22.5 requires an investigating authority's affirmative determination to include the "reasons" for the decision[349] as well as "the *basis* on which the existence of a subsidy has been determined".[350]

186. In the light of the above, we 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.[351] 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.[352]

187. 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[353], 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.[354]

188. 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

---

[348]We understand the relevant definitions of the term "determine" to include "[c]onclude *from reasoning* or investigation, deduce" as well as "[s]ettle or decide (a dispute, controversy, etc., or a sentence, conclusion, issue, etc.) as a judge or arbiter". (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 110 (quoting *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 1, p. 659). (emphasis added))

[349]Article 22.5 of the *SCM Agreement*.

[350]Article 22.4(iii) of the *SCM Agreement* (incorporated by reference into Article 22.5). (emphasis added)

[351]Compare Appellate Body Report, *US – Steel Safeguards*, paras. 276-279; and Appellate Body Report, *US – Lamb*, para. 103.

[352]Compare Appellate Body Report, *US – Lamb*, para. 106.

[353]*Ibid*., para. 114; and Appellate Body Report, *US – Wheat Gluten*, paras. 55-56.

[354]Appellate Body Report, *US – Wheat Gluten*, para. 162.

authority reasonably supports its conclusions. In the context of reviewing individual pieces of evidence, for example, a panel should focus on issues such as the accuracy of a piece of evidence, or whether that piece of evidence may reasonably be relied on in support of the particular inference drawn by the investigating authority. As we observed above[355], however, the Panel in this case examined whether certain pieces of evidence were sufficient to establish certain conclusions that the USDOC did not seek to draw, at least solely on the basis of those pieces of evidence. Moreover, it failed to examine the evidence in its *totality*.[356] The Panel thus failed to assess the agency's determination. Instead, the Panel's examination reflected its own view of whether entrustment or direction existed in this case; the Panel thereby engaged, improperly, in a *de novo* review of the evidence before the agency.[357]

189. Furthermore, with respect to the Panel's refusal to admit certain evidence submitted by the United States, we note that the Panel did not indicate that the evidence was not contained in the record of the underlying investigation. Nevertheless, the Panel excluded such evidence from its consideration in the absence of any legal basis to do so.[358] In addition, the Panel erred in concluding that the USDOC should have been aware of a fact that was not reasonably based on evidence in the agency record, namely, that three creditors exercised mediation rights under the CRPA.[359] In so doing, the Panel essentially "second-guessed" the investigating authority's analysis of the evidence and thus overstepped the bounds of its review.

190. Taken together, these errors lead us to conclude that the Panel went beyond its role as the reviewer of the investigating authority's decision and, instead, conducted its own assessment, relying on its own judgement, of much of the evidence before the USDOC. Accordingly, we *find* that the Panel failed to apply the proper standard of review and, therefore, failed to comply with its obligations under Article 11 of the DSU.

[355]*Supra*, paras. 149-152.

[356]*Supra*, paras. 154-157.

[357]We observe that the European Communities agrees that, by failing to consider the evidence in its totality, the Panel effectively conducted a *de novo* review of the USDOC's finding of entrustment or direction. (European Communities' third participant's submission, para. 20)

[358]*Supra*, para. 165.

[359]*Supra*, para. 179.

H. *The Panel's Conclusion under Article 1.1(a)(1)(iv) of the SCM Agreement*

191. Following its examination of the evidence in relation to the factual premises of the USDOC's finding of entrustment or direction, the Panel concluded:

> [A]lthough the [US]DOC established that the GOK had a policy to save Hynix, and that the GOK had a certain capacity to influence Group B and C creditors, we consider – on the basis of a thorough and global review of all the reasoning set forth by the [US]DOC in light of the standard set forth in Article 1.1(a)(1)(iv) of the *SCM Agreement* - that the [US]DOC did not properly demonstrate that the GOK availed itself of that capacity to entrust or direct all Group B and C creditors to participate in all four of the financial contributions at issue. For this reason, we consider that the [US]DOC could not properly have found that there was sufficient evidence to support a generalized finding of entrustment or direction with respect to private bodies spanning multiple creditors and multiple transactions over the period of investigation.[360]

192. Although the Panel may have intended to convey a broader meaning of the terms "entrusts" and "directs" than what might be understood from a strict reading of the terms "delegation" and "command", we have found it useful, nevertheless, to modify the Panel's interpretation of "entrusts" and "directs" in order to clarify the meaning of these terms in accordance with the interpretation we set out above.[361] We have also found multiple errors in the Panel's analysis of the USDOC's finding of entrustment or direction. In particular, we have found that the Panel erred in (i) applying Article 1.1(a)(1)(iv) so as to examine the USDOC's evidence piecemeal rather than in its totality, notwithstanding the Panel's stated intention to follow the USDOC's approach[362]; (ii) refusing to admit certain record evidence submitted by the United States; and (iii) faulting the USDOC for its failure to address facts that were not on the record of the investigation. On the basis of these errors, we have found that the Panel failed to apply the proper standard of review in accordance with Article 11 of the DSU. In our view, these errors, taken together with the modification we found necessary to the Panel's interpretation of the terms "entrusts" and "directs", invalidate the basis for the Panel's conclusion, quoted above, that there was not sufficient evidence to support the USDOC's finding of entrustment or direction.[363]

---

[360]Panel Report, para. 7.177.

[361]*Supra*, para. 118.

[362]Panel Report, para. 7.45.

[363]We note that Korea agrees that a finding of error in this case under Article 11 of the DSU, with respect to the Panel's standard of review, would require a reversal of the Panel's finding that the USDOC's subsidy determination is inconsistent with Article 1.1(a)(1)(iv) of the *SCM Agreement*. (Korea's response to questioning at the oral hearing)

193. Because this conclusion is the sole basis for the Panel's finding of inconsistency with Article 1.1(a)(1)(iv) of the *SCM Agreement*, we *reverse* the Panel's findings, in paragraphs 7.178, 7.209, and 8.1 of the Panel Report, that the USDOC's determination of GOK entrustment or direction of Hynix's Group B and C creditors is inconsistent with Article 1.1(a)(1)(iv) of the *SCM Agreement*.

194. We note that neither participant requested, in its written submissions, that we complete the analysis by undertaking our own review of the USDOC's finding of entrustment or direction if we were to reverse the Panel's finding of inconsistency with Article 1.1(a)(1)(iv). In response to questions posed at the oral hearing, Korea stated that, although it had not made such a request in its written submissions, it did want the Appellate Body to complete the analysis and find the USDOC's subsidy determination inconsistent with Article 1.1(a)(1)(iv) of the *SCM Agreement*. Korea suggested that, because the USDOC's finding of entrustment or direction rests on its finding that a "single [subsidy] program" exists, we could complete the analysis by reviewing only the evidentiary basis of the USDOC's finding of a "single program".[364]

195. We might have been able to resolve this dispute solely by addressing the USDOC's finding of a "single program", as Korea suggests, *only if* this were one of the indispensable bases for the USDOC's ultimate finding of entrustment or direction. We are not persuaded, however, that this is the case. In support of its "single program" finding, the USDOC pointed to conclusions it had drawn in the course of its entrustment and direction analysis.[365] As we read the USDOC's determination, therefore, the characterization of the alleged subsidy as a "single program" appears to *follow from* the

---

[364]Issues and Decision Memorandum, *supra*, footnote 6, p. 48; see also Panel Report, paras. 7.146-7.155.

[365]*Ibid*., pp. 48-49:

> Rather than view each of the measures taken by the financial institutions that participated in Hynix' restructuring as separate events, these actions are appropriately examined as part of a single program that occurred over a short, ten-month period. The objective of this program was the complete financial restructuring of Hynix in order to maintain the company as an ongoing concern. Each of the measures taken over the period from December 2000 through October 2001, whether by government entities such as the KDB, FSC, or the [Korea Deposit Insurance Corporation], or by the government-owned and controlled creditor banks, reflected a pattern of GOK practices to ensure the continued viability of Hynix. Many of these events were overlapping and had the effect of reinforcing each other with respect to the goal of keeping Hynix operating. As we will detail more fully below, the GOK's role was essential at each stage in directly supporting the restructuring process through its own actions and by directing, facilitating, and guiding the actions taken by the creditor banks. The GOK's presence and policies throughout this restructuring process were clear, and Hynix' creditor banks, whether specialized GOK entities, majority government-owned, or private, were guided by ... these governmental policies and objectives. (footnote omitted)

USDOC's analysis of entrustment or direction, rather than serve as a *premise* of this analysis. As a result, even if we were to determine that the USDOC's finding of a "single program" lacked sufficient evidentiary support, as Korea contends, that alone would not undermine the USDOC's finding of entrustment or direction. Examining the USDOC's finding of a "single program" would therefore not provide us with a basis to arrive at a definitive answer as to the consistency of the USDOC's subsidy determination with Article 1.1(a)(1)(iv).

196. Moreover, in our view, the nature of the errors we have found in the Panel's decision, especially with respect to the approach taken by the Panel to the admissibility and probative value of several individual pieces of evidence, is such that completing the analysis would require us to examine anew the entire USDOC finding of entrustment or direction. We have stated above that the determination of entrustment or direction will hinge largely on the particular facts of the case.[366] Thus, in completing the analysis—that is, in examining the legal question whether the USDOC could have arrived at a finding of entrustment or direction on the basis of the evidence and explanation provided—we would need to engage in a thorough examination of the evidence, particularly as the Panel improperly excluded certain evidence from its consideration.

197. Furthermore, we do not consider that the participants have addressed sufficiently, in their submissions, those issues that we might need to examine if we were to complete the analysis in this case, including, for example: (i) whether the probative value of certain pieces of evidence is affected by our modification of the Panel's interpretation of the terms "entrusts" and "directs"; (ii) the probative value of the United States evidence improperly excluded by the Panel; (iii) the relevance of certain factual disagreements that the Panel considered unnecessary to resolve in the light of its legal analysis[367]; and (iv) the inferences that may reasonably be drawn from an analysis of the evidence in its totality. In these circumstances, we believe it is more appropriate to limit our examination to a review of the issues of law covered in the Panel Report and the legal interpretations developed by the Panel. Therefore, we do not complete the analysis to arrive at our own conclusion on the consistency of the USDOC's subsidy determination with Article 1.1(a)(1)(iv) of the *SCM Agreement*.

198. This does not mean that we are hereby expressing any view as to whether the USDOC's determination of entrustment or direction—which is a necessary component of its determination of financial contribution—is necessarily supported by sufficient evidence. We conclude only that the Panel's finding of inconsistency, which resulted from its flawed approach to reviewing the evidence, is in error. Of course, the inquiry into the existence of a subsidy does not end with a determination of a financial contribution. Such an inquiry must proceed to examine whether the alleged financial

[366]*Supra*, para. 116.

[367]See, for example, Panel Report, footnote 166 to para. 7.141 and para. 7.167.

contribution confers a "benefit".[368] In addition, the *SCM Agreement* requires that a subsidy be "specific" in order for countervailing measures to be imposed.[369] We turn to these issues in the following Section of our Report.

VII. Benefit and Specificity

199. The United States appeals the Panel's findings relating to the USDOC's determination of benefit and, in respect of Group B and C creditors, specificity.

200. As to the determination of benefit, the Panel noted that the USDOC's benefit analysis "was predicated almost entirely upon the [US]DOC's determination that Group B and C (except Citibank) creditors were entrusted or directed by GOK to participate in the four financial contributions at issue".[370] "[T]hese creditors", the Panel explained, "were rejected as market benchmarks ... because the [US]DOC found that they were acting pursuant to government entrustment or direction, rather than market principles, when participating in the Hynix restructuring".[371] The Panel reasoned that, because the USDOC could not properly have found that these private creditors had been entrusted or directed by the GOK, "government entrustment or direction of these creditors could not have been a proper basis for the [US]DOC to reject them as market benchmarks".[372] Therefore, the Panel found that "the [US]DOC's benefit determination is inconsistent with Article 1.1(b) of the *SCM Agreement*".[373]

201. The Panel made the following finding in respect of the USDOC's determination of specificity relating to Group B and C creditors:

> [W]e understand that the [US]DOC found that the alleged subsidies provided by Group B and C creditors are specific because of the role allegedly played by the GOK in entrusting and directing those creditors to save a specific entity, i.e., Hynix. In other words, the [US]DOC's finding of specificity in respect of Group B and C creditors was based on its finding of GOK entrustment or direction of private creditors to participate in the single programme of Hynix restructuring. We recall, however, that we have found that the [US]DOC's determination of government entrustment or direction is factually flawed, and inconsistent with Article 1 of the *SCM Agreement*. In the circumstances, the [US]DOC's finding of GOK entrustment cannot provide a proper basis for a determination of

[368]Article 1.1(b) of the *SCM Agreement*.

[369]Article 1.2 of the *SCM Agreement*.

[370]Panel Report, para. 7.190.

[371]*Ibid*. (footnote omitted)

[372]*Ibid*. (footnote omitted)

[373]*Ibid*.

> specificity in respect of alleged subsidies provided by Group B and C creditors.
>
> ...
>
> For these reasons, we find that the [US]DOC's finding of specificity is inconsistent with Article 2 of the *SCM Agreement* in so far as it relates to alleged subsidies by Group B and C creditors[.][374]

202. On appeal, the United States requests the Appellate Body to reverse these findings because "the Panel's conclusions are based solely on its erroneous finding that the [US]DOC's determination of GOK entrustment or direction of certain Hynix creditors is inconsistent with Article 1.1(a)(1)(iv) of the SCM Agreement."[375]

203. At the oral hearing, Korea disagreed with the United States' assertion that the Panel's finding relating to benefit is premised exclusively on the Panel's finding on entrustment or direction. Korea stated that the Panel also criticized the USDOC's rejection of Citibank as an appropriate benchmark for the determination of benefit.[376]

204. We find no such "criticism" in the paragraph of the Panel Report referred to by Korea; in that paragraph, the Panel is merely describing the approach taken by the USDOC, including its rejection of Citibank as a benchmark. In paragraph 7.191 of the Panel Report, the Panel expressly indicates that, in the light of its finding that the USDOC's determination of benefit was inconsistent with Article 1.1(b) because it was premised on an improper finding of entrustment or direction, "it is not necessary ... to examine other issues raised by the parties regarding market benchmarks". Thus, we agree with the United States' assertion that the Panel's finding concerning the USDOC's determination of benefit is premised exclusively on the Panel's finding relating to entrustment or direction.

205. Having reversed the Panel's findings that the USDOC's determination of entrustment or direction is inconsistent with Article 1.1(a)(1)(iv), there is no basis for us to uphold the Panel's finding on benefit. Consequently, we also *reverse* the Panel's finding, in paragraphs 7.190, 7.209, and 8.1 of the Panel Report, that the USDOC's benefit determination is inconsistent with Article 1.1(b) of the *SCM Agreement*.[377]

---

[374]Panel Report, paras. 7.206 and 7.208. (footnote omitted) The Panel found that the USDOC could have properly found specificity in respect of Group A creditors. (*Ibid*., para. 7.207)

[375]United States' appellant's submission, para. 131. (footnote omitted)

[376]Korea's response to questioning at the oral hearing (referring to Panel Report, para. 7.180).

[377]Because we have reversed the Panel's findings of inconsistency with Article 1.1(a)(1)(iv) and 1.1(b), we do not address whether a Member may be found to be acting inconsistently with a *definitional* provision, such as Article 1 of the *SCM Agreement*. (Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 85)

206. As to specificity, Korea agreed at the oral hearing that the Panel's finding of inconsistency in respect of the USDOC's determination of specificity relating to Group B and C creditors is premised exclusively on the Panel's finding on entrustment or direction. Korea acknowledged that a reversal of the Panel's finding relating to entrustment or direction would necessarily result in the reversal of the Panel's finding of inconsistency concerning the determination of specificity in respect of Group B and C creditors. We agree. In paragraph 7.206 of the Panel Report, the Panel explains its view that "the [US]DOC's finding of GOK entrustment cannot provide a proper basis for a determination of specificity in respect of alleged subsidies provided by Group B and C creditors". The Panel provides no other basis for its finding.

207. Accordingly, we *reverse* the Panel's findings, in paragraphs 7.208, 7.209, and 8.1 of the Panel Report, that the USDOC's finding of specificity is inconsistent with Article 2 of the *SCM Agreement* insofar as it relates to alleged subsidies by Group B and C creditors.

208. The Panel did not examine these issues further. Consequently, there are neither sufficient findings by the Panel nor undisputed facts contained in the record to allow us to conduct our own analysis of Korea's claims regarding benefit and specificity.[378] We recall that it is not sufficient to determine that there is a "financial contribution by a government or any public body" in order to find that there is a "subsidy" under Article 1.1 of the *SCM Agreement*. This provision also requires that "a benefit is thereby conferred". Article 1.2 requires, in addition, that the subsidy be "specific". Because the Panel's findings on benefit and specificity were premised exclusively on its conclusion relating to entrustment or direction, there is insufficient basis for us to examine the consistency of the USDOC's benefit and specificity determinations with the *SCM Agreement*. Even though we reverse the Panel's findings, we offer no view as to the consistency of the USDOC's underlying determinations of benefit and specificity.

[378]Appellate Body Report, *US – Softwood Lumber IV*, para. 113.

VIII. Findings and Conclusions

209. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's finding, in paragraph 7.415 of the Panel Report, that Korea's request for consultations did not fail to indicate the legal basis for the complaint in relation to the USDOC's CVD order, as required by Article 4.4 of the DSU;

(b) as regards the USDOC's finding of entrustment or direction:

(i) with respect to the Panel's interpretation of Article 1.1(a)(1)(iv) of the *SCM Agreement*:

(A) modifies the Panel's interpretation of Article 1.1(a)(1)(iv), set out in paragraph 7.31 of the Panel Report, to the extent that it may be understood as limiting the terms "entrusts" and "directs" to acts of "delegation" and "command"; and

(B) upholds the Panel's finding, in paragraph 7.117 of the Panel Report, that the evidence was "sufficient for an objective and impartial investigating authority to properly find government entrustment or direction in respect of KFB";

(ii) with respect to the Panel's review of the USDOC's finding of entrustment or direction under Article 1.1(a)(1)(iv) of the *SCM Agreement*:

(A) finds that the Panel did not err in finding, in paragraphs 7.35 and 7.46 of the Panel Report, that the evidence underlying the USDOC's finding of entrustment or direction must be "probative and compelling", to the extent the Panel understood these terms to require only that the evidence demonstrate entrustment or direction;

(B) finds that the Panel erred in failing to examine the USDOC's evidence in its totality, and requiring, instead, that individual pieces of evidence, in and of themselves, establish entrustment or direction by the GOK of Hynix's creditors;

(C) finds that the Panel erred, in paragraphs 7.88, 7.102, 7.116, 7.121, and 7.141 of the Panel Report, in declining to consider certain evidence on the record of the underlying investigation but not cited by the USDOC in its published determination;

(D) finds that the Panel failed to comply with its obligations under Article 11 of the DSU by finding, in paragraph 7.85 of the Panel Report, that "the mediation provisions [of the CRPA] had actually been invoked by three creditors in respect of the October 2001 restructuring", in the absence of supporting evidence on the record of the underlying investigation; and

(E) finds that the Panel failed to apply the proper standard of review and, therefore, failed to comply with its obligations under Article 11 of the DSU; and, consequently,

(iii) reverses the Panel's findings, in paragraphs 7.178, 7.209, and 8.1 of the Panel Report, that the USDOC's determination of GOK entrustment or direction of Hynix's Group B and C creditors is inconsistent with Article 1.1(a)(1)(iv) of the *SCM Agreement*;

(c) reverses the Panel's findings, in paragraphs 7.190, 7.209, and 8.1 of the Panel Report, that the USDOC's benefit determination is inconsistent with Article 1.1(b) of the *SCM Agreement*; and

(d) reverses the Panel's findings, in paragraphs 7.208-7.209, and 8.1 of the Panel Report, that the USDOC's finding of specificity, insofar as it relates to subsidies provided by virtue of GOK entrustment or direction of Hynix's Group B and C creditors, is inconsistent with Article 2 of the *SCM Agreement*.

210. Based on these findings, the Appellate Body makes no recommendation to the Dispute Settlement Body pursuant to Article 19.1 of the DSU.

Signed in the original in Geneva this 9th day of June 2005 by:

_____

Georges Abi-Saab
Presiding Member

_____ _____

Merit E. Janow
Member

Yasuhei Taniguchi
Member

Annex I

WORLD TRADE ORGANIZATION

WT/DS296/5
1 April 2005

(05-1309)

Original: English

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

Notification of an Appeal by the United States
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 29 March 2005, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* (WT/DS296/R) ("Panel Report") and certain legal interpretations developed by the Panel in this dispute.

1. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the determination by the U.S. Department of Commerce ("DOC") of Government of Korea ("GOK") entrustment or direction of Hynix's Group B and C creditors is inconsistent with Article 1.1(a)(1)(iv) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").[1] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the findings described below.

(a) The Panel erroneously interpreted the phrase "entrusts or directs" in Article 1.1(a)(1)(iv) of the SCM Agreement and then applied that erroneous interpretation to the record evidence.[2]

(b) The Panel applied an erroneous "probative and compelling" evidentiary standard that is not found in Article 1.1(a)(1)(iv) or any other provision of the SCM Agreement (or any other covered agreement), and that, *inter alia*, effectively shifted the burden of

[1]Panel Report, paragraphs 7.175-7.178.

[2]The Panel's erroneous interpretation is articulated in, *inter alia*, paragraphs 7.27-7.46 of the Panel Report, and is applied in subsequent paragraphs, including, *inter alia*, paragraphs 7.51, 7.56, 7.62-7.63, 7.76-7.78, 7.82-7.91, 7.99-7.104, 7.129-7.130, 7.135, 7.141, 7.155, 7.163-7.168, 7.172-7.174, 7.175-7.178.

proving a WTO-inconsistent action from Korea to the United States, caused the Panel to discount the circumstantial evidence relied upon by the DOC, and resulted in the Panel disregarding certain evidence altogether.[3]

(c) The Panel relied upon evidence that was not on the record of the DOC and that was contradicted by evidence that was on the DOC record. Such reliance was inconsistent with the Panel's obligation under Article 11 of the DSU to conduct an objective assessment of the matter before it.[4]

(d) The Panel failed to consider certain record evidence cited by the United States based on the Panel's erroneous findings that U.S. reliance on such record evidence constituted *ex post facto* rationalizations. These findings are erroneous because neither the SCM Agreement nor any other covered agreement requires an investigating authority to cite in its published determinations to every piece of evidence on which the authority relies. In addition, in most instances the DOC, in fact, had cited to the record evidence that the Panel disregarded. In those instances where the DOC had not cited to the record evidence disregarded by the Panel, the evidence was consistent with the record evidence that the DOC had cited. The Panel's disregard of record evidence was inconsistent with the Panel's obligation under Article 11 of the DSU to conduct an objective assessment of the matter before it.[5]

(e) The standard of review actually applied by the Panel amounted to an impermissible *de novo* review of the DOC determination. As noted above in subparagraphs (c) and (d), the Panel improperly considered non-record evidence and disregarded record evidence. In addition, instead of looking at the totality of the record evidence, as had the DOC, the Panel considered each piece of evidence in isolation, ignored and/or mischaracterized evidence upon which the DOC relied, and substituted its own interpretation of the evidence for that of the DOC. The Panel's conduct of a *de novo* review was inconsistent with the Panel's obligation under Article 11 of the DSU to conduct an objective assessment of the matter before it.[6]

(f) The Panel made an erroneous legal finding that the DOC finding of entrustment or direction under Article 1.1(a)(1)(iv) was not supported by sufficient evidence.[7]

2. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the DOC's benefit determination is inconsistent with Article 1.1(b) of the SCM Agreement. This conclusion is in error and is based on the Panel's erroneous legal conclusion, described in paragraph 1, above, that the DOC's determination of GOK entrustment or direction of Hynix's Group B and C creditors is inconsistent with Article 1.1(a)(1)(iv) of the SCM Agreement.[8]

---

[3]The Panel's erroneous standard of proof is set forth in, *inter alia*, paragraphs 7.35 and 7.46 of the Panel Report, and is applied in, *inter alia*, paragraphs 7.35, 7.45, 7.46, 7.51, 7.76-7.78, 7.99-7.103, 7.129-7.130, 7.141, 7.164, 7.168, 7.173.

[4]These errors are contained in, *inter alia*, paragraphs 7.63, 7.82-7.89, 7.91, 7.152 and 7.155 of the Panel Report.

[5]These errors are contained in, *inter alia*, paragraphs 7.76, 7.88, 7.90, 7.102, 7.105, 7.116, 7.121, 7.125-7.130 and 7.141 of the Panel Report.

[6]These errors permeate section VII.C.1 of the Panel Report, but examples of such errors are contained in, *inter alia*, paragraphs 7.45, 7.51, 7.56, 7.62-7.63, 7.77-7.78, 7.81-7.82, 7.85, 7.89, 7.91, 7.103-7.104, 7.130, 7.146-7.155, 7.164, 7.168, and 7.174 of the Panel Report.

[7]This finding is set forth in, *inter alia*, paragraphs 7.175-7.177 of the Panel Report.

[8]The Panel's findings are contained in paragraphs 7.190-7.191 of the Panel Report.

3. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the DOC's finding of specificity is inconsistent with Article 2 of the SCM Agreement insofar as it relates to subsidies by Group B and C creditors. This conclusion is in error and is based on the Panel's erroneous legal conclusion, described in paragraph 1, above, that the DOC's determination of GOK entrustment or direction of Hynix's Group B and C creditors is inconsistent with Article 1.1(a)(1)(iv) of the SCM Agreement.[9]

4. The United States seeks review by the Appellate Body of the Panel's legal conclusion that, with respect to the DOC countervailing duty order, Korea's consultation request provides a sufficient indication of the legal basis of the complaint within the meaning of Article 4.4 of the DSU. This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations.[10]

---

[9]Panel Report, paragraphs 7.204-7.208.

[10]Panel Report, paragraphs 7.414-7.415.

Annex II

WORLD TRADE ORGANIZATION

WT/DS296/6
11 April 2005

(05-1531)

Original: English

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

Notification of an Other Appeal by Korea
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification, dated 11 April 2005, from the Delegation of the Republic of Korea, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23 of the Working Procedures for Appellate Review, the Republic of Korea hereby notifies its decision to appeal to the Appellate Body certain issues of law and legal interpretations contained in the report of the Panel *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* (WT/DS296/R) (the "Panel Report").

Specifically, Korea seeks review of the legal conclusion and interpretation by the Panel in upholding the finding of the U.S. Department of Commerce that a certain private Korean bank, Korea First Bank ("KFB"), was entrusted or directed to make a financial contribution to Hynix Corporation within the meaning of Article 1.1, (including Article 1.1(a)(1)(iv)) of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").[1]

In particular, the Panel found that the government of Korea had coerced KFB and that this constituted "entrustment or direction" despite the fact that KFB ultimately did not undertake the action that was supposedly the purpose of the intended coercion. Korea considers this conclusion and legal interpretation to be a legal error. Under the terms of Article 1.1 of the SCM Agreement there can be no legally cognizable entrustment or direction to undertake a specified function if the private body never actually undertakes the function supposedly entrusted or directed.

---

[1] These findings of the Panel include paragraphs 7.107 to 7.117 and 7.176, including footnote 136, of the Panel Report.

Annex III

WORLD TRADE ORGANIZATION

WT/DS296/1
G/L/633
G/SCM/D55/1
8 July 2003
(03-3687)

Original: English

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

Request for Consultations by Korea

The following communication, dated 30 June 2003, from the Permanent Mission of Korea to the Permanent Mission of the United States and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the Government of the United States pursuant to Article 4 of the Understanding of the Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article 30 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), and Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), with regard to US Department of Commerce's ("DOC") affirmative preliminary and final countervailing duty determinations, published on 7 April 2003 at 68 Fed. Reg. 16766 and 23 June 2003 at 68 Fed. Reg. 37122 in *Dynamic Random Access Memory Semiconductors from the Republic of Korea* (case number C-580-851), US International Trade Commission's affirmative preliminary injury determination published on 27 December at 67 Fed. Reg. 79148 and any subsequent determinations that may be made during the Commission's injury investigation in *DRAMS and DRAM Modules from Korea* (Inv. No. 701-TA-431), and the related laws and regulations including Section 771 of the Tariff Act of 1930 and 19 CFR 351 respectively.

The Government of Korea considers these determinations by the Government of the United States to be inconsistent with its obligations under the relevant provisions of the GATT 1994 and the SCM Agreement, including, but not limited to:

1. Article 1 of the SCM Agreement because, *inter alia*, DOC failed to demonstrate the existence of a financial contribution by the Government of Korea within the meaning of Article 1 of the SCM Agreement.

2. Article 1 of the SCM Agreement because, *inter alia*, DOC failed to examine each separate alleged government measure at issue in the investigation.

3. Articles 1 and 14 of the SCM Agreement because, *inter alia*, DOC failed to demonstrate that a benefit was conferred on the respondent Hynix Semiconductor Inc., given available market benchmarks.

4. Articles 1 and 14 of the SCM Agreement because, *inter alia*, the "creditworthy," "equityworthy," and other analysis required by Section 771(5) of the Tariff Act of 1930 and 19 CFR 351 are as such inconsistent with DOC's obligations under the SCM Agreement.
5. Articles 1 and 2 of the SCM Agreement because, *inter alia*, Section 771(5) and (5A) of the Tariff Act of 1930 and 19 CFR 351 impose and DOC applied an improper burden of proof on respondents and, in turn, DOC did not base its decisions on affirmative, objective, and verifiable evidence.

6. Articles 11 of the SCM Agreement because, *inter alia*, DOC did not base its decision to initiate its countervailing duty investigation on sufficient evidence.

7. Article 12 of the SCM Agreement because, *inter alia*, DOC conducted various verification meetings over the explicit objection of the Government of Korea.

8. Article 17 of the SCM Agreement because, *inter alia*, DOC imposed provisional measures based on flawed analysis of financial contribution, benefit, and other factual and legal issues that were inconsistent with the US obligations under the SCM Agreement.

9. Article 22 of the SCM Agreement because, *inter alia*, DOC failed to provide all relevant information on the matters of fact and law and reasons for its determinations.

10. Articles 10 and 32.1 of the SCM Agreement and Articles VI:3 and X:3 of the GATT 1994 because, *inter alia*, DOC failed to conduct its investigation and make determinations in accordance with fundamental substantive and procedural requirements.

The Government of Korea reserves its rights to raise additional factual and legal issues during the course of the consultations and in the request for the establishment of a panel.

We look forward to the response of the Government of the United States to this request so that we can schedule a mutually convenient date to begin consultations.

_____

Annex IV

WORLD TRADE ORGANIZATION

WT/DS296/1/Add.1
G/L/633/Add.1
G/SCM/D55/1/Add.1
21 August 2003
(03-4353)

Original: English

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

Request for Consultations by Korea

Addendum

The following communication, dated 18 August 2003, from the Permanent Mission of Korea to the Permanent Mission of the United States and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

With reference to document WT/DS296/1, G/L/633, G/SCM/D55/1 circulated on 8 July 2003, my authorities have instructed me to request further consultations with the Government of the United States pursuant to Article 4 of the Understanding of the Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article 30 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), and Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), with regard to the US International Trade Commission's ("ITC") final determination of material injury, as reported on 4 August 2003 and as reflected in *DRAMs and DRAM Modules from Korea*, Inv No. 701-TA-431 (Final), USITC Pub 3617 (August 2003) and the US Department of Commerce's ("DOC") final countervailing duty order, both published on 11 August 2003 at 68 Fed. Reg. 47607 and 68 Fed. Reg. 47546, respectively. Both of these actions relate to the same underlying measures at issue in our previous request for consultations.

The Government of Korea considers these determinations by the Government of the United States to be inconsistent with its obligations under the relevant provisions of the GATT 1994 and the SCM Agreement, including, but not limited to:

1. Article 15.1 of the SCM Agreement, because the ITC determination was not based on positive evidence and an objective assessment of the effects of allegedly subsidized imports;

2. Article 15.2 of the SCM Agreement, because the ITC determination improperly assessed the significance of the volume and price effects of subject imports;

3. Article 15.4 of the SCM Agreement, because the ITC improperly assessed the condition of the domestic industry;

4. Article 15.5 of the SCM Agreement, because the ITC improperly assessed the role of other factors, and improperly attributed the effect of other factors to the allegedly subsidized imports.

The Government of Korea reserves the right to raise additional factual and legal issues during the course of the consultations and in the request for the establishment of a panel.

We look forward to the response of the Government of the United States to this request for further consultations on the countervailing duties imposed on DRAMs from Korea, so that we can schedule a mutually convenient date to resume consultations following the first set of consultations scheduled for 20 August in Geneva.

Annex V

WORLD TRADE ORGANIZATION

WT/DS296/2
21 November 2003

(03-6239)

Original: English

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

Request for the Establishment of a Panel by Korea

The following communication, dated 19 November 2003, from the Delegation of Korea to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 11 August 2003, the United States published a final countervailing duty order in the US *Federal Register* in the matter of *Dynamic Random Access Memory Semiconductors (DRAMS) from the Republic of Korea* (68 Fed. Reg. 47546), confirming under US law countervailing duties against DRAMS from Korea. Provisional countervailing duties had been in place since 7 April 2003, with publication in the *Federal Register* of the DOC's preliminary affirmative countervailing duty determination (68 Fed. Reg.16766). The final order was the result of the US Department of Commerce's (DOC's) final countervailing duty determination, published in the *Federal Register* on 23 June 2003 (68 Fed. Reg. 37122), as amended on 28 July 2003 (68 Fed. Reg. 44290), and as further explained in an unpublished Decision Memorandum.[1] It was also the result of the US International Trade Commission's (ITC's) final material injury determination, also published in the *Federal Register* on 11 August 2003 (68 Fed. Reg. 47607), and as further elaborated in the ITC's report of its final DRAMS investigation.[2]

The Government of Korea considers these determinations by the DOC and the ITC that led to the US countervailing duty ("CVD") order against DRAMS from Korea, and thereby the order itself, to be inconsistent with US obligations under the relevant provisions of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). As a result, the Government of Korea requested consultations with the Government of the United States regarding these determinations pursuant to Article 4 of the Understanding of the 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 30 June 2003 concerning the DOC's determination,[3] and on 18 August 2003 concerning the ITC's determination.[4] The consultations were

---

[1] The DOC makes the Decision Memorandum available on the internet at http://ia.ita.doc.gov/frn/summary/korea-south/03-15793-1.pdf.

[2] *DRAM Modules from Korea*, Inv. No. 701-TA-431 (Final), USITC Pub. 3617 (August 2003).

[3] WT/DS296/1, G/L/633, G/SCM/D55/1.

[4] WT/DS296/1/Add.1, G/L/633/Add.1, G/SCM/D55/1/Add.1.

held with the United States on 20 August 2003 and 1 October 2003, respectively. These consultations failed to resolve the dispute between the parties.

As a result of the failure to resolve the dispute, the Government of Korea requests the establishment of a panel pursuant to Article 6 of the DSU, Article XXIII of the GATT 1994, and Article 30 of the SCM Agreement regarding the DOC and ITC determinations and the resulting CVD order imposed on DRAMS from Korea. The Government of Korea requests that the panel make findings that the United States has acted inconsistently with its obligations under Articles 1, 2, 10, 12, 14, 15, 19, 22 and 32 of the SCM Agreement, as well as Article VI:3 of GATT 1994. Specifically, the Government of Korea makes claims under the following:

1. Article 1.1 of the SCM Agreement because, *inter alia*, the DOC failed to demonstrate the existence of a financial contribution by the Government of Korea with respect to each distinct financial transaction at issue in its subsidy investigation;

2. Article 1.1 of the SCM Agreement because, *inter alia*, the DOC erroneously assumed that every Korean private financial institution involved in its subsidy investigation was under the direction or entrustment of the Government of Korea;

3. Articles 1.1 and 14 of the SCM Agreement because, *inter alia*, the DOC failed to demonstrate that a benefit was conferred on the respondent Hynix Semiconductor, Inc., given available market benchmarks among Hynix's creditors;

4. Articles 1.1 and 14 of the SCM Agreement because, *inter alia*, the DOC disregarded market benchmarks for measuring benefit established by a foreign bank operating in the Korean market that extended financing to the respondent Hynix Semiconductor, Inc. during the period of investigation;

5. Articles 1.1 and 14 of the SCM Agreement because, *inter alia*, the DOC failed to utilize relevant market benchmarks in determining whether Hynix was "creditworthy" or "equityworthy," and otherwise applied an improper "uncreditworthy" benchmark and discount rate in calculating the benefit to Hynix Semiconductor, Inc., in this case;

6. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 because, *inter alia*, the DOC's failure to measure the benefit in accordance with the principles of Article 14 of the SCM Agreement resulted in countervailing duties levied in excess of the amount allowed under the SCM Agreement and the GATT 1994;

7. Articles 1 and 2 of the SCM Agreement because, *inter alia*, the DOC imposed an improper burden of proof on respondents, that is the Government of Korea and Hynix Semiconductor, Inc., and thereby failed to base its decision on affirmative, objective, and verifiable evidence;

8. Article 2 of the SCM Agreement because, *inter alia*, the DOC disregarded the fact that many Korean companies underwent debt restructuring similar to that undergone by Hynix Semiconductor, Inc. Therefore, the DOC did not establish that all of the alleged subsidies were specific to the respondent Hynix Semiconductor, Inc., on the basis of positive evidence;

9. Article 12.6 of the SCM Agreement because, *inter alia*, the DOC conducted various private verification meetings in the territory of Korea, at which the Government of Korea had no representatives, over the explicit objection of the Government of Korea;

10. Article 15.1 of the SCM Agreement because, *inter alia*, the ITC determinations on injury and causation were not based on positive evidence and an objective assessment of the effects of allegedly subsidized imports;

11. Article 15.2 of the SCM Agreement because, *inter alia*, the ITC determinations on injury and causation improperly assessed the significance of the volume and price effects of subject imports;

12. Article 15.4 of the SCM Agreement because, *inter alia*, the ITC improperly assessed the overall condition of the domestic industry;

13. Articles 15.2 and 15.4 of the SCM Agreement because, *inter alia*, the ITC improperly ignored the definition of domestic industry as set forth in Article 16 of the SCM Agreement, defined the domestic industry and imports inconsistently, and thus distorted the volume of imports and the effects thereof on the domestic industry;

14. Article 15.5 of the SCM Agreement, because, *inter alia*, the ITC failed to demonstrate the requisite causal link between subject imports and injury, improperly assessed the role of other factors, and improperly attributed the effect of other factors to the allegedly subsidized imports;

15. Article 22.3 of the SCM Agreement because, *inter alia*, the ITC's injury determination did not set forth in sufficient detail the ITC's findings and conclusions on all material issues of fact and law; and

16. Articles 10 and 32.1 of the SCM Agreement because, *inter alia*, the CVD order imposed by the United States against DRAMS from Korea was not in accordance with the relevant provisions of the SCM Agreement or the relevant provisions of the GATT 1994.

The Government of Korea requests that the panel be established with the standard terms of reference set forth in Article 7 of the DSU.

The Government of Korea further requests that this request be placed on the agenda for the meeting of the Dispute Settlement Body on 1 December 2003.