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UNITED STATES – COUNTERVAILING DUTY INVESTIGATION ON DYNAMIC RANDOM ACCESS MEMORY SEMICONDUCTORS (DRAMS) FROM KOREA (DS 296)

Report of the Panel

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TABLE OF KEY ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Full Title / Meaning
AD Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
ASP	Average Selling Price
BOK	Bank of Korea
CBO	Collateralized Bond Obligation
CHB	Choheung Bank
CLO	Collateralized Loan Obligation
CRA	Agreement of Financial Institutions for Promoting Corporate Restructuring (Corporate Restructuring Agreement)
CRPA	Corporate Restructuring Promotion Act
CVD	Countervailing Duties
D/A	Document against Acceptance
DDR	Double Data Rate
DOC	United States Department of Commerce
DRAM	Dynamic Random Access Memory Chips
DRAMS	Dynamic Random Access Memory Semiconductors
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
EC	European Communities
FAB	Fabrication Facilities or Plants
FSC	Financial Supervisory Commission
FSS	Financial Supervisory Service
GATT 1994	*General Agreement on Tariffs and Trade 1994*
GDS	Global Depositary Shares
GOK	Government of Korea
H&CB	Korea Housing and Commercial Bank
HSMA	Hynix Semiconductor Manufacturing America
HYNIX	Hynix Semiconductor, Inc.
IAS	International Accounting Standards
IBK	Industrial Bank of Korea
IMF	International Monetary Fund
ITC	United States International Trade Commission

Abbreviation	Full Title / Meaning
KCGF	Korea Credit Guarantee Fund
KDB	Korea Development Bank
KEB	Korea Exchange Bank
KEIC	Korea Export Insurance Corporation
KFB	Korea First Bank
KRW	Korea Won
MOU	Memorandum of Understanding
OEM	Original Equipment Manufacturer
Panel Request	Request for the Establishment of a Panel contained in document WT/DS296/2
ROA	Return on Assets
ROK	Republic of Korea
SEC	United States Securities and Exchange Commission
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
SSB	Salomon Smith Barney
Vienna Convention	*Vienna Convention on the Law of Treaties*
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation of Case
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 Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Brazil – Aircraft (Article 21.5 – Canada II)	Panel Report, *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW/2, adopted 23 August 2001, DSR 2001:X, 5481
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
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC - Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by the Appellate Body Report, WT/DS219/AB/R
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
Mexico - Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345
Thailand - H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701 Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, DSR 2001:VII, 2741

Short Title	Full Case Title and Citation of Case
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 Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, adopted 8 January 2003, as modified by the Appellate Body Report, WT/DS212/AB/R
US - Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, 5767
US - Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
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 - Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US - Steel Safeguards	Panel Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, adopted 10 December 2003, as modified by the Appellate Body Report, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R
US- Softwood Lumber VI	Panel Report, United States – Investigation of the International Trade Commission in Softwood Lumber from Canada ("US – Softwood Lumber VI"), WT/DS277/R, adopted 26 April 2004.
US - Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
US- Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323.

I. INTRODUCTION

A. COMPLAINT OF KOREA

1.1 On 30 June 2003, Korea requested consultations with the US pursuant to Article 4 of the *DSU*, Article 30 of the *SCM Agreement*, and Article XXII of the *GATT 1994*, with regard to the DOC Preliminary and Final subsidy determinations on Dynamic Random Access Memory Semiconductors from Korea, published in the Federal Register on 7 April 2003 and 23 June 2003, respectively, the ITC Preliminary injury determination published in the Federal Register on 27 December 2003, and any subsequent determinations made during the ITC's injury investigation on DRAMS and DRAM Modules from Korea.[1]

1.2 On 18 August 2003, Korea requested further consultations with the US pursuant to the same provisions cited in its initial request, with regard to the ITC's Final determination of material injury, and the DOC's Final countervailing duty order, both published in the Federal Register on 11 August 2003. According to Korea, both of these actions relate to the same underlying measures at issue in Korea's initial request for consultations.[2]

1.3 Korea and the US held consultations on 20 August 2003 and 1 October 2003, but failed to reach a mutually satisfactory resolution of the matter. With respect to the ITC preliminary injury determination and the DOC countervailing duty order, the US maintained that Korea's consultation requests did not conform with Article 4.4 of the *DSU* because Korea did not identify any provisions with which the preliminary determination or order were inconsistent. The US asserted that, as a result, it did not agree to consult on either the preliminary determination or the order.[3]

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

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.5 At its meeting on 23 January 2004, the DSB established a Panel in accordance with Article 6 of the *DSU* and pursuant to the request made by Korea in document WT/DS296/2.

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

> [t]o examine, in the light of the relevant provisions of the covered agreements cited by Korea in document WT/DS296/2, the matter referred by Korea to the DSB in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements

1.7 On 23 February 2004, Korea requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the *DSU*. This paragraph provides:

> If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with

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[1] WT/DS/296/1.
[2] WT/DS296/1/Add.1
[3] The Panel notes that the ITC's *Preliminary Determination* is not covered by Korea's request for establishment of a panel.
[4] WT/DS296/2.

> any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

1.8 On 5 March 2004, the Director-General accordingly composed the Panel as follows:[5]

Chairman: Mr. Hardeep Puri

Members: Mr. John Adank
Mr. Michael Mulgrew

1.9 China, the European Communities, Japan and Chinese Taipei reserved their third-party rights.

C. PANEL PROCEEDINGS

1.10 The Panel met with the parties on 23-24 June 2004 and on 21-22 July 2004. The Panel met with third parties on 24 June 2004.

1.11 The Panel submitted its Interim Report to the parties on 17 November 2004. The Panel submitted its final report to the parties on 21 December 2004.

II. FACTUAL ASPECTS

2.1 This dispute arises out of a countervailing duty investigation by the US on imports of DRAMS and Memory Modules containing DRAMS[6] from Korea. Korea alleges that both the determination of existence of a countervailable subsidy by the DOC and the determination of material injury by the ITC, which led to the US countervailing duty order against DRAMS from Korea, and the order itself, are inconsistent with certain US obligations under the *SCM Agreement* and the *GATT 1994*.

2.2 On 1 November 2002, Micron Technology, Inc. filed a petition with the investigating authorities of the US (DOC and ITC) regarding imports of allegedly subsidised DRAMS from Korea. On 8 November 2002, the ITC published a notice of initiation of an investigation of the injury allegations.[7] The ITC's final injury determination covered the full years 2000, 2001 and 2002, as well as the first quarters of 2002 and 2003.[8] On 27 November 2002, the DOC initiated an investigation of the subsidy allegations. The DOC investigation covered the period of 1 January 2001 through 30 June 2002.[9]

2.3 The two products concerned by the investigations were (1) DRAMS, subheading 8542.21.80 of the Harmonized Tariff Schedule of the US (HTSUS); and (2) Memory modules containing DRAMS, subheading 8473.30.10 of the HTSUS[10] as described more specifically in the DOC's countervailing duty order.

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[5] WT/DS296/3.
[6] These products will be referred hereinafter simply as DRAMS.
[7] Exhibit GOK-1.
[8] Exhibit GOK-10.
[9] Exhibit GOK-2.
[10] Exhibit GOK-1, p. 68176, Exhibit GOK-2, p. 70927.

2.4 Exporters concerned were Hynix Semiconductor, Inc. and Samsung Electronics Co., Ltd.[11]

2.5 The ITC published a Preliminary injury determination on 27 December 2002[12] and a Final injury determination on 11 August 2003.[13] The DOC published a Preliminary Determination on 7 April 2003 with an affirmative finding for Hynix Semiconductors, Inc. (provisional duties of 57.37 per cent) and a negative finding for Samsung Electronics Co., Ltd.[14] The DOC published a Final subsidy determination on 23 June 2003[15], amended on 28 July 2003, with an affirmative finding for Hynix Semiconductors, Inc. (final countervailable subsidy of 44.29 per cent) and a negative finding for Samsung Electronics Co., Ltd. (*de minimis* countervailable subsidy of 0.04 per cent).[16] Because of the DOC's negative finding for Samsung Electronics Co., Ltd., the ITC's final injury determination concerned subject DRAMS produced by Hynix Semiconductor Inc.[17] On 11 August 2003, the DOC published a final countervailing order[18], requiring at the same time as importers would normally deposit estimated duties, a cash deposit equal to a net subsidy rate of 44.29 per cent, for all entries of DRAMS from Korea, except Samsung entries, as described more specifically in the countervailing duty order.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. KOREA

3.1 In its first submission[19], Korea requests the Panel to make findings that the US acted inconsistently with its obligations under Articles 1, 2, 10, 12, 14, 15, 19, 22 and 32 of the *SCM Agreement*, as well as Article VI:3 of the *GATT 1994*. Specifically, Korea requests the Panel to find that the US acted inconsistently with:

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

(b) Article 15.2 because *inter alia*, the ITC injury determinations improperly assessed the significance of the volume effects of subject imports;

(c) Article 15.2 because *inter alia*, the ITC injury determinations improperly assessed the significance of the price effects of subject imports;

(d) Article 15.4 because *inter alia*, the ITC failed to consider all factors relevant to the overall condition of the domestic industry;

(e) Article 15.5 because *inter alia*, the ITC failed to demonstrate the requisite causal link between subject imports and injury;

(f) Article 15.5, because *inter alia*, the ITC improperly assessed the role of other factors, and improperly attributed the effect of other factors to the allegedly subsidized imports;

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[11] Exhibit GOK-4, p. 16782
[12] Exhibit GOK-3.
[13] Exhibit GOK-7.
[14] Exhibit GOK-4, p. 16782.
[15] Exhibit GOK-5.
[16] Exhibit GOK-6, p. 44291.
[17] Exhibit GOK-10.
[18] Exhibit GOK-8.
[19] Korea First Written Submission, para. 598.

(g) Article 15.2 and 15.4 because *inter alia*, the ITC improperly and inconsistently defined the domestic industry;

(h) Article 22.3 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;

(i) Article 1.1 because *inter alia,* the DOC failed to demonstrate the existence of a financial contribution by the Government of Korea with respect to the October 2001 restructuring at issue in its subsidy investigation;

(j) Article 1.1 because *inter alia*, the DOC failed to demonstrate the existence of a financial contribution with respect to the other discrete transactions at issue;

(k) Article 1.1 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 even without sufficient evidence regarding that particular bank;

(l) Articles 1.1 and 14 because *inter alia,* the DOC failed to demonstrate that a benefit was conferred on the respondent Hynix, given available market benchmarks among Hynix's creditors;

(m) Articles 1.1 and 14 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 Hynix during the period of investigation;

(n) Articles 1.1 and 14 because *inter alia*, the DOC failed to utilize relevant Korean 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 in this case;

(o) Article 2 because *inter alia,* the DOC disregarded the fact that many Korean companies underwent debt restructuring similar to that undergone by Hynix, and therefore, the DOC did not establish that all of the alleged subsidies were specific on the basis of positive evidence;

(p) Articles 1 and 2 because *inter alia,* the DOC imposed an improper burden of proof on respondents, that is the Government of Korea and Hynix, and thereby failed to base its decision on affirmative, objective, and verifiable evidence;

(q) Article 12.6 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;

(r) 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*;

(s) Articles 10 and 32.1 because *inter alia,* the CVD order imposed by the US against DRAMs from Korea was not in accordance with the relevant provisions of the *SCM Agreement* or the relevant provisions of the *GATT 1994*.

3.2 Korea also requests the Panel to recommend that the US terminate the countervailing duty order immediately.[20]

B. UNITED STATES

3.3 In its first submission, the United States requests that the Panel reject Korea's claims in their entirety. With respect to Korea's request for a specific recommendation by the Panel, the US responds that should the need for recommendations arise, the Panel should reject the recommendations requested by Korea.[21]

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties as submitted, or as summarized in their executive summaries as submitted to the Panel, are attached as Annexes (see Table of Annexes, page iv).

4.2 The parties' answers to questions from the Panel, their comments on each other's answers, and other documents submitted at the request of each other are also attached as Annexes.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of those third parties which have made submissions to the Panel, as submitted or as summarized in their executive summaries, are attached as Annexes (see Table of Annexes, page iv).

VI. INTERIM REVIEW

6.1 On 17 November 2004, we submitted the Interim Report to the parties. Both parties submitted written requests for the review of precise aspects of the Interim Report. Parties also submitted written comments on the other party's comments. Neither party requested an interim review meeting.

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

A. US COMMENTS

6.3 The US made a number of comments regarding typographical and clerical errors contained in our Interim Report. We are grateful for those comments, and have made the necessary corrections. The US also made additional comments, to which we respond below.

DOC Preliminary Determination

6.4 The US objects to findings made by the Panel regarding the DOC's Preliminary Determination. Since Korea states in its reaction to the comments by the US on the Panel's Interim Report that it "agrees that it has not made any separate claim against the DOC preliminary determination, as such", we have deleted those findings from our Final Report.

GATT 1994

6.5 The US objects to the inclusion of a recommendation concerning the GATT 1994 in the Interim Report. Since we have not found any violation of the GATT 1994, we have deleted that reference.

[20] Korea First Written Submission, para. 599.
[21] US First Written Submission, paras. 497 and 498.

DOC reliance on record evidence (para 7.90 and note 101 of the Interim Report)

6.6 The US requests a revision to accurately reflect the fact that the DOC's reliance on certain evidence did appear in the *Decision Memorandum*. In order to avoid any error in this regard, we have deleted the relevant parts of the Interim Report.

Demand (para. 7.368 of the Interim Report)

6.7 The US argues that Korea's handling of the "demand" issue prevented the Panel from adequately exploring it. We disagree. As noted at para. 7.368, we understand Korea's argument to be based on a decrease in the rate of growth of demand for DRAMs, caused by a drop in demand for products that use DRAMs, such as personal computers.

6.8 As noted at para. 7.367 *infra*, we consider that Korea established a *prima facie* case that the ITC improperly evaluated the impact of slowing demand on price. Since the US failed to rebut Korea's prima facie case, we upheld Korea's claim regarding this matter. We therefore make no changes to our Interim Report in respect of this issue.

Section VII.F (para. 7.410 of the Interim Report)

6.9 The US claims that it addressed Korea's argument regarding burden of proof during the DOC's investigation at para. 243 of its first written submission. Although we do not find any explicit reference to this argument in that part of the US first written submission, we have decided to delete para. 7.410 in order to avoid any error regarding the US response to Korea's argument.

B. KOREAN COMMENTS

Para. 7.8 (of the Interim Report)

6.10 Korea asks the Panel to make explicit that any financial contribution by a public body is not a subsidy unless it provides a "benefit" within the meaning of the *SCM Agreement*. We do not consider it necessary to amend our report. Since the element of "benefit" is part of the definition of "subsidy", there is no need to list that element separately.

Paras 7.8 and 7.62 (of the Interim Report)

6.11 Korea suggests that the Panel should be very circumspect in making any statements regarding the possibility of a 100 per cent government-owned entity being treated as a public body. Korea asserts that this issue was not discussed in either the DOC determination, or the deliberations of this Panel. Since we do not make any findings that 100 per cent government-owned entities will necessarily constitute public bodies, we do not consider it necessary to amend the statements that we have made regarding this matter.

Para. 7.42 (of the Interim Report)

6.12 Korea asks the Panel to clarify this paragraph. We have done so by deleting the words "and affirmative".

Para. 7.46 (of the Interim Report)

6.13 Korea asks the Panel to amend the reference to the "three restructurings at issue in these proceedings". According to Korea, the Panel's language presupposes some common definition of

when a particular transaction arises to the level of a "restructuring". In a order to avoid any uncertainty, we have referred to "financial contributions" instead.

Paras 7.88 and 7.90 (of the Interim Report)

6.14 Korea asks the Panel to clarify its judgment regarding evidence that it did not consider. We decline to do so, however, precisely because we have not considered the evidence at issue. In any event, we note that we deleted para. 7.90 of our Interim Report in response to a comment made by the US.

Para. 7.212 (of the Interim Report)

6.15 Korea asks the Panel to rule that the ITC's injury determination was inconsistent with Article 15 of the *SCM Agreement* because it rested on a WTO inconsistent finding of subsidy. Since this issue was not raised by Korea in the proceedings leading up to the preparation of our Interim Report, we see no reason to amend our Interim Report in the manner suggested by Korea. The interim review phase is not an opportunity for complaining parties to introduce new issues for review by the Panel.

VII. FINDINGS

A. STANDARD OF REVIEW

7.1 Article 11 of the *DSU* sets forth the appropriate standard of review for panels for all covered agreements, including the *SCM Agreement.* Article 11 calls for panels to "make an objective assessment of the matter before [them], including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ... ."

7.2 The Appellate Body provided the following guidance regarding the application of Article 11 of the *DSU* in *US – Lamb*. The Appellate Body stated:

> As regards the standard of review contained in Article 11 of the DSU…the "applicable standard is neither *de novo* review as such, nor total deference, but rather the objective assessment of the facts.[22]
>
> Thus, an "objective assessment" of a claim under Article 4.2(a) of the *Agreement on Safeguards* has, in principle, two elements. First, a panel must review whether competent authorities have evaluated *all relevant factors*, and, second, a panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination. Thus, the panel's objective assessment involves a *formal* aspect and a *substantive* aspect. The formal aspect is whether the competent authorities have evaluated "all relevant factors." The substantive aspect is whether the competent authorities have given a reasoned and adequate explanation for their determination.[23]
>
> We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities. To the contrary, …, a panel can assess whether the competent authorities' explanation for its determination is reasoned and

[22] Appellate Body Report, *US – Lamb* at para. 101.
[23] *Id.* at para. 103 (emphasis in original).

> adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an "objective assessment"…, panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate.[24]

7.3 On the basis of Article 11 of the *DSU*, and the above guidance offered by the Appellate Body, we consider that our standard of review is to determine whether the DOC and 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 DOC and 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 DOC and 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 DOC or ITC.

B. BURDEN OF PROOF

7.4 It is now well established in WTO dispute settlement proceedings that the party claiming a violation of a provision of a WTO Agreement by another Member must assert and prove its claim. Thus, we note that the Appellate Body stated in *US – Wool Shirts and Blouses* that:

> the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[25]

7.5 In this dispute Korea, which has challenged the consistency of certain US determinations and measures, thus bears the burden of demonstrating that the measures are not consistent with the relevant provisions of the *SCM Agreement* and *GATT 1994*.

C. DOC'S SUBSIDY DETERMINATIONS

7.6 The disciplines of the *SCM Agreement* apply to subsidies that are specific to an enterprise or industry or groups of enterprises or industries. A subsidy arises when there is a "financial contribution" by a government, public body or private body entrusted or directed by a government, that confers a "benefit."

7.7 The DOC's subsidy determinations covered a number of individual financial contributions by Hynix's creditors, including an 800 billion won syndicated loan, the KDB Fast Track Programme, the May 2001 restructuring package, and the October 2001 restructuring package. The DOC found that "these actions are appropriately examined as part of a single programme that occurred over a short,

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[24] *Id*. at para. 106 (emphasis in original).
[25] Appellate Body Report, *US – Wool Shirts and Blouses*, page 14.

ten-month period",[26] the objective of which "was the complete financial restructuring of Hynix in order to maintain the company as an ongoing concern."[27]

7.8 The DOC found that these financial contributions were provided by four public bodies and a larger number of private bodies entrusted or directed by the GOK. We shall refer to Hynix's public body creditors as Group A creditors.[28] The DOC also found that these financial contributions were provided by a number of GOK owned or controlled banks, which were not found by the DOC to be public bodies. For all but one of these creditors, GOK was either the sole or largest single shareholder. We shall refer to these creditors as Group B creditors.[29] In addition, the DOC found that the financial contributions were provided by other private entities, in which the GOK had much smaller, or even non-existent, shareholdings. We shall refer to these as Group C creditors. We recall that financial contributions by public bodies (i.e., Group A creditors) necessarily fall within the scope of the *SCM Agreement* (although they do not necessarily constitute specific subsidies), whereas transactions by private bodies (i.e., Group B and C creditors) only fall within the scope of the *SCM Agreement* to the extent that such private bodies were entrusted or directed by a government.

7.9 Korea does not challenge the DOC's determination that participation in the four financial contributions by public body, Group A, creditors falls within the scope of the *SCM Agreement*. However, Korea claims that the DOC improperly found that Hynix's Group B and C creditors were entrusted or directed by GOK to participate in the financial contributions, and argues that their participation therefore falls outside the scope of the *SCM Agreement*. Korea also claims that the DOC improperly found that the financial contributions conferred a benefit. Korea further claims that the DOC improperly found that the alleged subsidies (i.e., financial contributions conferring a benefit) were specific to an enterprise. We shall first consider Korea's claims regarding the alleged entrustment or direction of Hynix's Group B and C creditors.

1. Entrustment or Direction

7.10 In the context of its complaints regarding the DOC's determination of government entrustment or direction, Korea claims that the US violated Article 1.1 of the *SCM Agreement* because:

- the DOC failed to demonstrate the existence of a financial contribution by the GOK with respect to the October 2001 restructuring;
- the DOC failed to demonstrate the existence of a financial contribution with respect to the other discrete transactions at issue; and
- the DOC erroneously assumed that every Korean private financial institution involved in its subsidy investigation was under the direction or entrustment of the GOK even without sufficient evidence regarding that particular bank.

7.11 Korea's claims raise general issues regarding the interpretation of Article 1.1(a)(1)(iv) of the *SCM Agreement*. In particular, Korea's claims raise the issue of whether, in order to find that a

[26] *Decision Memorandum*, page 48 (Exhibit GOK-5).
[27] *Id.*
[28] See Figure US-4.
[29] A number of Group B creditors were 100 per cent owned by GOK. Depending on the circumstances, 100 per cent government ownership might well have justified the treatment of such creditors as public bodies. If they had been treated as public bodies, the DOC would not have needed to determine whether or not such Group B creditors were entrusted or directed by GOK in order to find that their participation in the four financial contributions at issue fell within the scope of the *SCM Agreement*. On the basis of the criteria provided for in US law, however, the DOC treated these 100 per cent owned Group B creditors as private bodies.

private body is entrusted or directed by the government, an investigating authority must demonstrate an explicit and affirmative government action addressed to that particular private body, entrusting or directing a particular task or duty. If we find that Article 1.1(a)(1)(iv) does not require an explicit act addressed to a particular entity entrusting or directing a particular task or duty, Korea's claims also require us to consider the more factual issue of whether the DOC properly found that there was sufficient evidence to support a generalized finding of entrustment or direction of all Group B and C creditors in respect of each of the four financial contributions identified by the DOC.

(a) Is an investigating authority required to demonstrate an explicit and affirmative government action addressed to a particular entity, entrusting or directing a particular task or duty?

(i) Arguments of the parties

7.12 Korea asserts that, pursuant to Article 1.1(a)(1)(iv) of the *SCM Agreement*, the disciplines of the *SCM Agreement* only cover the acts of private bodies when they have been "entrusted or directed" by a government to take those acts. Korea asserts that the plain meaning of "entrustment or direction" required the DOC to demonstrate an explicit and affirmative government action addressed to a particular party to perform a particular task or duty. According to Korea, the use of the singular "a financial contribution" in Article 1.1 implies that an authority must examine each distinct transaction by source and measure. Korea submits that authorities cannot meet this standard with generalized findings of entrustment or direction. According to Korea, it is insufficient to conclude that if some connection exists between government, certain events and certain actors, then financing by all lenders to a particular party, no matter when or how it occurs, is the result of entrustment or direction.

7.13 Korea asserts that the words "entrust[] or direct[]" do not describe tepid or ambiguous government action. According to Korea, the dictionary defines the term "entrust" as, *inter alia*, to "give (a person, etc.) the responsibility for a task . . . Commit the . . . execution of (a task) to a person."[30] Korea therefore submits that the government must already have something that is going to be "entrusted" to the private body. Korea asserts that this meaning of "entrusts" is reinforced by the later phrase "which would normally be vested in the government", such that what is being "entrusted" is whatever would normally be a function vested in the government.

7.14 Korea submits that the word "direct" is defined as, *inter alia*, to "[g]ive authoritative instructions to; order (a person) to do . . . order the performance of." Korea submits that the term "direct," when followed by "to" plus an infinitive (*i.e.*, a verb), means to "give a formal order or command to"[31] do a thing. Korea notes that both the French text "ordonnent" (from the verb "ordonner") and the Spanish text "ordene" (from the verb "ordenar") most directly translate as "order." According to Korea, if one looks for other French and Spanish words that correspond to "direct," one finds many other words -- not used in the text of the *SCM Agreement* -- that convey softer meanings. Korea therefore submits that, in light of the French and Spanish versions, the most appropriate interpretation of the English word "directs" must be the meaning that conveys the idea of ordering the private body to take some action, and not the looser idea of mere guidance or suggestions.

7.15 Korea asserts that the context of these terms supports its interpretation. Korea notes that all of the four sub-provisions of Article 1.1(a) refer to "government" action, and concludes from this that the proper interpretation of "entrusts or directs" therefore requires government action so clear and unambiguous that the actions of private bodies can be imputed to the government itself. Korea asserts that anything other than such a strict reading would not be consistent with the overall context of Article 1.1(a). Korea submits that the additional phrase in Article 1.1(a)(1)(iv) reinforces this reading.

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[30] *The New Shorter Oxford English Dictionary*, Fourth Edition, Clarendon Press, Oxford (1993), at 831 (Exhibit GOK-38).

[31] *The Concise Oxford Dictionary*, Ninth Edition, Clarendon Press, Oxford (1995) (Exhibit GOK-37).

In this regard, Korea notes that the provision goes on to clarify that the actions of the private body can only be imputed to the government if "the practice, in no real sense, differs from practices normally followed by governments." According to Korea, therefore, the "entrusts or directs" needs to be so specific and compelling that the private body is not really making the decision at all -- the private body has become the instrument of the government. Korea submits that any discretion left to the private body transforms the situation, and the action can no longer properly be imputed to the government.

7.16 Korea asserts that its reading of the language and context of Article 1.1(a)(1)(iv) finds further support in the underlying purpose of this provision. Korea considers that the language of Article 1.1(a)(1)(iv) seeks to narrow the scope of indirect subsidies, since it is not broad, but rather very narrow. Korea argues that the provision does not speak of government suggestions, or other passive acts, nor of private bodies trying to win the favor of a government, or trying to act on their own concepts of the national interest.

7.17 Korea submits that its interpretation of Article 1.1(a)(1)(iv) is supported by the reasoning of the *US – Export Restraints* panel, which found:

> It 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). To our minds, both the act of entrusting and that of directing therefore necessarily carry with them the following three elements: (i) an explicit and affirmative action, be it delegation or command; (ii) addressed to a particular party; and (iii) the object of which action is a particular task or duty. In other words, the ordinary meanings of the verbs 'entrust' and 'direct' comprise these elements – *something* is necessarily delegated, and it is necessarily delegated to *someone*; and, by the same token, *someone* is necessarily commanded, and he is necessarily commanded *to do something.* We therefore do not believe that either entrustment or direction could be said to have occurred until all of these three elements are present.[32]

7.18 According to Korea, the findings of the panel in *US – Export Restraints* make clear that generalized statements of government intent or desire, or even general interventions in the market itself, are insufficient to establish a financial contribution through a private body. Korea asserts that, instead, each alleged government delegation or command must be examined with respect to each party, and with respect to each task or duty. Korea asserts that the use of the singular "a financial contribution" in Article 1.1 implies that an authority must examine each distinct transaction by source and measure. According to Korea, therefore, an authority must demonstrate an explicit and affirmative government action addressed to a particular party to perform a particular task or duty. Although Korea acknowledges that entrustment or direction can arise absent formal acts of government, Korea does not believe that either entrustment or direction can be implicit, in the sense of a private party being left to wonder precisely what it is being entrusted or directed to do.

7.19 The US submits that there is no basis in Article 1.1(a)(1)(iv) of the *SCM Agreement* for the type of bank- and transaction-specific analysis advocated by Korea. The US submits that the word "entrust" is defined in relevant part as "[i]nvest with a trust; give (a person, etc.) responsibility for a task .... Commit the execution of (a task) to a person ... ."[33] According to the US, therefore, if a government gives a "private body" responsibility to carry out what might otherwise be a governmental subsidy function of the type listed in subparagraphs (i)-(iii) of Article 1.1(a)(1), there would be a financial contribution within the meaning of Article 1.1(a)(1).

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[32] Panel Report, *US – Export Restraints*, para. 8.29 (emphasis in original).
[33] *The New Shorter Oxford English Dictionary* (1993) (Exhibit US-89).

7.20 The US asserts that definitions of the word "direct" include "Cause to move in or take a specified direction; turn towards a specified destination or target"; "Give authoritative instructions to; to ordain, order (a person) to do (a thing) to be done; order the performance of"; "Regulate the course of; guide with advice"; and "Inform or guide (a person) as to the way; show or tell (a person) the way (to)"; and "govern the actions ... of."[34] According to the US, there is entrustment or direction by the government when a government "gives responsibility to", "orders", or "regulates the activities of" a private body such that one or more of the type of functions referred to in subparagraph (iv) is carried out.

7.21 The US submits that, although Korea cites essentially the same dictionary definitions, it does not proffer an interpretation of the meaning of "entrusts or directs" based on those definitions. The US asserts that Korea instead advocates an evidentiary standard for "entrustment or direction", since it argues that government action amounts to entrustment or direction only where it is "clear and unambiguous"[35] or "specific and compelling."[36] The US accepts that whether a particular government action amounts to entrustment or direction always will present an evidentiary question, but denies that there is a special evidentiary standard for entrustment or direction distinct from the general evidentiary standard that applies in any dispute governed by Article 11 of the *DSU*, which is whether there is a "reasoned and adequate" explanation of how the facts support the investigating authority's determination.[37]

7.22 The US notes that Korea argues that the evidence of entrustment or direction must be in a particular form; *i.e.*, an "explicit" government command.[38] The US understands Korea to argue that the use of the term "explicit" suggests that government entrustment or direction may only be evidenced by a formal or official command. The US considers that subparagraph (iv) cannot be limited in the manner Korea suggests, since the plain meaning of entrustment or direction encompasses, but is not limited to, an order or command. According to the US, an interpretation of subparagraph (iv) that would rule out automatically, and in all cases, any government direction not expressed in writing would render Article 1.1(a)(1)(iv) virtually meaningless.

7.23 The US asserts that Korea misconstrues the applicable evidentiary standard when it argues that the evidentiary standard of entrustment or direction requires a government command to an explicitly named private body to take an explicitly identified action at an explicit point in time. The US submits that there is no obligation that the DOC have express proof of bank-by-bank, transaction-by-transaction government direction since, as an evidentiary matter, any piece of evidence or fact can be relevant, provided it demonstrates, either individually or in conjunction with other evidence, whether or not a government entrusted or directed private bodies to provide financial contributions. The US considers that the relative importance of each piece of evidence or fact can only be determined in the context of a particular case, and not on the basis of generalities. According to the US, the evidentiary question in this dispute is whether a reasonable, objective decision-maker, looking at *all* the evidence on the investigation record, could have concluded that the GOK's actions *in toto* evince entrustment or direction.

7.24 The US notes that Korea claims textual support for its bank-by-bank, transaction-by-transaction standard by citing the use of the singular "a" financial contribution in the text of Article 1.1(a)(1). According to the US, following this logic through the text with respect to each of the elements of a countervailable subsidy reveals a fatal flaw in this approach, since the text of Articles 1 and 2 of the *SCM Agreement* also use the singular "a" where it refers to benefit, subsidy and

[34] *The New Shorter Oxford English Dictionary* (1993) (Exhibit US-89).
[35] Korea First Written Submission, para. 374.
[36] Korea First Written Submission, para. 375.
[37] The US refers in this regard to paras. 276-78 of the Appellate Body Report in *US - Steel Safeguards*.
[38] Korea First Written Submission, para. 366.

specificity. The US therefore asserts that if "a" financial contribution were interpreted to mean government direction to "a" particular bank, then specificity would be considered always in the context of, for example, an individual bank's loan to "a" beneficiary, with the result that the subsidy would always be specific. The US submits that the Panel should reject Korea's "a"/singular argument because it would render Article 2 of the *SCM Agreement* a nullity. The US also asserts that Korea's "a"/singular argument overlooks the fact that use of the singular does not rule out a meaning that encompasses the plural of that term. The US notes in particular that the definition of the term "body", as used in "a private body" in subparagraph (iv), provides that the term "body" may refer to a singular entity or more than one entity.[39] According to the US, therefore, the plain meaning of the text of Article 1.1(a)(1)(iv), does not rule out government entrustment or direction of a particular "group" of private bodies.

7.25 The US submits that Korea's reliance on *US - Export Restraints* for its bank-by-bank, transaction-by-transaction evidentiary standard also is misplaced, since *US - Export Restraints* addressed a very different issue; *i.e.*, whether a hypothetical restriction on exports could constitute entrustment or direction under Article 1.1(a)(1)(iv). According to the US, the *US - Export Restraints* report is therefore of limited (or no) relevance to the instant dispute, in which there is a voluminous body of evidence that the GOK affirmatively caused, and gave responsibility, to private entities to provide loans, equity infusions, and debt forgiveness to save Hynix from bankruptcy.

7.26 The US disagrees with Korea's argument that the phrase in subparagraph (iv) – "in no real sense, differs from practices normally followed by governments" – means that the private body must, in effect, become "the instrumentality of the government" and that "any discretion" left to the private body would mean that "the action can no longer be imputed to the government."[40] The US understands Korea to argue that one must gauge the behaviour of private bodies to know whether there was government entrustment or direction. The US submits that Korea's focus on the motives of Hynix's creditors is incongruous with its recognition that the "perceived" or "confirmed" reaction by private entities "cannot be the basis on which the Member's compliance with its treaty obligations under the WTO is established."[41] The US asserts that the existence of a government financial contribution – whether direct or indirect – is determined with reference to the actions of the government.

(ii) Evaluation by the Panel

7.27 The parties disagree as to the circumstances under which an investigating authority could properly determine that a government has entrusted or directed a private body to make a "financial contribution" in the sense of Article 1.1(a)(1)(iv).[42] Korea submits that an authority must demonstrate an explicit and affirmative government action addressed to a particular party to perform a particular task or duty. The US considers that there is no need to have express proof of private body-by-private body, transaction-by-transaction, entrustment or direction, arguing that entrustment or direction can be established on the basis of broader evidence.

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[39] *See The New Shorter Oxford English Dictionary* (1993). (The US notes that "body" may refer to the singular, *e.g.*,"an individual, a person," or the plural, *e.g.*, "an aggregate of individuals") (Exhibit US-89); *see also* Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003, para. 108 [hereinafter "*US – Countervailing Measures on Certain EC Products*"] (the US notes that, while discussing "a benefit" to "a recipient", the Appellate Body stated that "a recipient" could mean more than one entity).

[40] Korea First Written Submission, para. 375.

[41] Korea First Written Submission, para. 383.

[42] There is no disagreement between the parties concerning the DOC's determination that the relevant acts that private bodies were allegedly entrusted or directed to undertake constitute "financial contributions."

7.28 We recall that Article 3.2 of the *DSU* recognizes that interpretative issues arising in WTO dispute settlement are to be resolved through the application of customary rules of interpretation of public international law. It is well settled that the principles codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*") are such customary rules.[43] Thus, we shall first examine the parties' arguments regarding the terms "entrusts or directs". Thereafter, we shall examine their arguments regarding the context, and object and purpose of those terms.

The terms "entrusts or directs"

7.29 Article 1.1(a)(1) of the *SCM Agreement* provides:

> there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as 'government'), i.e., where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) [footnote omitted];
>
> (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.

7.30 We note that the terms "entrusts or directs" were interpreted by the *US – Export Restraints* panel. That panel found:

> The dictionary meaning of the word "entrust" is, *inter alia*, to "give (a person, etc.) the responsibility for a task . . . Commit the . . . execution of (a task) *to* a person . . . ." The word "direct" is defined, *inter alia*, as to "[g]ive authoritative instructions to; order (a person) *to do* . . . order the performance of". In this regard, we consider significant the fact that, for "direct" when followed by "to" plus an infinitive (i.e., a verb), the dictionary gives as a meaning to "give a formal order or command to", as this is precisely the construction used in subparagraph (iv) (" . . entrusts or directs a private body *to carry out* . . .").
>
> 8.29 It 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). To our minds, both the act of entrusting and that of directing therefore necessarily carry with them the following three elements: (i) an explicit and affirmative action, be it delegation or command; (ii) addressed to a particular party; and (iii) the object of which action is a particular task or duty. In other words, the ordinary meanings of the verbs "entrust" and "direct" comprise these elements – *something* is necessarily delegated, and it is

[43] Article 31(1) of the *Vienna Convention* provides in relevant part that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

> necessarily delegated *to someone*; and, by the same token, *someone* is necessarily commanded, and he is necessarily commanded *to do something.* We therefore do not believe that either entrustment or direction could be said to have occurred until all of these three elements are present.
>
> 8.30 Having said that, it is clearly the first element – an explicit and affirmative action of delegation or command – that is determinative. The second and third elements – addressed to a particular party and of a particular task – are *aspects* of the first. Any assessment of whether delegation or command has occurred would necessarily be in reference to that which has been delegated or commanded and in reference to the one to whom it has been delegated or commanded. As aspects of and flowing from the first element of the definition, the second and third elements provide further support for our view that the action must be an explicit and affirmative act of delegation or command. We note, in this regard, that the "entrusts or directs" language in subparagraph (iv) is followed by the language "a private body to carry out . . . ", which is similar to that which we have used to describe the second and third elements of the definition of entrustment or direction. Thus, the subsequent language in subparagraph (iv) confirms our view of the requirement of an explicit and affirmative action.[44]

7.31 As noted by the panel in *US – Export Restraints*, the dictionary meaning of the word "entrust" is, *inter alia*, to "give (a person, etc.) the responsibility for a task . . . Commit the . . . execution of (a task) *to* a person . . . ."[45] The word "direct" is defined, *inter alia*, as to "[g]ive authoritative instructions to; order (a person) *to do* . . . order the performance of."[46] We agree 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)."[47]

7.32 The *US – Export Restraints* panel also found that "both the act of entrusting and that of directing therefore necessarily carry with them the following three elements: (i) an explicit and affirmative action, be it delegation or command; (ii) addressed to a particular party; and (iii) the object of which action is a particular task or duty."[48] The parties disagree on this aspect of the panel's findings. Korea relies on this finding to argue that there can be no finding of entrustment or direction in the absence of an explicit act whereby a particular task or duty is delegated to a specific person, or whereby a specific person is commanded to perform a particular task or duty. The US denies that the act of delegation or command need be explicit, or addressed to a specific person.

7.33 Regarding the first element identified by the *US – Export Restraints* panel, we agree that the delegation or command inferred by the terms "entrustment" and "direction" must take the form of an affirmative act. The object of a Member's responsibility should be its acts, as such, rather than the reactions to or consequences of those acts, as these reactions and consequences may simply be the result of happenstance or chance.[49] That being said, we see nothing in the text of Article 1.1(a)(1)(iv) that would require the act of delegation or command to be "explicit". Although the particular facts of the *US – Export Restraints* case may have caused that panel to employ the term "explicit", no such

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[44] *US – Export Restraints*, paras 8.28-8.30, (footnotes omitted).
[45] *The New Shorter Oxford English Dictionary*, Volume 1, 1993, Clarendon Press, Oxford.
[46] *Id.*
[47] *US – Export Restraints*, para. 8.29.
[48] *Ibid*.
[49] Like the *US – Export Restraints* panel, "we do not see how the reaction of private entities to a given governmental measure can be the basis on which the Member's compliance with its treaty obligations under the WTO is established" (see *US – Export Restraints*, para. 8.34).

qualification is included in the terms of Article 1.1(a)(1)(iv). In our view, the affirmative act of delegation or command could be explicit or implicit, formal or informal. [50]

7.34 As to the issue of whether or not the act of delegation or command must be addressed to a specific individual, we agree with the *US – Export Restraints* panel that, of the three elements it identified in the extract cited above, the first element, *i.e.* the affirmative action of delegation or command, is determinative. As the panel noted, the second and third elements – addressed to a particular party and of a particular task – are aspects of the first, in the sense that assessment of whether delegation or command has taken place would of necessity involve an examination of both who allegedly has been entrusted or directed to act, and what the action or task in question is.

7.35 Since the second and third elements identified by the *US – Export Restraints* panel are aspects of the first element, we consider that the manner, or degree of detail in which the addressee and object of the act of delegation or command is specified will depend on the form that the act of delegation or command may take. Thus, while a greater degree of specificity may be expected in respect of explicit or formal acts of delegation or command,[51] this will not necessarily be the case in respect of implicit or informal acts. In our view, the fact that the addressee and object of the act of delegation or command is described in less detail does not preclude a finding of entrustment or direction, as a matter of law. Rather, it raises evidentiary issues. While the fact that an act of delegation or command is specifically addressed to a particular private body may make it easier, in terms of evidence, for a complainant or investigating authority to establish the existence of entrustment or direction, the fact that an act of delegation or command is not specifically addressed to a particular private body does not necessarily mean that a finding of entrustment or direction in respect of that private body is precluded. It simply means that, as an evidentiary matter, it will be more difficult for a complainant or investigating authority to properly demonstrate that such private party was entrusted or directed.[52] Similarly, the fact that an act of delegation or command does not specify in great detail what must be done does not necessarily preclude a finding of entrustment or direction. It simply makes it more difficult for a complainant or investigating authority to properly demonstrate that a transaction undertaken by a private body was the object of governmental entrustment or direction. Thus, although the plain meaning of entrustment and direction requires that something must be delegated to someone, or that someone must be commanded to do something, the plain meaning of those terms does not require that such someone or something must necessarily be specified in great detail.[53] That being said, the 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

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[50] Indeed, the utility of Article 1.1(a)(1)(iv) would be undermined if an "explicit and affirmative action of delegation or command" were required. That provision operates as a catch-all, so that indirect government action does not fall outside the scope of the *SCM Agreement*. We are not prepared to read into Article 1.1(a)(1)(iv) terms that would allow such indirect government action to circumvent the WTO's subsidy disciplines.

[51] Of course, explicit and formal acts of delegation or command could also be drafted in very general terms, and addressed to a broadly defined group.

[52] Korea argues that, because Article 1.1(a)(1)(iv) refers to the entrustment or direction of "a" private body, the relevant act of delegation or command must be specifically and explicitly addressed to "a" particular private body. We disagree, since there may be factual circumstances where it is possible for an investigating authority to properly conclude that "a" particular private body has been entrusted or directed, even though the relevant act of delegation or command was not specifically and explicitly addressed to that private body.

[53] We note that Korea has argued that the French and Spanish versions of Article 1.1(a)(1)(iv) confirm its view that "the English word 'directs' ... conveys the idea of ordering the private body to take some action" (para. 21 of Korea's Second Written Submission, emphasis in original), and that the English word "entrust" "conveys the idea of being definitely told something must be done" (para. 22, Korea's Second Written Submission). While this may be correct, Korea has not made any argument on the basis of the plain meaning of the text regarding the degree to which the "some action" or "something" must be specified in order to entrustment or direction to arise.

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.[54]

The context of the terms "entrusts or directs"

7.36 Korea states that it has stressed the "who" that is being entrusted or directed because the entrustment or direction must apply to "a private body". According to Korea, this contextual language makes clear that some kinds of entrustment or direction simply will not fall within the meaning of Article 1.1(a)(1)(iv) because the government has not been targeting a "private body". Korea argues that if the government orders a public body to take some action, that entrustment or direction of that public body is legally irrelevant to the issue of whether a private body has been directed. We do not agree with this broad statement, since it excludes the possibility of indirect entrustment or direction of a private body by a government via a public body.[55] Thus, if a government were to instruct a public body to entrust or direct a private body, such entrustment or direction would fall within the scope of Article 1.1(a)(1)(iv). Korea also argues that if a government expresses a generalized wish that something happens, that is not entrustment or direction of a private body, since there is no specific private body that is the object of the action. As noted above, we do not consider that the addressee of the alleged entrustment or direction need be specified in detail in order for Article 1.1(a)(1)(iv) to apply. We would agree with Korea's argument that an expression of a generalized wish does not amount to entrustment or direction, however, but on different grounds, namely that the expression of a generalized wish does not amount to an affirmative act of delegation or command.

7.37 Korea also notes that a private body must be entrusted or directed "to carry out" something. Korea argues that "[t]he object of the verbs 'entrusts' or 'directs' must be something concrete that can be carried out. A Korean bank can 'carry out' making a loan, but it cannot 'save' a company."[56] Article 1.1(a)(1)(iv) actually provides that a private body must be entrusted or directed "to carry out one or more of the type of functions illustrated in [sub-paragraphs] (i) to (iii)."[57] In our view, if a private body were entrusted or directed to carry out one of those functions, or to carry out an act that would necessarily entail the execution of one of those functions, then Article 1.1(a)(1)(iv) would in

[54] Whatever the nature or form of the affirmative acts of delegation or command, and whatever the type of evidence relied upon, there must always be a determination to the effect that each of the private entities at issue was entrusted or directed by the government.

[55] We note that, according to Article 1.1(a)(1), the word "government" in Article 1.1(a)(1(iv) would cover both governments and public bodies.

[56] Korea's Second Written Submission, para. 29.

[57] Article 1.1(a)(1)(iv) further provides that the functions covered by the entrustment or direction must "normally be vested in the government and the practice [must], in no real sense, differ[] from practices normally followed by governments." We note that the "in no real sense" language was addressed by the panel in *US – Export Restraints*. That panel referred to the report of the Group of Experts on the Calculation of the Amount of a Subsidy, which in turn referred to a 1960 panel report (see MTN.GNG/NG10/W/4, "Subsidies and Countervailing Measures – Note by the Secretariat", 28 April 1987, Section 4.1.A). Like the *US – Export Restraints* panel, we too "find very significant the Group of Experts' interpretation that the 1960 Panel's reference to 'practice . . . in no real sense different from those normally followed by governments' was a general reference to the delegation to private parties of the particular government functions of taxation and expenditure of revenue" (para. 8.72). We note that the reference to functions "normally vested in the government" textually mirrors the reference to "practices normally followed by governments." Accordingly, we consider that the reference to functions "normally vested in the government" should also be understood to mean functions of taxation and revenue expenditure. Thus, a function may be said to be "normally vested in the government" if that function involves the levy of taxation or the expenditure of revenue. We are therefore not persuaded by Korea's argument (para. 24, Korea's Second Written Submission) that "conventional" loans and restructuring measures, i.e., those not made pursuant to some government programme, are not "normally vested in the government", and therefore fall outside the scope of Article 1.1(a)(1)(iv). To the extent that loans and restructuring measures involve taxation or revenue expenditure, they are capable of falling within the scope of that provision.

principle apply. Since this issue would need to be resolved on the basis of the facts of a particular case, we see no merit in discussing in the abstract whether or not a particular task might be sufficiently "concrete" for the purpose of Article 1.1(a)(1)(iv).

7.38 Korea also argues that Article 1.1(a)(1)(iv) would not apply if a private body were merely entrusted or directed to consider some action, or to assist some action, rather than "carry out" some action. According to Korea, any discretion being left to the private body is fundamentally at odds with this notion of "carry out". Korea asserts that any time private bodies have a choice, it is hard to imagine how they can have been entrusted or directed to "carry out" an action. However, we do not consider that leaving discretion to a private body is necessarily at odds with entrusting or directing that private body. In particular, it is possible that a government could entrust or direct a private body to make a loan, but leave the terms of that loan to the discretion of the private body. While there may be cases where the breadth of discretion left to the private body is such that it becomes impossible to properly conclude that that private body has been entrusted or directed (to carry out a particular task), this is a factual/evidentiary matter to be addressed on a case-by-case basis.

The object and purpose of the terms "entrusts or directs"

7.39 Korea submits that its reading of the language and context of Article 1.1(a)(1)(iv) finds further support in the underlying purpose of this provision. According to Korea, this language seeks to narrow the scope of indirect subsidies by narrowing the scope of private actions that can be imputed to the government.

7.40 The US asserts that Members did not intend that governments be able to evade the subsidy disciplines by using less formal – but no less effective – forms of entrustment or direction over private parties to grant subsidies.

7.41 Although Article 31(1) of the *Vienna Convention* provides that a treaty interpreter may have regard to the object and purpose of the provisions at issue, in this case we note that the parties have both identified plausible object and purpose arguments in support of their respective interpretations of Article 1.1(a)(1)(iv). Thus, while it is important that Article 1.1(a)(1)(iv) should not be interpreted so broadly that it covers the conduct of private bodies acting independently of governmental delegation or command, neither should that provision be interpreted so narrowly that it allows Members to escape the disciplines of the *SCM Agreement* by acting indirectly through private bodies. Since there is no compelling object and purpose argument requiring us to adopt either party's interpretation, we shall focus our interpretation on the plain meaning of the text, as set out above.

7.42 As a matter of law, therefore, we do not consider that the plain meaning of Article 1.1(a)(1)(iv) of the *SCM Agreement* requires an investigating authority to demonstrate an explicit government action addressed to a particular entity, entrusting or directing a particular task or duty.

(b) Did the DOC properly find 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?

7.43 Korea submits that the only evidence relied upon by the DOC relates to narrow circumstances that do not support the DOC's broad theory of entrustment or direction. Korea asserts that, at best, DOC's case constitutes a finding of entrustment or direction by inference. Korea submits that inference is not a substitute for establishing explicit and affirmative government action of delegation or command.

7.44 The US submits that the DOC's determination of entrustment or direction was supported by ample record evidence. According to the US, the evidence before the DOC demonstrated (1) that the GOK pursued a policy to support Hynix and prevent its failure; (2) that the GOK exercised the control over Hynix's creditors necessary to implement its policy; and (3) that, where necessary, the GOK used its power and influence to coerce Hynix's creditors to adhere to the GOK's policy.

7.45 Each party's submissions regarding the sufficiency of the evidence of entrustment or direction relied on by the DOC are structured differently. For the most part, we shall follow the structure of arguments adopted by the US, since that more closely follows the structure of the DOC's determination on entrustment or direction.[58] We shall begin by addressing the parties' arguments concerning GOK's alleged policy to support Hynix and prevent its failure. In doing so, we are conscious that the DOC relied on the totality of the evidence before it, without attaching particular importance to one or several evidentiary factors. We shall adopt the same approach in our review of the DOC's determination. In order to do so, however, we must consider the DOC's assessment of the probative value of each evidentiary factor separately.

7.46 Before reviewing that evidence, we note that, for the most part, the DOC does not rely on any explicit affirmative act of government delegation or command in respect of the financial contributions at issue in these proceedings. Instead, its determination is largely based on alleged implicit and informal acts of delegation or command. For this reason, most of the evidence relied on by the DOC is circumstantial in nature. There is no reason why a case of government entrustment or direction should not be premised on circumstantial evidence, provided that such evidence is 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.

(i) Policy to Support Hynix and Prevent its Failure

7.47 The DOC found that:

> the GOK had a policy to prevent Hynix' failure. The GOK attached such great importance to Hynix' survival because it feared that the company's collapse would have serious repercussions for the ROK's corporate, labour and financial markets, and because Hynix was part of an industry sector considered to be of 'strategic' importance to the GOK.[59]

7.48 Korea objects to the DOC's reliance on policy considerations. Korea submits that this approach ignores all of the warnings of the panel decision in *US-Export Restraints*, since government actions and interventions for various policy reasons suddenly become actionable as entrustment or direction, without any regard for the nature of those actions. Korea also asserts that, particularly with regards to timing, the US theory has no limits, because once a government has made clear its hope to "save" a company, that original intention goes on forever.

7.49 The US submits that the GOK established a policy to save Hynix because of the strategic status of the Korean semiconductor industry. The US asserts that, in January 2001, a Blue House[60] official stated that, "Hyundai's semiconductors and constructions are Korea's backbone industries, and these businesses are deeply-linked with other domestic companies. Thus, these firms should not

[58] This does not mean that the Panel is placing the burden of proof on the US. It simply means that, for the most part, the Panel is considering the parties' arguments on Korea's claims against the DOC's determination of government entrustment or direction in the order set out in the US First Written Submission.

[59] *Decision Memorandum*, page 49 (Exhibit GOK-5).

[60] The Panel understands that this is a reference to the official residence of the President of ROK.

be sold off just to follow market principles."[61] The US asserts that in May 2001, a senior KEB official stated that, "[i]f Hynix is placed under receivership, Korea's exports will be severely battered [because] Hynix accounts for 4 per cent of exports. As far as I know, the government is now working out a series of powerful measures to ensure the survival of Hynix Semiconductor."[62] The US asserts that a Chong Wa Dae[63] official stated that, "[w]e are doing what is deemed necessary to save companies leading the countries [sic] strategic industries."[64] According to the US, the perception in the Korean banking community was that Hynix was "too big to fail".[65]

7.50 The US submits that the DOC considered this and other evidence of the GOK's policy to prevent the failure of Hynix. The US asserts, for example, that the DOC noted that Economic Ministers held several meetings in late 2000 and early 2001 where senior government officials determined what measures could be taken by the government to assist Hynix. According to the US, the evidence before the DOC indicated that as early as November 2000, the GOK began pursuing a policy (and taking specific actions) to prevent the failure of Hynix.

7.51 We find that an objective and impartial investigating authority could properly have found that the GOK had a policy to save Hynix on the basis of the evidence described above. Although this policy may well explain the participation of public body, Group A, creditors in the four financial contributions at issue, it is not sufficient to attribute to GOK the participation of the private body, Group B and C, creditors by virtue of Article 1.1(a)(1)(iv) of the *SCM Agreement*. Article 1.1(a)(1)(iv) is not concerned with the establishment of government policy. It is concerned with affirmative governmental acts of delegation or command. Although the DOC may have relied on the existence of a GOK policy to save Hynix as context for evaluating the alleged affirmative government acts at issue, the existence of a GOK policy to save Hynix in and of itself could not properly be treated as evidence of government entrustment or direction. Something more is required, in the sense of evidence of implementation of that policy *vis-à-vis* private bodies through affirmative government acts of delegation or command. We consider that the DOC was of the same view, since it first examined whether or not there was a GOK policy to support Hynix's restructuring, and then considered whether there was a pattern of practices on the part of GOK to act upon that policy.[66]

(ii) GOK Control Over Hynix's Creditors

7.52 Korea submits that the DOC failed to establish that GOK exercised control over Hynix's creditors. The US asserts that GOK did exercise such control, through its multiple roles as lender, owner, legislator and regulator.

The GOK's role as lender/signalling

7.53 Korea notes that the DOC found that:

> "[t]he Fast Track programme was [] vital to the success of Hynix' and other Hyundai companies financial restructuring, and the KDB's involvement sent a clear signal that

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

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

[63] The Panel understands that this is a reference to the official residence of the President of ROK, also known as the Blue House.

[64] *Chong Wa Dae Defends Hyundai Rescue*, KOREA TIMES (7 February 2001) (Exhibit US-27); *see also The State Activism toward the Big Business in Korea, 1998-2000: Path Dependence and Institutional Embeddedness*, Jiho Jang, University of Missouri-Columbia (April 2001) (Exhibit US-17).

[65] *Financial Experts Report*, Meeting 2, at 7 (Exhibit GOK-30).

[66] *Decision Memorandum*, page 49 (Exhibit GOK-5).

> the government stood behind the programme and would take dramatic steps to ensure the restructuring effort moved forward."[67]

7.54 Korea submits that evidence of government signalling (through the provision of KDB loans) is legally irrelevant to the issue of entrustment or direction. According to Korea, the fact that a government may desire and approve of a certain outcome does not and cannot establish entrustment or direction.

7.55 The US submits that KDB is a public body, and that the KDB's role as Hynix's primary lender significantly underscored the GOK's support for the company. According to the US, the KDB's presence as a lender was a signal to Korean "private" banks that a particular investment decision had the GOK's blessing, and that a company was backed by the GOK. The US asserts that the KDB also played a critical role in managing the KDB Fast Track Programme. The US argues that only six companies participated in the KDB Fast Track Programme, four of which were current or former Hyundai affiliates.[68]

7.56 In considering the DOC's analysis of the GOK's role as lender, we note the US statement that "[t]he DOC never found that signalling in and of itself amounted to entrustment or direction. Rather, the DOC considered the government's creation of the KDB Fast Track Programme – which benefited a limited pool of users – as a relevant piece of evidence."[69] In our view, the DOC properly found that signalling in and of itself did not amount to entrustment or direction. We consider the fact that GOK and/or public bodies made loans to Hynix to be of very limited probative value in an investigation of alleged government entrustment or direction, since the provision of a loan to Hynix by GOK and/or public bodies does not, in and of itself, entail any affirmative acts of delegation or command. Indeed, it does not even entail any interaction between the GOK and/or public bodies and Hynix's private creditors. Even when viewed in conjunction with other evidentiary factors, we consider that an impartial and objective investigating authority would have refrained from attaching undue importance to the lending practices of public bodies when considering evidence of alleged government entrustment or direction of private bodies in the circumstances at issue.

The GOK's role as owner

Arguments of the parties

7.57 Korea asserts that the DOC relies extensively on the fact that the GOK held ownership interests in certain banks involved in Hynix's restructuring over the course of the period investigated.[70] According to Korea, however, this fact does not constitute evidence of an explicit and affirmative delegation or command by the GOK to entrust or direct credit to Hynix. Korea asserts that the GOK obviously has complete or majority ownership in some of the banks involved in the Hynix restructuring. Korea argues that even if this shareholding somehow constituted evidence of an explicit and affirmative delegation or command by the GOK to the banks in which it held a controlling stake, it is affirmatively not evidence of an explicit and affirmative delegation or command to all banks.

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[67] *Decision Memorandum*, page 52 (Exhibit GOK-5). The KDB Fast Track Programme provided for the repackaging and refinancing of maturing bonds. Eligible companies enrolled by their creditors in the Programme were required to cover the immediate costs of 20 per cent of their maturing bonds. The remaining 80 per cent of the bonds were re-issued through KDB.

[68] *Decision Memorandum* at 23 (Exhibit GOK-5).

[69] US First Written Submission, Note 86.

[70] Korea refers, for example, to pages 53-54 of the *Decision Memorandum* (Exhibit GOK-5).

7.58 Korea asserts that the standard set out in the *US - Export Restraints* case makes clear that a government holding shares in a private body alone is not sufficient evidence to presume that a measure adopted by the private body has been 'directed" by the government-shareholder. Korea submits that this is true even if the shareholding allows the government to exercise a decisive influence over the private body's operations. According to Korea, direction can be found to be present only if it is positively established that the government has actually exercised its control to direct the bank in some specific way as set forth in *US - Export Restraints*.[71]

7.59 The US asserts that "the GOK's role as owner was crucial in its exercise of control over Hynix's creditors."[72] The US argues that the DOC found that the government-owned and controlled banks played a "dominant role"[73] in the Hynix restructuring, particularly in the October 2001 restructuring.[74] The US asserts that the DOC's views were consistent with the views of private financial experts interviewed by the DOC.

Evaluation by the Panel

7.60 In its *Decision Memorandum*, the DOC stated that "[t]he GOK's ownership or control of these banks, which held a majority throughout all critical phases of the Hynix bailout, allowed the GOK to entrust the financial aspects of the bailout to these GOK owned or controlled banks, operating through the Hynix creditors council."[75] The DOC continued that "[t]hrough its control and influence over these banks, ... the government was able to establish its dominant position over Hynix' Creditors' Council, influence the outcome of the council meetings, and entrust the continuation of its policies to the council."[76]

7.61 The DOC's findings on government ownership therefore relate to two issues. First, it relates to the alleged entrustment or direction of Group B (government owned or controlled) creditors. Second, it relates to the GOK's alleged ability, through ownership or control of the Group B creditors, to control proceedings within the Creditors' Councils, and therefore dictate terms to the Group C creditors. Since we address the second issue elsewhere in this report[77], we shall concentrate on the first issue at this juncture.

7.62 We recall that the DOC found that GOK ownership or control of Group B creditors "allowed the GOK to entrust the financial aspects of the bailout to these GOK owned or controlled banks."[78] Thus, the DOC did not find that government ownership or control in and of itself amounted to entrustment or direction. We agree with this approach, because whereas government entrustment or direction refers to affirmative acts of delegation or command, government ownership is a state. Although that state, depending on the degree of government ownership, might facilitate government entrustment or direction, the existence of that state *per se* is not indicative of any affirmative acts on delegation or command on the part of the government. That being said, we note that the DOC in its *Preliminary Determination* stated that "banks that are owned, in whole or in part, by the GOK are subject to the influence of their majority or minority shareholders."[79] We would emphasise that a

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[71] Korea also asserts that provisions of the Public Fund Oversight Act and various Memoranda of Understanding ensured that GOK-owned banks took day-to-day decisions independently. These arguments are addressed in the next section of our report.

[72] US First Written Submission, para. 62.

[73] *Decision Memorandum*, page 53(Exhibit GOK-5) .

[74] *Id*., page 54.

[75] *Id.*, page 53.

[76] *Id*., page 54.

[77] *See* paras. 7.82 to 7.87 *infra*.

[78] *Decision Memorandum*, page 53 (Exhibit GOK-5).

[79] This statement by the DOC is inconsistent with its statement in the *Decision Memorandum* (Exhibit GOK-5) that "[t]he GOK's ownership ... allowed the GOK to entrust the financial aspects of the bailout to these

government's influence as a shareholder is not *per se* evidence of entrustment or direction, since government influence does not necessarily entail affirmative acts of delegation or command.[80] Whereas all affirmative acts of delegation or command will result in influence, the converse is not true. If it were, financial contributions by any private entity in which a government held shares would fall within the scope of Article 1.1(a)(1)(iv) of the *SCM Agreement.*

7.63 Furthermore, in finding that the GOK was able to entrust or direct Group B creditors to participate in the Hynix restructuring as a result of its shareholder influence, we consider that the DOC overlooked record evidence[81] indicating that certain Group B creditors did not actually participate in one of the financial contributions at issue in these proceedings. In particular, the DOC failed to explain how the KFB, a Group B creditor in which GOK had a 49 per cent shareholding, was able to exercise appraisal rights and subsequently seek mediation in respect of the October 2001 restructuring.[82] Faced with the same factual circumstances, we do not consider that an objective and impartial investigating authority could properly have found, on the basis of the reasoning advanced by the DOC, that government ownership, either in isolation or in conjunction with other factors, constituted compelling evidence of government entrustment or direction of Group B creditors.

The GOK's role as legislator

Arguments of the parties

7.64 Korea submits that the DOC and US ignored the various procedural safeguards imposed by GOK to ensure that GOK ownership in certain banks did not turn into *de facto* control of day-to-day operations. Korea submits that the DOC mischaracterized the following legislative measures: Prime Minister's Decree No. 408, the Public Funds Oversight Act, and the CRPA.

7.65 Korea submits that the US mischaracterizes Article 1 of the Prime Minister's Decree No. 408, which provides that the Decree seeks to "exclude unfair outside intervention in the management of financial institutions."[83] Korea acknowledges that the Decree envisages the GOK exercising its rights as a shareholder. Korea asserts that, much like other shareholders that do not intervene in the day-to-day decisions, the GOK does not intervene in the day-to-day decisions of Korean banks. Korea states that the US has never articulated the ways in which exercising standard shareholder rights constitutes -- either in general or this specific case -- any intervention in the particular decisions to grant loans to certain customers. Korea accepts that those banks with substantial GOK shareholding might be influenced by the Korean Government, but argues that influence is not entrustment or direction. The fact that banks with substantial GOK shareholding might be more likely to make loans, or might consider a broader range of economic factors, does not represent entrustment or direction.

GOK owned ... banks," (emphasis supplied) since it implies that government ownership necessarily constitutes entrustment or direction, rather than merely allowing (or facilitating) entrustment or direction.

[80] We recall that, in our view, the DOC may well have been entitled under the *SCM Agreement* to treat 100 per cent GOK-owned Group B creditors as public bodies. In the absence of any such finding, the DOC was required to demonstrate that they were entrusted or directed, through affirmative GOK acts of delegation or command, to participate in the four financial contributions at issue.

[81] Including the Financial Notes to the Hynix 2001 Audit Report set forth in Exhibit US-125, which included the following statement:

> According to [CRPA], any creditor financial institutions 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 [won] 80,100 million of other payables as current liabilities."

[82] The issue of mediation under the CRPA is addressed at para. 7.85 *infra*.

[83] Exhibit GOK-45.

7.66 Regarding the Public Funds Oversight Act, Korea submits that the US mischaracterizes the role of the MOU. According to Korea, the MOUs were about improving transparency, and ensuring some degree of prudential management over the banks that had to receive public funds. As the DOC's verification report makes clear, the purpose of the MOUs is to ensure that the banks are operated in accordance with sound business principles. Korea submits that the GOK is acting to ensure that the public funds that have been injected in the bank are put to good use and the bank is placed on a sound financial footing. Korea asserts that, far from being an instrument of government control, the MOUs are a means to limit and ultimately eliminate GOK involvement. Korea also argues that the MOUs did not allow for intervention in the day-to-day decisions of the banks. Korea also submits that many Korean banks simply did not have any such MOU. In particular, Korea notes that Kookmin did not have an MOU, despite the US argument to the contrary.

7.67 Korea submits that the US makes several serious mischaracterizations regarding the CRPA. Korea asserts that the US argument that the Creditors' Council gave only limited options ignores the context of the restructuring. According to Korea, in the context of restructuring, the creditors either hammer out an agreement that most can accept, or the company goes into bankruptcy. Korea asserts that this is the whole point of the restructuring -- to preserve more value by hammering out compromises rather than allowing the company to fail. Korea understands the core US argument to be that creditors did not have any real choices because in any event they had to forgive some debt. Korea asserts that this US argument in fact represents a *per se* rule that distressed companies must declare bankruptcy, and that restructuring is never allowed.

7.68 Korea submits that the definitive factual history of the Hynix creditors exercising appraisal rights confirms the procedural fairness of the CRPA process. Korea asserts that, on 31 October 2001, the Creditors Council passed a resolution for those creditors having chosen to exercise their appraisal rights under option 3. Korea states that, in response to this decision, dissenting creditors asked for resolution of the matter by a mediation committee as provided under the CRPA. According to Korea, the mediation committee decided that 100 per cent of these creditors' secured debts and 25 per cent of their unsecured debts are to be paid in cash by 31 May 2002. Korea asserts that where the creditor agrees, the term of payment may be adjusted accordingly, in which case 6 per cent interest shall be paid on any payments after 1 June 2002. Korea states that both the Creditors Council and the option 3 creditors accepted the outcome of this mediation without further recourse to court litigation as provided under the CRPA. According to Korea, the Creditors Council therefore made respective lump sum cash payments to Kwangju, Kyungnam and HSBC on 31 May 2002. Korea states that two payments were made to KFB on 3 October 2002 and 3 December 2003, respectively, with 6 per cent interest paid on the latter. Korea submits that this concrete history shows that the CRPA fully guarantees the legal rights of creditors opting for appraisal rights thereunder.

7.69 The US submits that the legislative action taken by the GOK actually enhanced its ability and the ability of Hynix's creditors to effectuate the GOK's policy to save Hynix.

7.70 Regarding Prime Minister Decree No. 408, the US disagrees that the measure was introduced to diminish the GOK's authority to intervene in the decisions of Korean banks. The US refers to the DOC's finding that the Decree contained "sufficient ambiguities which would allow the GOK to become involved in the banking system."[84] The US asserts that Article 5 of Prime Minister Decree No. 408 permits supervisory agencies to request "cooperation" from financial institutions for the purpose of the stability of the financial market, or to attain the "goals of financial policy." The US asserts that Article 6 provides the government with the flexibility to intervene on a company's behalf, stating that: "The Minister of MFE and KDIC shall, *unless they exercise their rights as shareholders of any of the Financial Institutions*, procure that the Financial Institution which was invested by the Government or KDIC, can be operated independently under the direction of the Board of Directors

[84] *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).

thereof" (emphasis added). The US submits that the Decree legalized the GOK's rights to intervene under the guise of stabilizing financial markets or exercising its shareholder rights to elect and appoint the banks' decision makers and to make credit policy decisions.

7.71 The US asserts that the DOC also found that the GOK was able to leverage its control of the financial sector to assist Hynix through enactment of the Public Fund Oversight Act. According to the US, this law required Korean private banks to sign MOUs in exchange for the massive recapitalizations they received from the government. The US submits that these MOUs provided the government with a contractual right to intervene in the day-to-day business and credit decisions of Korean banks. The US notes that the DOC concluded that, by entering into MOUs, "[t]he GOK in this manner can be directly involved in the fiscal operations of the bank."[85] The US asserts that, in particular, MOUs allowed the GOK to "require that the bank management be changed or the bank be restructured" such that "employees can be fired, the bank can be restructured, or the KDIC can order that the bank be merged with another healthier bank."[86] According to the US, many of Hynix's creditors, suffering from capital shortages and seriously over-exposed with respect to Hynix, had no choice but to accept the strict requirements of the MOUs. The US asserts that such legislatively-mandated contractual agreements provided the GOK with substantial control in directing credit to Hynix.

7.72 The US submits that another important step in furtherance of the GOK's policy towards Hynix was the enactment of the CRPA. The US asserts that the DOC concluded that this law essentially permitted a handful of Hynix's creditors, most of whom were majority owned by the GOK, to dictate the terms of the October 2001 restructuring to other Hynix creditors. The US asserts that the CRPA permits the creditors of a distressed Korean company to form a council and jointly manage the company through its restructuring. The US asserts that, according to Article 27(1) of the CRPA, the "principal transactions bank" (i.e., the KEB in this case) is nominally head of the council, which makes decisions "with a concurrent vote of the creditor financial institutions retaining ¾ or more of the gross amount of credit extension by the creditor financial institutions (including the loans converted into investments pursuant to the plans for management normalization)."[87]

7.73 The US accuses Korea of mischaracterizing the CRPA, since it implies that Hynix's creditors could "choose" their own path and "walk away" from Hynix restructuring and recapitalization measures taken under the CRPA. According to the US, the CRPA gave Hynix's largest creditors – *i.e.*, the specialized banks and those owned and controlled by the GOK – the power to dictate restructuring terms to all other Hynix creditors. The US asserts that Hynix's Creditors' Council, dominated by specialized banks and government-owned and -controlled banks, determined that: (1) no creditor would have the option to call in its debt, (2) no creditor would have the option to walk away without penalty, and (3) no creditor would have the option to remain an interest-earning creditor without the extension of new loans or forgiving significant debt on terms favourable to Hynix. The US argues that the DOC found that these "choices" were extremely limited and highly favourable to Hynix, essentially keeping Hynix from complete bankruptcy. According to the US, the terms of those "choices" were dictated by Hynix's government-owned and -controlled creditors.

7.74 The US submits that the three options presented to Hynix's creditors as part of the October restructuring and recapitalization measures were: (1) extend new loans, convert a majority of their debt to equity, and extend maturities and lower interest rates on the remainder of outstanding loans; (2) decline to extend new loans, convert a still significant portion of their debt to equity, and forgive the remainder; or (3) decline to extend new loans or convert debt to equity, and exercise their appraisal rights on small part of their debt. The US asserts that these three options do not offer much

[85] *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).
[86] *Government of Korea Verification Report*, at 4 (Exhibit US-12).
[87] Exhibit US-51.

of a real choice, since each of the three was structured to maximize benefits to Hynix and to minimize the creditors' abilities to exercise basic creditor rights. The US argues that even the third option was highly favourable to Hynix because it required creditors to forgive their debt on very unfavourable terms. Specifically, creditors that exercised the third option could only exercise their appraisal rights for 25 per cent of the unsecured debt; they had to forgive the rest, *i.e.*, they had to forgive 75 per cent of that debt. The US asserts in addition that the few banks that selected the third option not only had to write-off 75 per cent of Hynix's debt, but also did not even actually receive the proceeds from having exercised their appraisal rights on the remaining 25 per cent. According to the US, this is because they were forced under the terms of the Creditors' Council agreement to convert this portion into zero coupon (i.e., interest free) debentures with a five-year maturity, whereby option 3 banks will not actually receive what they were able to salvage from their loans to Hynix until 2006, and will not earn any interest on the money that is owed to them by Hynix.

Evaluation by the Panel

Prime Minister's Decree No. 408

7.75 The DOC's findings regarding the Prime Minister's Decree No. 408 are set forth in the *Preliminary Determination*. In this document, the DOC determined that:

> the *de jure* measures contain sufficient ambiguities which would allow the GOK to become involved in the banking system. For instance, the *Prime Minister's Decree* at Article 5 states that the financial supervisory agencies can request cooperation from financial institutions for the purpose of the stability of the financial market, or to attain the goals of financial policies. As noted above, the financial system in the ROK has been going through a crisis that could be the type of situation in which this exception would be applied. A further exception that would allow GOK influence over the banks is included in Article 6 of the *Prime Minister's Decree*. Article 6 states that the Minister of MOFE and KDIC shall, *unless they exercise their rights as shareholders of any of the Financial Institutions*, procure that the Financial institution, which was invested by the {GOK} or KDIC, can be operated independently under the direction of the Board of Directors thereof" (emphasis added). As noted above, because the GOK is part-owner in many commercial banks, an exercise of its shareholder rights could allow the GOK an opportunity to become involved in the operations of the banks.[88]

7.76 The DOC therefore focused on Articles 5 and 6 of Prime Minister Decree No. 408. We are not persuaded by the DOC's analysis of Article 5 of Prime Minister Decree No. 408. The DOC determines that Article 5 allows financial supervisory agencies to "request cooperation" from financial institutions. We do not consider that an objective and impartial investigating authority could properly determine that a request for co-operation amounts to evidence of affirmative acts of delegation or command. Requesting co-operation in a matter is not the same as delegating a task, or commanding someone to do something. In addition, even if Article 5 did enable the GOK to entrust or direct private bodies, the DOC has not provided any evidence that any such authority under Article 5 was actually exercised in this way. Instead, the DOC merely asserts that a financial crisis "could be the type of situation in which [Article 5] would be applied." We do not consider that an objective and impartial investigating authority could treat such a conditional statement as evidence that affirmative acts of delegation or command were actually taken by the GOK pursuant to Article 5 of the CRPA.

7.77 Regarding Article 6 of Prime Minister Decree No. 408, the DOC's analysis merely establishes the legal authority of the GOK to intervene in the activities of government-owned banks through the

[88] *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).

exercise of its shareholder rights. We do not consider that an objective and impartial investigating authority could properly have determined that this amounts to evidence of affirmative acts of delegation or command. The exercise of shareholder rights does not necessarily entail affirmative acts of delegation or command. In our view, a finding of entrustment or direction must be based on affirmative acts going beyond the simple exercise of shareholder rights. Otherwise, the acts of any companies with government shareholdings could be attributed to Members under Article 1.1(a)(1)(iv) of the *SCM Agreement.*

Public Funds Oversight Act

7.78 The DOC found that the use of MOUs allowed the GOK to "set financial soundness, profitability, and asset quality targets"[89], and review implementation of such targets.[90] Although the DOC may have been correct in determining that MOUs therefore allowed the GOK to become "directly involved in the fiscal operations of the bank", the DOC failed to establish that such involvement would entail anything other than ensuring compliance with the abovementioned targets. Neither the DOC's evaluation (in the *Preliminary Determination*), nor the *GOK Verification Report* (referred to by the US), suggest that GOK intervention under the MOUs would have resulted, or in fact did result, in government entrustment or direction of banks to invest in (what the US considers to be) an unsound company. We fail to see how an objective and impartial investigating authority could properly have determined that there was evidence of government entrustment or direction on the basis of the limited DOC analysis of the Public Funds Oversight Act set forth in the *Preliminary Determination.*

CRPA

7.79 The DOC found that:

> [d]ecisions made by the October Creditors' Council were subject to the newly enacted CRPA. Under this Act, banks holding 75 per cent of a company's debt may set the financial restructuring terms for all of a company's creditors. Hynix' government-owned and controlled creditors accounted for a substantial majority of [Hynix's] outstanding debt at that time, an amount sufficient to set the terms for all banks ....[91]

7.80 We understand the DOC to have found that the GOK was able to control the participation of Group C creditors in the October 2001 restructuring because, pursuant to the CRPA, Group C creditors were constrained by decisions of the Creditors' Council, which in turn was controlled by Group A and B creditors (owned or controlled by the GOK). The parties' arguments regarding the DOC's finding give rise to two issues. First, whether the DOC could properly have found that the Creditors' Council was controlled by Group A and B creditors. Second, whether the DOC could properly have found that Group C creditors were constrained by decisions of the Creditors' Council.

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[89] *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).

[90] During the second substantive meeting with the parties, a dispute arose as to whether a copy of an MOU submitted by Korea regarding MOUs was admissible. The US asserted that it was not, because such MOU was not on the DOC's record, even though the DOC had requested a copies of MOUs. Korea disputed this, arguing that para. 83 of the US First Written Submission shows that the DOC reviewed such documents. We do not consider that para. 83 of the US First Written Submission shows that the DOC reviewed an MOU during its investigation. In particular, the GOK Verification Report (Exhibit US-12) referred to by the US does not indicate that this was the case, since the discussion appears to have concerned MOUs in the abstract. Accordingly, we do not have regard to the MOU submitted by Korea when reviewing this part of the DOC's determination.

[91] *Decision Memorandum*, page 54 (Exhibit GOK-5).

Control of the Creditors' Council by Group A and B Creditors?

7.81 The clear implication of the DOC's finding was that Group A and B creditors held at least 75 per cent of the voting rights. Korea queries whether the Group A and B creditors held 75 per cent of the votes. Korea refers to Exhibit US-37, which contains a document prepared by the US Embassy in Seoul, at the request of the DOC. That document indicates that those "institutions where [GOK] is the first shareholder" held 63.3 per cent of the voting rights. Furthermore, in Figure US-4, the US reported that the share of the Creditors Council vote held by Group A and B creditors at the time of the October 2001 restructuring was "above 65 [per cent]."[92] It would appear, therefore, that the Group A and B creditors did not hold at least 75 per cent of the votes. This would mean that there is not a proper factual basis for the DOC's finding that the Group A and B creditors had sufficient votes to "set the terms for all banks."[93]

Constraints on Group C Creditors?

7.82 Second, even if the Group A and B creditors did hold 75 per cent of the votes, we are not persuaded that an objective and impartial investigating authority could properly have found that this would have allowed them to "set the terms for all banks."[94] We note that creditors were presented with three options[95], and that four creditors, including both Group B and C entities, exercised their appraisal rights pursuant to the third option established by the Creditors Council. In this regard, the DOC found 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 large government-owned and controlled creditors."[96] Although the terms of the payment and buyout price under option 3 were crafted by the Creditors' Council, the DOC overlooked the fact that, under the terms of the CRPA, option 3 creditors exercising their appraisal rights were entitled to decline those terms of payment and buyout price proposed by the Creditors' Council if those conditions were deemed unreasonable or otherwise unacceptable. In such circumstances, Article 29.5 of the CRPA[97] provides that creditors exercising appraisal rights may refer the matter for mediation, whereby those creditors and the Creditors' Council appoint an accounting firm to calculate a mutually agreeable buyout price. More importantly, the DOC overlooked record evidence indicating 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.

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[92] The shares of Group A and B creditors at the time of the May 2001 restructuring was reported as "above 75%." The share was reported as "above 70%" at the time of the syndicated loan and KDB Fast Track Programme. This would suggest that the US reported data in 5 per cent increments, such that the reference to "above 65" per cent means something between 65 and 70 per cent, but in any event less than 75 per cent.

[93] *Decision Memorandum*, page 54 (Exhibit GOK-5). Although the Group A and B creditors appear to have had sufficient votes (i.e., more than 25 per cent) to block decisions within the Creditors Council, a blocking minority does not have the same effect as a deciding majority.

[94] *Decision Memorandum*, page 54 (Exhibit GOK-5).

[95] The three options were: (1) extend new loans, convert some debt to equity, and extend maturities and lower interest rates on the remainder of outstanding loans; (2) decline to extend new loans, convert a portion of their debt to equity, and forgive the remainder; or (3) decline to extend new loans or convert debt to equity, and exercise their appraisal rights on part of their debt.

[96] *Decision Memorandum*, page 61 (Exhibit GOK-5).

[97] Article 29(5) of the CRPA provides:

"[w]here the consultation under paragraph (4) is not attained, the mediation committee under Article 31(1) 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 by evaluating the value of the relevant enterprise with insolvency signs and the possibility for implementing the agreement, as well as the situation of funds of purchase institutions."

7.83 The US asserts that neither Hynix nor the GOK informed the DOC that option 3 creditors could, or indeed had, sought mediation under the CRPA, despite a specific request for detailed information on option 3. The US asserts that, in the underlying investigation, the GOK stated in its questionnaire response that option 3 banks received a zero coupon debenture based on the value of their secured debt and the liquidation value of their unsecured debt. The US submits that the Panel is precluded from considering the fact that three of the four option 3 banks sought mediation, and from reviewing the terms offered under that mediation. The US considers that this is new information that was not on the record before the DOC.

7.84 We agree with the US that our review of the DOC's determination should be confined to facts actually recorded on the DOC's record of investigation. Although there is no evidence to suggest that the DOC record contained information regarding the terms ultimately agreed under the mediation procedure, the record clearly did contain the CRPA, and the possibility of mediation is clearly set forth in Article 29(5) of that statute. With Article 29(5) on the record, at the very least we would expect an impartial and objective investigating authority to take that provision into account, and explain how, notwithstanding the possibility of Article 29(5) mediation, "controlling" creditors were still able to "set the terms for all banks."

7.85 In addition to Article 29(5) of the CRPA indicating the possibility of mediation, there was also evidence on the DOC's record indicating that the mediation provisions had actually been invoked by three creditors in respect of the October 2001 restructuring. In particular, the last paragraph of page 40 of the Notes to Financial Statements attached to Hynix's 2001 Audit Report, which was on the DOC record (and submitted to the Panel by the US in Exhibit US-125), provides:

> According to [CRPA], any creditor financial institutions 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 [won] 80,100 million of other payables as current liabilities.

7.86 In our view, this statement should have put the DOC on notice that a request for mediation had been filed, and that the terms offered to the three option 3 creditors might be changed. Again, this evidence is inconsistent with the DOC's determination that creditors "controlling" the Creditors' Council were able to "set the terms for all banks."

7.87 Although the GOK questionnaire response should perhaps have made a reference to the request for mediation by three of the four option 3 creditors, we consider that there was in any event sufficient information on the record to bring into question the DOC's determination that creditors "controlling" the Creditors' Council were able to "set the terms for all banks." In these circumstances, we do not consider that an objective and impartial investigating authority could properly have found, on the basis of the CRPA, 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 large government-owned and controlled creditors."[98]

[98] US First Written Submission, para. 88. Indeed, we note that such a conclusion is contradicted by other record cited by the DOC in its *Decision Memorandum* (Exhibit GOK-5). Thus, at page 55 of the *Decision Memorandum*, the DOC refers to expert testimony in the following terms: "At one point, however, a number of commercial banks, including Kookmin, Hana, and Shinhan, were no longer willing to provide fresh capital to Hynix and decided to take losses on their exposure instead. The expert stated that had this happened before the financial crisis, the GOK would have forced all of Hynix's creditors to provide fresh capital to the company. In this case, however, the GOK influenced only government-owned banks." According to that expert, therefore,

7.88 At para. 71 of its replies to the Second Set of Panel Questions, the US seeks to support its arguments regarding the CRPA by referring to an article published in the Dong-A Daily. However, the US has not referred to any part of either the *Preliminary Determination*, the *Final Determination* or the *Decision Memorandum* where the DOC addresses this article. Nor have we been able to find any reference to this provision in these documents. Accordingly, we consider that the US argument in respect of this article constitutes *ex post* rationalization which, in accordance with our standard of review, we decline to consider.

7.89 In addition, the US seeks to rely on two alleged statements by GOK officials regarding the purpose of the CRPA.[99] One statement was allegedly made by GOK officials at verification. The other statement was allegedly reported in the Korea Times. We do not consider that statements regarding the purpose of the CRPA should take precedence over our interpretation of the provisions thereof. Thus, even if statements were made to the effect that the purpose of the CRPA was to prevent banks from being able to avoid participating in restructurings, this does not change the fact that Article 29(5) of the CRPA provides a meditation mechanism that undermines the ability of dominant creditors in the Creditors' Council to dictate the terms on which other creditors participate in the restructuring. In this regard, we agree with the statement by the panel in *Brazil – Aircraft (Article 21.5 – Canada II)*:

> In our view, a conclusion that PROEX III *could* be applied in a manner which confers a benefit, or even that it was intended to be and *most likely would* be applied in such a manner, would not be a sufficient basis to conclude that PROEX III as such is mandatory legislation susceptible of inconsistency with Article 3.1(a) of the *SCM Agreement*.[100]

7.90 The US also argues that, pursuant to Article 14 of the CRPA, the FSS prevented creditors from placing Hynix into liquidation. However, we can find no reference to Article 14 of the CRPA in any of the DOC documents under review in these proceedings. For this reason, we shall not take Article 14 of the CRPA into account in making our findings.

7.91 In light of the above considerations, we find that the DOC could not properly have found that Group A and B creditors controlled the Creditors' Council at the time of the October 2001 restructuring. Nor could the DOC properly have found that Group C creditors were constrained by the decisions of the Creditors' Council.

The GOK's role as regulator

Arguments of the Parties

7.92 The parties have submitted arguments regarding two regulatory interventions by the GOK. The first concerns events surrounding certain meetings of the Economic Ministers in late 2000 and early 2001. The second concerns the allegedly selective enforcement of bankruptcy principles by the FSC in respect of the October 2001 restructuring. Korea submits that the DOC read too much into these regulatory interventions, whereas the US refers to them as evidence of government entrustment or direction.

Economic Ministers' meetings

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certain creditors were able to act independently within the framework of the CRPA. At a minimum, the DOC should have sought to reconcile this expert testimony with its conclusions regarding the CRPA.

[99] See US reply to Question 2 after the second substantive meeting, para. 68.

[100] Panel Report in *Brazil – Aircraft (Article 21.5 – Canada II)*, para. 5.43

7.93 The DOC found that meetings of the Economic Ministers resulted in communications to KEIC and KEB, with an instruction that the results should be "carried out perfectly."[101] According to the DOC, "[t]hese results included a 'resolution of special approval' by the FSC to increase certain banks' ceiling limits for single borrowers, as requested by the KEB on behalf of Hynix' creditors."[102] The DOC found that the FSC subsequently provided loan limit waivers. One loan limit waiver was for KDB, KEB and KFB to participate in the December 2000 syndicated loan. Another was a blanket waiver provided for any bank that participated in the KDB Fast track Programme. A third waiver was for Woori Bank relating to its D/A financing to Hynix. The DOC concluded that, through these meetings, the GOK "took early and affirmative steps to secure Hynix' survival."[103] The DOC also concluded that "[t]hese meetings signalled the GOK's determination that Hynix would not be allowed to fail."[104]

7.94 Korea submits that the DOC read too much into the Ministers' meetings and resulting actions in reaching the conclusion that they reflected the beginning of a ten-month conspiracy by the GOK to restructure Hynix. Korea asserts that, as the DOC acknowledges, the actions taken resulted in communications only to: (1) KEIC to resume export insurance (*i.e.*, make available export insurance) for Hynix; and (2) the KEB, that it proceed with an application to the Financial Supervisory Commission for a waiver of the applicable lending limits on KEB with respect to Hynix.[105]

7.95 According to Korea, the communication to KEIC constituted a command or delegation by one government entity (the Economic Ministers) to another government entity (KEIC). As such, Korea asserts that it cannot constitute evidence of entrustment or direction, which concerns government action vis-à-vis private bodies. The Ministers simply resolved a regulatory issue about the permissibility of insuring certain kinds of transactions.

7.96 With regard to the communication to KEB, Korea asserts that the guidance offered by the GOK was for KEB to seek a lending limit waiver in respect of KEB's desire to participate in the December 2000 syndicated loan. Korea asserts that the communication did not command KEB or any other Hynix creditor to provide financing to Hynix. According to Korea, the syndicated loan had already been fully contemplated by KEB and other Hynix creditors, with Citibank organizing the effort from early November 2000, well before the date of the Economic Ministers' documents. Korea submits that, at most, DOC has identified evidence of KDB, KEB and KFB being allowed to do something. There is no evidence that these banks were being forced by the GOK to extend new credit to Hynix.

7.97 The US asserts that in a November 2000 meeting, the Economic Ministers concurred on a "resolution of special approval" by the FSC to increase certain banks' ceiling limits for single borrowers, as requested by the KEB on behalf of Hynix's creditors.[106] The US argues that the FSC approved three credit limit increases for Hynix' creditors "in order to allow them to participate in the Hynix restructuring process."[107] The US argues that the first waiver was for the KDB, KEB and KFB, thereby ensuring the existence of enough participants to raise the 800 billion won December 2000 syndicated loan. The US argues that the second was a blanket waiver provided for any bank that participated in the KDB Fast Track Programme. The US asserts that the FSC granted this blanket waiver without any regard to the commercial considerations pertaining to the individual banks. The

[101] *Decision Memorandum* at 50 (Exhibit GOK-5)
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at 50-51.
[106] *Results of Discussions at the Economic Ministers' Meeting*, letter from Ministry of Finance and Economy (28 November 2000) (translated version) (Exhibit US-28).
[107] *Decision Memorandum* at 50-51 (Exhibit GOK-5); *Government of Korea Verification Report* at 16 (Exhibit US-12).

US asserts that the third waiver was a March 2001 waiver for Woori Bank relating to its D/A financing to Hynix.

7.98 The US further asserts that, in a November 2000 letter to the Presidents of the KEIC and the KEB, the Minister of Finance relayed the "results on alleviating the cash crunch of Hyundai Electronics" reached at a 28 November 2000 meeting of the Economic Ministers.[108] According to the US, the measures, which were "initiated by" the Financial Supervisory Service (FSS), included an instruction to seek a waiver of the ceiling on loans extended to a single borrower (which otherwise would prevent certain lenders from providing new loans to Hynix) and a command to the KEIC to resume the insurance for the balance of the non-negotiated D/A transactions[109], valued at $550 million. The US asserts that the letter instructs the Presidents of the KEIC and KEB to make sure these results "are carried out perfectly."[110] The US submits that these events were reported in the Korea Economic Daily.

Evaluation by the Panel

7.99 As a preliminary matter, we note that the instruction to the KEIC to resume export insurance for Hynix, and the instruction to the FSC to grant loan limit waivers, were addressed to government entities (i.e., the KEIC and FSC). These instructions, therefore, could not properly be relied on as evidence of government entrustment or direction of private bodies.

7.100 Regarding alleged instructions to private bodies, we note the US argument that the FSC's November 2000 letter "included an instruction to seek a waiver of the ceiling on loans extended to a single borrower",[111] namely the KEB. We understand the US to infer that KEB was thereby instructed to seek a loan limit waiver. Upon examination of that letter[112], we note that it refers to the pursuit of "a resolution of special approval by the [FSC] upon the request of the [KEB] representing creditor financial institutions." The DOC *Decision Memorandum*[113] also refers to such special resolution being "requested by" the KEB. For this reason, we do not consider that the US is correct to argue that the letter included an "instruction" to seek a loan limit waiver. If there is no factual basis for the US argument that the KEB was instructed to seek a loan limit waiver, we fail to see how the facts could support a determination that the KEB was entrusted or directed to not only seek a loan limit waiver, but to actually participate in the syndicated loan. We do not consider that the DOC determination contains an adequate explanation of how an instruction to a government entity to respond to a request

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

[109] The US asserts that D/As or "documents against acceptance" are trade bills promising future payments for delivered goods that exporters frequently negotiate with banks to obtain financing for the amount of the D/A in advance of the scheduled maturity of the trade bill. According to the US, the D/As that Hynix negotiated with its creditor banks related to export transactions between Hynix and its foreign subsidiaries. The US asserts that, because Hynix was in a state of technical insolvency, the KEIC had suspended guarantees of D/A loans to Hynix. *See Direct Intervention by the Government in Supporting Hynix*, The Korea Economic Daily (28 August 2001) (Exhibit US-29); *Results of Discussions at the Economic Ministers' Meeting*, letter from Ministry of Finance and Economy (28 November 2000) (translated version) (Exhibit US-28).

[110] *Results of Discussions at the Economic Ministers' Meeting*, letter from Ministry of Finance and Economy (28 November 2000) (translated version) (Exhibit US-28). In a subsequent letter from the Ministry of Commerce, Industry, and Energy ("MOCIE") to the KEIC, MOCIE informed the KEIC that Economic Ministers had decided to provide temporary support of export insurance for the D/A transactions between the main office and branch offices of Hyundai Electronics and requested that the KEIC "take actions accordingly." *Regarding the provision of Export Insurance for the Hyundai Electronics' D/A transaction*, letter from Ministry of Commerce, Industry and Energy (November 30, 2000) (translated version) (Exhibit US-30).

[111] US First Written Submission, para. 48.

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

[113] *Decision Memorandum* at 50 (Exhibit GOK-5).

for a loan limit waiver from the KEB could properly be treated as evidence of government entrustment or direction of the KEB to participate in the syndicated loan. The US submits that commercial principles were not applied by the FSC in granting the loan limit waivers. While this may have been the case, this concerns relations between the GOK and FSC, and could not properly be treated as evidence that private bodies were somehow entrusted or directed to do something.

7.101 Even though the US 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 DOC could properly have inferred from this that creditors were entrusted or directed to participate in the syndicated loan. In order to properly draw such a conclusion, we consider that the DOC would have had to demonstrate that the KEB was entrusted or directed to request a loan limit waiver in respect of a loan that it would otherwise not wish to participate in. The DOC failed to show this. The US 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.

7.102 The US has also sought to rely on reporting of the events surrounding the Economic Ministers' meeting by an article in the Korea Economic Daily. We have not been able to find, and the US has not pointed us to, any reference to this article in either the *Preliminary* or *Final Determinations*, or the *Decision Memorandum*. Thus, even though that article may have been on the DOC's record, we consider that US reliance on that article in these proceedings constitutes *ex post* rationalization, which we will not consider.

7.103 Thus, even if the US is correct to argue the loan limit waivers demonstrate that the GOK "took early and affirmative steps to secure Hynix's survival", there was no evidence that such steps included instructing creditors to seek loan limit waivers or participate in the syndicated loan. Furthermore, while the DOC found that the Economics Ministers' meetings "signalled the GOK's determination that Hynix would not be allowed to fail"[114], we recall the US assertion in these proceedings that "[t]he DOC never found that signalling in and of itself amounted to entrustment or direction."[115] Thus, even if the US argument regarding signalling was correct, that alone was not sufficient for the DOC to properly treat the circumstances surrounding the Economic Ministers' meetings as evidence of government entrustment or direction.

7.104 In light of the above, we consider that the DOC failed to properly demonstrate that the circumstances surrounding the Economic Ministers' meetings constituted evidence of government entrustment or direction of private creditors to participate in the restructuring of Hynix.

Allegedly selective enforcement of bankruptcy principles

7.105 The parties also made arguments regarding Article 14 of the CRPA, and the fact that the FSS requested creditors to refrain from exercising their liquidation rights. We recall[116] that the US has not referred to any part of either the *Final Determination* or the *Decision Memorandum* where the DOC addresses the existence or application of Article 14 of the CRPA, and that we therefore declined to make findings in respect of this issue.

(iii) GOK Coercion

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[114] *Id.*
[115] US First Written Submission, Footnote 86.
[116] See para. 7.90 *supra*.

7.106 Korea challenges the DOC's reference to alleged GOK threats against KFB, KorAm and Hana Bank. Korea also challenges the US allegation that GOK disciplined credit rating agencies, and mandated attendance at creditor meetings.

Threats against creditors

KFB

7.107 The DOC found that "[t]here were also numerous statements on the record relating to the GOK's pressure on KFB [] to participate in the Fast Track programme."[117]

7.108 Korea raises questions regarding the reliability of the press accounts relied upon by the DOC to make this finding. In particular, Korea submits that ultimately KFB declined to participate in the Fast Track Programme, and in fact did not participate in the Fast Track Programme, and exercised its appraisal rights in the October restructuring. Korea asserts that the behaviour of KFB undermines the credibility of the US allegations. According to Korea, KFB's actions are hardly consistent with the US theory of coercion from the Government of Korea.

7.109 The US asserts that the DOC considered "numerous statements on the record relating to the GOK's pressure on KFB (which was, at that time, 51 per cent owned by Newbridge Capital, a US company) to participate in the Fast Track Programme."[118] The US argues that on 4 January 2001, KFB had rejected a government call for participation in the Hynix bailout, reflecting its assessment that increased credit to Hynix was not commercially warranted. The US asserts that Wilfred Horie, Chief Executive Officer of KFB, observed at the time that KFB's "opposition is the result of sticking to strict principles for profit making. All told, [the KFB directors] said the purchase of the bonds of insolvent firms would push the bank into further managerial hardship."[119] The US asserts that Horie viewed the GOK's request for participation in the Hynix restructuring and recapitalization measures as coercive, complaining that "[i]t is nonsense for the government to force the banks to undertake the corporate bond. Such issue should be left to the banks' discretion."[120] According to the US, the FSS bluntly responded that, "[a]t the moment, we will ask [KFB] to undertake Hyundai's bond one more time. But if the bank rejects again, leading to the collapse of related companies, we will hold the bank responsible."[121] The US asserted that Yong-hwa Chong, Information Director at the FSS, openly threatened that "[s]evere sanctions will be imposed by adding the banks' willingness to support public policy as a category to the evaluation of bank management."[122]

7.110 The US submits that a *BusinessWeek* article indicated that "[t]he next day [after KFB rejected the government demand], a government agency pulled, then redeposited, $77 million from a Korea First account."[123] According to the US, this followed at least ten angry phone calls between the FSS and the KFB.[124] The US argues that *BusinessWeek* reported that: "Word spread that all government

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[117] *Decision Memorandum*, page 59 (Exhibit GOK-5).
[118] *Decision Memorandum* at 59-60 (Exhibit GOK-5).
[119] *KFB Changing Fast Under Profit-First Management*, KOREA TIMES (29 January 2001) (Exhibit US-56).
[120] *Government's Compulsory Allotment of Corporate Bond Causes a Stir*, KOREA ECONOMIC DAILY (6 January 2001) (Exhibit US-57).
[121] *Id*.
[122] *FSS-Korea First Bank Collide Head-on Over Corporate Debentures*, THE KOREA DAILY NEWS (6 January 2001) (Exhibit US-58).
[123] *This Banker Breaks Rules: Wilfred Horie Riles the Establishment*, BUSINESSWEEK ONLINE (9 April 2001) (Exhibit US-59).
[124] *American Boss Dispenses With Protocol at South Korean Bank*, WALL STREET JOURNAL (29 January 2001) (Exhibit US-14).

agencies would cut ties with Korea First."[125] The US submits that, according to Bloomberg, the government even threatened to demand that one of KFB's main corporate customers (the SK Group) cease doing business with the bank.[126]

7.111 According to the US, the press reported that Wilfred Horie later confirmed that "[t]here was someone [at the FSS] who was very angry with the bank's decision. And it's true that someone within the government was talking to our clients."[127] Horie further elaborated, explaining that "[a]t some point he [the FSS official] can make our life very miserable. Their comment directly to me was: 'We have no desire nor do we have the right to insist that you do things against your will, but this is Korea and you should cooperate as much as you can'."[128]

7.112 The US asserts that, in its *Final Determination*, the DOC noted there were multiple press reports on the record indicating that the KFB had resisted the purchase of the Hynix bonds because it considered Hynix to be a high credit risk. For example, the US asserts that the DOC cited to a 29 January 2001 *Wall Street Journal* article, stating that Korean banks have "been more accustomed to following government orders than making sound credit decisions."[129]

7.113 The US further asserts that the DOC also observed that the article explained that when KFB refused to participate in the government programme at the request of the FSS, the FSS applied pressure to KFB and "strongly urged" KFB to participate in the plan lest it risk losing some of its clients.[130] The US argues that the article was quite specific, identifying the FSS official as Lee Sung No, a director at the FSS Credit-Supervision Department, and the KFB official as Lee Soo Ho. According to the US, the DOC also noted that the article quoted an executive at a government-owned bank as stating that the nationalized banks were "green with envy," as "nobody wants to increase their exposure to these corporations that still have a long way to get their acts together." The US notes that the article stated that the FSS asked creditor banks to participate in this programme, and only KFB refused.[131]

7.114 The US asserts that, notwithstanding the KFB's initial resistance, it ultimately surrendered to the GOK's pressure by agreeing to participate in the bailout. The US argues that Horie committed to share about $38 million among $1.5 billion funding for Hynix's D/As after a personal meeting with a high-level FSS official. The US notes that, in fact, KFB ultimately participated in a number of the Hynix restructuring and recapitalization measures. According to the US, such capitulation by a foreign majority-owned bank simply underscores the even more precarious position of Korean-owned banks when it came to GOK pressure.

7.115 The US submits that not only did the GOK threaten to impose sanctions on KFB, it also, through the FSC and FSS, threatened to terminate banks' relationships with either the government or their existing customers. According to the US, the GOK threatened KFB with the loss of its customers, interceding directly with them, and raised the possibility of losing tens of millions of dollars in government business unless the bank complied with government demands. The US asserts that the DOC specifically noted a 29 January 2001 *Wall Street Journal* article stating that when KFB

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[125] *This Banker Breaks Rules: Wilfred Horie Riles the Establishment*, BUSINESSWEEK ONLINE (9 April 2001) (Exhibit US-59.

[126] *Korea First Bank Shuts Government 'Wallet' Under New Management*," BLOOMBERG (31 January 2001), at 2 (also issued as a news release by KFB on 5 February 2001) (Exhibit US-60).

[127] *Cooperate or be Damned*, EUROMONEY (February 2001) (Exhibit US-61).

[128] *Korea First Bank Shuts Government 'Wallet' Under New Management*, KFB NEWS RELEASE (5 February 2001) (Exhibit US-60).

[129] *American Boss Dispenses With Protocol at South Korean Bank*, WALL STREET JOURNAL (29 January 2001) (Exhibit US-14).

[130] *Id*.

[131] *Id*.

refused to participate in the GOK programme at the request of the FSS, the FSS applied pressure to KFB and "strongly urged" KFB to participate in the plan lest it risk losing some of its clients.[132] According to the US, other Hynix creditors facing similar pressure from the GOK are likely to have capitulated, as did KFB.

7.116 While the US has cited from a number of articles on the DOC record, we note that the DOC only made express reference to a limited number of these articles.[133] We shall therefore focus on the evidence that the DOC actually referred to in its *Preliminary* and *Final Determinations*, and *Decision Memorandum*.

7.117 We note that the DOC referred to a newspaper article in which Mr. Lee, reportedly an executive vice president and chief credit officer at the KFB, stated that the FSS had expressed "extreme displeasure" towards the KFB's failure to participate in the Fast Track Programme.[134] That same article quoted an FSS official as saying that he had "strongly urged" the KFB to participate, and also warned the KFB that "by not complying, it may be putting itself at a risk of losing its clients."[135] There is nothing on the record to suggest that the FSS disputed the accuracy of these quotes. Nor does Korea challenge their accuracy. In our view, these quotes, and in particular the implied threat that there would be an adverse impact on KFB's relationship with its clients if it did not cede to the wishes of the GOK, are sufficient for an objective and impartial investigating authority to properly find government entrustment or direction in respect of KFB.[136]

KorAm

7.118 The DOC stated that a June 2001 Dow Jones article "reported that KorAm Bank, a bank without substantial GOK ownership, reversed its decision not to participate in the Hynix June 2001 convertible bond offering that was part of the May restructuring programme after the FSS warned of a possible sanction against KorAm if it did not participate."[137]

7.119 Korea submits that the press reports of alleged coercion of KorAm relied upon by the DOC are inaccurate, and denied at the time by KorAm officials. Korea asserts that the mistaken press reports and the KorAm denials were provided to the DOC, but were brushed aside.

7.120 The US submits that the DOC found that the GOK made threats against KorAm Bank when the bank refused to participate in the May 2001 restructuring. The US asserts that the bank had refused, contending that Hynix had failed to deliver a written pledge to use its best effort to reduce its debt. According to the US, the FSS severely rebuked KorAm, with one FSS official stating: "If KorAm does not honour the agreement, we will not forgive the bank."[138] The US asserts that the same FSS official further threatened stern measures against the bank, such as disapproving new financial instruments and subjecting the bank to a tighter audit. According to the US, another FSS

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[132] *American Boss Dispenses With Protocol at South Korean Bank*, Wall Street Journal (29 January 2001) (Exhibit US-14).

[133] For example, the DOC did not make express reference to the Euromoney articles referred to at note 196 to the US First Written Submission.

[134] *Decision Memorandum*, page 60 (Exhibit GOK-5).

[135] See Exhibit US-14.

[136] Korea notes that the KFB ultimately did not participate in the KDB Fast Track Programme, and that it exercised appraisal rights under option 3 in the October 2001 restructuring. Our analysis at this stage is concerned first and foremost with the acts of the GOK, rather than private entities' reaction to those acts. The issue of the evidentiary value of the coercion of KFB in respect of the alleged entrustment or direction of other private creditors is addressed in our concluding remarks at paras 7.175- 7.177 *infra*.

[137] *Decision Memorandum*, page 59 (Exhibit GOK-5).

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

official predicted that the bank would extend credit to Hynix even without the Hynix memorandum pledging to reduce its debt: "We don't think KorAm will break the agreement. In particular, the bank yesterday expressed its intention to extend financial support to the semiconductor maker even if Hynix fails to submit the memorandum."[139] The US submits that, as a result of the threats, KorAm Bank capitulated and reversed its decision in a single day.

7.121 While the US has referred to a number of quotes in newspaper articles regarding the alleged coercion of KorAm, only one of those articles was referred to by the DOC.[140] That was a June 2001 article published by Dow Jones. According to the DOC, that article "reported that KorAm Bank, a bank without substantial GOK ownership, reversed its decision not to participate in the Hynix June 2001 convertible bond offering that was part of the May restructuring programme after the FSS warned of a possible sanction against KorAm if it did not participate."[141]

7.122 Considered in isolation, such a report might well enable an objective and impartial investigating authority to properly find government entrustment or direction. In the instant case, however, we note that the DOC record contained an alternative explanation of KorAm's conduct, and evidence from a KorAm official that KorAm had not refused to participate in the convertible bond offering. In particular, the record contained a submission by Hynix[142] to the effect that:

> the issue was simply whether Hynix had provided KorAm with the necessary legal documentation to complete the convertible bond transaction. At one point, Hynix apparently had not provided the necessary paperwork and KorAm at that point delayed its purchase of its portion of the convertible bonds that it had committed to buy. But once Hynix provided the necessary legal paperwork, KorAm followed through on its promise to buy a portion of the convertible bonds. In fact, the *Korea Times* article that seems to have been the original source for all the reports *(sic)* that a KorAm official specifically denied the allegation that they refused to buy the convertible bonds, and made clear the dispute was basically about the legal paperwork requirement.[137] (emphasis in original)

[137] Kim, KorAm Reluctantly Continues Financial Support for Hynix, *Korea Times*, 21 June 2001 (Petition, at tab 52).

7.123 We note that the *Korea Times* article[143] referred to in the above extract stated *inter alia*:

> "We called on the chipmaker to turn in the memorandum in return for underwriting the CBs," one KorAm official explained. "But Hynix failed to produce it."
>
> Denying allegations that the bank refused to provide financial support to Hynix, he said, "We will not break the agreement reached among creditors."

7.124 Despite the existence of such evidence on the DOC record, the DOC failed to address, or even mention, this alternative explanation of Kookmin's conduct. Nor did it refer to the denial by a KorAm official referred to in the abovementioned *Korea Times* article, which was also on the DOC record.[144] In our view, an objective and impartial investigating authority would have acknowledged the

[139] *Id*.
[140] We therefore shall not have regard to the other articles relied on by the US.
[141] *Decision Memorandum*, page 59 (Exhibit GOK-5).
[142] See Exhibit GOK-49.
[143] See Exhibit US-64.
[144] This is evidenced by the reference to "Petitioner, at tab 52" in the abovementioned Hynix submission.

existence of such conflicting evidence, and sought to explain how nevertheless its finding of government entrustment or direction was warranted. The DOC failed to do this.

Hana Bank

7.125 Korea challenges the DOC's reliance on a press report which, according to the DOC, "notes that the FSS threatened to fine Hana Bank if it failed to provide emergency liquidity to [Hyundai Petrochemical]."[145] Korea submits that the allegations about Hana Bank's dealings with Hyundai Petrochemical have nothing to do with Hynix, or any specific transactions involving Hynix.

7.126 The US asserts that the DOC noted an April 2001 *Korea Herald* report that the FSS threatened to fine Hana Bank if it failed to provide emergency liquidity to Hyundai Petrochemical, which was a part of the Hyundai Group that was going through the corporate workout process. According to the US, while this report discussed Hyundai Petrochemical, the GOK's policies during this investigation period were aimed at the corporate and financial restructuring of the entire Hyundai Group.

7.127 Concerning the relevance of alleged coercion of Hana in respect of a company other than Hynix, we note that the DOC relied on the fact that "the GOK's policies during this period were aimed at the corporate and financial restructuring of the entire Hyundai Group, including Hynix's predecessor, HEI, which was part of that group."[146] Irrespective of the alleged scope of GOK's policies, however, we note that the financial contributions under review by the DOC related exclusively to Hynix. Although we consider that evidence of entrustment or direction in respect of one financial contribution concerning Hynix might also serve as evidence of entrustment or direction in respect of another financial contribution concerning Hynix, alleged entrustment or direction of Hana Bank in respect of its dealings with companies other than Hynix would generally be of less evidentiary value in the context of an investigation of Hana Bank's dealings with Hynix.

7.128 The value of such evidence becomes further diminished when one considers the form that the evidence took. In this regard, the *Korea Herald* report relied on by the US does not appear to have been on the DOC's record. We make this inference from the fact that, in these proceedings, the US merely submitted a paper in which the author has inserted a footnote referring to the relevant *Korea Herald* report. The US has not submitted the *Korea Herald* report itself. The relevant footnote refers to "a report that the [FSS] had threatened to fine Hana Bank KRW 6 billion if it fails to provide a promised KRW 11.9 billion of emergency liquidity to Hyundai petrochemical by 19 April 2001 (*Korea Herald*, 21 April 2001)."[147]

7.129 Since the Panel has no reason to believe that the DOC had the actual *Korea Herald* article before it when making its determination, we proceed on the basis that the DOC relied on the footnote contained in the abovementioned paper. If that is so, we note that the DOC had no means of gauging the accuracy of the report, and was unaware of the context in which the alleged threat was made. In addition, we note that the footnote provided no details of the powers that the FSS could allegedly exercise against renegade creditors. An 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.

7.130 In light of the above, we consider that the DOC's analysis could not properly support a finding of widespread coercion of Hynix's creditors. While the DOC could properly find coercion in

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[145] *Decision Memorandum*, page 60 (Exhibit GOK-5).

[146] Id..

[147] See footnote 5 in *Corporate Structuring and Reform: Lessons from Korea*, William P. Mako, Exhibit US-70.

respect of the KFB, an objective and impartial investigating authority would have treated this isolated incident of coercion regarding a single creditor as being of limited probative value in respect of the alleged entrustment or direction of other private creditors.

Disciplining credit rating agencies

7.131 Korea denies US allegations that GOK disciplined credit rating agencies. Korea asserts that the alleged pressure against the credit rating agencies has nothing to do with decisions by banks to lend or not lend to Hynix. Korea also submits that many of these allegations were denied at the time. Korea also submits that the three credit rating agencies mentioned by the US have been allied with major international credit rating agencies in terms of management or capital investment.

7.132 The US submits that the GOK disciplined credit rating agencies for giving Hynix a low credit rating. The US asserts, for example, that on 22 January 2001, the Korea Investors Service, one of three local rating firms, downgraded Hyundai Electronics' corporate bonds to a speculation-grade credit rating. The US argues that the FSC, concerned that this lower rating might endanger Hynix's eligibility for the KDB Fast-Track programme, reacted swiftly. According to the US, on that very day, at approximately 4:00 p.m., an FSS official called one of the credit rating agency officials responsible for Hyundai Electronics (now Hynix) and was told to attend a meeting of the three credit rating agencies and the FSS on 26 January 2001. The US asserts that the agency official commented that "it was his first time to receive such a call in his more than 10 years of employment at a credit agency."[148]

7.133 The US also asserts that, on 26 January 2001, FSS officials met with eight representatives from the three local credit rating agencies: Korea Investors Service, Korea Ratings, and National Information and Credit Evaluation. According to the US, the participants at the meeting who were later interviewed reported that the FSS had stated that: "[I]t was caught off guard by the downgrading of Hyundai Electronics' credit without prior consultation when the company's financial situation is improving. [Credit agencies] should look at the market as a whole rather than insisting upon the earlier positions."[149] The US asserts that one report stated that the FSS had used the meeting to express its strong dissatisfaction[150], while another report stated that the agency officials received a "reprimand" and "lecture."[151] According to the US, an exasperated agency official remarked: "Where in the world does the government call in credit agency's employees and apply pressure?"[152] The US asserts that, as a result of the meeting, one agency reportedly cancelled its plans to follow the lead of Korea Investor Service and downgrade the credit rating of Hyundai Electronics.

7.134 The US also alleges that on 7 January 2001, the National Information and Credit Evaluation agency, "buckling under government pressure," upgraded the credit rating for Hyundai Engineering and Construction.[153] The US submits that the upgrade was due to GOK pressure.

7.135 We note that the US arguments concern the alleged coercion of credit rating agencies, rather than creditors participating in the Hynix restructuring. Such arguments are therefore not relevant to the question of whether or not creditors were entrusted or directed by GOK to participate in the Hynix

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[148] *Not an Outright Order of Do-this-Do-that, but a Subtle Pressure*, DONG-A ILBO (6 March 2001) (translated version) (Exhibit US-71).

[149] *Id*.

[150] *Does the FSS Peddle Influence even on Credit Ratings?* HANKYOREH SHINMUN (14 February 2001) (translated version) (Exhibit US-74).

[151] *Corporate Credit Rating' 'Wobbles' Under the Sway of Government Influence*, DONG-A ILBO (1 March 2001) (translated version) (Exhibit US-75).

[152] *Id*.

[153] *'Corporate Credit Rating' 'Wobbles' Under the Sway of Government Influence*, DONG-A ILBO (1 March 2001) (translated version) (Exhibit US-75).

restructuring. Indeed, it is presumably for this reason that there is no reference to the alleged coercion of credit rating agencies in the findings of the DOC set forth in the *Preliminary Determination*, the *Final Determination*, or the *Decision Memorandum*.[154] Since considerations regarding the alleged coercion of credit rating agencies were not relied upon by the DOC in its determinations, they fall outside the scope of these proceedings.

Mandating attendance at creditor meetings

7.136 Korea notes that the DOC found that an FSS[155] official attended a creditors' meeting "at the request of the lead creditor bank 'to urge creditor banks to execute resolutions made by creditors'."[156] Korea challenges the accuracy of press reports relied on by the DOC in respect of this finding. Korea asserts that the March 2001 meeting of Hynix creditors was convened by the creditors to reconfirm past financial commitments and to establish a "creditors' council" to better manage their continuing and mutual commercial interests in Hynix. Korea notes that the DOC found the presence of the FSS official to be "support [for] the conclusion that there was a pattern of practices by the government to direct banks' lending decisions with regard to Hynix."[157] Korea further notes that the DOC also cited documents provided by the GOK at verification and generated for the Korean National Assembly indicating that the reason for the FSS official's attendance was to "urge creditor banks to execute resolutions made by creditors."[158] Korea submits that this statement is hardly a smoking gun of entrustment or direction, and is better understood in light of a press release issued by the FSS three days after the March meeting to respond to erroneous press speculation that the FSS was exerting undue pressure on the banks to extend new credit to Hynix.

7.137 According to Korea, the facts before the DOC reflected that there was hardly anything sinister about the FSS's presence at the March meeting. Korea asserts that a disagreement arose among the banks concerning their commitments, and it was therefore logical for the FSS to be present at the meeting to witness discussion of the prior commitments of the banks involved.

7.138 The US asserts that another method used by the GOK to coerce Hynix's creditors was requiring attendance at meetings with government officials. The US asserts that in early 2001, Hynix's increasingly poor financial condition prompted several banks to retract their earlier promises to increase purchase limits on Hynix's export bills of exchange ("D/A loans"). The US argues that, on 2 February 2001, the FSS responded by inviting officials from two of these banks (Shinhan Bank and Hanmi Bank) to a meeting with FSS officials to "request their cooperation."[159] The US asserts that the FSS called a general meeting of the Hynix creditor bank presidents on 10 March 2001, when the banks continued to resist. According to the US, creditors at the meeting were pressured to:

- Sign a written agreement pledging to maintain the D/A export ceiling at $1,450 million (overturning an earlier decision in January 2001 to reduce the ceiling to $640 million by year's end);

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[154] Although the alleged influence of Korean credit rating agencies was listed as an argument of the Petitioner at page 105 of the *Decision Memorandum* (Exhibit GOK-5), we can find no reference to this issue in the statements of the Department's Position.

[155] Although the DOC referred to an FSC official, Korea asserts that the official actually worked for the FSS. Korea asserts that FSS is not a governmental organization, but a special public corporation affiliated with FSC functioning as an executive arm of the FSC. In light of our finding regarding the DOC's treatment of this issue, we do not consider it necessary to resolve this particular disagreement between the parties.

[156] *Decision Memorandum*, page 59 (Exhibit GOK-5).

[157] *Id.*

[158] *Id.*

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

- Maintain the letter of credit-based export credit line at $530 million until the end of 2001;

- Agree to a one-year grace period for bank credits of 300 billion won, including bank account based loans and general fund loans;

- Sign a written "covenant" that they would assist Hynix;[160] and

- Confirm their intention to aid the Hyundai firms.[161]

7.139 The US notes that during verification the DOC confirmed that at least one FSC official was present at the March 2001 meeting, and that the official was invited by the KEB "to urge creditor banks to execute the resolutions made by creditors."[162] The US submits that the verification report further explains that the FSC attended the meeting to exert pressure on the banks. It states:

> The creditors felt that, if an FSS person was there, it might facilitate a resolution .... According to the FSC/FSS, the creditors thought that, if there was a regulator there, the other creditors who no longer wanted to participate in the restructuring plan might change their minds and go along with the wishes of the rest of the creditors.[163]

7.140 The US submits that the GOK itself stated that the FSC official attended the meeting to "act as a witness" so that "creditors could no longer back out" of any prior commitments they had made.[164] According to the US, the evidence before the DOC therefore indicates that GOK officials from the FSC were present at this meeting for the express purpose of pressuring Hynix's creditors to comply with the GOK's policy of assisting Hynix. The US also asserts that record evidence suggests that there were at least three additional meetings where GOK officials met directly with one or more of Hynix's creditors to obtain their agreement on assisting Hynix.

7.141 We note that many of the arguments and evidence advanced by the US in these proceedings were not referred to in any of the DOC documents before us. In particular, the DOC did not find that creditors were required to sign written agreements, to agree to a one-year grace period, or to attend meetings with the FSS. Such US arguments/evidence therefore constitute *ex post* rationalization which we shall also exclude from our review.[165] In its *Decision Memorandum*, the only reference made by the DOC to the March 2001 meeting was a statement that the FSS[166] official attended the

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[160] *The Grace Period Decision for Three Affiliates of Hyundai Group - Stories of Inside and Outside*, KOREAN SEOUL ECONOMIC DAILY (11 March 2001) (translated version) ("The Financial Supervisory Service (FSS) and Korea Exchange Bank talked to individual banks, but talks did not work. Hence the FSS told the bank presidents to sign on the support plan to enforce it in the form of a covenant.") (Exhibit US-79).

[161] *See Never-ending Aid for Hyundai*, KOREA TIMES (12 March 2001) ("A high-ranking official of the Financial Supervisory Commission attended a meeting of creditor bank presidents on Saturday, an unusual occurrence in itself, and *confirmed one by one their intention to aid the Hyundai firms*, proving the government's intention to help Hyundai.") (emphasis added) (Exhibit US-80).

[162] *Government of Korea Verification Report* at 19 (Exhibit US-12).

[163] *Government of Korea Verification Report* at 18 (Exhibit US-12).

[164] *Decision Memorandum* at 41 (Exhibit GOK-5).

[165] Similarly, we note that Korea has not disputed an argument by the US that the abovementioned FSS press release relied upon by Korea (see para. 7.136 *supra*) was not on the record of the DOC. Nor has Korea claimed that it was not on the DOC's record as a result of any oversight by the DOC. Accordingly, we also exclude the contents of that press release from our review.

[166] Although the DOC referred to an FSC official, Korea asserts that the official actually worked for the FSS. Korea asserts that FSS is not a governmental organization, but a special public corporation affiliated with FSC functioning as an executive arm of the FSC. In light of our finding regarding the DOC's treatment of this issue, we do not consider it necessary to resolve this particular disagreement between the parties.

meeting "at the request of the lead creditor bank 'to urge creditor banks to execute resolutions made by creditors'."[167] In our view, the 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. The fact that the resolutions at issue in these proceedings had already been "made by creditors" prior to the attendance of any FSS/FSC officials would indicate to an impartial and objective investigating authority that the officials' attendance could not have caused those resolutions to be adopted.

(iv) The DOC's single programme approach

7.142 The DOC found:

> 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 programme that occurred over a short, ten-month period. The objective of this programme 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 [] 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. (footnote deleted)[168]

7.143 The DOC's decision to treat all four financial contributions as part of a "single programme" is important, as it effectively enabled the DOC to rely on evidence of alleged entrustment or direction of a creditor in respect of one financial contribution as evidence of alleged entrustment or direction of that creditor in respect of the three other financial contributions.

Arguments of the Parties

7.144 According to Korea, the timing of the different events contradicts the DOC theory of a single programme. Korea asserts that the most significant aspect of Hynix's restructuring -- Hynix's October 2001 restructuring -- occurred almost one year after the initial financial transactions. Korea submits that the October 2001 restructuring had no meaningful connection to the earlier transactions. According to Korea, at the time of the May 2001 restructuring, Hynix advisors, industry experts, and the global financial markets all expected the DRAM market to recover, as it had in prior cycles, rather than develop as the worst year in DRAM market history. Korea asserts moreover that no one expected the downturn to be reinforced and exacerbated by the terrorist attack of 11 September 2001, and what it refers to as the consequent economic turmoil in the US economy. Korea submits that the DOC should have made discrete findings of financial contribution, and therefore entrustment or direction of private creditors, in respect of the October 2001 restructuring.

7.145 The US submits that the DOC was entitled to conclude that the abovementioned transactions, including the October 2001 restructuring, formed part of a "single subsidy programme" because early in the countervailing duty investigation, both the GOK and Hynix conceded – in fact argued – that the various bailout phases were part of a single overall restructuring programme for Hynix. During each phase, the creditor banks rescheduled over and over again their existing loans with Hynix, while providing additional liquidity whenever Hynix needed more. Furthermore, each phase of the Hynix bailout involved essentially the same banks. Eventually, the majority of the loans were converted into

[167] *Decision Memorandum*, page 59 (Exhibit GOK-5).
[168] *Decision Memorandum* at 48 (Exhibit GOK-5).

equity as part of the October restructuring package. The US asserts that the DOC gave a reasoned explanation of how the various aspects of the bailout were part of an overall programme, since it found that they were all driven by the same GOK policy to support Hynix; they occurred over a relatively short period of time; they were overlapping and interrelated; and the GOK's role was evident at each stage.

Evaluation by the Panel

7.146 We recall that the DOC identified four alleged financial contributions. The first three of those alleged financial contributions formed part of a restructuring proposal prepared by Citibank and Salomon Smith Barney (SSB) in September 2000. The fourth financial contribution, the October 2001, was not part of the Citibank/SSB proposal. Furthermore, the US has not contested Korea's assertion that the October 2001 restructuring was not envisaged at the time that the Citibank/SSB proposal was implemented. Indeed, the October 2001 restructuring was effected some five months after the third and final alleged financial contribution envisaged in the Citibank/SSB proposal (i.e., the May 2001 restructuring).

7.147 The US asserts that support for the DOC's finding of a "single programme" lies in the fact that the four alleged financial contributions were "overlapping and interrelated." In this regard, we note that the DOC referred to the fact that "many of [the] events were overlapping and had the effect of reinforcing each other."[169] Thus, the DOC did not find that all of the relevant financial contributions were overlapping and mutually-reinforcing. This would suggest that the DOC actually considered that certain financial contributions were not overlapping or mutually-reinforcing. Accordingly, the fact that many financial contributions overlapped and were mutually-reinforcing does not necessarily provide a sufficient for concluding that all four of the financial contributions formed part of a "single programme."

7.148 The US also argues that both the GOK and Hynix "conceded – in fact argued – that the various bailout phases were part of a single overall restructuring programme for Hynix."[170] In this regard, note 12 of the DOC's *Decision Memorandum* states that Hynix and the GOK stressed throughout the course of the proceeding that Hynix was taking part in an overall "restructuring plan." The DOC asserts that Hynix stated in its January 2003 questionnaire response that, in September 2000, "Citibank and SSB, Hynix' financial advisors retained to devise a financial restructuring plan, presented a fully integrated proposal to completely realign the financial structure of Hynix . . .The important point, for purposes of this submission, is that many of the financial transactions that are separately identified in the [Department's] questionnaire (each with their own sub-heading) were, in fact, all part of Citibank's and SSB's original integrated plan for a complete financial restructuring of Hynix."

7.149 We note that Hynix's questionnaire response goes on to argue that "the proper framework for examining the Hynix restructuring is to divide the financial transactions into two time periods: (I) those financial transactions from the fourth quarter of 2000 through the first half of 2001, and which were all part of the master SBS/Citibank plan; and (II) those financial transactions that were needed later in 2001 when the unprecedented collapse of the DRAM market required further restructuring measures."[171] Thus, there was no basis for the DOC to state that Hynix "stressed ... that [it] was taking part in an overall 'restructuring plan'." Rather, Hynix had clearly argued that the October 2001 restructuring should be distinguished from the earlier transactions. The DOC failed to account for this important nuance in Hynix's position.

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[169] *Decision Memorandum*, page 48 (Exhibit GOK-5), emphasis supplied.
[170] US Second Written Submission, para. 12.
[171] Exhibit GOK-21, page 15.

7.150 Regarding the GOK, the DOC notes that the GOK's February 2003 questionnaire response referred to "a several stage financial plan developed and implemented by SSB over the 2000-2001 period."[172] However, since the October 2001 restructuring was not part of the SSB plan, any reference by the GOK to the SSB plan should not have led to any inferences by the DOC regarding the GOK's position vis-à-vis the October 2001 restructuring.

7.151 There is therefore no basis for the US argument that "GOK and Hynix conceded – in fact argued – that the various bailout phases were part of a single overall restructuring programme for Hynix." While the GOK and Hynix may have argued that three of the financial contributions were part of an overall restructuring programme, the US has not produced evidence to the effect that the GOK and Hynix argued that the October 2001 restructuring was part of an overall restructuring programme.

7.152 Furthermore, we note that a number of creditors that had participated in the initial Citibank/SSB restructuring proposal did not participate in the October 2001 restructuring, or at least not in the same manner. We have already noted that certain Group B and C creditors sought mediation under option 3. Furthermore, certain creditors that had provided new funds under the initial Citibank/SSB proposal declined to provide new funds under the October 2001 restructuring (by choosing option 2). This indicates that at least certain creditors were operating under different conditions in respect of the October 2001 restructuring compared to the three earlier financial contributions under the Citibank/SSB proposal. This would suggest that these creditors did not consider themselves to be acting under a "single programme" in respect of all four financial contributions.

7.153 In addition, we note that the DOC found that the objective of the "single programme" was the complete financial restructuring of Hynix, and essentially included any act of restructuring within that programme. However, it is not necessarily true that any act of restructuring will form part of the same "programme" as other acts of restructuring, simply because they all pursue the same objective. Indeed, the DOC's argument is circular, since it determines that certain acts are part of a "single programme" on the basis of the objective of that programme, even before the very existence of the programme has been established.

7.154 Finally, we note the DOC's assertion that each of the financial contributions could be linked by the fact that they "reflected a pattern of GOK practices to ensure the continued viability of Hynix."[173] On the basis of the *Decision Memorandum*, we understand such "pattern of GOK practices" to be a reference to GOK entrustment or direction.[174] In light of the preceding analysis, however, we consider that the DOC determination contained little evidence of GOK entrustment or direction of private bodies to participate in the Hynix restructuring. This is therefore a further reason for doubting the DOC's justification for treating the four financial contributions as being part of a "single programme."[175]

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[172] *Decision Memorandum*, pages 48-49, note 12 (Exhibit GOK-5).

[173] *Decision Memorandum*, page 48 (Exhibit GOK-5).

[174] The DOC refers at page 49 of the *Decision Memorandum* (Exhibit GOK-5) to "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" (emphasis supplied).

[175] We also consider the DOC's reasoning to be self-serving. The DOC claimed widespread GOK entrustment or direction as justification for identifying a "single programme", while the decision to identify a "single programme" enabled the DOC (by using evidence of alleged GOK entrustment or direction in respect of one financial contribution as evidence of GOK entrustment or direction in respect of other financial contributions) to demonstrate the existence of alleged GOK entrustment or direction.

7.155 For the above reasons, we do not consider that the evidence relied on by the DOC was sufficient to permit an objective and impartial investigating authority to properly conclude that the financial contributions at issue all formed part of a same "single programme."

(v) The Kookmin Prospectus

Arguments of the Parties

7.156 Korea challenges the DOC's reliance on a filing made by Housing and Commercial Bank (H&CB) and Kookmin banks in September 2001 to the US Securities and Exchange Commission ("SEC"). That filing contained the following statement:

> The {GOK} has promoted, and, as a matter of policy may continue to attempt to promote lending to certain types of borrowers. It generally has done this by requesting banks to participate in remedial programmes for troubled corporate borrowers and by identifying sectors of the economy it wishes to promote and making low interest loans available to banks and financial institutions who lend to borrowers in these sectors. The government has in this manner promoted low-income mortgage lending and lending to technology companies. We expect that all loans made pursuant to government policies will be reviewed in accordance with {Kookmin's} credit review policies. However, we cannot assure you that government policy will not influence {Kookmin} to lend to certain sectors or in a manner in which {Kookmin} otherwise would not in the absence of the government policy. [176]

7.157 Korea submits that the statement is speculative as regards future action by the GOK. Korea also asserts that a generalized acknowledgement by Kookmin of GOK "promotion" hardly constitutes an indictment of lending to Hynix by numerous commercial banks during the period of investigation. According to Korea, nothing within the statement establishes an affirmative and explicit GOK action, whether delegation or command, to direct commercial bank lending to Hynix, whether generally or specifically with respect to certain transactions transpiring across the entire period of investigation in this case. Korea also asserts that the DOC failed to address a detailed statement by the specific lawyers who drafted the prospectus, which made clear that the language was in no way meant to imply GOK control over Kookmin lending decisions.[177]

7.158 The US notes that the DOC actually referred to two filings by Kookmin Bank with the SEC. The US asserts that the first filing, made in September 2001, contained a statement that:

> The Korean government promotes lending to certain types of borrowers as a matter of policy, which New Kookmin may feel compelled to follow ... . In addition, the Korean Government has, and will continue to, as a matter of policy, attempt to promote lending to certain types of borrowers. It generally has done this by identifying qualifying borrowers and making low interest loans available to banks and financial institutions who lend to those qualifying borrowers. The government has in this manner promoted low-income mortgage lending and lending to technology companies. We expect that all loans made pursuant to government policies will be reviewed in accordance with New Kookmin's credit review policies. However, we cannot assure you that government policy will not influence New Kookmin to lend to

[176] *See Decision Memorandum*, at 57-58 (Exhibit GOK-5).

[177] *See DRAMs from Korea* -- CVD Investigation: Documentation Supporting Papers on the Directed Credit Issue and Independence of Korean Banks and Other Relevant Documents, 14 April 2003 (hereinafter "Hynix Supporting Document"), at Vol. III, Tab 2 (Exhibit GOK-28-(a)).

> certain sectors or in a manner in which New Kookmin otherwise would not in the absence of the government policy.[178]

7.159 The US submits that the second filing, made in June 2002, contained the following statement:

> The Korean government promotes lending to certain types of borrowers as a matter of policy, which we may feel compelled to follow. The Korean Government has promoted, and, as a matter of policy, may continue to attempt to promote lending to certain types of borrowers. It generally has done this by requesting banks to participate in remedial programmes for troubled corporate borrowers and by identifying sectors of the economy it wishes to promote and making low interest loans available to banks and financial institutions who lend to borrowers in these sectors. The government has in this manner promoted low-income mortgage lending and lending to high technology companies. 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 would not in the absence of the government policy.[179]

7.160 According to the US, the filing of these prospectuses in September 2001 and June 2002 link the statements therein, concerning government influence over bank lending decisions, to the DOC's period of investigation. The US asserts that the DOC found that they were "very telling with regards to GOK influence over bank lending decisions."[180]

7.161 The US submits that the prospectuses constitute direct evidence from one of the Hynix creditors that, notwithstanding the protestations of the GOK and Hynix to the contrary, the GOK was still in the business of directing the lending decisions of banks. The US also submits that the prospectuses refute arguments made by the GOK and Hynix during the investigation that the banks with lower levels of government ownership, such as Kookmin, were not subject to government direction.

7.162 The US notes Korea's arguments that, according to the lawyers that drafted the Kookmin prospectus, the language "was in no way meant to imply government control over Kookmin lending decisions",[181] and that the DOC "did not even attempt to address this evidence."[182] The US submits that Korea is wrong on both accounts. The US asserts that the DOC explicitly addressed Hynix's and the GOK's arguments that the language in Kookmin's US SEC prospectus was not meant to imply government control over Kookmin's lending decisions:

> Hynix and the GOK attempt to discredit the meaning of the Kookmin US SEC prospectus by arguing that the language was not meant to imply GOK control over Kookmin's lending decisions, that it relates to potential future actions, and that Kookmin's statements are totally unrelated to the Hynix restructuring. The timing of the September 2001 US SEC prospectus, however, clearly links the statements about government influence over bank lending decisions to the POI. Moreover, the plain reading of these documents, along with documents examined at verification, connect the government's influence over Kookmin and the government objective to rescue

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[178] *Kookmin Bank Prospectus* (10 September 2001) at 24 (Exhibit US-45).
[179] *Kookmin Bank Prospectus* (18 June 2002) at 22 (Exhibit US-46).
[180] *Decision Memorandum* at 58 (Exhibit GOK-5).
[181] Korea First Written Submission, para. 438.
[182] Korea First Written Submission, para. 438.

> Hynix from financial collapse. Kookmin's reference to "troubled corporate borrowers" and "technology companies" alone establish such a link.[183]

Evaluation by the Panel

7.163 The US asserts that the DOC based its review of the prospectuses on the basis of a "plain reading" of the language used. The US asserts that when companies, whether foreign or domestic, issue securities on US securities markets, they are required to warn prospective investors of all material risks associated with the proposed investment. According to the US, the SEC mandates the use of "plain English" in that section and requires that risk factors be "clear, concise and understandable."[184]

7.164 We are not persuaded that a plain reading of the two Kookmin prospectuses indicates government entrustment or direction. Rather, a plain reading of those documents indicates that the GOK has sought to promote lending to certain types of borrowers, and that it has done so by requesting banks to participate in remedial programmes, and making low interest loans available to them for this purpose.[185] The plain language therefore indicates the pursuit of government policy through requests to banks, and the making available of low interest loans. Such conduct is indicative of a generalized government policy, rather than affirmative acts of delegation or command. We are therefore not persuaded that an objective and impartial investigating authority could properly have found that the abovementioned submissions in the two Kookmin prospectuses constitute evidence of GOK entrustment or direction.[186]

7.165 We also note that the DOC referred to documents concerning the approval of Kookmin's participation in the December 2000 syndicated loan. According to the DOC, these documents demonstrated "the nexus ... regarding Kookmin's lending to Hynix and the government's policies to ensure that banks 'participate in remedial programmes for troubled corporate borrowers'."[187] The relevant documents were made available to the Panel by Korea, in the form of Exhibit KOREA-64. According to Korea, the summary of the rationale for making the loan includes nine different reasons for making the loan. Korea argues that this summary, when read in its entirety and in context, does not support the DOC characterization of Kookmin as making this loan because they were told they must. Korea asserts that the first eight items stress the purely commercial reasons for the loan, including the ongoing Hynix restructuring, the strong cash flow, and the possibility of inducing new foreign capital. Korea asserts that the fact that one of the nine reasons acknowledges a broader national policy to encourage debt restructuring of otherwise viable companies in no way undermines the core commercial rationale for this loan.

7.166 The US has not disputed that the first eight stated reasons for Kookmin's participation in the December 2000 syndicate loan relate to commercial considerations. The US relies, however, on the ninth reason as evidence of government entrustment or direction. The DOC's interpreter noted the following translation of that ninth reason at the time of verification:

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[183] *Decision Memorandum* at 58 (Exhibit GOK-5).

[184] *See* Letter from Hale & Dorr Corporate Department Partner (23 April 2003) (Exhibit US-92) (discussing the use of "plain English" in the risk factor sections of prospectuses and responding to the statement from the lawyers who drafted the Kookmin prospectus (attached by Korea as Exhibit GOK-28-(a)).

[185] The fact that the prospectuses refer to action actually taken by GOK causes us to reject Korea's argument that the statements are merely speculative as regards future action.

[186] The US also argues that record evidence indicated that the GOK had a significant role in selecting the president of Kookmin. First, we consider this issue to be more relevant to the private/public status of Kookmin, rather than the government entrustment/direction thereof, since appointing the president of Kookmin could not properly be treated as an affirmative act of delegation or control. Second, we consider this argument to be *ex post* rationalization, since we can find no consideration of it by the DOC.

[187] *Decision Memorandum*, page 59 (Exhibit GOK-5).

[BCI: Omitted from public version [188]]

7.167 Korea contests the accuracy of the DOC's translation. This is not an issue that we need resolve, however, since the 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[189] to save Hynix. Furthermore, we note that the DOC linked this statement to "the government's objectives cited in"[190] the Kookmin prospectuses. We have already found that such objectives, including "requests" to banks to participate in remedial programmes for troubled corporate borrowers and the identification of sectors of the economy the GOK wishes to promote, could not properly be treated as evidence of affirmative government acts of delegation or command.[191] A determination of government entrustment or direction requires more than finding that private bodies act with regard to generalized governmental policy requests.

7.168 In addition, we do not consider that an objective and impartial investigating authority could properly have relied on the above reference to a generalized policy "request" from the government as evidence of government entrustment or direction when confronted with a further eight reasons explaining Kookmin's participation in the loan on the basis of commercial considerations. The US argued during the second substantive meeting that such commercial considerations were not legitimate given critical evaluation reports from brokerage houses at that time. In our view, however, an 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. Rather, there must be evidence that the government has taken affirmative acts of delegation or command to implement that policy. Furthermore, we note that at least two experts[192] indicated that Kookmin had acted independent of the government during the Hynix restructuring. In our view, given the alternative commercial rationale for Kookmin's participation in the December 2000 syndicated loan, and given expert opinion to the effect that Kookmin acted independently during the Hynix restructuring, we do not consider that the ninth reason set forth above could properly be treated as proof of any affirmative GOK act of delegation or control in respect of Kookmin.

(vi) Expert Opinion

Arguments of the Parties

7.169 Korea submits that the only evidence the DOC provides to link the motives of all the banks involved in the October restructuring to its alleged GOK action is the unverified assertions of an

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[188] **[BCI: Omitted from public version]**

[189] See para. 7.51 *supra*.

[190] *Decision Memorandum*, page 59 (Exhibit GOK-5).

[191] See para. 7.163 *supra*.

[192] See reports of Meetings 1, 4 and 5, Exhibit GOK-30. Regarding Meeting 1, the DOC reported "[a]t one point, however, a number of commercial banks, including Kookmin ..., were no longer willing to provide fresh capital to Hynix and decided to take losses on their exposure instead. The expert stated that had this happened before the financial crisis, the GOK would have forced all of Hyxnix's creditors to provide fresh capital to the company. In this case, however, the GOK influenced only government-owned banks. According to the official, the future fate of Hynix now rests with the state-owned banks, i.e., the KEB, KDB, Chohung, and Woori." For Meeting 4, the DOC reported "[t]he official stated that the case of Hynix is different because some of the company's creditors got out. When Kookmin ... pulled out, for example, there was no intervention by the government." In respect of Meeting 5, the DOC reports that "[t]he expert stated that other creditors with foreign ownership, such as Hana and Kookmin, are very different from the KEB and other government-owned banks."

anonymous "expert" the DOC interviewed in Seoul. In discussing the October restructuring package, the DOC notes the following in its *Decision Memorandum*:

> The independent experts interviewed by the Department noted the important role played by these [GOK owned or controlled] banks in Hynix' restructuring and the GOK's influence in this process through them. According to one expert:
>
> {T}he government was aware of the {Hynix} workout process and could influence the government-owned banks and the {KDB}. In the creditors' meetings, the other state owned banks and the specialized banks persuaded other creditor banks to participate in the various restructuring decisions. At one point, however, a number of commercial banks, including Kookmin, Hana, and Shinhan, were no longer willing to provide fresh capital to Hynix and decided to take losses on their exposure instead. The expert stated that had this happened before the financial crisis, the GOK would have forced all of Hynix' creditors to provide fresh capital to the company. In this case, however, the GOK influenced only government-owned banks. According to the official, the future fate of Hynix now rests with the state-owned banks, i.e., the KEB, KDB, Chohung, and Woori. He further noted that management level officers at the KEB, Hynix' lead bank, talk with government officials, so there is an indirect channel through which the government can influence these creditors.[193]

7.170 Korea submits that government "influence" does not amount to entrustment or direction in the meaning of Article 1.1(a)(1)(iv) of the *SCM Agreement*. In addition, Korea asserts that the above expert statement actually undercuts the DOC's theory, since it provides further evidence that (even if "influence" does amount to entrustment or direction) the GOK could not and did not "influence" commercial banks such as Kookmin Bank, Hana Bank, and Shinhan Bank. Korea submits that, at the very best, the DOC has perhaps established some link between alleged GOK action and the GOK-owned and -controlled banks involved in the October restructuring, but it has established no link with respect to the wholly private banks and those banks without controlling government ownership. Korea notes that the expert specifically said the "GOK influenced only government-owned banks," confirming the absence of influence over the other banks.

7.171 Korea further notes that one of the experts consulted by the DOC in fact identified the complexity of the workout process in which Hynix was engaged as a barrier to GOK control: "In the case of Hynix's creditor council, the expert stated that because of the complex structure of these groups it is difficult for the government to have any control over the decisions made by the councils."[194] According to Korea, therefore, the DOC's claim that the GOK dictated the terms of the October restructuring, or the banks decisions, is immediately contradicted by one of its own experts.

Evaluation by the Panel

7.172 We understand that Korea does not contest the DOC's reliance on the experts' views to determine that government-owned (Group B) creditors "were very much subject to government influence." Instead, we understand Korea to argue that influence is not entrustment or direction, and that the experts did not provide evidence of GOK influence over private, non government-owned (Group C) creditors. We reject Korea's second argument, however, since we do not consider that the DOC did rely on the experts' opinions to find that GOK influenced non government-owned (Group C)

[193] *Decision Memorandum*, page 55 (Exhibit GOK-5).
[194] Exhibit GOK-30, page 16.

creditors. Indeed, the DOC acknowledged that the one expert it quoted in its *Decision Memorandum* "did not state that bank *(sic)* not owned by government were subject to the GOK influence."[195]

7.173 However, we agree with Korea's first argument that evidence of government "influence" does not amount to evidence of government entrustment or direction. Government entrustment or direction is a higher standard than government influence. A government may "influence" creditors in a number of ways, without necessarily engaging in affirmative acts of delegation or command.[196] Furthermore, at least one expert stated that GOK "does not control" government-owned banks.[197] In these circumstances, we do not consider that an impartial and objective investigating authority could properly have relied on expert evidence of nothing more than mere GOK "influence" over Group B creditors as evidence of GOK entrustment or direction of Group B creditors.

7.174 In light of the above, we find that the DOC was not entitled to rely on the experts' opinions as evidence of government entrustment or direction.

(vii) Conclusion

7.175 We recall that the DOC could properly have established that the GOK had a policy to save Hynix. We recall that although this policy may well explain the participation of public body, Group A, creditors in the four financial contributions at issue, it is not sufficient to establish GOK entrustment or direction of Group B and C creditors pursuant to Article 1.1(a)(1)(iv) of the *SCM Agreement*.

7.176 In order to meet the requirements of that provision, the DOC was required to gather evidence of affirmative GOK acts of delegation or command vis-à-vis the Group B and C private creditors. In this regard, the DOC established that the GOK had the means to influence certain Group B creditors through government shareholdings. The DOC also established that the GOK had certain regulatory authority over Group B and C creditors. However, the DOC has not properly established that the GOK actually exercised such influence or regulatory authority so as to entrust or direct Group B and C creditors to participate in the four restructuring financial contributions. Furthermore, although the DOC purported to demonstrate that the GOK could dictate the terms of the October 2001 restructuring by virtue of the statutory framework of the CRPA, we consider that the DOC's analysis of the operation of this legal instrument is flawed, and could not have been properly relied upon by an objective and impartial investigating authority. In addition, we consider that the DOC improperly found that Kookmin Bank was entrusted or directed by GOK, despite expert evidence to the contrary, and despite an ostensibly commercial rationale for Kookmin's participation in the restructuring of Hynix. The DOC also purported to demonstrate that a number of other Group C creditors had been coerced by GOK to participate in the four financial contributions. Ultimately, however, we consider that the DOC only properly established that one such creditor had been coerced by GOK. Furthermore, the DOC found that all four financial contributions should be treated as a "single programme." This enabled the DOC to treat evidence of alleged entrustment or direction in respect of one financial contribution as evidence of alleged entrustment or direction in respect of other financial contributions. We consider that the DOC's justification for adopting such an approach is also flawed.

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[195] *Decision Memorandum*, page 55, note 22 (Exhibit GOK-5).

[196] For example, the DOC's report of Meeting 6 indicates that "[t]he expert further stated that the 'too big to fail' mentality no longer prevails. Since the crisis, the policymakers and the banks are more keenly aware of and affected by foreign interests. Any intervention on the part of the government is much more indirect, so that it may state publicly that a company such as Hynix is important for the country and the economy in the hope that creditors would go alone. But he stressed that the government no longer pressures banks directly the way it did in the past (pages 2 and 7, Exhibit GOK-30).

[197] See DOC report of Meeting 7, Exhibit GOK-30, page 15.

7.177 In sum, although the 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 DOC in light of the standard set forth in Article 1.1(a)(1)(iv) of the *SCM Agreement* - that the 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 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. There are simply too many irregularities and shortcomings in the DOC's reasoning to properly sustain such a broad determination.

7.178 For the above reasons, we conclude 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*.

2. Benefit

7.179 It is now well established that a financial contribution confers a "benefit" within the meaning of Article 1.1(b) of the *SCM Agreement* when it is made available on terms that are more favourable than the recipient could have obtained on the market. In order to determine the existence of "benefit", therefore, one must identify an appropriate market benchmark against which to assess the terms of the financial contribution at issue.

7.180 In considering potential market benchmarks for determining whether (a) the restructuring loans and (b) the restructuring debt-for-equity swaps undertaken by the Group A, B and C (except Citibank) creditors were made available on terms more favourable than Hynix could have obtained on the market, the DOC determined that the participating Group B and C private creditors were not suitable benchmarks. The DOC considered that the Group B and C (except Citibank) creditors were unsuitable market benchmarks because of its finding that they were entrusted or directed by the GOK to participate in the four financial contributions. Citibank was rejected as a market benchmark because, although it had not been found to have been entrusted or directed by the GOK, the DOC determined that it had acted on motivations not shared by the average, market lender. Instead of using the private Group B and C creditors as market benchmarks, the DOC treated Hynix as uncreditworthy and unequityworthy, and constructed uncreditworthy and unequityworthy benchmarks.

7.181 Korea raises claims regarding the DOC's use uncreditworthy and unequityworthy benchmarks. In particular, Korea submits that the DOC's determination of "benefit" is inconsistent with Articles 1.1 and 14 because *inter alia*:

- the DOC failed to demonstrate that a benefit was conferred on the respondent Hynix, given available market benchmarks among Hynix's creditors;

- the DOC disregarded market benchmarks for measuring benefit established by a foreign bank (i.e., Citibank) operating in the Korean market that extended financing to Hynix during the period of investigation; and

- the DOC failed to utilize relevant Korean 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 in this case.

(i) Arguments of the parties

7.182 Concerning Hynix's creditworthiness, Korea notes that Hynix's creditors included Korean and foreign private bodies. Korea asserts that the DOC incorrectly found that the Korean private bodies were entrusted or directed by GOK to participate in the Hynix restructuring. Korea asserts that these Korean private bodies should, therefore, have been used by the DOC as market benchmarks for the purpose of assessing whether or not the "financial contributions" by public bodies conferred a "benefit." Failing that, Korea argues that the DOC should at least have used Citibank, a foreign creditor, as a market benchmark, since the DOC did not find that Citibank had been entrusted or directed by GOK to participate in the Hynix restructuring.

7.183 Regarding Hynix's equityworthiness, Korea asserts that the DOC dismissed as irrelevant the fact that in June 2001 Hynix made a successful equity offering of $1.2 billon. Korea acknowledges that if market circumstances had changed between June 2001 and October 2001, such change might provide some reason to reject the specific prices paid for equity at an earlier point in time. Korea argues, however, that whatever one thinks about the price level of the GDS issuance, the fact that Hynix was able to raise $1.2 billion in equity from the international capital markets is a relevant fact that the DOC should have considered.

7.184 Korea also complains that the DOC dismissed out of hand all of the third party studies conducted by the Hynix creditors to assist them in deciding what to do.[198] According to Korea, the DOC's analysis ignores the single most critical fact: these studies were done for existing creditors, not new outside investors. Korea argues that the DOC's analysis allows the existing creditor to consider only one thing: the future prospects of the investment. Korea asserts that this view is fundamentally inconsistent with the concrete evidence on the record of the underlying case. Korea argues that the DOC ignored these studies because it did not want to confront the basic point of all the studies: that further debt restructuring -- including the debt-equity swap -- was the best chance to ensure Hynix survival and to maximize the recovery of the existing investment. According to Korea, this perspective is completely rational for an existing creditor, and is the only conclusion supported by the evidence before the DOC when deciding these issues.

7.185 Korea asserts that the DOC improperly rejected the common sense notion supported by the facts of the underlying case that existing creditors consider their existing investment when making new investments. Korea states that the DOC insisted that rational investors do not let the value of past investments affect present or future investment decisions.[199] Korea submits that, as a matter of law and fact, this approach is just wrong, since the text of Article 14(a) provides that an equity infusion will normally be deemed to confer a "benefit" only if the investment decision is inconsistent with "the usual investment practice. . . of private investors in the territory of that Member." Korea asserts that Hynix's creditors were acting, based on a substantial amount of evidence prepared both internally and by outside consultants, in the manner most likely to preserve the maximum return on their existing capital in Hynix. Korea asserts that this behaviour is entirely consistent with the actions of normal private investors.

7.186 The US submits that the DOC was entitled not to use Korean private creditors as market benchmarks because they had been entrusted or directed by GOK to participate in the Hynix restructuring. The US submits that Citibank was excluded as a market benchmark because Citibank's involvement was small in absolute and percentage terms compared to the involvement of the government-owned and controlled banks; Citibank itself acknowledged that its participation was only a symbolic gesture; there was substantial record evidence that Citibank's risk assessment of Hynix was influenced by the GOK's policy to support Hynix and prevent its failure; record evidence showed

[198] Korea asserts that Hynix submitted to the DOC a wide range of third party reports commissioned by creditors for various purposes, including a Monitor Group Report, SSB Discussion Documents, and an Arthur Andersen Report.

[199] *Decision Memorandum*, at 92 (Exhibit GOK-5).

that Citibank was influenced by the significant and continuing involvement of the GOK in propping up Hynix, rather than by its belief that Hynix was a commercially worthy credit risk in its own right; Citibank and SSB were the exclusive financial advisors to Hynix, and reaped significant fees from this engagement; and evidence showed that Citibank's involvement with Hynix was viewed by Citibank as a stepping stone toward a larger and more lucrative role in helping the GOK to resolve other structural problems in the Korean financial market. The US submits that other "unusual aspects" relevant to Citibank's decision to participate in the syndicated loan include the fact that despite its long involvement in the Korean financial market dating back to the 1960s, Citibank was not a lender to Hyundai Electronics or Hynix prior to the December 2000 Syndicated Loan. The US further asserts that Citibank did not extend any financing to Hynix other than in GOK entrusted and directed restructurings (and was not a participant in the KDB Fast Track Program). The US also submits that Citibank's participation in those restructurings was on the same terms as were applicable to government entrusted and directed participants, and that Citibank also did not seek internal credit approval for its portion of the syndicated loan until after Korean banks had committed to the arrangement. The US further submits that Citibank did not base its lending decisions on independent credit analyses that a commercial bank normally would consider, but rather upon the assessment of Hynix that SSB prepared for purposes of advancing a plan to restructure Hynix's debt.

7.187 The US asserts that the DOC properly determined that the June 2001 GDS issuance did not demonstrate that Hynix was equityworthy at the time of the October 2001 restructuring, as a result of the "extreme differences in the condition of the global DRAMs market ... and Hynix's financial state at the time of the two equity infusions."[200]

7.188 Regarding Korea's argument that Hynix should not be considered unequityworthy because its creditors relied upon reports prepared by Salomon Smith Barney, the Monitor Group, and Arthur Anderson, the US asserts that the DOC found that these studies, prepared at the request of Hynix or its creditors, were not a reasonable basis for determining that Hynix was equityworthy. The US submits that the DOC determined that the SSB and Monitor Group studies were not prepared to answer the question of whether Hynix was equityworthy, but focused instead on presenting options for ensuring Hynix's survival, which is different than assessing whether Hynix would provide its investors with a reasonable rate of return within a reasonable period of time. The US asserts that the DOC also found that the SSB study was based upon assumptions regarding the DRAM market that were inconsistent with the consensus view held by neutral industry analysts, which viewed the DRAM industry as being in a significant slump, with no recovery imminent. The US argues that, accordingly, the reports could not reasonably be used as evidence of whether investment in Hynix was consistent with the usual practice of private investors and could not have been reasonably relied upon by the government and government-directed banks in deciding whether to convert debt into equity. The US also asserts that Hynix's creditors could not have relied on the Arthur Anderson report, as the report was not finished until two months after the creditors agreed to the October 2001 restructuring package. The US also argues that the Arthur Anderson report does not establish that the investment by Hynix's creditors was consistent with the usual practice of private investors, as the report was drafted from the perspective of a creditor rather than an equity investor.

7.189 The US submits that the Expected Utility Model of explaining commercial behaviour, which is the basis for the DOC's rational investor standard, holds that a private investor will look upon any past investments, including its own, as sunk costs that are not relevant to its analysis of whether to make additional investments. The US asserts that, in other words, a private investor will evaluate whether to make additional investments based upon the expected rate of return on the additional investment, regardless of the value of past investments. The US argues that the Prospect Theory relied on by Korea, on the other hand, posits that investors will continue to make investments in a particular project or entity in hopes of minimizing past losses, even if the investment would not be

[200] *Decision Memorandum*, pages 90-91(Exhibit GOK-5).

justified based only the potential for future return. The US asserts that the DOC has considered and rejected on many occasions the argument that inside investors should be held to a different investment standard than outside investors, since the prevailing economic theory for explaining normal commercial behaviour holds that an investor makes its decision on the margin, seeking to maximize the return on incremental outlays. The US argues that if the Prospect Theory were carried to its logical conclusion, this would support the untenable notion that the more the banks invest in Hynix, the more the additional investments are justified, such that a company could never be unequityworthy from the perspective of an inside investor.

(ii) Evaluation by the Panel

7.190 In reviewing the DOC's benefit analysis (in respect of both creditworthiness and equityworthiness), we note that it was predicated almost entirely upon the 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. In other words, these creditors were rejected as market benchmarks (for both the loans and debt-for-equity swaps) because the DOC found that they were acting pursuant to government entrustment or direction, rather than market principles, when participating in the Hynix restructuring.[201] Since we have found that the DOC 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 DOC to reject them as market benchmarks.[202] As a result, we find that the DOC's benefit determination is inconsistent with Article 1.1(b) of the *SCM Agreement.*

7.191 In light of the above finding, it is not necessary for us to examine other issues raised by the parties regarding market benchmarks. Even if we were to find, for example, that the DOC could properly have rejected Citibank as a market benchmark for assessing the restructuring loans, or the GDS offering and/or expert reports as benchmarks for determining whether or not Hynix was equityworthy in October 2001, our finding that the DOC improperly rejected the Group B and C (except Citibank) creditors as potential market benchmarks would still remain, as would the issue of whether or not Hynix might be found to be creditworthy or equityworthy on the basis of such potential market benchmarks.[203] For this reason, we shall not consider the additional issues raised by the parties concerning the DOC's benefit analysis.

3. Specificity

7.192 According to Article 1.2 of the *SCM Agreement*, a subsidy is only subject to Part V of the *SCM Agreement*, and therefore countervailable, if it is "specific" in the meaning of Article 2.1. Article 2.1 provides that the following principles shall apply for determining whether a subsidy is specific to an enterprise or industry or group of enterprises or industries within the jurisdiction of the granting authority:

> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

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[201] *Decision Memorandum*, pages 3-5 (Exhibit GOK-5).

[202] We recall that certain Group B creditors might otherwise have been treated as public bodies in the meaning of Article 1.1(a)(1) of the *SCM Agreement*. We are not finding that the DOC should have used those Group B creditors as market benchmarks. (Indeed, we are precluded from engaging in such *de novo* review.) We are simply finding that the DOC could not properly have rejected the Group B and C (except Citibank) creditors as market benchmarks on the basis of the reasoning advanced by the DOC.

[203] These are issues that we are precluded from examining *de novo*.

> (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
>
> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

(i) Arguments of the parties

7.193 Korea submits that the DOC's determination of specificity is inconsistent with Article 2. Korea asserts that the DOC supports its finding of specificity with respect to Hynix's financial restructuring over the period investigated on three fundamental grounds: The first ground relates to largely secondary evidence of the GOK's interaction, at various stages, with Hynix creditors and Hynix's financial restructuring. The second ground offered by the DOC relates to the level of financial restructuring occurring at Hynix and other Hyundai Group companies under the CRPA, relative to other CRPA companies. The third and final ground relates to the level of lending to Hynix and other Hyundai Group Companies by KDB and KEB, specifically. Korea argues that none of these grounds withstand serious scrutiny.

7.194 Korea asserts that because the DOC's analysis of entrustment or direction was flawed, it cannot support a finding of specificity. Korea also argues that the DOC's analysis attempts to collapse two distinct requirements, whereas the obligation in Article 1.2 to find specificity is separate and distinct from the obligation in Article 1.1(a)(1) to find a "financial contribution." Korea acknowledges that the same facts might be relevant to both inquiries, but the decision by the competent authorities must clearly and explicitly discuss how the facts satisfy each of these obligations. Korea argue that none of the four factors listed in Article 2.1(c) justifies the DOC decision to turn a finding of "financial contribution" into a finding of specificity. According to Korea, these factors relate to the extent to which the subsidy at issue has been utilized, and are irrelevant to alleged government plans to "save" a company.

7.195 Korea also submits that the level of financing received by Hynix under the CRA/CRPA framework, by itself, is irrelevant to the issue of specificity. Korea notes the DOC's argument that the debt restructuring data provided by GOK covering CRPA workouts revealed that Hynix and Hyundai Group companies accounted for "a disproportionately large share of the debt restructurings for all companies" under the CRPA.[204] Korea asserts that the quantitative level of Hynix restructuring (whether grouped with Hyundai Group companies or not) is, by itself, irrelevant to the issue of specificity. Korea argues that, to avoid ridiculous outcomes, the term *use* in Article 2.1 of the *SCM Agreement* must be read to have both a quantitative and qualitative component. In this regard, what is being *used* under the CRPA is not the amount of debt restructuring specifically, but the framework itself. Korea asserts that Hynix was just one company out of over 100 different companies ushered

[204] *Decision Memorandum*, at 18-19 (Exhibit GOK-5).

through the framework by its creditors. According to Korea, the difference between the companies involved constitute the qualitative distinctions by which any quantitative measure of specificity must be tempered. Korea submits that the DOC's one-dimensional quantitative exercise does not capture any of the qualitative distinctions among the various restructurings under the CRPA. For example, Korea notes that no effort was made by the DOC to examine the size or capital intensity of the CRPA companies to determine if Hynix's debt restructuring under the CRPA was truly disproportionate. Korea also asserts that the DOC overlooked two textually explicit considerations provided for in Article 2.1(c), namely the "extent of diversification of economic activities," and "the length of time" the programme has been in existence.

7.196 Korea also submits that the DOC's focus on the level of lending by KEB and KDB over the 2000-2002 period as a measure of specificity is also without merit, as it merely identifies creditors with whom Hynix had a long-standing business relationship, and who therefore might naturally hold more Hynix debt than other creditors. Korea argues that, in focusing on KEB's and KDB's lending, DOC also neglected the fact that much of the new lending and refinancing at issue in its investigation was allocated among participating creditors on a *pro rata* basis, taking into account their existing debt holdings. Korea argues that under such a system, both KDB and KEB would be expected to extend a higher level of financing over the period investigated, since they were already among the larger Hynix creditors.

7.197 The US submits that, because the subsidy programme is directed at a particular company – Hynix – it is specific within the meaning of Article 2 of the *SCM Agreement.* The US asserts that, in addition, the DOC confirmed the specificity of the Hynix bailout through an analysis of corporate usage of the CRA/CRPA.

7.198 The US argues that, although the existence of a financial contribution and the existence of specificity are two separate determinations that must be made, the nature of the financial contribution can impact the specificity analysis under Article 2. The US refers, for example, the situation in which the government provides a grant to a single, financially distressed manufacturer. The US asserts that there is no law or regulation providing for such grants; this is *sui generis* government assistance to a particular company. The US asserts that the subsidy is specific because there is a limited number of users – one. The US argues that in the present case, as in the case of company-specific grants, the nature of the subsidy – a government-directed bailout – impacts the specificity analysis. The US asserts that, as a result, much of the evidence establishing that the GOK directed and entrusted the banks to provide the bailout, is also relevant to the specificity analysis. Thus, the US claims that reliance on that evidence in its specificity analysis is therefore not an effort to "collapse" distinct requirements to find financial benefit and specificity. Rather, it is a natural consequence of the nature of the subsidy. The US further asserts that the DOC record of the investigation is replete with positive evidence of a government-directed bailout of Hynix. According to the US, the evidence demonstrates the GOK's commitment and actions taken specifically to prevent the collapse of Hynix.

7.199 The US submits that the DOC's analysis of the CRA/CRPA confirms the specificity determination. The US asserts that record data, which was provided by the GOK, demonstrates that the Hyundai Group companies received an extraordinarily large percentage of financial restructuring and recapitalization aid and that Hynix alone received a very high percentage of such aid. The US argues that, although Korea states that its own objective, credible data on use of the CRA/CRPA is irrelevant to the specificity analysis, the relevance of the data, however, should be beyond question given that disproportionate use is expressly listed in Article 2 as a factor that may be considered in a specificity analysis.

7.200 According to the US, nothing in the text of Article 2.1(c) requires the broader analysis advocated by Korea; *i.e.*, one that looks beyond use of the subsidy at issue. The US asserts that nothing in the *SCM Agreement* dictates a methodology for determining disproportionate use of a

subsidy, contrary to Korea's argument that the term "use" *must* be read to have both a "quantitative and qualitative component."[205] The US argues that the ordinary meaning of the term "use" is, however, the "act of using, fact of being used"[206], and that nothing in the ordinary meaning of the term "use" suggests either a quantitative or qualitative component. The US also asserts that, while there is no reference to "qualitative" factors in examining use, Article 2.1(c) contains explicit references to "quantitative" factors related to use; *i.e.*, the "number" of users, "predominant" use and "disproportionate" use. The US argues that there is no requirement in Article 2.1(c) to "temper" those quantitative factors based on "qualitative distinctions," and there is no basis for Korea's assumption that a qualitative analysis is necessary to avoid "ridiculous outcomes."[207]

7.201 The US also notes there is no basis in the text of Article 2 to support Korea's argument that what is being "used" is not the vast amount of debt restructuring aid, but rather the CRPA "framework" itself, and that Hynix was only one of over 100 different companies "ushered through" the CRPA.[208] The US asserts that, assuming *arguendo* that Korea is correct, the GOK's own data demonstrate that members of the Hyundai Group – and Hynix in particular – were granted disproportionately large amounts of the restructuring and recapitalization aid through those frameworks. According to the US, therefore, even if one were to accept, for the sake of argument, that 100 companies received restructuring aid and that 100 companies is not a "limited number," the receipt by Hynix of a disproportionate amount of restructuring aid makes the subsidy specific.

7.202 The US also notes Korea's argument that the DOC was required to examine the size and capital of Hynix in relation to the size and capital intensity of all companies undergoing debt restructurings and to consider that debt restructuring aid allocated among participating creditors on a *pro rata* basis, taking into account their existing debt holdings. The US asserts that Article 2.1(c) does not contain *any* requirements regarding how a disproportionate use analysis is to be conducted, much less the specific analytical methods Korea asserts are required. The US also argues that, carried to its logical conclusion, the analytical approach Korea claims is required would imply the untenable notion that the Members intended that the more indebted a company is, the more additional subsidies it may receive without being subject to the subsidy disciplines because the disproportionately large subsidies could never be specific. The US asserts that Korea's proffered interpretation of Article 2 is therefore directly at odds with the object and purpose of the *SCM Agreement.*

7.203 The US asserts that Korea's argument that the DOC's specificity analysis failed to take into account "the extent of diversification of economic activities" and the "length of time" the programme has been in existence, as required under Article 2(c) of the *SCM Agreement* misapprehends the nature and relevance of these two requirements. The US also asserts that these issues were considered in the context of the DOC's investigation.

(ii) Evaluation by the Panel

7.204 The US argues that "because the subsidy programme is directed at a particular company – Hynix – it is specific within the meaning of Article 2 of the *SCM Agreement.*"[209]

7.205 For its part, the DOC found that "record evidence in this proceeding indicates that the GOK only directed or provided loans and other benefits to a specific company or group of companies."[210] The DOC also referred to the "substantial record evidence demonstrating the GOK's commitment,

[205] Korea First Written Submission, para. 570.
[206] *The New Shorter Oxford English Dictionary* (1993) (Exhibit US-89).
[207] Korea First Written Submission, para. 570.
[208] *Id.*
[209] See para. 236 of the US First Written Submission.
[210] *Decision Memorandum*, page 17 (Exhibit GOK-5).

and actions taken, to prevent the collapse of the Hyundai Group, and Hynix in particular",[211] and the fact that it found "a number of indicators of ROK activity specifically focused on aiding Hynix and the Hyundai Group of companies."[212]

7.206 The DOC's finding of specificity related to the alleged subsidies provided by Group A, B and C creditors respectively. Whereas we understand the DOC's reference to GOK "direct[ion]" of loans and other benefits to relate to the participation of Group B and C creditors, we consider that the reference to GOK "provid[ing]" such loans and other benefits relates to the participation of Group A creditors. On this basis, we understand that the 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 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 DOC's determination of government entrustment or direction is factually flawed, and inconsistent with Article 1 of the *SCM Agreement*. In the circumstances, the 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.[213]

7.207 To the extent that the DOC's finding of specificity in respect of Group A creditors was based on GOK "activity specifically focused on" Hynix, however, we consider that such finding of specificity is consistent with Article 2 of the *SCM Agreement*. We recall in this regard that the DOC properly found that Group A creditors provided financial contributions to Hynix pursuant to a GOK policy to save Hynix. We consider that such policy meant that such financial contributions by Group A creditors were necessarily specific to Hynix. The fact that such financial contributions were provided pursuant to a restructuring package tailor-made for Hynix confirms the specific nature thereof. In these circumstances, we consider that an objective and impartial investigating authority could properly have found that the alleged subsidies provided by Group A creditors were specific within the meaning of Article 2 of the *SCM Agreement*.

7.208 For these reasons, we find that the 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, but consistent with Article 2 in so far as it relates to alleged subsidies provided by Group A creditors.

4. Conclusion

7.209 For the above reasons, we find that the DOC did not properly determine that the four financial contributions at issue constitute specific subsidies. Accordingly, we conclude that the DOC's *Final Subsidy Determination*, and the *Final Countervailing Duty Order* based thereon, are inconsistent with Articles 1 and 2 of the *SCM Agreement*, and that the US is therefore in violation of those provisions.

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[211] *Decision Memorandum*, page 18 (Exhibit GOK-5).

[212] *Id*.

[213] In finding specificity, the DOC also referred to "a list of the largest recipients of KDB and [KEB] financing" (*Decision Memorandum*, page 18, Exhibit GOK-5). The DOC further referred to "the magnitude of monies involved with corporate restructurings under corporate restructuring laws in the ROK" (*Decision Memorandum*, page 18). While the DOC referred to these additional elements, there is nothing in its *Decision Memorandum* to suggest that the DOC considered that its specificity analysis could be upheld purely on the basis of them. We are of course precluded from considering this issue *de novo*. There is, therefore, no basis for upholding the DOC's specificity analysis (in respect of Group B and C creditors) on the basis of its consideration of these additional elements. Accordingly, we need not address the parties' arguments concerning this issue.

D. ITC INJURY INVESTIGATION

7.210 Korea claims that the US acted inconsistently with:

- Article 15.1 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;

- Article 15.2 because *inter alia*, the ITC determinations improperly assessed the significance of the volume effects of subject imports;

- Article 15.2 because *inter alia*, the ITC determinations improperly assessed the significance of the price effects of subject imports;

- Article 15.4 because *inter alia*, the ITC failed to consider all factors relevant to the overall condition of the domestic industry;

- Article 15.5 because *inter alia*, the ITC failed to demonstrate the requisite causal link between subject imports and injury;

- Article 15.5, because *inter alia*, the ITC improperly assessed the role of other factors, and improperly attributed the effect of other factors to the allegedly subsidized imports; and

- Article 15.2 and 15.4 because *inter alia*, the ITC improperly and inconsistently defined the domestic industry.

7.211 In light of our findings in respect of subsidization, it is not strictly necessary for us to consider Korea's claims against the ITC's *Final Injury Determination.* We shall do so, however, in case our findings on this issue might be of use to the Appellate Body, or in the context of the implementation of any recommendation by the DSB.

7.212 In order to rule on Korea's claims, we must resolve the following issues:

- Did the ITC properly assess the volume of subject imports?

- Did the ITC properly assess the price effects of subject imports?

- Did the ITC properly consider all factors relevant to the overall condition of the domestic industry?

- Did the ITC properly demonstrate the requisite causal link between subject imports and injury?

- Did the ITC properly comply with its obligation not to attribute to subject imports injury caused by other factors?

- Did the ITC properly define domestic industry, subject imports and non-subject imports?

7.213 Before turning to the parties arguments concerning the substantive issues raised by Korea's claims under sub-paragraphs 2, 4 and 5 of Article 15 of the *SCM Agreement*, we shall first consider the application of Article 15.1.

7.214 Article 15.1 of the *SCM Agreement* provides:

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

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

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

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

> The term 'objective examination' aims at a different aspect of the investigating authorities' determination. While the term 'positive evidence' focuses on the facts underpinning and justifying the injury determination, the term 'objective examination' is concerned with the investigative process itself. The word 'examination' relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word 'objective,' which qualifies the word 'examination,' indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness.[215]

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

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

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

> Article 3 as a whole deals with obligations of Members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs. These obligations concern the

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[214] Appellate Body Report, *United States –Hot-Rolled Steel*, para. 193 (emphasis added); Appellate Body Report, *Thailand – H-Beams*- para. 106.

[215] *US – Hot-Rolled Steel*, para. 193 (footnote omitted).

[216] *US – Hot-Rolled Steel*, para. 193.

> determination of the volume of dumped imports, and their effect on prices (Article 3.2), investigations of imports from more than one country (Article 3.3), the impact of dumped imports on the domestic industry (Article 3.4), causality between dumped imports and injury (Article 3.5), the assessment of the domestic production of the like product (Article 3.6), and the determination of the threat of material injury (Articles 3.7 and 3.8). The focus of Article 3 is thus on *substantive* obligations that a Member must fulfil in making an injury determination.[217]

7.218 The parties agree that our interpretation and application of Article 15.1 should be guided by the abovementioned Appellate Body rulings. The parties also agree that Article 15.1 informs the more detailed obligations set forth in the remainder of Article 15. We shall be guided by these statements by the Appellate Body in determining whether or not the ITC's injury determination is consistent with paragraphs 2, 4 and 5 of Article 15 of the *SCM Agreement.*

1. Did the ITC properly assess the volume of subject imports?

7.219 Article 15.2 of the *SCM Agreement* provides in relevant part:

> With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member.

(i) Arguments of the parties

7.220 Korea submits that the ITC's finding of a significant increase in subject imports was not based on an objective examination of positive evidence, contrary to Articles 15.1 and 15.2 of the *SCM Agreement.* Korea asserts that, pursuant to Article 15.2, the competent authorities must do more than simply find an increase. Korea asserts that the competent authorities have a specific obligation to find a "significant" increase, and to explain why they deemed the increase to be significant. Korea argues that there was no "significant" increase in imports, since the data shows that the Hynix brand lost market share over the period of investigation, and that subject imports changed only slightly in reaction to the temporary shutdown of the Hynix US operations at HSMA.

7.221 Korea acknowledges that the ITC properly adopted the industry practice of calculating "billion bits" of DRAMs memory when assessing the volume of DRAMs sold. Korea asserts, however, that the continual movement to higher and higher densities (e.g., the 64MB chip was replaced with the 128MB chip, which was replaced with the 256MB chip) has meant that total bits supplied and total bits consumed have always been increasing. According to Korea, as measured in billion bits of DRAMs memory, the total consumption (and supply) of DRAMs has increased dramatically every year over the previous year's consumption. Korea asserts that, in the DRAMs market, the simple fact that an actual increase in imports (on a billion bit basis) occurred from a particular supplier is meaningless. According to Korea, what is important when analzying the volume of DRAMs shipments is to examine the increased shipments relative to consumption and relative to other suppliers. Korea submits that the best measure of any volume effects of the subsidized imports is therefore to examine market share data. Korea asserts that any methodology that does not focus on market share bears a very high burden of persuasion to be considered "objective."

7.222 Korea states that the following chart was made available to the ITC concerning respective DRAM market shares for each of the major suppliers in the Americas market:

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[217] *Thailand – H-Beams* at 160 (emphasis in original).

Figure 8 America's Market Share by Supplier Brand

	1998	*1999*	*2000*	*2001*	*2002*	*Change '98-02*
Micron	17.9%	21.0%	27.0%	26.2%	25.7%	+7.8
Infineon	3.5%	6.7%	7.4%	11.5%	14.8%	+11.3
Combined	21.4%	27.7%	34.4%	37.7%	40.5	+19.1
Samsung	22.7%	22.5%	23.7%	28.3%	34.4%	+11.7
Hynix	15.8%	15.2%	13.6%	10.6%	10.4%	-5.4
All Others	40.1%	35.7%	28.2%	23.3%	13.5%	

7.223 Korea asserts that the data show that over the past few years the Hynix brand has been losing market share in the Americas market. Korea also asserts that the market share data show absolutely no correlation between shipments from Hynix and any deterioration of Micron's and Infineon's US market positions, since Micron and Infineon gained significant market share, while Hynix lost market share.

7.224 Korea also asserts that, even focusing on subject import data (as opposed to data concerning the Hynix brand, which includes both Hynix's US domestic and imported shipments), the evidence before the ITC establishes that the market share of subject imports remained small throughout the investigation period, and actually declined at the end of the period. Korea submitted the following chart to the Panel. Korea asserts that the chart is based on the evidence before the ITC that presents the respective market shares of US producers, Hynix and non-subject suppliers. According to Korea, the data in the chart consists of the public market share data contained in the ITC's determination (at page C-3) for US production plus a Hynix market share calculated from the volume of Hynix's shipments to the US from Korea, which Hynix has agreed to make public in order to assist the Panel's analysis. Korea states that the total market share of non-subject suppliers was simply derived by the following calculation: 100 per cent minus US producers' market share minus Hynix's market share.

Figure 9. US Market Shares

	1999	*2000*	*2001*	*2002*	*1Q 2003*
US Shipments of Domestic Producers	45.8%	43.4%	34.3%	30.7%	29.8%
US Shipments of Hynix Subject Product	8.5%	6.7%	9.0%	8.9%	5.8%
US Shipments of Non-Subject Products	45.7%	49.9%	56.7%	60.4%	64.4%

7.225 According to Korea, the above data demonstrates the following facts about trends in market share based on US shipments from these different sources:

- The market share of Hynix's imported DRAMs was 6.7 per cent in 2000, increased to 9.0 per cent in 2001, decreased to 8.9 per cent in 2002 and decreased again to 5.8 per cent in 2003;

- The consistently small volume of Hynix's imports was dwarfed by both domestic production and non-subject imports. In 2002 domestic producers' shipments

were more than three times larger than Hynix's imported volume; and non-subject imports were more than six-and-a half times larger than Hynix's imports;

- Although the market share of Hynix's imports did increase over the three year (2000-2002) period, the increase was only two percentage points;

- All of the increase in Hynix import market share occurred from 2000 to 2001, prior to Hynix receiving the bulk of the alleged subsidies in the 4th quarter of 2001. In fact, the data demonstrate that after Hynix received the vast majority of the alleged subsidies, the market share of Hynix's imports actually decreased from 2001 to 2002, and then decreased again from interim 2002 to interim 2003; and

- The increase in market share by non-subject imports from 2000 - 2002 was nearly five times larger than the increase in market share by Hynix's imports.

7.226 Korea submits that it is not an objective assessment of subject import volume to focus on the small nominal increase in market share and largely to ignore these other critical facts that put that small change in market share in proper context. According to Korea, any objective assessment would have found that in light of the fact that (1) Hynix import market share fell in both 2002 and the beginning of 2003, (2) non-subject imports consistently dwarfed subject imports, and that (3) the increase in non-subject imports was almost five times larger than the increase of subject imports, the small increase in subject imports could not be considered significant. Korea submits that the ITC did not make an objective assessment of these facts.

7.227 Korea submits that, even focusing on the absolute volume of subject imports, the evidence before the ITC demonstrates that the increase in imported Hynix DRAMs was solely the result of the temporary closure of Hynix's US manufacturing facility, HSMA. Korea asserts that HSMA temporarily suspended all production in July 2001 to hasten a planned upgrade of HSMA's production facility. Korea states that the upgrade was completed in January 2002, and that full-scale commercial production began in September 2002. Korea submits that the apparent "increase" in Hynix imports found by the ITC is really just a data aberration, and therefore has little significance. According to Korea, the increased volume of imported Hynix DRAMs simply replaced the volume previously produced by the Hynix US manufacturing facility, and therefore such volume did not displace sales from Micron or Infineon.

7.228 The US submits that the ITC's conclusions about the significance of the volume of subsidized subject imports from Korea on an absolute basis, as well as the increase in that volume relative to production and consumption, are based on positive evidence and an objective examination. The US asserts that the ITC's analysis of the volume of subsidized imports is also otherwise consistent with US obligations under Articles 15.1 and 15.2 of the *SCM Agreement.*

7.229 The US argues that the ITC relied on a single consistent set of data from questionnaire responses for its examination of the volume of subsidized subject imports, whereas Korea refers to a varying set of data sources. In light of these alleged problems with the data, as presented by Korea, the US calls attention at the outset to several trends in the data used by the ITC in its final determination:

- The ITC discussed the volume of subsidized subject imports in terms of billions of bits, as a ratio to domestic production, and as a share of apparent US consumption. It found the absolute volume of subsidized subject imports was significant in and of itself;

- Subsidized subject import volume increased over the period of investigation;

- In terms of billions of bits, subsidized subject imports increased between 2000 and 2001 and between 2001 and 2002;

- In terms of their market share, subsidized subject imports increased between 2000 and 2001, then declined between 2001 and 2002 to a level that the ITC observed was still significantly higher than in 2000;

- Compared to US production, the ratio of total subsidized subject imports increased between 2000 and 2001, and then declined between 2001 to 2002 to a level that was still significantly higher than in 2000; and

- Thus, in addition to an increase in subsidized subject imports over the period of investigation in absolute terms, the volume of subsidized subject imports relative to US consumption and relative to US production also increased over the period of investigation.[218]

7.230 The US submits that there are multiple ways under Article 15.2 of the *SCM Agreement* to examine subsidized subject import volume. The US asserts that, based upon the clear text of Article 15.2, which uses the disjunctive terms "either" and "or," analysis of the volume of subject imports should include consideration of the absolute volume of subsidized subject imports, a significant increase in the volume of subsidized subject imports in absolute terms, a significant increase in the volume of subsidized subject imports relative to production in the importing Member, or a significant increase in the volume of subsidized subject imports relative to consumption in the importing Member. The US argues that, in the DRAMs investigation, the ITC found that the volume of subsidized subject imports was significant and that the increase in that volume absolutely and relative to production and consumption in the US was significant. The US asserts that the ITC therefore examined volume in each of the ways contemplated by Articles 15.1 and 15.2. The US disagrees with Korea's argument that "the only objective means of assessing the volume impact of subject imports is by examining relative changes in market share."[219] The US asserts that Korea's approach directly contravenes the last sentence of Article 15.2, which specifies that "no one or several" of the Article 15.2 factors "can necessarily give decisive guidance." The US argues that the ITC tied its volume analysis to the relevant conditions of competition in this industry and put the data in context by explaining why subsidized subject import volume was significant in the DRAMs investigation. The ITC stated that its "findings about the volume of subject imports are reinforced by the substantial degree of substitutability between subject imports and domestic shipments," and it noted that "[t]he commodity-like nature of domestic and subject imported DRAM products magnifies the ability of a given volume of imports to impact the domestic market and industry."[220] The US submits that it was reasonable for an investigating authority to consider substitutability in its volume analysis. Whether the product is fungible and price sensitive, or whether the market is highly differentiated, can be relevant in assessing the significance of a given import volume or a given increase in import volume absolutely or relative to consumption or production.[221]

7.231 Regarding Korea's argument that subject imports increased market share because Hynix's US manufacturing facility, HSMA, was closed between July 2001 and January 2002, the US asserts that Korea would have this Panel believe that, in large measure, the increased subject imports were entering the US market to replace other Hynix-brand products while the HSMA facility was being upgraded. The US submits that this argument is flawed for many reasons: first, because even if this

[218] *See, e.g., Final Injury Determination,* at 20-22 (Exhibit GOK-10); *see also, e.g.*, Hearing Transcript at 243-245 (Exhibit US-94).

[219] Korea First Written Submission, para. 89.

[220] *See, e.g., Final Injury Determination (USITC Pub. 3616) at 21 (Exhibit GOK-10).*

[221] *See, e.g., US First Written Submission, paras. 311-314.*

explanation of the circumstances were accurate, it does not detract from the fact that a domestic producer was losing sales to subsidized subject imports; second, because the ITC in its final determination explicitly identified a missing (confidential) factual basis to Hynix's argument; and third, because Korea's argument is premised on the notion that the ITC should have examined the impact of subsidized subject imports on a "brand-name" basis (i.e., excluding from subject import volume those imports of subsidized subject DRAM products that it alleges "merely replaced" DRAM products produced by Hynix's Eugene facility). The US submits that Korea's brand-name approach would not be consistent with the *SCM Agreement*, since it does not focus on the impact of subsidized imports on the condition of the domestic industry (including Hynix's Oregon facility). In contrast to Korea's suggested brand-name analysis, the US argues that the ITC analyzed the volume data consistent with the requirements of SCM Articles 15.1, 15.2, and 15.4. First, the data used by the ITC concerned "the volume of the subsidized imports from Korea." Second, the ITC analyzed the significance of the volume of subsidized subject imports and increases in that volume relative to indicators for "the domestic industry." [222]

7.232 The US notes Korea's argument that "all of the increase in Hynix import market share occurred from 2000 to 2001, *prior to* Hynix receiving the bulk of the alleged subsidies in the 4th quarter of 2001. In fact, the data demonstrate that *after* Hynix received the vast majority of the alleged subsidies, the market share of Hynix's imports actually decreased from 2001 to 2002, and then decreased again from interim 2002 to interim 2003."[223] The US asserts that it is incorrect that "all of the increase" in Hynix's market share occurred between 2000 and 2001, because subsidized subject imports' market share in 2002 was significantly greater than in 2000, as the ITC noted. The US also asserts that some of the subsidies that the DOC found benefited Hynix predated the period for which the DOC made its subsidy finding. The US submits that Korea's argument therefore lacks both legal and factual foundation.

(ii) Evaluation by the Panel

7.233 There are three ways in which an investigating authority may comply with the Article 15.2 requirement to "consider whether there has been a significant increase in subsidized imports."[224] First, the investigating authority may consider whether there has been a significant increase in the volume of subsidized imports in absolute terms. Second, the investigating authority may consider whether there has been a significant increase in the volume of subsidized imports relative to domestic production. Third, the investigating authority may consider whether there has been a significant increase in the volume of subsidized imports relative to domestic consumption. Article 15.2 provides that "[n]o one or several of these factors can necessarily give decisive guidance."

7.234 In the case at hand, the ITC determined that "the absolute volume of subject imports and the increase in that volume over the period of investigation relative to production and consumption in the US is significant."[225] Thus, the ITC undertook two of the three considerations envisaged by Article 15.2 of the *SCM Agreement*. In particular, the ITC found that the increase in the volume of subsidized imports was "significant" (1) relative to domestic production, and (2) relative to domestic consumption. Although the ITC found that "the absolute volume of subject imports ... is significant" ,

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[222] *See, e.g., US First Written Submission, paras. 328-332.*

[223] Korea First Written Submission, para. 107.

[224] Article 15.2 does not require a determination that there has been a significant increase in subsidized imports. It simply requires investigating authorities to "consider" whether there has been such an increase. Although this issue is not disputed by the parties in this case, we note that the language of Article 15.2 would seem to suggest that an injury determination may be consistent with Article 15 of the *SCM Agreement* even in the absence of a determination that (as opposed to consideration whether) there has been a significant increase in the volume of subsidized imports.

[225] *Final Injury Determination*, page 20, (Exhibit GOK-10).

it did not determine that the increase in the absolute volume of subsidized imports was significant.[226] Since Article 15.2 provides that "[n]o one or several of these factors can necessarily give decisive guidance", the fact that the ITC did not find that there was a significant increase in the absolute volume of subsidized imports is not *per se* inconsistent with Article 15.2 of the *SCM Agreement.*

7.235 Korea challenges the entirety of the ITC's determination regarding volume effects. However, given the scope of Article 15.2, we shall focus on Korea's claims concerning the ITC's determination that "the increase in th[e] volume [of subsidized imports] over the period of investigation relative to production and consumption in the US is significant."[227] We shall not consider the ITC's determination that the absolute volume (but not any increase therein) of subsidized imports was significant.

7.236 Since Korea argues that "what is important when analyzing the volume of DRAMs shipments is to examine the increased shipments relative to consumption",[228] we shall begin by examining Korea's claim against the ITC's determination that the volume of subsidized imports was "significant" relative to domestic consumption.

The volume of subject imports relative to domestic consumption

7.237 The first point to be made in respect of Korea's arguments is that Article 15.2 of the *SCM Agreement* is concerned with the volume of "the subsidized imports", or "subject imports" in ITC parlance. This is because Part V of the *SCM Agreement* provides relief for injury caused by subsidized imports. It does not provide relief for injury caused by non-subsidized imports. Nor does it provide for relief from injury caused by goods that are not imported at all. In contrast, many of Korea's arguments concerning market share relate to the volume of Hynix shipments by brand, i.e., including both Hynix subject imports and Hynix's US production. Since Korea's brand analysis does not focus on the relative market share of "subsidized imports", as required by Article 15.2 of the *SCM Agreement*, it provides no basis for finding that the ITC's determination that the volume of subject imports was "significant" relative to domestic consumption is inconsistent with Article 15.2.

7.238 That being said, we acknowledge that, in addition to its brand analysis, Korea also argues that the volume of subject imports (rather than subject brand) was not "significant" relative to domestic consumption. Korea submits that Hynix's import market share fell in both 2002 and the beginning of 2003, that non-subject imports consistently dwarfed subject imports, and that the increase in non-subject imports was almost five times larger than the increase of subject imports. The factual basis for Korea's arguments is contained in Figure 9 of Korea's first written submission, set forth at para. 7.224 *supra*. The US disputes the reliability of the Figure 9 data, whereas Korea asserts that it represents a reliable proxy given the US failure to provide the Panel with the confidential information actually relied on by the ITC.

7.239 Before turning to the substantive issue at hand, we note that Korea has not raised any claims under Article 12.4 of the *SCM Agreement* concerning the designation of the relevant information by the ITC as confidential. We also note that, pursuant to that provision, the US is precluded from disclosing confidential information "without specific permission of the party submitting it." We considered it would only be appropriate and necessary[229] to request the relevant confidential

[226] The US argues at para. 303 of its First Written Submission that the ITC found that "the increase in th[e] volume [of subsidized subject imports] absolutely ... was significant." We see no such finding in the ITC's *Final Injury Determination*, however.

[227] *Final Injury Determination*, page 20, (Exhibit GOK-10).

[228] Korea's First Written Submission, para. 93.

[229] We note that Article 13.1 of the *DSU* provides in relevant part that "[a] Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate."

information from the US if Korea had established a basis for its case using the "proxy" data set forth in the abovementioned Figure 9. However, we consider that Korea failed to do so.[230]

7.240 We note that the data submitted by Korea in Figure 9 shows that the market share of US shipments of Hynix subject imports ranged from 6.7 to 9.0 to 8.9 per cent from 2000 to 2001 to 2002, falling to 5.8 per cent in the first quarter of 2003.

7.241 Korea asserts that the nominal increase in subject imports' market share (relative to apparent domestic consumption) should not have been determined by the ITC to be "significant" for three reasons. First, because Hynix import market share fell in both 2002 and the beginning of 2003. Second, because non-subject imports consistently dwarfed subject imports. Third, because the small increase in subject imports could not be considered significant in light of the much larger increase in non-subject imports.

7.242 Regarding the alleged decrease in the market share of subject imports from 2002 to the first quarter of 2003, we note that Korea has not challenged the ITC's finding that the weight accorded to the 2003 data should be reduced because it "is related to the pendency of this investigation."[231] In light of this finding, which undermines the relevance of the 2003 data, we consider that the ITC could properly have reduced the weight it accorded to interim 2003 data. Accordingly, we shall not consider Korea's interim 2003 data in our findings. Instead, we focus our findings on Korea's 2000 – 2002 data, which show an increase in subject imports' market share from 6.7 to 8.9 per cent.

7.243 Concerning Korea's argument that non-subject imports "dwarfed" subject imports, we recall that Article 15.2 requires (in relevant part) a consideration of whether there is a significant increase in the volume of subsidized imports relative to domestic consumption. Since non-subject imports are only one part of total domestic consumption, the volume of subject imports relative to the volume of non-subject imports is not determinative of the relevant issue.[232] The same is true in respect of Korea's argument concerning the rate of increase in subject imports compared to the rate of increase in non-subject imports. Neither the volume of non-subject imports, nor the increase in the volume of non-subject imports, detracts from the fact that there was an increase in the market share of subject imports. Furthermore, we agree with the US that, in emphasizing the increase in subject import market share of 2.2 percentage points, Korea is focusing on the percentage-point increase, ignoring that this was equivalent to an increase in market share of a certain percentage magnitude over the period of investigation. Indeed, the 2000 – 2002 increase of 2.2 percentage points represents an increase in subject import market share of 32.8 per cent.[233] We do not consider that Korea has established that an increase in subject import market share of this magnitude could not properly be considered significant.

7.244 Korea argues instead that the increase in market share of subject imports should be viewed in the context of the closure of HSMA. In other words, Korea considers that the ITC should have taken into account the fact that the increase in market share of subject imports (by comparison to domestic consumption) was largely accounted for by the fact that Hynix's subject imports were replacing sales

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[230] In assessing Korea's arguments concerning Figure 9, we do not take into account the US arguments that such data is unreliable. In the absence of confidential data being made available by the US, we consider that Korea is entitled to build its case as best it may. It is unrealistic to expect Korea to use data of a quality equivalent to that available to the ITC.

[231] *Final Injury Determination*, page 21, (Exhibit GOK-10).

[232] It would appear that Korea's arguments regarding non-subject imports really concern the issue of whether the ITC improperly attributed injury caused by non-subject imports to subject imports. Our analysis of Korea's non-attribution arguments is set forth at paras 7.350-7.371 *infra*.

[233] In addition, Korea has not rebutted the US argument that subsidized subject imports maintained their market share better than domestic producers. In the context of Article 15.2, which concerns the impact of imports on the domestic industry, this is a relevant consideration.

made by Hynix's Eugene facility. We do not accept this argument, however, because Article 15.2 of the *SCM Agreement* is concerned with the volume of subsidized imports.[234] Furthermore, the Korean argument is factually flawed, **[BCI: Omitted from public version[235]]** It was not, therefore, a simple case of swapping customers between Hynix's Korean and US facilities.

7.245 Korea also argues that all of the increase in subject imports' market share occurred from 2000 to 2001, prior to Hynix receiving the bulk of the alleged subsidies in the fourth quarter of 2001. However, Article 15.2 does not require an investigating authority to demonstrate that all of the subject imports covered by the period of injury investigation are subsidized. As noted by the panel in *Argentina – Poultry Anti-Dumping Duties*, "the period of review for injury need only 'include' the entirety of the period of review for dumping."[236] It is not necessary that the period of review for subsidization must mirror the period of review for injury.

7.246 In light of the above, we do not consider it necessary or appropriate to request confidential information from the US. Even accepting the data set forth in Korea's Figure 9, Korea has failed to persuade us that the ITC could not properly have found that the increase in the volume of allegedly subsidized imports was "significant" relative to domestic consumption.

The volume of subject imports relative to domestic production

7.247 In support of its determination that the increase in the volume of subject imports relative to domestic consumption was significant, we note that the ITC found that:

> [c]ompared to US production of uncased DRAMs, the ratio of total subject imports increased from *** per cent in 2000 to *** per cent in 2001, then declined to *** per cent in 2002, a level that was still *** that of 2000, and was *** per cent in interim 2003 compared to *** in interim 2002.[237]

7.248 Korea has not challenged any of the underlying data relied on by the ITC. Nor has Korea denied that there was an increase in subject imports relative to domestic production. In fact, Korea only addressed the ITC's determination regarding the volume of subject imports relative to domestic production at the Panel's second substantive meeting with the parties. At para. 13 of its oral statement at that meeting, Korea stated:

> The US tries to shift focus away from this small change in share of domestic consumption by citing subject imports relative to domestic production. But this alternative approach has only limited usefulness in this particular case, and therefore was not a focus of our earlier submissions. This measure actually says more about changes in the denominator – the domestic production – than the numerator. As US based companies become more global, it is quite natural that more of US consumption comes from offshore sources. All four of the major DRAM companies producing in the US also have major operations overseas. Moreover, domestic

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[234] We note Korea's argument that the closure of HSME is relevant to the ITC's determination regarding the causal link between the allegedly subsidized imports and injury suffered by the domestic industry (see para. 236 of Korea's First Written Submission, and para. 194 of Korea's Second Written Submission). In certain circumstances, the closure of HSME (and therefore the reason for the increase in subject imports) may well have had a bearing on causation. However, since the ITC determined that **[BCI: Omitted from public version]**, we consider that the ITC could properly have decided not to revert to this issue in its causation analysis.

[235] Korea has not rebutted the US argument, based on Exhibit GOK-41, that **[BCI: Omitted from public version]**.

[236] Panel Report, *Argentina – Poultry Anti-Dumping duties*, para. 7.287.

[237] *Final Injury Determination*, page 21 (footnotes omitted), (Exhibit GOK-10).

> production in 2001 is understated because the Hynix Oregon facility shut down for much of that year. Finally, under this approach of measuring imports relative to domestic production, the non-subject imports also become much more important. The non-subject imports surged from about 59 per cent of domestic production in 2000 to 102 per cent of domestic production in 2001. Even if by this measure subject import share doubled from a much smaller initial level, the non-subject share in 2001 was still more than six times as large. (footnotes omitted)

7.249 Korea's statement was made in response to assertions made by the US at para. 117 of its Second Written Submission. At no time did Korea initiate any discussion of the ITC's determination regarding the volume of subject imports relative to domestic production. Indeed, Korea itself acknowledged at our second substantive meeting with the parties that this issue "was not a focus of [its] earlier submissions."[238] Considering that the burden is on Korea to establish a prima facie case in support of its claim against the ITC's determination that the volume of subject imports relative to domestic production is significant, we find this surprising. We also note that Korea has entirely failed to substantiate its assertion that US production declined as a result of US production being moved offshore. Nor has Korea argued that any such relocation of production facilities, if true, was not properly addressed by the ITC. Regarding Korea's argument concerning the volume of non-subject imports relative to domestic production, we recall that Article 15.2 only requires (in relevant part) consideration of the volume of subsidized (as opposed to non-subsidized, or non-subject) imports relative to domestic production.[239] For these reasons, we do not consider that Korea's arguments provide sufficient basis for finding that the ITC could not properly have found that the increase in the volume of subject imports relative to domestic production was significant.

2. Did the ITC properly assess the price effects of subject imports?

7.250 Article 15.2 of the *SCM Agreement* provides in relevant part that:

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

7.251 The ITC determined that there was significant price undercutting by the subsidized imports, and that the effect of such imports was to depress prices to a significant degree. Korea challenges both determinations by the ITC on the basis of Article 15.1 and 15.2 of the *SCM Agreement*.

(i) Arguments of the parties

7.252 Korea asserts that the central premise of the ITC's determination was that Hynix's DRAMs were sold in the US market at low prices, and that these low prices somehow injured the US domestic industry. Korea argues that economic logic for the market-pricing dynamics of a commodity product demonstrate that the ITC's conclusion is not an objective examination.

7.253 First, Korea states that, at the height of the alleged subsidization of Hynix in 2001, Hynix was losing market share in the US market, not gaining share. According to Korea, this steady loss of

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[238] See para. 13 of Korea's oral statement at the second substantive meeting with the parties.

[239] To the extent that the volume of non-subject imports may be relevant to the issue of causation, this is addressed at paras 7.350-7.371 *infra*.

market share simply cannot be reconciled with the ITC's conclusion that Hynix's prices significantly undersold US market prices, particularly at the end of the period being investigated. Korea argues that, given that DRAMs are a commodity product, if that were true, Hynix would have increased its market share significantly, which it did not.

7.254 Second, Korea argues that the ITC's conclusion is also contrary to basic economic theory. Korea asserts that because Hynix was neither the highest cost producer nor the lowest cost producer, simple economics dictates that Hynix could not have determined the market price. Korea argues that this is confirmed by the fact that, when responding to the ITC questionnaire, not a single purchaser/customer identified Hynix as the price leader in the DRAM market.

7.255 Regarding the ITC's price-comparison analysis, Korea acknowledges that Article 15.2 does not impose any specific methodology for analyzing prices. However, Korea argues that a lowest price analysis is the most appropriate type methodology for commodity products such as DRAMs. Korea asserts that a lowest price analysis shows that, overall, Hynix subject imports were the lowest price source only a small per cent of the time and that, the overwhelming majority of time, other suppliers were offering lower prices than Hynix. Korea asserts that the ITC disregarded a lowest price analysis, and attached greater importance to a weighted-average subject import price to a weighted-average US producer price comparison instead.

7.256 According to Korea, the ITC tries to dismiss the role of non-subject import pricing by saying that the frequency of underselling by such imports was smaller and growing more slowly than underselling by subject imports. Korea asserts that this argument glosses over two fundamental flaws. First, these patterns of underselling reflect average non-subject import prices, not individual non-subject suppliers. According to Korea, that the average non-subject price may be higher than domestic prices does not mean very much if there is an individual non-subject supplier that is underselling and offering the lowest price. Second, these patterns of underselling need to be considered together with trends in market share. Korea argues that if non-subject imports were large and significantly gaining market share as acknowledged by the ITC, the only objective conclusion is that the non-subject imports are having a significantly greater impact on the market. Korea asks the Panel to request the ITC's confidential price underselling analysis from the US.

7.257 Korea states that the ITC's determination makes a half-hearted attempt to proclaim that even the lowest-price analysis (what the ITC calls a "disaggregated analysis") supports its conclusion that subject imports had adverse price effects. The ITC states that the lowest-price analysis demonstrated that Hynix's price was the lowest-price some of the time, "or more often than" any other source. According to Korea, the ITC's statement ignores the fact that the data distinguished import and domestic supply sources for the other suppliers whereas, on a combined (import plus domestic supply) brand basis, other suppliers had the lowest price more frequently. Korea also argues that the ITC's statement analyses each of the other suppliers individually, ignoring their combined effect.

7.258 Korea submits that the ITC's price depression analysis is flawed because it defies common sense to say that, for this commodity product, the absence of subject imports would allow domestic prices to be "substantially higher," even though the volume of non-subject imports in the market was six to seven times the volume of subject Hynix imports.

7.259 The US submits that the ITC's analysis of the price effects of subsidized subject imports is based on an objective examination and positive evidence and is otherwise consistent with the requirements of Articles 15.1 and 15.2 of the *SCM Agreement*. The US asserts that, however measured, there was significant underselling by subsidized subject imports from Korea.

7.260 The US argues that its weighted-average analysis was based on representative data that have not been challenged by Korea. The US argues that, for the majority of possible comparisons,

subsidized subject imports undersold domestic like product at high margins (often over 20 per cent), and at increasing frequencies (from 51 per cent of possible comparisons in 2000 to 56 per cent in 2001 and 70 per cent in 2002). The US asserts that the conclusions drawn from this analysis are incontrovertible. The US argues that the ITC explained that in a commodity-type market that adjusts quickly (even biweekly) to price changes, significant price disparities between suppliers would not usually be expected. According to the US, the ITC therefore found the patterns of frequent, sustained high-margin underselling by subsidized subject imports was especially significant in this industry, and could be expected to have particularly deleterious effects on domestic prices.

7.261 The US asserts that the ITC's methodology for its underselling analysis was reasonable. The US notes Korea's statement that the ITC's weighted-average pricing analysis was "wrong for this industry."[240] According to the US, the fact that Korea would have preferred the ITC to apply a different methodology is simply irrelevant, since it is for the investigating authorities in the first instance to select methodologies to analyze the price effects of subject imports. The US submits that there is no requirement in the *SCM Agreement* to analyze price effects on a brand-name basis, nor does Korea identify one.

7.262 The US submits that it was entirely reasonable for the ITC to analyze the pricing data using a weighted-average pricing analysis that segregated pricing on a country-specific basis, since the use of the disaggregated analysis by brand name urged by Hynix would not reflect the source country of the DRAM products and would be utterly inconsistent with the requirement under the *SCM Agreement* to examine the effect "of the subsidized imports" on the "like product," the product produced by the domestic industry. According to the US, Korea's disregard for distinctions between subsidized imports and the domestic like product eliminates the single most basic and fundamental distinction underlying the injury framework of the *SCM Agreement*.

7.263 The US submits that Korea ignores that the ITC also examined the pricing data on a disaggregated basis (broken down both by brand-name and by source). The US asserts that the ITC found that even a disaggregated analysis showed that subsidized subject imports were the lowest-priced product "more often than DRAM products from any other source."[241]

7.264 The US also argues that the ITC properly found that subsidized subject imports depressed prices to a significant degree. The US asserts that product-specific data showed price declines of 70 to 90 per cent from late 2000 through 2001, a modest rebound in early 2002, then a further decline over the course of 2002. The US argues that the ITC noted that the price decline in 2001 was the most severe in history, and pricing continued to decline in 2002. The US asserts that the ITC pointed to significant quantities of subsidized subject imports that competed in the same product types at increasing frequencies of underselling, noted that the underselling corresponded with the substantial price decline over this period, and found that domestic prices would have been substantially higher without such significant quantities of low-priced products. The US argues that confirmed lost sales/lost revenue allegations reinforce the ITC's findings concerning subject imports' price effects.

(ii) Evaluation by the Panel

7.265 Article 15.1 provides that an injury determination must involve an objective examination of "the effect of the subsidized imports on prices in the domestic market for like products." Article 15.2 provides that, "[w]ith regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases,

[240] Korea First Written Submission, para. 149.
[241] *See, e.g., Final Injury Determination*, at 24 (Exhibit GOK-10).

which otherwise would have occurred, to a significant degree." Under Article 15.2, therefore, competent authorities may choose whether to examine the price effects of subsidized imports on the basis of price underselling, price depression, or price suppression.

7.266 In its determination, the ITC considered both price underselling and price depression. The ITC determined that "there is significant price underselling by subject imports, and that the effect of such subject imports has depressed prices to a significant degree."[242]

Price underselling

7.267 In respect of price underselling, the ITC employed two methodologies. First, it compared a weighted average import price to a weighted average US producer price. Second, the ITC performed a disaggregated lowest-price analysis.

7.268 Korea does not challenge the factual data used by the ITC in its price underselling analyses, nor the ITC conduct of those analyses. Nor does Korea claim that Article 15.2 imposes any specific methodology for analysing prices. Nor, indeed, does Korea claim that the ITC failed to examine the price effects of subsidized imports. Instead, Korea challenges the ITC's weighted average methodology because it ignored the price effects of non-subject imports, and the ITC's lowest-price analysis because it was not done on a combined, aggregated brand basis (i.e., all non-subject import plus domestic sources combined together).

7.269 Article 15.2 of the *SCM Agreement* requires the competent authority to analyse "the effect of the subsidized imports on [domestic] prices." In light of the plain meaning of this text, the competent authority is only required to examine the price effects of subsidized imports. It is not required to also examine the price effects of non-subsidized imports, or pricing on a combined brand basis.[243] Such examinations would extend beyond the price effects of subsidized imports, and therefore are not required by Article 15.2.[244] For this reason, Korea's arguments regarding the price effects of non-subsidized imports, or pricing on a combined brand basis, provide no basis for finding that the ITC could not properly have found that "there is significant price underselling by subject imports."[245]

Price depression

7.270 The ITC found:

> prices for nearly every pricing product and channel of distribution declined substantially over the period of investigation. Prices for domestic products and subject imports followed the same general trends and were generally similar for sales to PC OEMs across all products. The product-specific data show price declines of 70 to 90 per cent from late 2000 through 2001, a modest rebound in early 2002, then a further decline over the course of 2002. The parties agreed that the price decline in 2001 was the most severe in DRAMs history, and pricing continued to decline in

[242] *Final Injury Determination*, page 25, (Exhibit GOK-10).

[243] We note that the ITC did in fact analyse the price effects of non-subject imports on a weighted average basis, and that it also performed a disaggregated analysis (i.e., broken down both by brand-name and by source). We further note that Korea conceded at our second substantive meeting with the parties that the ITC performed a "better than usual analysis."

[244] Of course, the price effects of non-subject imports could impact on causation / non-attribution. This issue is addressed at paras 7.350-7.371 *infra*.

[245] *Final Injury Determination*, page 25, (Exhibit GOK-10).

> 2002. ... The increasing frequency of underselling by subject imports from 2000 to 2002 corresponds with the substantial decline in US prices over these same years.[246]

7.271 Korea's arguments concerning the ITC's determination on price depression are mainly concerned with the role of non-subject imports. In other words, Korea argues that the reason prices were depressed was not because of subject imports, but because of a much larger volume of non-subject imports. However, Korea does not deny that there may be multiple causes of injury suffered by a domestic industry. Thus, the fact that non-subject imports may have had negative price effects does not preclude a finding that subject imports also had negative effects on prices. Even if Korea's arguments regarding the role of non-subject imports were correct, therefore, Korea's arguments do not necessarily mean that the ITC could not properly have found, nevertheless, that "the effect of [] subject imports [] depressed prices to a significant degree."[247]

7.272 Korea does focus on the price effects of subject imports when challenging the ITC's analysis of price leadership. In this regard, the ITC determined:

> Most purchasers did not identify a price leader in the US market. This is not surprising in a commodity industry characterized by frequent (even biweekly) price changes such as the DRAM product market. Nevertheless, *** purchasers of DRAM products contacted by staff regarding lost sales and lost revenue allegations identified Hynix as a source of low-priced DRAM products, and confirmed that the domestic industry lost sales and/or revenues due to competition from Hynix.[248]

7.273 The US argues that confirmed lost sales/lost revenue allegations reinforced the ITC's findings concerning subject imports' price effects. In its arguments regarding price leadership, Korea emphasises the fact that Hynix was not identified by purchasers as a price leader. This confirms the ITC's finding to that effect.[249] However, Korea overlooks the ITC's finding that purchasers "identified Hynix as a source of low-priced DRAM products, and confirmed that the domestic industry lost sales and/or revenues due to competition from Hynix."[250] Nor does Korea rebut the US argument that confirmed lost sales/lost revenue allegations reinforced the ITC's findings concerning subject imports' price effects.

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[246] *Final Injury Determination*, page 24, (footnotes omitted), (Exhibit GOK-10).

[247] *Final Injury Determination*, page 25, (Exhibit GOK-10). In this regard, we note in particular the ITC's determination that "[t]he increasing frequency of underselling by subject imports from 2000 to 2002 corresponds with the substantial decline in US prices over these same years." (*Final Injury Determination*, page 25, (Exhibit GOK-10)). Other than its challenge against the ITC's price underselling analysis, which we have already rejected, Korea does not dispute this important finding by the ITC.

[248] *Final Injury Determination*, page 25, (footnotes omitted), (Exhibit GOK-10).

[249] In this regard, we note the US argument that "Korea fails to identify any requirement under Article 15 to find price leadership, because there is no such requirement" (US First Written Submission, para. 391). Since Korea failed to rebut this argument, we have no reason to disagree with the US that Article 15 does not require a finding of subject import price leadership.

[250] In response to Question 29 from the Panel after the first substantive meeting with the parties, Korea states that the ITC's questionnaire "asks only for an indication of which firm[s] is having a 'significant impact' on price. Thus, when customers responded to this question, and failed to identify Hynix as the price leader, the customers were basically indicating that the effects of Hynix imports were not to depress prices to a significant degree." This does not undermine the ITC's determination, however, since it was not based on Hynix being a price leader. To the contrary, the ITC explicitly acknowledged that Hynix was not identified as a price leader. However, the ITC's determination that subject imports caused significant price depression was based on other considerations that have not been addressed by Korea in respect of its claim against the ITC's finding on price depression.

7.274 In short, Korea's arguments provide no basis on which to find that the ITC could not properly have determined that "the effect of []subject imports []depressed prices to a significant degree."[251] As a result, we reject Korea's arguments that the ITC failed to properly assess the price effects of subject imports.

3. Did the ITC properly consider all factors relevant to the overall condition of the domestic industry?

7.275 Korea submits that the ITC violated Articles 15.1 and 15.4 of the *SCM Agreement* because it failed to address and assess all relevant economic factors having a bearing on the state of the domestic industry.

7.276 Article 15.4 of the *SCM Agreement* provides:

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

(i) Arguments of the parties

7.277 Korea asserts that the ITC did not adequately consider the "boom-bust" business cycle of the DRAMs industry when analysing the condition of the domestic industry and the relative impact of subject imports. Korea asserts that the business cycle is the single most important characteristic in the DRAM market.

7.278 Korea acknowledges that the ITC recognized the existence of the business cycle in the DRAM industry, but argues that the ITC completely ignored the implication of this business cycle when analyzing the causes of the deterioration of the domestic industry's financial condition over the period examined. Korea asserts that this omission is demonstrated by the fact that, except for a quotation of the statutory language, there is not a single reference to term "business cycle" in the section of the ITC *Determination* dealing with the "Impact of Subject Imports." Korea states that this omission is particularly egregious because the evidence before the ITC made clear that the DRAM industry went from the top of the boom to the trough of the bust during the very period being investigated.

7.279 Korea also submits that the ITC failed to take into account the domestic industry's own definition of success when analyzing the condition of the domestic industry. Korea asserts that the ITC's determination of material injury was based primarily on an examination of the following factors: capacity utilization, production, commercial shipments and operating profit. Korea argues that these factors ignore the criteria that US DRAM producers themselves use to measure success in this industry in light of the severe boom/bust cycles, namely (1) ability to continue capital spending; (2) ability to continue R&D efforts; (3) strong market share to spread out costs; (4) strong cash flow to fund investments; and (5) access to capital markets to supplement cash flow. In this regard, Korea asserts that the ITC record contains Micron's 2001 year in review (issued in 2002) that provides Micron's own definition of "financial strength":

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[251] *Final Injury Determination*, page 25, (Exhibit GOK-10).

> A strong cash position, coupled with our ability to access capital markets, giving Micron operational flexibility. With minimal debt, and a reputation as a leading edge manufacturer, Micron has the resources to continue investing in technology and to meet our customers' growing demand for Micron products.[252]

7.280 Korea asserts that the record also contains a later statement by Micron CEO Steve Appleton in which many of these key themes for defining success were reiterated:

> We have a good cash balance. We are able to keep investing in the technology. We have enough market share to spread out our cost, and we are able to focus on technology innovation. I think we're in as good a shape as anybody.[253]

7.281 The US argues that Korea does not dispute the positive evidence supporting the ITC's conclusions, and that it makes only two limited arguments regarding the ITC's impact analysis. First, the US understands Korea to assert that the ITC did not consider the business cycle in its analysis of the impact of the subsidized subject imports on the domestic industry. Second, the US understands Korea to argue that the ITC should have weighed the factors differently, and that in this industry there are only five key indicia.

7.282 The US notes Korea's argument that the final determination did not meet the obligation under *SCM Agreement* Article 15.4 to examine the business cycle distinctive to the DRAMs industry as an "other" "relevant factor."[254] The US asserts that the panel in *Thailand – H Beams*, in a finding subsequently explicitly endorsed by the Appellate Body[255], contrasted the requirement to examine the enumerated factors with "other" relevant economic factors," in the context of the *AD Agreement* provision that is substantively identical to Article 15.4 of the *SCM Agreement*, stating:

> We thus read the Article 3.4 phrase "shall include an evaluation of all relevant factors and indices having a bearing on the state of the industry, including ..." as introducing a mandatory list of relevant factors which must be evaluated in every case. We are of the view that the change that occurred in the wording of the relevant provision during the Uruguay Round (from "such as" to "including") was made for a reason and that it supports an interpretation of the current text of Article 3.4 as setting forth a list that is not merely indicative or illustrative, but, rather, mandatory. Furthermore, we recall that the second sentence of Article 3.4 states: "This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance." Thus, in a given case, certain factors may be more relevant than others, and the weight to be attributed to any given factor may vary from case to case. Moreover, there may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required.[256]

7.283 The US notes that the industry's "business cycle" is not an enumerated factor under Article 15.4. The US asserts that, whether or not the Panel finds that the business cycle distinctive to

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[252] *See* Prehr. Br., at 24 *citing Micron 2001 Year in Review*, at 4, provided as Exhibit 8 in the same submission (Exhibits GOK-18, 18-(f)).

[253] *See* Prehr. Br., at *Id. citing Electronic Engineering Times*, 8 July 2002, at 1, provided as Exhibit 2 in the same submission (Article No. 25 (Mike Clendenin, *Don't Count Out Korean DRAM Deal, Says Micron CEO - Hynix Still Looks Good*)) (Exhibit GOK-18-(a)).

[254] Korea First Written Submission, paras. 32-48, 178-189.

[255] Appellate Body Report, *Thailand–H-Beams*, para. 125.

[256] Panel Report, *Thailand – H Beams*, para. 7.225.

the DRAMs industry is an "other" "economic factor" for purposes of Article 15.4, the ITC's examination of this factor in this investigation is also consistent with US obligations under Article 15.4. The US asserts that the ITC did analyze the business cycle, ascertaining that because growth in demand for DRAM products has been continuous, but supply increases are sporadic, supply and demand in this industry tend to be chronically out of equilibrium, giving the market its characteristic "boom" and "bust" business cycle. According to the US, the ITC also determined that largely because of the perpetual improvements in production efficiencies experienced by this industry, prices are usually declining. The US asserts that, based on its evaluation of the record evidence in this investigation, the ITC determined that "[w]hile slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor."[257] The US asserts that, although much of the ITC's evaluation of this issue appears in the "price effects" section of the final determination, the ITC expressly cross-referenced this analysis in its evaluation of the "impact" of the subsidized subject imports on the domestic industry.[258]

7.284 The US asserts that Korea's argument regarding the five main criteria suffers from two major defects. First, the US asserts that Article 15.4 contains a non-exhaustive list of enumerated factors for evaluation, specifies that no one or several of these factors is determinative, and, as evident in the reports of other panels and the Appellate Body, it is the investigating authorities that are to weigh the factors in any given investigation, not interested parties or other Members.[259] The US also asserts that, while Korea focuses on a select set of criteria, the ITC's final injury determination reflects evaluation of positive evidence concerning a variety of factors showing changes in the industry's condition, as illustrated above. According to the US, the ITC evaluated these factors based on the time period from 2000 to 2002 and interim 2003, the same time period it used for its analysis of the volume and price effects of subject imports, while Korea uses different time periods depending on the point that it seeks to make.

7.285 Second, the US asserts that even the select criteria that Korea asserts are important in this industry[260] showed declines during at least part, if not the entire, period of investigation. The US argues that even these criteria therefore do not support Korea's assertion that the domestic industry was in a strong condition. Furthermore, the US asserts that while Korea cites bits of data about individual producers in its submission, the ITC examined the domestic industry, as well as the record, as a whole, consistent with Article 15.4. The US relies on the panel reports in *Mexico – Corn Syrup*[261] and *EC – Tube or Pipe Fittings*[262] to support its argument regarding the need to examine the state of the "domestic industry" as a whole.

7.286 The US also asserts that, in any event, Korea's specific arguments about individual domestic producers are also flawed. For example, the US argues that some of the data that Korea cites in its submission pertain to the global DRAMs market or the global operations of Micron or Infineon, not just their US operations or their DRAMs operations, whereas the ITC's impact analysis focused on the domestic industry's performance in the US market and on its operations concerning DRAM products, as opposed to other products. The US also argues that, with respect to the excerpts from public statements by Micron and Infineon to the financial community that were submitted by Hynix during the ITC's investigation, when read in context, these statements support, rather than detract

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[257] *Final Injury Determination*, pages 24-25, (Exhibit GOK-10).
[258] The US refers in this regard to pages 24 -25 and 27 of the *ITC Final Injury Determination*.
[259] The US refers, for example, to the Appellate Body Report in *EC – Tube or Pipe Fittings* paras. 160-166.
[260] *See* Korea First Written Submission, paras. 190-218.
[261] Panel Report, *Mexico –Corn Syrup*.
[262] Panel Report, *EC - Tube or Pipe Fittings*.

from the ITC's findings in this investigation. The US asserts that neither statement establishes, or was intended to suggest, that the identified factors show that Micron or the domestic industry did not suffer injury. According to the US, they rather show that, because of good management practices, Micron expected to survive, despite the significant injury it had suffered.

(ii) Evaluation by the Panel

7.287 Korea's Article 15.4 claim raises two issues. First, did the ITC properly consider the DRAM industry business cycle when analysing the condition of the domestic industry? Second, should a proper consideration of the five criteria that Korea alleges are key to measuring the success of the domestic DRAM industry necessarily have resulted in a finding of no injury?

Did the ITC properly consider the DRAM industry business cycle when analysing the condition of the domestic industry?

7.288 In addressing Korea's arguments[263], we note that the US does not contest that the "boom-bust" business cycle was a "relevant economic factor ... having a bearing on the state of the industry" in the meaning of Article 15.4. We will therefore proceed on that basis.

7.289 The ITC assessed the business cycle in its discussion of the price effects of subsidized imports on the domestic industry.[264] Having explained the nature of the business cycle earlier in the *Final Injury Determination*, the ITC stated:

> While slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicates that supplier competition was an important factor.[265]

7.290 Although Korea acknowledges that the ITC recognized the existence of the business cycle in the DRAM industry, Korea claims that the ITC ignored the implication of the business cycle when analyzing the causes of the deterioration of the domestic industry's financial condition. Korea claims that this is evidenced by the fact that there is no reference to the business cycle in that part of the *Final Injury Determination* entitled "Impact of Subject Imports." Korea does not challenge the ITC's treatment of the business cycle as a potential cause of injury to the domestic industry. Korea argues that the ITC's consideration of the business cycle as a potential cause of injury to the domestic injury does not satisfy the requirement of Article 15.4, since the business cycle was also a critical part of understanding the condition of the domestic industry. Korea argues that trends that might otherwise seem negative in the abstract could in fact be signs of strength when viewed in the context of the business cycle.

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[263] In its submissions, Korea referred to alleged inconsistencies between the ITC's injury determination in this investigation and its approach in another investigation. Since we are concerned with the conformity of the ITC's DRAM injury determination with the *SCM Agreement*, the ITC's practice in other investigations is not relevant to our analysis.

[264] We do not consider that the fact that this issue was addressed in that part of the ITC determination dealing with price effects, as opposed to the impact of subject imports, in and of itself gives rise to a violation of Article 15.4. In this regard, we agree fully with the statement of the panel in Panel Report, *US - Softwood Lumber VI*, para. 7.136 that:

> [it did] not mean to suggest that all aspects of the investigating authorities' determination must be entirely contained in the specific parts of the report dealing with particular issues. Certainly, in dispute settlement, a Member may argue the consistency of an anti-dumping or countervailing duty determination based on the entirety of that determination.

[265] *ITC Final Injury Determination*, page 25, (Exhibit GOK-10).

7.291 It is by no means clear to us that the ITC failed to review the state of the domestic industry in the context of the business cycle. In particular, the above determination indicates that the ITC acknowledged that poor performance by the domestic DRAM industry was not necessarily indicative of injury, but could simply be attributed to a downturn in the DRAM business cycle. However, it is clear from the determination that the ITC concluded that this was not the case in the present case, since the principal indicator of injury, i.e., price declines, could not be attributed to the business cycle (because "the price decline in 2001 was the most severe in the DRAMs history", and was therefore greater than had been caused by the business cycle in the past).[266]

7.292 Korea argues that "[u]nder [the ITC] an approach any industry in the 'bust' phase will always be deemed 'injured,' which is not an objective examination"[267]. Korea's argument would seem to be premised on its view that the ITC should have concluded that negative trends resulted from the operation of the business cycle. In other words, we understand Korea to argue that the ITC was only able to find injury because it failed to view the state of the domestic industry in the context of the business cycle. However, to the extent that the ITC demonstrated that negative trends – such as price declines - were caused by factors unrelated to the business cycle, viewing those trends in the context of the business cycle would not have precluded a finding of injury. Thus, the fact that the ITC found injury does not necessarily mean that it failed to view the state of the industry in the context of the business cycle. Korea's argument ignores the possibility that, even during the "bust" phase of the business cycle, a domestic industry could properly be found to be suffering injury caused by subsidized imports.

7.293 We do not attach any relevance to the fact that the ITC's consideration of the business cycle is set forth in a part of the report of the *Final Injury Determination* other than the "Impact of Subject Imports" section.[268] Our analysis is based on the ITC's *Final Injury Determination* as a whole, rather than particular sections thereof.

7.294 In light of the above, we reject Korea's argument that the ITC failed to properly consider the DRAM industry business cycle when analysing the condition of the domestic industry.

Should a proper consideration of the five criteria that Korea alleges are key to measuring the success of the domestic DRAM industry necessarily have resulted in a finding of no injury?

7.295 Korea claims that the ITC failed to properly consider the following five criteria: (1) ability to continue capital spending; (2) ability to continue R&D efforts; (3) strong market share to spread out costs; (4) strong cash flow to fund investments; and (5) access to capital markets to supplement cash flow. Korea asserts that the ITC ignored these criteria, even though they are used by US DRAM producers themselves to measure success. Korea submits that these criteria actually show a well-positioned domestic industry.

7.296 The US does not deny that the five criteria identified by Korea are "relevant economic factors" having a bearing on the state of the domestic industry. The US argues that the ITC assessed these factors appropriately. We shall examine the ITC's assessment of each of these factors in light of Korea's arguments.

Capital spending

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[266] We note that the ITC also compared the state of the domestic industry in the 2001/2002 downturn to the state of the domestic industry in the 1996-1998 downturn (see note 180 of the *Final Injury Determination*), (Exhibit GOK-10).

[267] *See* Korea's first oral Statement, para. 22.

[268] See note 264 *supra*.

7.297 The ITC stated that "[b]oth fabbing operations and assembly operations warrant continuing ... capital spending to keep up with the latest product and process developments."[269] The ITC also found that, although the domestic industry "continued to make substantial capital expenditures," such capital expenditures were "at increasingly lower levels, with reported capital expenditures decreasing from $1.8 billion in 2000 to $1.6 billion in 2001 and $*** in 2002; capital expenditures in interim 2003 were $*** compared to $*** in interim 2002."[270] This finding demonstrates both that the ITC assessed capital expenditures by the domestic industry, and that such capital expenditures were decreasing. Indeed, Korea has not disputed that the domestic industry's capital expenditures were "at increasingly lower levels." Although Korea submitted record evidence in support of an argument that Micron and Infineon continued capital spending during the downturn, this is not inconsistent with the ITC's finding that the domestic industry as a whole reduced capital expenditures over the period of investigation.

Research and development

7.298 The ITC examined the research and development expenditures of specific companies and by production process, and for the domestic industry as a whole. The ITC found that "R&D expenses decreased from 2000 to 2001 and then increased in each subsequent comparative period."[271] During part of the period of investigation, therefore, there was a downward trend in R&D expenditure. Again, Korea refers to evidence regarding an increase in Micron's R&D spending, but does not explain how this consideration alone means that the ITC could not properly have found (on the basis of a downward trend in R&D expenditure by the domestic industry as a whole during part of the period of investigation) that the domestic industry as a whole was suffering material injury.

Market share

7.299 The ITC found that the domestic industry's market share "declined from 43.4 per cent in 2000 to 34.3 per cent in 2001 and 30.7 per cent in 2002, while its market share in interim 2003 was 29.8 per cent compared to 30.4 per cent in interim 2002."[272] Korea has not disputed the accuracy of the market share data relied on by the ITC. Instead, Korea has submitted evidence concerning Micron and Infineon's world market shares. However, since such global evidence is not an indicator of the performance of the domestic industry, we see no reason why the ITC should have taken it into account.

Cash flow

7.300 The US argues that, according to record evidence, the domestic industry's cash flow (net operating profit plus depreciation) also declined over the period of investigation. Korea has not rebutted this argument. Instead, Korea has submitted evidence regarding Micron's cash flow. This, however, does not indicate the state of the domestic industry as a whole.

Access to capital markets

7.301 The US asserts that the domestic industry's cash flow problems were exacerbated when domestic producers' credit ratings were lowered. The US asserts that, for example, the ITC emphasized that Micron's credit rating was lowered in December 2002 by Standard and Poor's, and in January 2003 by Moody's. Since the ITC only considered that the credit rating of one domestic

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[269] *See Final Injury Determination* at 9 (Exhibit GOK-10).
[270] *See Final Injury Determination* at 27 (Exhibit GOK-10).
[271] *See, e.g., Final Injury Determination* at 9, 16 & n.40, Tables VI-4, C-1 (Exhibit GOK-10); Exhibit GOK-44(a) at Question III-8.
[272] *Final Injury Determination*, page 26 (Exhibit GOK-10).

producer had been downgraded, whereas Korea has pointed to record evidence to the effect that two domestic producers apparently had ready access to capital markets at least in 2000 and 2001, there may be some basis for reasonable disagreement regarding the ITC's analysis of the domestic industry's access to capital markets. However, we do not consider that the fact that two domestic producers may have had continued access to capital markets is sufficient to overturn the ITC's determination, based on a multitude of factors, that the domestic industry was suffering material injury. This is especially so as the last sentence of Article 15.4 makes it clear that no single economic factor having a bearing on the state of the domestic industry necessarily gives decisive guidance, and Korea has not established why domestic producers' access to capital should be considered decisive. Accordingly, we are not persuaded that an objective and impartial investigating authority could not properly have found material injury in these circumstances.

7.302 Before concluding on the ITC's assessment of the five criteria identified by Korea, we note Korea's argument that the ITC's finding of material injury was at odds with the domestic industry's own perception of its performance. Korea refers to two statements in this regard. First, Korea refers to a statement in Micron's 2001 year in review (issued in 2002) that:

> A strong cash position, coupled with our ability to access capital markets, giving Micron operational flexibility. With minimal debt, and a reputation as a leading edge manufacturer, Micron has the resources to continue investing in technology and to meet our customers' growing demand for Micron products.[273]

7.303 Second, Korea refers to a later statement by Micron CEO Steve Appleton:

> We have a good cash balance. We are able to keep investing in the technology. We have enough market share to spread out our cost, and we are able to focus on technology innovation. I think we're in as good a shape as anybody.[274]

7.304 We note, however, that the ITC record also contained statements by Micron officials to the effect that Micron was encountering difficulties, and that these difficulties were not exclusively linked to the particular stage of the DRAM business cycle. For example, Wilbur Stover, VP, Finance and CFO, Micron Technology stated: "[a]s you appreciate, the ongoing price pressure stems from the continued supply of subsidized Korean parts in the market."[275] In addition, Michael Sadler, VP, Worldwide Sales, Micron Technology Inc. commented, "[a] general over supply of DRAM attributed primarily to the Korean government subsidization programme continues to supply the industry. The resulting economics present obvious challenges. We are facing up to those challenges by advancing the technology, browsing the entire product offering, and doing so with the focus on cost reduction."[276] We consider that an objective and impartial investigating authority could properly have concluded from these comments that Micron was experiencing financial difficulties, and that those difficulties did not result exclusively from factors other than the subject imports.

7.305 In light of the above, we are not prepared to accept Korea's argument that evidence it has produced regarding the five alleged "key" criteria reflects a well positioned domestic industry. Much of the evidence relied on by Korea relates to only a single domestic producer.[277] In addition, Korea

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[273] *See* Prehr. Br., at 24 *citing Micron 2001 Year in Review*, at 4 provided as Exhibit 8 in the same submission (Exhibits GOK-18, 18-(f)).

[274] *See* Prehr. Br., at *Id. citing Electronic Engineering Times*, 8 July 2002, at 1, provided as Exhibit 2 in the same submission (Article No. 25 (Mike Clendenin, *Don't Count Out Korean DRAM Deal, Says Micron CEO - Hynix Still Looks Good*)) (Exhibit GOK-18-(a)).

[275] Micron's Posthearing Brief at Exhibits 5, 6 (Exhibit US-96).

[276] *Ibid*.

[277] In this regard, we agree with the statement by the panel in *EC – Tube or Pipe Fittings* that "an injury assessment under Article 3.4 deals with the state of the domestic industry as a whole. The Anti-Dumping

does not challenge the accuracy of the domestic industry data relied on by the ITC. Nor are we prepared to accept Korea's argument that these five criteria were ignored by the ITC, since the ITC's *Final Injury Determination* contains data and discussion concerning each of them. Furthermore, although evidence adduced by Korea might suggest that the ITC's treatment of one factor identified by Korea, i.e., access to capital, was not properly assessed by the ITC, we do not consider that Korea's arguments regarding access to capital would have precluded an impartial and objective investigating authority from properly finding that the domestic industry suffered injury.

7.306 In light of the above, we do not consider that a proper consideration of the five criteria that Korea alleges are key to measuring the success of the domestic DRAM industry should necessarily have resulted in a finding of no injury.

4. Did the ITC properly demonstrate the requisite causal link between subject imports and injury?

7.307 Korea submits that the ITC's final injury determination did not comply with the causal relationship requirement of Article 15.5 of the *SCM Agreement.* Article 15.5 provides:

> It must be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry. (footnote omitted)

(i) Arguments of the parties

7.308 Korea asserts that the first and second sentences of Article 15.5 serve to connect the examinations required under Article 15.2 with respect to import trends, including volume and price effects, and under Article 15.4, with respect to indicia of domestic industry performance. According to Korea, a correlation should be established between import trends on the one hand, and industry performance on the other, if a "causal relationship" is to be proved. Korea argues that this inter-linkage has been explored more closely in the context of Articles 3.2, 3.4 and 3.5 of the *AD Agreement* containing virtually identical language. Korea argues that the panel in *Thailand – H-Beams* found that inconsistencies between the analyses required under Article 3.2 concerning import trends, and Article 3.4 concerning indicia of industry performance, render an analysis under Article 3.5 with respect to establishing a causal relationship WTO inconsistent.

7.309 Korea asserts that the Appellate Body has also offered useful guidance on what "causal relationship" really means. Korea argues that in *US – Line Pipe*, a safeguards case, the Appellate Body elaborated on the nearly identical term "causal link" found in the causation language of Article 4.2(b) of the Agreement on Safeguards:

Agreement provides that "injury" means "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry" (para. 7.326).

> … the causal link required by Article 4.2(b), first sentence, of the *Agreement on Safeguards* is "a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury." More specifically, we said there that "{t}he word 'causal' means 'relating to a cause or causes', while the word 'cause', in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, 'brought about', 'produced' or 'induced' the existence of the second element." We also explained that the word "link" indicates "that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal 'connection' or 'nexus' between these two elements."[278]

7.310 Korea asserts that in *US – Steel Safeguards*, the panel set forth a useful framework for testing the existence of a causal link. Korea argues that, first, the panel examined trends in import volumes, charting those trends against various indicia of industry performance, including those specifically referenced under Article 4.2(a) of the *Agreement on Safeguards* (similar to those listed in Article 15.4 of the *SCM Agreement*), to discern any correlation. Second, where the correlation was not clear, the panel looked to other evidence of a causal relationship, including any relationship based on import pricing and other factors of competition. Korea believes this approach, well grounded in Appellate Body jurisprudence on "causal link" for trade remedies, provides a useful framework for this case.

7.311 Korea submits that the ITC's *Final Injury Determination* did not establish any correlation between import volume and decline in domestic industry performance. Korea argues that although the presence of a correlation may not be dispositive, as there may be other more significant factors that are causing material injury, the *absence* of a proper correlation between the subsidized imports and material injury strongly suggests that the subsidized imports are not the cause of the material injury.[279] According to Korea, the evidence before the ITC demonstrated that there was no correlation between the trends in subject imports and either the domestic industry's market share or the domestic industry's financial performance. Korea argues that, to establish the requisite correlation, the data would need to demonstrate that the market shares of subject imports and domestic producers moved in opposite directions; that is, subject imports were gaining market share while domestic producers were losing. According to Korea, the evidence before the ITC, however, actually demonstrate just the opposite: Hynix was losing market share (on a brand basis) while Micron and Infineon gained market share. Korea argues that the ITC may have thought the domestic industry was losing market share, but only because Micron and Infineon were choosing to produce more outside the US, and were winning more overall market share in the US by doing so. Similarly, Korea asserts that the ITC may have thought Hynix was gaining market share, but only because the shutdown of the Oregon facility forced Hynix to temporary increase imports from Korea.

7.312 The US submits that the ITC's causation analysis is also based on positive evidence and an objective examination and is otherwise in accordance with US obligations under Articles 15.1 and 15.5 of the *SCM Agreement.*

7.313 The US asserts that Korea's arguments concerning the ITC's causation analysis in this investigation are predicated largely on Appellate Body reports issued in the context of the *Safeguards*

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[278] Appellate Body Report, *US – Line Pipe* at para. 209, Appellate Body Report, *US – Wheat Gluten* at para. 67.

[279] Korea asserts that in *Argentina–Footwear (EC)*, the Appellate Body ruled that that national trade authorities are required to find a correlation between the increased imports and any deterioration in the performance of the domestic industry before finding a causal link: "In practical terms, we believe therefore that this provision means that if causation is present, an increase in imports normally should coincide with a decline in the relevant injury factors. While such a coincidence by itself cannot *prove* causation…its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation is still present." Appellate Body Report, *Argentina – Footwear(EC)* at paras. 144-145.

Agreement. The US argues that these are not useful in examining causation in a different type of investigation governed by a different agreement with a different object and purpose, since the injury inquiry in a countervailing (and antidumping) duty investigation has many critical distinctions from an inquiry in a safeguards investigation. The US asserts that in a countervailing duty investigation, an affirmative determination of "material injury" is based on an examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on the domestic producers of such products. In a safeguards investigation, the standard is whether the product is being imported into the Member's territory "in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces the like or directly competitive products."[280] The US also notes that "serious injury" is defined under Article 4.1(a) of the *Safeguards Agreement* as "a significant overall impairment in the position of a domestic industry", and that the Appellate Body stated in *US – Lamb* that "serious injury" is a much higher standard than "material injury."[281] The US also argues that the "causal relationship" of the *SCM Agreement* is thus different from the "causal link" requirement of the *Safeguards Agreement*. According to the US, therefore, there is no basis for importing a causation standard associated with a "serious" injury requirement into a countervailing duty investigation, which is governed by a "material" injury requirement.

7.314 The US asserts that the ITC integrated the causation discussion and its discussion of how it ensured that it did not attribute material injury from other factors to the subject imports into its analysis of the volume, price effects and impact of subject imports. The US argues the ITC did not analyze causation issues in a vacuum, but analyzed them in context to determine whether there was a causal relationship between subject imports and the material injury experienced by the domestic industry and to ensure that it did not attribute injury from other factors to the subject imports. The US asserts that the ITC's final material injury determination demonstrated that there was a causal relationship between the subject imports from Korea and the material injury to the domestic industry.

7.315 The US submits that Korea continues to make many of the same discredited arguments already addressed above. For example, the US notes that Korea argues that the volume of the subsidized imports from Korea (or their market share) declined over the period of investigation, even though that was not the case. The US further notes that Korea repeats its arguments about the methodology used by the ITC to analyze price effects, and misstates or ignores the results of that analysis, and ignores much of the ITC's evaluation of the impact of subject imports, and seeks to have this Panel reweigh other evidence. The US also asserts that Korea cites an ever-varying set of data sources and time periods.

7.316 The US submits that the ITC clearly analyzed trends in both injury factors and the volume and price effects of the subsidized subject imports, and explored the relationship between the factors indicative of the volume and price effects of the subject imports and the movements in injury factors. The US asserts that the ITC demonstrated an "overall" temporal relationship or coincidence between the subsidized subject imports and the material injury of the domestic industry, and in demonstrating a causal link between the subsidized subject imports and the injury to the domestic industry, the ITC

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[280] *Safeguards Agreement* Article 2.1.

[281] The US notes that the Appellate Body stated: "We are fortified in our view that the standard of 'serious injury' in the Agreement on Safeguards is a very high one when we contrast this standard with the standard of 'material injury' envisaged under the Anti-dumping Agreement, the Agreement on Subsidies and Countervailing Measures (the '*SCM Agreement*') and the *GATT 1994*. We believe that the word 'serious' connotes a much higher standard of injury than the word 'material.' Moreover, we submit that it accords with the object and purpose of the Agreement on Safeguards that the injury standard for the application of a safeguard measure should be higher than the injury standard for anti-dumping or countervailing measures ... ." *US – Lamb*, para. 124 (citations omitted).

evaluated the relevant factors in the context of the business cycle and conditions of competition distinctive to this industry.

(ii) Evaluation by the Panel

7.317 The US asserts that the ITC complied with its Article 15.5 obligations by conducting a "unitary" analysis, i.e., it did not separately analyze "material injury" and "causation." Instead of asking, in the abstract, whether a domestic industry was experiencing material injury and then, if the answer was affirmative, proceeding to a second determination of causation, the ITC asked whether a domestic industry was being materially injured "by reason of" subject imports as a unified question, and then issued a single determination that subsumed the causation question. Korea has not argued that such a unitary approach is *per se* inconsistent with Article 15.5.

7.318 Instead, Korea argues that the ITC failed to establish a temporal correlation between an increase in subject import market share and a decline in domestic industry performance. In this regard, Korea relies on the finding by the Appellate Body in *Argentina – Footwear (EC)* that the absence of a "coincidence" between an increase in imports and a decline in the state of the domestic industry "would create serious doubts as to the existence of a causal link, and would require a very compelling analysis of why causation is still present."[282] The US asserts that the ITC demonstrated an overall temporal relationship or coincidence between the alleged subsidized imports and the material injury of the domestic industry.

7.319 We note that the *Argentina – Footwear (EC)* case concerned the causation standard under Article 4.2 of the *Safeguards Agreement.* While the parties have made additional arguments concerning the relevance of findings by the Appellate Body in respect of safeguard cases to disputes involving countervailing duties, we do not consider it necessary to resolve this issue.[283] This is because, in any event, Korea has failed to establish that there was an absence of coincidence between import volume and the injury to the domestic industry.

7.320 Korea argues that there was an absence of correlation between an increase in the market share of subject imports and a decline in the market share and profitability of domestic producers. Korea asserts that the market share of subject imports was decreasing at the same time that the market share and profitability of domestic producers was decreasing. In making this argument, however, Korea relies on the brand-based market share analysis set forth at para. 7.224 *supra*. Article 15.5, however, does not require a brand-based analysis. Instead, it requires the investigating authority to determine that "subsidized imports" – as opposed to any subsidized brand - are causing injury. The ITC found that the market share of the alleged subsidized imports increased over the period of investigation. Korea does not dispute the accuracy of this finding (other than to argue that the ITC should have also undertaken a brand-based analysis). Since the ITC's analysis demonstrated that the market share of the alleged subsidized imports was increasing, there is no factual basis to Korea's argument that the market share of imports was declining at the same time as the market share and profitability of the domestic industry.

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[282] *Argentina – Footwear (EC)*, at paras. 144-145 (emphasis in original) (quoting Panel Report, *Argentina –Footwear (EC)*, at para. 8.238).

[283] We note, however, that a finding of increased imports is a necessary condition for the imposition of a safeguard measure. This appears not to be the case for countervailing measures, since Article 15.2 of the *SCM Agreement* provides that "[n]o one or several of these [volume and price effect] factors can necessarily give decisive guidance." This provision suggests that a countervailing measure may be imposed even in the absence of a significant increase in the volume of subsidized imports, provided the requisite price effects exist. If there is no need to demonstrate increased imports in all cases, one might conclude that there is no generalized requirement to establish any temporal correlation between increased imports and injury in the context of a countervail investigation.

7.321 In light of the above, we reject Korea's argument that the ITC failed to properly demonstrate the requisite causal link between subject imports and injury.

5. Did the ITC properly comply with its obligation not to attribute to subject imports injury caused by other factors ?

7.322 Korea submits that the ITC improperly assessed the role of other factors and therefore failed to ensure that it did not attribute the effects of other causes to subject DRAM imports in violation of Article 15.5 of the *SCM Agreement*. Article 15.5 provides:

> It must be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry. (footnote omitted)

(i) Arguments of the parties

7.323 Korea asserts that, beyond the need to establish through positive evidence a causal link, the competent authorities must also ensure that subject imports are not improperly blamed for problems caused by other factors. According to Korea, this obligation of "non-attribution" stands as a bedrock principle of WTO treaty text to avoid excessive trade remedies.

7.324 Korea notes that the non-attribution obligation is not unique to the *SCM Agreement*. Korea notes that there is identical language contained in Article 3.5 of the *AD Agreement* and Article 4.2(b) of the *Safeguards Agreement* concerning "dumped" imports and "increased" imports, respectively. Korea asserts that these provisions, and their treatment by the Appellate Body, provide an important analog and guidance in this dispute. Korea notes that in *US – Wheat Gluten*, a dispute under the *Safeguards Agreement*, the Appellate Body explained:

> The need to ensure a proper attribution of "injury" under Article 4.2(b) indicates that competent authorities must take account, in their determination, of the effects of increased imports *as distinguished from* the effects of other factors.[284]

7.325 Korea also notes that in *US – Lamb*, also a safeguards case, the Appellate Body offered further guidance:

> The primary objective of the process we described in *US – Wheat Gluten Safeguard* is, of course, to determine whether there is "a genuine and substantial relationship of cause and effect" between increased imports and serious injury or threat thereof. As part of that determination, Article 4.2(b) states expressly that injury caused to the domestic industry by factors other than increased imports "shall not be attributed to increased imports." In a situation where *several factors* are causing injury "at the same time", a final determination about the injurious effects caused by *increased*

[284] *US – Wheat Gluten*, at para. 70 (emphasis in original).

> *imports* can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it *assumes* that the other causal factors are *not* causing the injury which has been ascribed to increased imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports. In this way, the final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury.[285]

7.326 Korea submits that, given the virtually identical language of Article 15.5 of the *SCM Agreement* and Article 4.2(b) of the Agreement on Safeguards, it makes sense that the analytical framework should be the same. Korea notes that Article 3.5 of the *AD Agreement* imposes an identical non-attribution obligation before imposing anti-dumping duties. Korea notes that the Appellate Body explained in *US – Hot-Rolled Steel*:

> In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.[286]

7.327 Korea asserts that, given the plain meaning of Article 15.5 of the *SCM Agreement*, as well as the unambiguous guidance of the Appellate Body, an unmistakable framework exists within which to analyze an authority's compliance with the non-attribution requirement of Article 15.5 of the *SCM Agreement*. According to Korea, the competent authority must "separate" and "distinguish" the injurious effects of factors other than subsidized imports to ensure they are not attributed to the subsidized imports. Korea asserts that, as the Appellate Body in *US-Line Pipe* stated, an authority must also "establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports."[287] Korea argues that difficulty in performing the analysis is no excuse for omission, and that like all the provisions of Article 15, the non-attribution analysis must also be based on positive evidence and an objective examination as required under Article 15.1.

7.328 Korea asserts that the ITC failed to comply with the non-attribution requirement, because it provided either no analysis or insufficient analysis of the role of non-subject imports; the changes in relative capacity; the drop in demand for 2001; and Micron's own technical shortfallings.

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[285] *US – Lamb*, at para. 179 (emphasis in original).
[286] *US – Hot-Rolled Steel*, at para. 223.
[287] *US – Line Pipe*, para. 217.

The Role of Non-Subject Imports

7.329 Korea asserts that the ITC improperly dismissed the adverse effects of an increasing and much larger volume of non-subject imports. Korea asserts that DRAMs are a commodity product and the volume of non-subject imports in the US market dwarfed the volume of subject imports.

7.330 Korea refers in this regard to the abovementioned Figure 9 market share data (see para. 7.224 *supra*). Korea asserts that the evidence before the ITC demonstrated that non-subject imports accounted for a six to seven times greater share of the US market than subject imports from Hynix, and therefore had six to seven times the competitive effect of subject imports. Korea argues that the ITC effectively ignored these important facts about the non-subject imports when it stated:

> We acknowledge that the increasing volume of non-subject imports played an important role in the US market during the period of investigation. Non-subject imports were responsible for the bulk of market share lost by domestic producers during the period of investigation. A portion of the non-subject imports are RAMBUS and specialty DRAM products for which domestic producers had no significant production during the period of investigation. These facts and the fact, discussed above, that non-subject imports undersold domestic product at a lower frequency than subject imports did, provide some support for finding that non-subject imports had less impact than their absolute and relative volumes might otherwise indicate. While non-subject import market share grew, the primary negative impact on the domestic industry was due to lower prices, and on this point, subject imports, themselves, were large enough and priced low enough to have a significant impact. This is so regardless of the adverse effects caused by non-subject imports.[288]

7.331 Korea asserts that the ITC's attempt to imply that the non-subject imports compete less with the domestic industry production than do subject imports ("a portion of the non-subject imports are Rambus products . . . products for which the domestic producers had no significant production") is directly contrary to the undisputed evidence before the ITC. Korea notes that Micron's Vice President for Worldwide Sales, Mike Sadler, told the ITC that: "The vast majority of Micron's competitors, including specifically Samsung and Hynix from Korea, manufacture DRAMs that are equivalent in performance to our own."[289] Korea also asserts that Rambus DRAMs do not account for a significant portion of Samsung's overall DRAM production, and that Samsung's dramatic increase in market share since 200l was not related to Samsung's Rambus production. Korea asserts that the ITC did not address any of this contrary evidence, and simply dismissed it without any rationale.

7.332 Korea asserts that the ITC's statement that "non-subject imports undersold domestic product at a lower frequency than subject imports did" is a completely meaningless and misleading assertion given the manner in which the ITC undertook its underselling analysis. Korea argues that a proper lowest price analysis would have demonstrated that for an overwhelming per cent of the time individual suppliers other than Hynix had the lowest price in the market. Korea argues that it is not objective to dismiss contrary evidence without discussion, or to average and thus obscure the prices of individual domestic and non-subject suppliers. Korea asserts that, in addition to methodological flaws, the ITC finding had no sense of perspective, since the ITC stressed small differences between the frequency of underselling for subject and non-subject imports, which averaged about seven percentage points. Korea argues that these small differences could be random data fluctuations. Korea asserts that, for a commodity market, non-subject market share roughly seven times as large would dwarf any price effects from a much smaller volume of subject imports.

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[288] *Final Injury Determination*, at 27 (Exhibit GOK-10).
[289] Staff Conference Transcript, at 20 (emphasis added) (Exhibit GOK-12).

Capacity Increases

7.333 Korea asserts that the ITC completely ignored large increases in DRAM capacity undertaken by suppliers other than Hynix. Korea asserts that the ITC itself commented on the significance of capacity to the DRAM industry in the "Conditions of Competition" section of its determination. According to Korea, the ITC appropriately recognized that both the timing and quantity of capacity increases can affect DRAM market pricing, and therefore profitability. Korea argues, however, that the ITC then either completely forgot or deliberately ignored this very fact when analyzing the effect of other possible causes to the change in the domestic industry's financial condition. Korea asserts that, although the ITC received substantial information and data that demonstrated that other suppliers increased DRAM production capacity much more than did Hynix during the period examined, there is zero discussion of this information in the ITC discussion of factors that had an adverse impact on the domestic industry.

Micron's "Admitted" Technological and Production Difficulties

7.334 Korea asserts that the ITC completely ignored the "admitted" technological and production difficulties of Micron during the claimed period of injury.

7.335 Korea asserts that the ITC had substantial information before it concerning the extreme importance to DRAM manufacturers of handling the constant pressure to introduce DRAMs produced with the newest technology. According to Korea, the evidence before the ITC demonstrated that Micron gambled on future market positioning through an emphasis on 0.11 micron technology development, missing a stronger market for Double Data Rate (DDR) products based on the 0.13 geometry in 2002. Korea argues that, by Micron's own account, this was a significant mistake. According to Korea, the evidence on the record demonstrates that at its winter analyst meeting in late January 2003, Micron CEO Stephen Appleton admitted that Micron's most damaging misstep of 2002 was its failure to be positioned with 0.13 micron production for a strengthening market for 256M DDR products:

> I think we were caught off guard . . . . It turned out that was the sweet spot of the market . . . . At the time we made the decision to focus on 0.11 {Micron products}. As a result that impacted us quite a bit. [290]

7.336 Korea asserts that the ITC effectively ignored this important information in its analysis of other factors that affected the condition of the domestic industry during the period. Korea argues that, notwithstanding that Micron was the largest US DRAM supplier and notwithstanding that the evidence before the ITC contains admissions by Micron that its technological foibles harmed Micron's financial performance ("impacted us quite a bit"), the ITC only addresses the evidence in the three sentences of footnote 177 of its determination:

> Hynix argues that Micron was harmed by poor business decisions, noting in particular its failure to position itself to be able to capitalize on a pocket of strong demand in a particular market segment in 2002. {cite omitted} Whatever negative effect any particular decisions may have had on Micron, they could not explain the harm

[290] *See* Prehr. Br., at 124-28 and Exhibit 2 (Articles Nos. 1 (Anthony Cataldo, *Full of Remorse*, Micron Pins Hopes on 0.11-Micron Tech, Electronic Engineering Times, 27 January 2003 (hereinafter "*Full Remorse*") and 20 (Julie Howard, *Micron Blames '02 Losses on Product Misstep; Analysts Pose Tough Questions for Chip Maker*, Idaho Statesman, 25 January 2003 (hereinafter "*Micron Blames '02 Losses on Product Misstep*") (Exhibit GOK-18-(a)).

> experienced the DRAM products industry as a whole. This harm was not isolated to Micron and was due mainly to lower prices.[291]

7.337 Korea submits that the complete absence of any serious analysis concerning Micron's "admitted" business mistakes demonstrates that the ITC did not comply with the requirement of Article 15.5 that an investigating authority separate and distinguish injury caused by other factors so as not to attribute that injury to the subsidized imports, or the Article 15.1 requirement of an objective examination.

7.338 The US recognizes that the Appellate Body, when interpreting the language concerning the investigating authorities' obligation in antidumping duty investigations not to attribute injury caused by other factors to the subject imports, has referenced the *Safeguards Agreement*, as well as other reports reviewing determinations of competent authorities under the *Safeguards Agreement*. The US contends that in the DRAMs investigation, the ITC met the standards articulated by the Appellate Body in those other reports.

Non-subject imports

7.339 The US asserts that, although Korea would have this Panel believe that the ITC completely disregarded the absolute and relative increase of non-subject imports, the ITC evaluated the presence of non-subject imports, determining that non-subject imports were in the US market throughout the period of investigation and at absolute volumes that were higher than subsidized subject imports. The ITC also recognized that some domestic producers were responsible for some of the non-subject imports. The US asserts that, although the ITC determined that non-subject imports were responsible for "the bulk of the market share lost by domestic producers during the period of investigation",[292] it identified two reasons why it did not find the volume of non-subject imports as significant as otherwise would be suggested.

7.340 First, the US argues that the ITC determined, after examining the composition of non-subject imports, that a significant portion of non-subject imports were Rambus and specialty DRAM products for which domestic producers had no significant production during the period of investigation. The US asserts that, contrary to Korea's arguments, non-subject imports were not as substitutable with subject or domestic DRAM products for product mix reasons. The US notes that Hynix itself, in a joint submission filed with Korean producer Samsung, emphasized that Samsung, whose US shipments of DRAM products were an important portion of US shipments of non-subject imports during the period of investigation, offered products that "differ[ed] substantially"[293] from, were not interchangeable with, and thus did not compete with products made by US producers.

7.341 Second, the US asserts that even those non-subject imports consisting of "standard" products did not have the price effects that subsidized subject imports did during the period of investigation. The US argues that, although there is no requirement in the *SCM Agreement* for the investigating authority to collect such data, and, to US knowledge, most do not collect *any* pricing data on non-subject imports, the ITC collected pricing data on non-subject imports in this investigation. The US asserts that, according to that pricing data, while the frequency with which non-subject imports undersold domestic-produced DRAM products increased between 2000 and 2002, the underselling frequency by non-subject imports was lower than, and increased less than, the underselling frequency by subsidized subject imports between 2000 and 2002. The US argues in particular that non-subject imports undersold the domestic industry in 46.6 per cent of instances in 2000, 47.7 per cent in 2001, and 60.7 per cent in 2002 whereas subsidized subject imports undersold the domestic industry in

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[291] *Final Injury Determination*, at 26, n. 177 (Exhibit GOK-10).
[292] *See, e.g., Final Injury Determination*, at 27 (Exhibit GOK-10).
[293] 27 November 2002 Postconference Brief of Hynix and Samsung at 50-56 (Exhibit US-100).

51.0 per cent of instances in 2000, 56.0 per cent in 2001, and 69.8 per cent in 2002. The US asserts that, consistent with these figures, the ITC concluded that for these "standard" pricing products, subsidized subject imports undersold non-subject imports in a majority of instances. The US argues further that, even based on a disaggregated analysis of the pricing data on these "standard" products by brand name and source, subsidized subject imports were the lowest-priced source more often than DRAM products from any other source, contrary to Korea's assertions. The US argues that the ITC also found that, while non-subject imports' market share grew, the "primary negative impact" on the domestic industry was due to lower prices,[294] and that subsidized subject imports, themselves, were large enough in volume, and priced low enough, to have a significant impact, regardless of the adverse effects caused by non-subject imports.

7.342 The US submits that the ITC also evaluated other reasons for the price declines. The US asserts that Korea argues that the price declines during the period of investigation were due to other factors (such as product life cycles and business cycle changes in demand and supply that led to "boom" and "bust" periods characteristic of this industry).[295] The US submits that the ITC explicitly evaluated these factors in its determination.

Product Life Cycle

7.343 The US asserts that the ITC examined price trends in the DRAM industry and determined that they are generally correlated with the product life cycle, whereby prices start high for new, state-of-the-art products, decline rapidly as the product becomes a commodity, and continue to decline until the product is replaced by the next generation of technology, unless the product becomes a "legacy" product in short supply.

Demand

7.344 The US asserts that, contrary to Korea's repeated characterization of a "collapse" in demand (echoing Hynix's argument in the agency proceedings),[296] the ITC examined data received in response to questionnaires tailored to this investigation, and determined that apparent US consumption of DRAM products in terms of billions of bits increased from 98.8 million in 2000 to 146.7 million in 2001 and to 186.9 million in 2002, and was 55.3 million in interim 2003 compared to 42.8 million in interim 2002. According to the US, the ITC concluded that the "slowing in the growth of apparent US consumption" in the latter portion of the period of investigation might be due in part to a decline in the quantity of personal computers sold.[297] The US argues that the ITC identified 2001 as the first year for which the number of personal computers sold declined rather than increased, and it also examined other possible reasons identified by questionnaire respondents, such as a slump in the telecommunications and network industry and a general recession.[298]

Supply

7.345 The US asserts that, contrary to Korea's contention[299], the ITC did not "completely forget" or "deliberately ignore" supply increases or their contribution to prices in the DRAMs market. The US argues that the ITC's *Final Injury Determination* contains much of the supply data relied on by Korea in these proceedings. The US asserts that the ITC also evaluated data collected in questionnaire responses and determined that "[a]lthough the domestic industry's wafer starts declined

[294] *See, e.g., Final Injury Determination*, at 27 (Exhibit GOK-10).
[295] Korea First Written Submission, paras. 264-296.
[296] Korea First Written Submission, paras. 284-296.
[297] *See, e.g., Final Injury Determination*, at 24 (Exhibit GOK-10).
[298] *See, e.g., Final Injury Determination*, at 24, II-4 (Exhibit GOK-10).
[299] Korea First Written Submission, paras. 264-283.

over the period of investigation, production quantity in billions of bits increased as domestic producers produced more bits per wafer."[300]

Business Cycle

7.346 The US submits that the ITC also analyzed the business cycle, ascertaining that because growth in demand for DRAM products has been continuous, but supply increases are sporadic, supply and demand in this industry tend to be chronically out of equilibrium, giving the market its characteristic "boom" and "bust" business cycle. The US argues that the ITC also determined that largely because of the perpetual improvements in production efficiencies experienced by this industry, prices are usually declining.

7.347 The US asserts that, based on its evaluation of the record evidence in this investigation, the ITC determined that "[w]hile slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor."[301] The US argues that the ITC determined that the pricing declines were far greater than the 20 to 30 per cent that Micron or even the 40 per cent declines that Hynix, itself, reported would be expected on an annual basis.

Micron's Technological and Production Difficulties

7.348 The US rejects Korea's argument that the ITC never considered that the domestic industry was responsible for the injury. The US argues that, contrary to Korea's assertions,[302] the ITC specifically evaluated what Korea (and Hynix) refer to as "mis-steps" by domestic producer Micron. According to the US, the ITC collected pricing data on 256 Mb DDR266 SDRAMs (which are based on 0.13 micron technology) that indicated that volume demand for these products did not develop until the latter half of 2002, which was after Micron and the domestic industry had sustained their most significant losses. The US also argues that, as the ITC analyzed the data, it determined that whatever negative effect any particular decisions may have had on Micron, they "could not explain the harm" experienced by the domestic industry as a whole.[303] The US notes the ITC determination that this "harm was not isolated to Micron and was due mainly to lower prices."[304]

7.349 The US submits that the ITC therefore analyzed the nature and the extent of the injurious effects of domestic producers' actions, and evaluated this factor in the factual context of this investigation to ensure that it did not attribute injury to subsidized subject imports. The US asserts that, because the ITCs evaluation was also based on positive evidence and an objective examination, its analysis of this factor is consistent with US obligations under Articles 15.1 and 15.5.

(ii) Evaluation by the Panel

7.350 Article 15.5 of the *SCM Agreement* contains the following non-attribution requirement:

> The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and

[300] *See, e.g., Final Injury Determination*, at 16 & n.97 (Exhibit GOK-10).
[301] *See, e.g., Final Injury Determination*, at 24-25 (Exhibit GOK-10).
[302] Korea First Written Submission, paras. 297-313.
[303] *See, e.g., Final Injury Determination*, at 26 n.177 (Exhibit GOK-10).
[304] *See, e.g., Final Injury Determination*, at 26 n.177 (Exhibit GOK-10).

> prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

7.351 The non-attribution requirement in anti-dumping investigations has been addressed by the Appellate Body in several recent cases. Although it has not been specifically considered in a countervailing duty case, given that the relevant provisions in the two Agreements are identical, and in light of the "need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures" (*Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*), it is clear to us that the requirement is the same in the context of both anti-dumping and countervailing duty investigations.

7.352 In its most recent statement on the non-attribution requirement in anti-dumping cases, the Appellate Body explained that:

> "This obligates investigating authorities in their causality determinations not to attribute to dumped imports the injurious effects of other causal factors, so as to ensure that dumped imports are, in fact, "causing injury" to the domestic industry. In *US – Hot-Rolled Steel* we described the non-attribution obligation as follows:
>
> > … In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve *separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports*. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors.
>
> Non-attribution therefore requires separation and distinguishing of the effects of other causal factors from those of the dumped imports so that injuries caused by the dumped imports and those caused by other factors are not "lumped together" and made "indistinguishable."
>
> We underscored in *US – Hot-Rolled Steel*, however, that the *Anti-Dumping Agreement* does not prescribe the *methodology* by which an investigating authority must avoid attributing the injuries of other causal factors to dumped imports: . . . Thus, provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the "causal relationship" between dumped imports and injury."[305]

7.353 Neither party has suggested that we should not be guided by the Appellate Body's interpretation of the non-attribution requirement set forth in Article 3.5 of the *AD Agreement*. We shall therefore determine whether the ITC's *Final Injury Determination* complied with the requirements of Article 15.5 of the *SCM Agreement* by examining whether the ITC properly separated

[305] Appellate Body Report, *European Communities – Tube or Pipe Fittings*, paras. 188-189.

and distinguished the injurious effects of other known factors from those of the alleged subsidized imports. We note that the Appellate Body has clarified that the ITC was "free to choose the methodology it [would] use" to separate and distinguish the injurious effects of other factors from those of the alleged subsidized imports. We also note that Korea has acknowledged that the ITC was not required to quantify the injury caused by other factors in order to separate and distinguish it from the injurious effects of the alleged subsidized imports.

7.354 The US asserts that its analysis demonstrated that subsidized imports had their own injurious effects, independent from the injurious effects of other factors. Korea has not argued that such an approach would not comply with the requirements of Article 15.5. Instead, Korea effectively argues that, as a matter of fact, the ITC failed to demonstrate alleged subsidized imports had such independent injurious effects.

7.355 Korea asserts that the ITC attributed to subsidized imports injury caused by the following other "known factors":[306] non-subject imports; capacity increases by other suppliers; decline in demand; and technological and production difficulties admitted by Micron. We shall examine whether the ITC properly separated and distinguished the injurious effects of each of these other factors from the injury caused by alleged subsidized imports.[307]

Non-subject imports

7.356 Korea asserts that the ITC improperly dismissed the injurious effects of the increasing and much larger volume of non-subject/non-subsidized imports. Korea asserts that the relative market shares of subsidized and non-subject imports means that non-subject imports had six to seven times the competitive effect as did subject imports. The US asserts that the ITC took account of the injurious effects of non-subject imports, since it found that "[n]on-subject imports were responsible for the bulk of market share lost by domestic producers during the period of investigation."[308] The US argues, however, that the ITC also separated and distinguished injury caused by non-subject imports on the basis of product mix and price considerations.

7.357 Regarding product-mix, the ITC found that, because "[a] portion of the non-subject imports are RAMBUS and specialty DRAM products for which domestic producers had no significant production during the period of investigation",[309] "non-subject imports had less impact than their absolute and relative volumes might otherwise indicate."[310] Although the exact proportion of RAMBUS/specialty products is confidential, the US indicated during the course of the Panel proceedings that they account for approximately 20 per cent of non-subject imports. Korea has not disputed the accuracy of this figure.

7.358 Korea argues that even a specialized DRAM is still a DRAM and competes at some level. Korea relies on evidence before the ITC to the effect that Micron's Vice President for Worldwide Sales told the ITC that "[t]he vast majority of Micron's competitors, including specifically Samsung and Hynix from Korea, manufacture DRAMs that are equivalent in performance to our own."[311]

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[306] The US does not deny that the factors identified by Korea were "known" to the ITC. Indeed, at para. 111 of its Second Written Submission, the US asserts that "[t]he ITC also examined other **known** factors to ensure that it did not attribute injury from those factors to the subsidized subject imports" (emphasis supplied).

[307] In doing so, we note that the parties agree that, in law, subsidized imports need not be the sole cause of injury in order for countervailing measures to be imposed.

[308] *Final Injury Determination*, at 27, (Exhibit GOK-10). During the Panel proceedings, the US stated that the volume of non-subject imports was at least five times the volume of alleged subsidized imports.

[309] *Final Injury Determination*, page 27, (Exhibit GOK-10).

[310] *Ibid*.

[311] Staff Conference Transcript, at 20 (emphasis added) (Exhibit GOK-12).

Korea also relies on record evidence to argue that Samsung's RAMBUS DRAMs (which are non-subject imports) do not account for a significant proportion of its overall DRAM production. However, the ITC record also contained evidence (US reply to Question 17 from the Panel after the first substantive meeting) to the effect that Hynix and Samsung jointly submitted a brief to the ITC stating that non-subject imports included products that "differ[ed] substantially from and were not interchangeable with products made by US producers", and that "[n]o domestic producer makes Rambus chips."[312] In these circumstances, and especially on the basis of the joint submission by Hynix and Samsung, we consider that an objective and impartial investigating authority could properly have determined that (1) 20 per cent of non-subject imports were not interchangeable with either subject imports or domestic industry shipments, and (2) the effect of non-subject imports on the domestic industry relative to that of subject imports was less than a simple volume-based comparison of subject and non-subject imports would suggest.

7.359 Korea also argues that, even focusing on the remaining 80 per cent of non-subject imports, the directly competitive portion of non-subject imports had about 45 per cent and 48 per cent market share in 2000 and 2001 respectively. Korea asserts that, compared to subject imports, with about nine per cent market share in both years, non-subject imports are still five times larger, and gaining market share much faster. We note, however, that Korea's argument regarding the relative volumes of directly competitive subject and non-subject imports does not contradict the ITC's determination that, because of product-mix, "non-subject imports had less impact than their absolute and relative volumes might otherwise indicate." Korea's argument does, however, overlook the ITC's determination that "subject imports undersold non-subject imports in a majority of instances."[313] Korea has not disputed this conclusion, other than to challenge the underselling methodology applied by the ITC.[314] As noted above, however, we consider that the ITC's price underselling methodology is not inconsistent with the *SCM Agreement*.

7.360 Furthermore, we note that the ITC found that the "primary negative impact" on the domestic industry resulted from lower prices.[315] Korea has not disputed this ITC conclusion. In fact, Korea has stated that "[t]he key issue in this case is not whether prices fell, but why."[316] By ascertaining that the price underselling frequency by non-subject imports was lower than, and increased less than, the underselling frequency of alleged subsidized imports between 2000 and 2002, and that the injurious price effects of non-subject imports were less pronounced than their absolute and relative volumes might otherwise indicate, the ITC effectively separated and distinguished the injurious price effects of alleged subsidized imports from the injurious price effects of the larger volume of non-subject imports. In other words, the ITC demonstrated that alleged subsidized imports had injurious price effects independent of those of the larger volume of non-subject imports. Given that there is no obligation under Article 15.5 to quantify the amount of injury caused by alleged subsidized and non-subject imports respectively, the ITC has done all that it was required to do.

Capacity increase

7.361 Korea complains that there was no explanation by the ITC of how injury caused by capacity increases by suppliers other than Hynix was not attributed to subject imports. However, the ITC did explain that supply increases, resulting from capacity increases, were an important element of the

[312] Furthermore, although Korea argues that Micron's competitors make DRAMs that are equivalent in performance to its own, this does not preclude the possibility of Micron's competitors also making DRAMs that are different in performance.

[313] *Final Injury Determination*, note 164, (Exhibit GOK-10).

[314] See para. 256 of Korea's First Written Submission: "As discussed above in the discussion on the pricing evidence...."

[315] *Final Injury Determination*, 27, (Exhibit GOK-10).

[316] See para. 204 of Korea's Second Written Submission. In this regard, Korea argues that prices fell because of factors other than the alleged subsidized imports.

boom/bust business cycle and product life cycle, and that these business and product life cycles could not account for the totality of the price declines suffered by the domestic industry. The ITC's analysis of supply and capacity considerations, and their impact on the business cycle, is set forth in a section entitled "Supply Considerations." This analysis has not been challenged by Korea. Nor has Korea alleged that the capacity increase it refers to occurred outside of the normal business cycle.[317] In a later part of the report, entitled "Price Effects of the Subject Imports", the ITC determined that "[w]hile slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor."[318] In this way, the ITC explained that capacity increases, and the business cycle, could not account for the totality of the injury suffered by the domestic industry, because that injury was caused primarily by price declines that were not caused by the business cycle. In particular, the ITC determined that "product-specific data showed price declines of 70 to 90 per cent from late 2000 through 2001",[319] and noted that "[t]he parties agreed that the price decline in 2001 was the most severe in DRAMs history."[320] Furthermore, there was record evidence to the effect that such declines were greater than the 20 to 40 per cent average annual price declines reported by Hynix and Micron.[321]

7.362 In this way, we consider that the ITC properly separated and distinguished the injurious effects of alleged subsidized imports from the injurious effects of capacity increases by non-Hynix suppliers, since it showed that such capacity increases (inherent in the DRAM business cycle) did not account for the totality of the injurious price declines suffered by the domestic industry.[322]

7.363 In light of the above, we reject Korea's argument that the ITC ignored changes in relative capacity when analyzing other factors affecting the domestic industry.

Decline in demand

7.364 Korea argues that the domestic industry was adversely affected by a drop in demand for products that use DRAMs, such as personal computers, and that this drop in demand led to a decrease in the rate of growth of demand for DRAMs. Korea asserts that the injury suffered by the domestic industry was caused by such decrease in demand, rather than alleged subsidized imports. Korea argues that Hynix imports have virtually nothing to do with the level of demand. Korea submits that the ITC ignored record information regarding declining demand for products that use DRAMs.

7.365 The ITC acknowledged that there was a decline in the growth of US apparent DRAM consumption, and that such decline "may be due in part to a decline in the quantity of personal

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[317] To the contrary, Korea's evidence of capacity increase is taken from findings made by the ITC concerning the boom-bust nature of the DRAM business cycle. See para. 264 of Korea's First Written Submission.

[318] *See, e.g., Final Injury Determination*, at 24-25 (Exhibit GOK-10).

[319] *See, e.g., Final Injury Determination*, at 24-25, I-11 (Exhibit GOK-10).

[320] *Final Injury Determination*, page 24, (Exhibit GOK-10). Korea has not challenged this statement.

[321] Hearing Transcript (Mr. Tabrizi, Hynix witness) at 267-68 (Exhibit US-94). At the first substantive meeting, Korea argued that Micron and Hynix had reported annual average declines, which could have included individual instances of price declines up to 90 per cent. Korea did not present any evidence in support of this argument. In its reply to Question 23 from the Panel after the first substantive meeting, the US demonstrated, with reference to Exhibit US-121, that none of the historical price data submitted by Hynix showed price declines as high as 90 per cent. Accordingly, Korea has failed to demonstrate that the ITC erred in finding that price declines ranged as high as 90 per cent.

[322] While Korea emphasises that other suppliers increased their capacity more than Hynix, we do not consider that the relative capacity increases of Hynix imports and non-subject imports are relevant to the extent that the ITC has shown that increased capacity (no matter what source) does not account for the totality of the injurious price effects suffered by the domestic industry.

computers sold."[323] The ITC also determined that "[w]hile slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the unprecedented severity of the price declines that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor."[324]

7.366 Although the ITC clearly acknowledged the negative impact of slowing demand (in part resulting from the decline in demand for PCs), we do not consider that the ITC properly explained how it ensured that the injury caused by such decline in demand was not attributed to alleged subsidized imports. In particular, although the ITC acknowledged that it played "some role" in the state of the domestic industry, it did not explain what that "role" was, nor how that "role" differed from the impact of subject imports. Similarly, while the ITC's reference to supplier competition as "*an* important factor",[325] rather than "the" most important factor, does not preclude other factors – including slowing demand – from also being important factors in the causation of injury, the ITC failed to explain how slowing demand was a less important factor in terms of injurious impact on the domestic industry.

7.367 In terms of possible explanation, we note the ITC's assertion that "[h]istorically, there appears to be no clear correlation between the growth of the DRAMs market and price movements."[326] Korea argues that "the alleged lack of correlation is just wrong", and incorrectly based on trends in DRAM output/supply, rather than demand.[327] Korea's assertion is substantiated by reference to record evidence that, according to Korea, shows that "DRAM prices do reflect ups and downs in the rate of demand growth, and the decline in demand growth in 2001 played a major role in the price decline in 2001."[328] Korea refers to parts of Exhibits KOREA – 18 and 19 in this regard. Korea also refers to statements by representatives of domestic producers referring to "waning" demand, a "fundamental shift" in the demand profile, and "substantially decreased demand ... resulting in substantial price and volume declines".[329] We consider that Korea thereby establishes *prima facie* that the ITC improperly evaluated the impact of slowing demand on price. The US does not rebut Korea's arguments, or deny the existence of the record evidence relied on by Korea. In other words, the US does not rebut the *prima facie* case established by Korea. In light of the *prima facie* case established by Korea, and the absence of any rebuttal by the US, we find that the DOC did not properly address the issue of slowing demand on price, and could not properly have found that there was no clear correlation between demand and price movements. Since there was record evidence to the effect that slowing demand resulted in "substantial price … declines", and since the ITC emphasised the impact of decreasing prices on the domestic industry, it was important for the ITC to properly address this issue.

7.368 We understand the US to argue that Korea's arguments regarding demand are addressed by the ITC's determination concerning the injurious role of the business cycle, in the sense that the

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[323] *Final Injury Determination*, page 24 (Exhibit GOK-10).

[324] *See, e.g., Final Injury Determination*, at 24-25 (Exhibit GOK-10). We note that the parties initially appeared to disagree on whether or not demand for DRAMs was actually declining during the period of investigation (as apparently argued by Korea), or merely increasing less rapidly than in the past (as argued by the US). At para. 219 of its Second Written Submission, however, we note that Korea refers to a "slowing of demand" for DRAMs. We understand that Korea therefore acknowledges that, while there may have been a decrease in demand for PCs, there was merely a slowing of demand for DRAMs. We also note that the US contests the data relied on by Korea (US First Written Submission, para. 455). However, our findings are based on the ITC's acknowledgement that there was "slowing demand" during the period of investigation.

[325] Emphasis supplied.

[326] *Final Injury Determination*, page 25, (Exhibit GOK-10).

[327] Para. 291 of Korea's First Written Submission.

[328] *Ibid.*

[329] Paras 293 and 294 of Korea's first written submission.

boom-bust nature of the business cycle is caused by discrepancies between supply and demand.[330] However, Korea's argument is different, in that it is addresses the injurious effects of a slowing of the growth in demand unrelated to the business cycle, i.e., caused by the decline in demand for products using DRAMs such as PCs. The fact that such slowing demand is distinct from the operation of the business cycle is confirmed by the ITC referring separately to "slowing demand" and "the operation of the DRAMs business cycle" in the same sentence. In the absence of any meaningful explanation of the nature and extent of the injurious effects of the slowing in demand, it is not apparent from the face of the *Final Injury Determination* whether, or how, the ITC separated and distinguished the injury caused by such slowing in the growth in demand from (a) the injury caused by the decline in demand inherent in the business cycle and, more importantly, (b) the injury caused by subject imports. This is a violation of the ITC's obligation under Article 15.5 of the *SCM Agreement* not to attribute to subsidized imports the injury caused by other factors.

Technological and Production Difficulties

7.369 The ITC addressed Micron's alleged technological and production difficulties in note 177 of its *Final Injury Determination*. In that note, the ITC asserted:

> Whatever the negative effect any particular decisions may have had on Micron, they could not explain the harm experienced by the DRAM products industry as a whole. This harm was not isolated to Micron and was due mainly to lower prices.

7.370 In our view, Korea has failed to rebut the ITC's finding that the injury to the domestic industry was "due mainly to lower prices." Nor has Korea established that Micron's alleged technological and production difficulties would have resulted in lower prices across the US industry. Although the US has not disputed Korea's assertion that Micron's decision to focus on 0.11 Micron products affected it "quite a bit", we consider that an objective and impartial investigating authority could properly have separated and distinguished the injury caused by Micron's alleged technological and production difficulties from the injury caused by other factors on the basis of price effects, in the sense that injurious price declines occurred that could not be explained by Micron's alleged technological and production difficulties.

7.371 In light of the above, we reject Korea's claim that the ITC failed to separate and distinguish the injury caused by alleged subsidized imports from the injury caused by Micron's alleged technological and production difficulties.

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[330] We base our understanding on the US response to Question 23 from the Panel after the first substantive meeting, where the US argues: "[r]egardless of the label attached to these factors or if a particular factor encompassed 'sub-factors,' it is clear from the face of the ITC's determination that the ITC examined the *product life cycle* and the DRAMs *business cycle* that is characterized by repeated 'boom' and 'bust' periods (when *supply/capacity*, which increased during the period of investigation, outpaces *demand*, whose growth slowed at the end of the period of investigation) as other possible reasons for the price declines" (emphasis in original).

6. Did the ITC properly define domestic industry, subject imports and non-subject imports?

(i) Arguments of the parties

7.372 Korea claims that the ITC defined the subject imports and domestic industry inconsistently, preventing a proper examination of imports under Article 15.2, or the domestic industry under Article 15.4, of the *SCM Agreement*.

7.373 Korea asserts that the evidence before the ITC demonstrated that for some DRAM producers, the assembly/casing stage is often undertaken in a different country from where the design and wafer fabrication are done. Korea asserts that an important question in the case, therefore, became what was the appropriate country of origin of a DRAM for which production occurred in two countries; that is, whether a particular DRAM shipment is to be considered a Hynix product from Korea, a product of the US or a "non-subject" import from another country.

7.374 Korea notes that the DOC ruled that subject merchandise only includes those Hynix DRAMs for which the wafer was fabricated in Korea. The DOC ruled that if a Hynix DRAM was "fabbed" in Korea but underwent assembly/casing in another country, the finished DRAM would still be considered "subject merchandise" -- allegedly subsidized imported DRAMs from Korea. Korea notes that, with respect to US produced DRAMs, the ITC adopted the same "wafer fabrication controls" approach that the DOC utilized for defining subject merchandise. The ITC ruled that a DRAM would be considered "US produced" as long as the wafer was "fabbed" in the US, even if assembly/casing was done in another country before returning to the US to be sold. Korea argues that the ITC adopted a completely different approach for defining non-subject imports, relying on the country of assembly/casing, rather than the country of fabrication.

7.375 For non-subject imports, the ITC abandoned the "wafer fabrication controls" approach. Specifically, the ITC ruled that if DRAMs were "fabbed" in a third country, e.g. Italy or Germany, but then assembled/cased in the US before sale to a US customer, such DRAM sales would be considered sales of US produced DRAMs.

7.376 Korea asserts that, although in its *Preliminary Injury Determination* the ITC specifically admitted that "there is some inconsistency to this position",[331] in its *Final Injury Determination* the ITC adopted the same approach for defining and distinguishing between US produced and non-subject imports. According to Korea, such approach meant that the volume of US produced shipments were overstated and the volume of non-subject imports were understated in the ITC's causation analysis.

7.377 Korea submits that the ITC had an obligation to resolve this inconsistency, rather than to ignore the inconsistency. Korea claims that the ITC's failure to do so distorted the relative importance of subject imports, and thus violated Article 15.2. Korea also submits that the ITC's failure to do so distorted the assessment of the domestic industry, and violated Article 15.4.

7.378 The US submits that the ITC used consistent definitions of subject imports, domestic shipments and non-subject imports. The US notes that Korea does not contest the definition of subject imports used by the ITC in this investigation. The US asserts that, in light of the DOC's scope determination, the ITC defined subject import shipments as consisting of all DRAM products regardless of density, including cased and uncased DRAMs as well as DRAMs packaged into memory modules and including all DRAM product types, if the DRAMs or DRAM modules were made from subject Korean-fabricated dice (by the Hynix companies), regardless of casing location. The US argues that Hynix was pleased with this definition because it meant that DRAMs fabricated in the US

[331] *See Preliminary Injury Determination*, at 11 (Exhibit GOK-9).

at HSME, but cased in Korea (since Hynix had no casing facilities in the US), were not in the scope of the investigation or subject to any eventual countervailing duty order.

7.379 The US asserts that the ITC defined shipments of "domestic" products to include "DRAMs and DRAM modules made from (1) United States fabricated dice, regardless of assembly location, and (2) Samsung Korean-fabricated dice that were assembled in the United States (***), and (3) 3rd-source-fabricated dice that were assembled in the United States."[332] The US asserts that the ITC defined shipments of "non-subject" imports to include "Samsung Korean-fabricated and 3rd-source-fabricated dice that were not cased in the United States."[333]

7.380 The US claims that Korea is asking the Panel to find that the ITC was required to use a methodology that is not required by the *SCM Agreement* and that is internally inconsistent. The US asserts that the methodology used by the ITC in this investigation was consistent with the *SCM Agreement*, internally consistent, and avoided data errors. The US argues that the ITC, applying its normal six-factor test, examined whether certain production-related activities, if conducted in the US, were sufficient to warrant treating the companies engaging in those activities as domestic producers. The US asserts that, as part of this inquiry, the ITC considered whether assembly of uncased DRAMs into cased DRAMs constituted sufficient production-related activities to include companies that assembled uncased DRAMs into cased DRAMs in the domestic industry. The US asserts that the ITC found that assembly operations involved sufficient production-related activity to constitute domestic production, and noted the absence of any dispute that the output of DRAM assembly operations – cased DRAMs – were part of the domestic like product. The US submits that, in light of its finding that assembly operations were sufficient production-related activities to constitute domestic production, the ITC included companies that assembled DRAMs in the US in the domestic industry, and treated the output of those operations – cased DRAMs – as shipments of the domestic industry.

7.381 The US notes that Korea does not dispute the ITC's application of its six-factor test to determine what activities were sufficient to warrant treating the companies engaging in those activities in the US as domestic producers. The US also notes that Korea does not dispute the ITC's definition of the domestic industry as those producers that fabricate DRAMs in the US and those producers that assemble DRAMs in the US, but not module "packagers" or fabless design houses. The US notes, therefore, that Korea does not challenge the ITC's determination based on Article 16 of the *SCM Agreement*. The US argues that, instead, Korea would have the ITC define the domestic industry for certain purposes as "producers of the domestic like product," but then abandon that definition when it comes to calculating industry shipments. According to the US, however, having found what constituted domestic production, having defined the domestic industry as producers of the domestic like product engaged in those production activities, and having found no basis to exclude any producer from the domestic industry, it was objective for the ITC to have applied the same, rather than a different, definition of the domestic industry for purposes of calculating the shipments of the domestic industry. The US argues that including companies in the domestic industry and in turn relying on their compiled financial information for one purpose while applying a different definition of domestic production for purposes of assessing trade data (*i.e.*, US shipments, market share, etc.) would be anomalous.

(ii) Evaluation by the Panel

7.382 The ITC defined the domestic industry as the producers of a domestic like product. As a result, the question arose as to what activities constitute domestic production activities, i.e., when could an entity be said to be producing a domestic like product. The ITC determined that both fabbing and assembly/casing constitute domestic production activities. Such determination meant that

[332] *See, e.g., Final Injury Determination*, at 6-11, 17 n.103, Table IV-5 n.1 (Exhibit GOK-10).
[333] *See, e.g., Final Injury Determination*, at 6-11, Table IV-5 n.2 (Exhibit GOK-10).

when either fabbing or assembly/casing were undertaken by an entity in the US, that entity was treated as part of the domestic industry (excluding module packagers and fables design houses), and its fabbing or assembly/casing activities were treated as domestic shipments.[334]

7.383 Korea does not challenge the ITC's decision to treat assembly/casing as a domestic production activity. Nor does Korea challenge the ITC's definition of the domestic industry.[335] In other words, Korea does not contest that an entity fabbing or assembling/casing DRAMs in the US should be treated as a domestic producer.

7.384 What Korea challenges is the treatment of assembly/casing in the ITC's definition of the domestic industry, to the extent it results in differences in treatment of products depending on whether they were assembled/cased in the US or in a foreign country. In particular, Korea complains that assembly/casing activities by an entity in the US is sufficient for those activities to be treated as domestic shipments, even if the DRAMs were fabbed in a third country, whereas assembly of a US fabbed DRAM by a third country entity does not change the origin of the DRAM, i.e., it remains a US domestic product. Korea argues that if assembly/casing is sufficient to constitute a domestic production activity when undertaken by a US producer, it should also be sufficient to change the origin of the DRAM when undertaken by a foreign entity[336] (such that assembly/casing of a US fabbed DRAM by a third country entity would be treated as a non-subject import, rather than a domestic product). Korea alleges that this inconsistency results in an artificially reduced volume of non-subject imports, and an artificially increased volume of domestic production, thereby rendering the ITC's consideration of the importance of subject imports (relative to non-subject imports and domestic production) inconsistent with Article 15.2 of the *SCM Agreement*, and its consideration of the domestic industry inconsistent with Article 15.4 thereof.

7.385 In our view, the inconsistency identified by Korea is a consequence of the ITC's definition of the domestic industry as those producers that fabricate DRAMs in the US and those producers that assembly/case DRAMs in the US (excluding module packagers and fables design houses). In order to remedy this inconsistency, Korea would have to challenge the ITC's definition of the domestic industry, and its treatment of assembly/casing as a domestic production operation, by filing a claim under Article 16 of the *SCM Agreement*. However, Korea has not done so. There is therefore no basis for us to consider that the ITC's definition of the domestic industry is inconsistent with that provision.

7.386 We do not consider that an objective and impartial investigating authority could not properly have assessed the volume of subject imports or the state of the domestic industry on the basis of the results of the application of a WTO-consistent[337] domestic industry definition. Although an investigating authority might act inconsistently with these provisions in a number of ways, simply collecting subject import, non-subject import and domestic production data on the basis of a WTO-consistent domestic industry definition is not one of them. For this reason, we reject Korea's claim that the US violated Articles 15.2 and 15.4 of the *SCM Agreement* because the ITC improperly and inconsistently defined the domestic industry, subject imports, and non-subject imports. We recall that Korea could have challenged the ITC's definition of the domestic industry, but failed to do so.

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[334] Subject to adjustments made by the ITC to avoid double counting.

[335] Nor does Korea challenge the DOC's definition of subject merchandise.

[336] We note that, according to the ITC, US Customs considers the country of origin of DRAMs to be the country where the DRAMs were assembled, because Customs has determined that assembly operations constitute a substantial transformation of the merchandise (see *Decision Memorandum*, page 8, Exhibit GOK-5).

[337] In the absence of any legal claim by Korea, and any consequential finding by the Panel, that the ITC's domestic industry definition is inconsistent with the *WTO Agreement*, there is no basis for us to presume that it is WTO-inconsistent.

7. Conclusion

7.387 In light of the above, we find that the ITC's *Final Injury Determination* did not properly ensure that injury caused by one known factor other than the allegedly subsidized imports was not attributed to the allegedly subsidized imports, contrary to Article 15.5 of the *SCM Agreement*. We therefore conclude that the ITC's *Final Injury Determination*, and the *Final Countervailing Duty Order* based thereon, are inconsistent with Article 15.5 of the *SCM Agreement*, and that the US is therefore in violation of that provision.

7.388 We reject Korea's claims that the US violated:

- Article 15.2 because *inter alia*, the ITC determinations improperly assessed the significance of the volume effects of subject imports;
- Article 15.2 because *inter alia*, the ITC determinations improperly assessed the significance of the price effects of subject imports;
- Article 15.4 because *inter alia*, the ITC failed to consider all factors relevant to the overall condition of the domestic industry;
- Article 15.5 because *inter alia*, the ITC failed to demonstrate the requisite causal link between subject imports and injury; and
- Article 15.2 and 15.4 because *inter alia*, the ITC improperly and inconsistently defined the domestic industry;

7.389 Korea has also claimed that the US violated Article 15.1 of the *SCM Agreement*. However, Korea's Article 15.1 claim is entirely dependent on its claims under Article 15.2, 15.4 and 15.5.[338] Since there is no independent basis to Korea's Article 15.1 claim, we do not consider it necessary to rule on that claim. We therefore decline to rule on Korea's claim that:

- Article 15.1 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.

E. VERIFICATION MEETINGS

(i) Arguments of the Parties

7.390 Korea asserts that the DOC conducted secret verification meetings in its territory with unnamed "experts" on the Korean financial markets. According to Korea, the DOC wanted such meetings to be secret, apparently because it believed that anonymity would encourage candour from such experts. Korea affirms that it did not object to the meetings themselves, but objected to the form or the meetings, *i.e.* with the need for anonymity. Korea points out that, without knowing the identity and background of the experts, it would not be in a position to comment on their degree of expertise or to identify possible biases in the experts. Korea notes that, without having observers at the meetings, it would have no way of knowing whether the DOC written report about the meetings was complete and objective.

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[338] In this regard, we note Korea's assertion that "[e]ach of the specific inconsistencies (under Articles 15.2, 15.4 and 15.5] identified is necessarily an inconsistency under Article 15.1 and will be noted as such" (see para. 85 of Korea's First Written Submission). During its submission, Korea provides no other basis for "not[ing]" a violation of Article 15.1 other than the alleged violations of Articles 15.2, 15.4 and 15.5.

7.391 Korea asserts that it sought a compromise with the DOC on the conduct of verifications, whereby its counsel would be allowed to monitor the meetings. Under the arrangement proposed by Korea, counsel would only monitor the dialogue and would not interact with the experts or the DOC team involved in the interviews. Korea affirms that the DOC rejected this proposal and that, in response, it expressed its specific objection to the meetings in several communications with the DOC officials. Korea argues that the secret expert meetings were conducted in Korea over its specific objections. Korea further argues that the DOC offered it no alternative, since to affirmatively block the meetings would have resulted in adverse findings by the DOC to the detriment of the Korean DRAMS producers involved in the investigation. Korea affirms that it was not objecting to the substance of the verification, but that it had rather a procedural objection. Korea affirms that, otherwise, it was not consenting to that portion of the verification that involved secret meetings. According to Korea, its request to the DOC was quite modest: it requested only that counsel – not government officials, but counsel – be allowed to observe the meetings. Korea notes that the DOC has allowed counsel to attend such meetings as witnesses in other cases. Korea recalls that, ironically, the experts offered evidence largely at odds with the US theory in this case.

7.392 Korea submits that the DOC's action is inconsistent with Article 12.6, which gives Members the right to object to any verification meeting taking place within the territory of that Member. Korea is of the opinion that the DOC should have found some mutually agreeable compromise that met the needs of both parties, instead of simply insisting in doing the meetings its own way, without any regard to Korea's objections.

7.393 The US observes that Article 12.6 foresees the possibility of investigations in the territory of other Members, provided that they have been notified in good time and do not object to the investigation. The US recalls that Article 12.6 also provides for investigations on the premises of a "firm" in the territory of a Member and that it requires the explicit consent of firms to investigation in their premises and requires that the Members must be notified and not object. The US observes that, additionally, the investigating authorities are required to disclose or make available the results of its verifications of firms.

7.394 The US notes that DOC officials travelled to Korea to make verifications. Prior to the departure, according to the US, the DOC notified Korea of its intent to conduct such verification and provided Korea with the schedule of verifications of the respondent firms. The US further notes that the DOC also indicated in its schedule that concurrent with its verifications, it planned to meet with independent financial experts during its visit to Korea.

7.395 According to the US, Korea's only objection was related to the substance of the scheduled verification, i.e. Korea objected to the scheduled meetings between DOC officials and financial experts without the presence of Korea's counsel. The US notes that Korea did not withhold consent to investigations within its territory. Consequently, in order to gather information about the investigation, the DOC officials proceeded to meet with the financial experts, without the presence of Korea's counsel. The US asserts that the DOC disclosed and made publicly available its report of such meetings.

7.396 The US disagrees with Korea's argument that the DOC's actions were inconsistent with Article 12.6 because the DOC failed to accommodate Korea's request to allow its counsel to monitor the meetings. The US notes that the DOC's meetings with financial experts were in the context of gathering additional information to assist in its countervailing duty investigation and that transparency was preserved by placing the summaries of the meetings in public record.

7.397 The US sees no requirement in Article 12.6 that government officials must permit counsel for the government of the Member in question to be present at meetings with financial experts. The US notes that Korea's assertion that its counsel would ensure reliability of the written record fails to

account for the fact that representatives of the US domestic industry are never permitted to attend any part of the verification proceedings.

7.398 The US is of the view that, while Article 12.6 gives Korea the right to object to the investigations conducted within its territory, the right of denial cannot be extended to encompass the right to dictate the specific procedures to be followed in the conduct of verification proceedings. The US asserts that the DOC was not required to negotiate with Korea over the details of its investigatory proceedings. The US affirms that, if Korea wanted to, if could have chosen to withhold its consent to the investigations within its territory, and that it did not.

(ii) Evaluation by the Panel

7.399 Korea claims that the US acted inconsistently with the terms of Article 12.6, which gives Members the right to object to any verification meeting taking place within the territory of that Member. Korea insists that the DOC should have worked with it to find some mutually agreeable compromise on this issue.

7.400 Article 12.6 provides that:

> The investigating authorities may carry out investigations in the territory of other Members as required, provided that they have notified in good time the Member in question and unless that Member objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if *(a)* the firm so agrees and *(b)* the Member in question is notified and does not object. The procedures set forth in Annex VI shall apply to investigations on the premises of a firm. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain and may make such results available to the applicants.

7.401 We note that, in a letter dated 10 April 2003, the US notified Korea of the details of the investigation the DOC intended to carry out in the territory of Korea and informed Korea of the names of the firms and banks that had agreed to meet with DOC officials.[339] In the same letter, the US informed Korea that the DOC officials were to meet with "non-government entities."

7.402 In a letter of response to the US dated 14 April 2003, Korea, through its Counsel, notes that "there is one aspect of the verification schedule, however, that causes concern for the GOK."[340] In this letter, Korea notes that the DOC officials planned to conduct a series of private meetings with various banks and other third-party experts. Korea then states that it "strongly objects to the Commerce Department arranging meetings to gather information that will then be utilized as the factual basis for the final determination in this case." Korea further states that it "very much objects to the Department of Commerce having secret meetings with private firms in Korea as part of its CVD verification."

7.403 Nonetheless, in the same letter, Korea affirms that its objection is "very limited." It states that "the GOK does not object to the Commerce Department having meetings with any private firm. Nor does the GOK object to the Commerce Department having complete discretion in deciding with

[339] Exhibit GOK-27-(a) and Exhibit US-111.
[340] Exhibit GOK-27-(b) and Exhibit US-112.

whom it wants to meet. The Commerce Department can meet with whomever it wants. The only objection that the GOK has is to the Commerce Department holding these meetings in secret."[341]

7.404 In our view, Article 12.6 establishes two conditions for investigating authorities to carry out investigations in the territory of other Members: (1) the intention to carry out the investigations is notified in good time to the Member in question; and (2) that Member does not object to the investigation.[342] As far as the first condition is concerned, Korea does not question the fact that the US notified Korea of its intention to carry out an investigation in the territory of Korea. The issue at hand has to do with the second condition, *i.e.* whether Korea objected to the investigation – or whether Korea had the right to object to the format of the investigation, not to the investigation in itself.

7.405 We recall the assertion by the US that while Article 12.6 provides Korea with the right to object to the investigations conducted within its territory, such right of denial cannot be extended to encompass a right to dictate the specific procedures to be followed during the investigation proceedings.[343] We agree with the US. Korea could have prevented the investigation in its territory from taking place, but it chose not to do so. In its letter of response to the US, Korea does not object to the meetings, nor to the discretion of the DOC to meet "with whomever it wants."[344] Since Korea did not object to the DOC's on-site investigation, the DOC's decision to proceed with that investigation is not inconsistent with Article 12.6 of the *SCM Agreement*.

7.406 We note Korea's argument that it had no choice but to accept the DOC's on-site investigation, since to affirmatively block the meetings would have resulted in adverse findings by the DOC to the detriment of the Korean DRAMS producers involved in the investigation. We assume that Korea is referring to the possibility of the DOC using the "facts available" under Article 12.7 of the *SCM Agreement*. We are not persuaded by Korea's argument, however, since investigating authorities do not have *carte blanche* in their use of "the facts available." In particular, we agree with the panel in *Guatemala – Cement II* that, "[a]lthough there are certain consequences (under Article 6.8) for interested parties if they fail to cooperate with an investigating authority, [...] view such consequences only arise if the investigating authority itself has acted in a reasonable, objective and impartial manner (...)"[345]

7.407 Thus, we reject Korea's claim under Article 12.6.

F. BURDEN OF PROOF DURING THE DOC'S INVESTIGATION

7.408 Korea submits that the DOC's investigation in this case began with an effective presumption, based on past, unrelated investigations, that the GOK directed lending to "strategic" industries, including the Korean semiconductor industry (and consequently, to Hynix, a semiconductor company). Korea asserts that the use of such presumptions by investigating authorities is inconsistent with Articles 1 and 2 of the *SCM Agreement*, since these provisions require competent authorities to have a factual basis to establish the various elements of a countervailable subsidy.

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[341] *Ibid*.

[342] We note that the provisions in Annex VI of the *SCM Agreement*, which contains procedures for on-the spot investigations pursuant to Article 12.6, were not referred to by either Korea or the US in this dispute.

[343] US First Written Submission, para. 263.

[344] Nowhere in its letter of response to the US does Korea object to the investigation in itself. Rather, it only objects to the "arranging of secret meetings" or to the DOC "having secret meetings." See Exhibit GOK-27-(b) and Exhibit US-112. As Korea asserts in paragraph 247 of its Second Written Submission, it was not objecting to the substance of the verification; Korea had a "procedural objection."

[345] Panel Report, *Guatemala – Cement II*, para. 8.251.

7.409 Korea's claims concern the propriety of the DOC's investigation, and the consistency of the DOC's determinations of GOK entrustment or direction and specificity with Articles 1 and 2 of the *SCM Agreement*. Since we have already found that those determinations are in violation of those provisions, we do not consider it necessary to examine Korea's burden of proof claim.

G. ARTICLE 4.4 OF THE *DSU*

7.410 The US submits that the Panel should reject Korea's claims regarding the DOC countervailing duty order because Korea failed to comply with Article 4.4 of the *DSU* in respect to the inclusion of the final DOC countervailing duty order referred to in Korea's second request for consultations. The US submits that, notwithstanding the requirements of Article 4.4 of the *DSU*, Korea's second request for consultations did not include any indication of the legal basis of its complaint with respect to the DOC countervailing duty order.

7.411 The second sentence of Article 4.4 provides as follows:

> 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 of the complaint.

7.412 Korea submits that its second consultation request explicitly identifies the countervailing duty order at issue, and that the two consultation request together provide a fairly detailed explanation of the legal defects with the DOC and ITC determinations. Korea asserts that, since the DOC final countervailing duty order rests on the legal and factual foundations of these two agency findings, the two Korean consultation requests were in fact providing a more than sufficient "indication" of the legal basis for its claim against the DOC's final countervailing duty order. Korea also argues that the second consultation request specifically cited to Article VI:3 of *GATT 1994*, which sets forth the basic legal rule also reflected in Article 19.4 that the duties levied should not exceed the amount of the subsidy.

7.413 Korea's original request for consultations was set forth in document WT/DS296/1. That request covered the DOC's affirmative preliminary and final countervailing duty determinations, but did not refer to the DOC's final countervailing duty order. The request for consultations in respect of the DOC's final countervailing duty order was set forth in document WT/DS296/1/Add.1.

7.414 We note that the first sentence of Korea's second request for consultations provides:

> With reference to document WT/DS296/1 ... circulated on 8 July 2003, my authorities have instructed me to request further consultations with the Government of the US ...

7.415 In our view, the reference in the first sentence of Korea's second request for consultations to Korea's first request for consultations (i.e., document WT/DS296/1) is sufficient for the second request to be read in light of the first request. Thus, 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 document WT/DS296/1. In our view, 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*.[346]

[346] We note, in any event, that the scope of these proceedings is not necessarily restricted to the measures and claims set forth in Korea's requests for consultations (see, for example, the Panel Report in *Canada – Aircraft*, paras 9.5 – 9.14).

H. THE LEVY OF COUNTERVAILING DUTIES – ARTICLE 19.4 OF THE *SCM AGREEMENT* AND ARTICLE VI.3 OF THE *GATT 1994*

7.416 Korea claims that the US has levied countervailing duties in excess of the value of alleged subsidies, contrary to Article 19.4 of the *SCM Agreement* and Article VI.3 of the *GATT 1994*. Article 19.4 of the *SCM Agreement* provides:

> No countervailing duty shall be levied [51] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.
>
> [51] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

7.417 Article VI:3 of *GATT 1994* provides in relevant part:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted [...].

7.418 We note that Korea's SCM Article 19.4 and *GATT 1994* Article VI.3 claims are dependent on its claims against the DOC subsidy determinations and the ITC's injury determinations. Thus, to the extent that we reject those claims, there is no basis to find that the US violated *SCM* Article 19.4 and *GATT 1994* Article VI.3. To the extent that we uphold those claims, we do not consider it necessary to make a finding under those provisions.

I. ARTICLES 10 AND 32.1 OF THE *SCM AGREEMENT*

7.419 Korea submits that, in light of many alleged inconsistencies in the DOC action, the CVD order against DRAMs from Korea is inconsistent with Articles 10 and 32.1 of the *SCM Agreement*.

7.420 Article 10 of the *SCM Agreement* provides:

> Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of *GATT 1994* and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture. (footnotes omitted)

7.421 Article 32.1 of the *SCM Agreement* provides:

> 32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of *GATT 1994*, as interpreted by this Agreement. (footnote omitted)

7.422 Korea asserts that both Articles 10 and 32.1 of the *SCM Agreement* constitute overarching provisions, establishing that no countervailing duty action specifically, and no action against a subsidy generally, shall be taken by a Member unless in accordance with provisions of the *SCM Agreement* and *GATT 1994*. Korea asserts that Article 19.2 gives Members the discretion to decide whether or not to impose duties, "where all requirements for imposition have been fulfilled." According to Korea, once the Member decides to impose the duty, the obligations of Article 10 and Article 32.1

come into play. Korea argues that the decision by the US to impose the countervailing duty order in this case thus violates Article 10 and 32.1.

7.423 The US asserts that Korea's claims under Articles 10 and 32.1 of the *SCM Agreement* are dependent claims, in that they depend upon a finding of an inconsistency with an obligation contained in some other provision of the *SCM Agreement* or *GATT 1994*. The US asserts that, because the US has not acted inconsistently with any such other provisions, the countervailing duty order is, by definition, not inconsistent with Articles 10 or 32.1.

7.424 We note that Korea's Article 10 and 32.1 claims are dependent on its claims against the DOC subsidy determinations and the ITC's injury determinations. Thus, to the extent that we reject those claims, there is no basis to find that the ITC's injury determinations are inconsistent with Articles 10 and 32.1. To the extent that we uphold those claims, we do not consider it necessary to make a finding under Articles 10 and 32.1.

J. ARTICLE 22.3 OF THE *SCM AGREEMENT*

7.425 Korea submits that the ITC's *Final Injury Determination* failed to comply with Article 22.3 of the *SCM Agreement*, which provides:

> Each [public] notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.

7.426 Korea asserts that the ITC's public determination failed to provide sufficient detail on important issues regarding the volume and price effects of the alleged subsidized imports, and the causal link between alleged subsidized imports and the injury to the domestic industry.

7.427 The US submits that the ITC's *Final Injury Determination* complied with Article 22.3.

7.428 We note that Korea's Article 22.3 claim is dependent on its claims under Articles 15.1, 15.2 and 15.5 of the *SCM Agreement*. Thus, to the extent that we reject those claims, there is no basis to find that the ITC's *Final Injury Determination* is inconsistent with Article 22.3. To the extent that we uphold those claims, we do not consider it necessary to make a finding under Article 22.3. Since the ITC's *Final Injury Determination* is inconsistent with Article 15.5 in respect of part of the ITC's non-attribution analysis, the adequacy of the ITC's public notice in respect of that part of its non-attribution analysis is immaterial.[347]

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 For the reasons set forth above, we conclude that the DOC's *Final Subsidy Determination*, the 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 US is in violation of those provisions of the *SCM Agreement*.

8.2 For the above reasons, we reject Korea's claims that the US violated:

- Article 2 in so far as Korea's claim concerns the DOC's finding the alleged subsidies provided by Group A creditors were specific;

[347] We note that such an approach is consistent with that adopted by previous panels, including *Guatemala – Cement II* (para. 8.291, note 48), Appellate Body Report, *EC – Bedlinen (Article 21.5 – India)* (para. 6.259), and *Argentina – Poultry Anti-Dumping Duties* (para. 7.293).

- Article 15.2 because *inter alia,* the ITC determinations improperly assessed the significance of the volume effects of subject imports;

- Article 15.2 because *inter alia*, the ITC determinations improperly assessed the significance of the price effects of subject imports;

- Article 15.4 because *inter alia,* the ITC failed to consider all factors relevant to the overall condition of the domestic industry;

- Article 15.5 because *inter alia,* the ITC failed to demonstrate the requisite causal link between subject imports and injury;

- Article 15.2 and 15.4 because *inter alia*, the ITC improperly and inconsistently defined the domestic industry;

- Article 12.6 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;

8.3 In light of the above conclusions, we do not consider it necessary to address Korea's claims that the US violated:

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

- Articles 1.1 and 14 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 Hynix during the period of investigation;

- Articles 1.1 and 14 because *inter alia*¸ the DOC failed to utilize relevant Korean 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 in this case;

- Article 19.4 of the *SCM Agreement* and Article VI:3 of the *GATT 1994* because *inter alia,* the DOC's failed 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*;

- Articles 10 and 32.1 because *inter alia,* the CVD order imposed by the US against DRAMs from Korea was not in accordance with the relevant provisions of the *SCM Agreement* or the relevant provisions of the *GATT 1994*;

- Article 15.1 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; and

- Article 22.3 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.

8.4 We note that Korea requests the Panel to recommend that the US terminate the countervailing duty order immediately.[348] Any such recommendation is precluded by Article 19.1 of the *DSU*, which restricts us to recommending that the US bring the relevant measures into conformity with the relevant agreement. Accordingly, in light of the conclusions above, we recommend that the US bring the DOC's *Final Subsidy Determination*, the ITC's *Final Injury Determination*, and the DOC's final countervailing duty order, into conformity with the *SCM Agreement*.

[348] Korea First Written Submission, para. 599.