VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In the light of our findings above concerning the EC' s definitive countervailing measure imposed on imports of DRAMs from Korea, we consider that the EC acted in a manner inconsistent with its WTO obligations under:

(a) Article 1.1(a) of the *SCM Agreement* in determining that the May 2001 Restructuring Programme constituted a financial contribution by the government;

(b) Article 1.1(b) of the *SCM Agreement* in its determination of the existence of a benefit in the case of the Syndicated Loan;

(c) Articles 1.1(b) and 14 of the *SCM Agreement* in applying, for the purposes of the calculation of the amount of benefit, its grant methodology to all programmes found to constitute a subsidy;

(d) Article 15.4 of the *SCM Agreement* by not evaluating the factor "wages" as a relevant factor affecting the state of the domestic industry;

(e) Article 15.5 of the *SCM Agreement* by failing to make sure that injury caused by certain other factors (in particular, decline in demand, overcapacity, and other (non-subsidized) imports) was not attributed to the subsidized imports.

8.2 For the reasons set forth in our findings above, we reject Korea's claims that the EC violated:

(a) Article 1.1(a) of the *SCM Agreement* because the EC failed to demonstrate the existence of a financial contribution with respect to the Syndicated Loan, the KEIC Guarantee, the KDB Debenture Programme, and the October 2001 Restructuring Programme;

(b) Articles 1.1(b) of the *SCM Agreement* because the EC failed to demonstrate that a benefit was conferred on the respondent Hynix by the KEIC Guarantee, the KDB Debenture Programme, the May 2001 Restructuring and the October 2001 Restructuring Programmes, given available market benchmarks among Hynix's creditors, including a foreign bank operating in the Korean market;

(c) Articles 1.2 and 2 of the *SCM Agreement* because the EC made an erroneous finding of *de facto* specificity, specifically with respect to the KDB Debenture Programme;

(d) Articles 1.2 and 2 of the *SCM Agreement* because the EC disregarded the fact that many Korean companies underwent debt restructuring similar to that undergone by Hynix in the May and October 2001 Restructuring Programmes, and therefore, the EC did not establish that the alleged subsidies were specific on the basis of positive evidence;

(e) Article 15.2 of the *SCM Agreement* because, the EC determinations improperly assessed the significance of the volume effects of Hynix imports;

(f) Article 15.2 of the *SCM Agreement* because the EC determinations improperly assessed the significance of the price effects of Hynix imports;

(g) Article 15.4 of the *SCM Agreement* because the EC failed to consider all factors relevant to the overall condition of the domestic industry, in so far as Korea's claim does not relate to the factor "wages";

(h) Article 15.5 of the *SCM Agreement* because the EC failed to demonstrate the requisite causal link between Hynix imports and injury, while accepting Korea's claim concerning the non-attribution aspect of the causation analysis, as stated above;

(i) Article 12.7 of the *SCM Agreement* because the EC did not justify its application of "facts available" with respect to its subsidy investigation.

8.3 Having reached the conclusions set forth above,[301] we apply judicial economy and do not rule on Korea's claims that the EC acted in a manner inconsistent with:

(a) Articles 19.4 of the *SCM Agreement* and VI:3 of the *GATT 1994* in levying countervailing duties in excess of the amount allowed under those provisions;

(b) Article 15.1 of the *SCM Agreement* because the EC determinations on injury and causation were not based on positive evidence and an objective assessment of the effects of allegedly subsidized imports;

(c) Article 22.3 of the *SCM Agreement* because the EC's injury determination did not set forth in sufficient detail the EC's findings and conclusions on all material issues of fact and law;

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

8.4 Under Article 3.8 of the *DSU*, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the EC has acted inconsistently with the provisions of the *SCM Agreement*, it has nullified or impaired benefits accruing to Korea under that Agreement.

8.5 We note that Korea requests the Panel to recommend that the EC terminate the countervailing duty order immediately.[302] Article 19.1 of the *DSU* is explicit concerning the recommendation a panel is to make in the event it determines that a measure is inconsistent with a covered agreement:

> [i]t shall recommend that the Member concerned bring the measure into conformity with that agreement. (footnotes omitted)

Article 19.1 goes on to provides that:

> [i]n addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

8.6 We thus consider that the language of Article 19.1 of the *DSU* permits us to make suggestions regarding implementation of the recommendation that the measure be brought into conformity with the *SCM Agreement*. We have found various violations of the EC's obligations under the *SCM Agreement*, which may necessitate differing responses in order to bring the measure concerned into conformity with the EC's obligations under the *SCM Agreement*. In our view, the modalities of the

[301] For ease of understanding, the Panel's conclusions concerning the EC's subsidy and injury determination are summarized in tabular form in Annexes F-2 and F-3 respectively.

[302] Korea First Written Submission, para. 676.

implementation of our recommendation are, in the first place, for the EC to determine. In this regard, we note Article 21.3 of the *DSU*, which provides:

> [a]t a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. (footnote omitted)

8.7 We therefore recommend that the Dispute Settlement Body request the EC to bring its measure into conformity with its obligations under the *SCM Agreement*, and decline to make the suggestion requested by Korea.

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