WORLD TRADE ORGANIZATION

WT/DS296/AB/R
27 June 2005

(05-2728)

Original: English

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

AB-2005-4

Report of the Appellate Body

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Ceramic Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, 6241
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Argentina – Textiles and Apparel	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R, DSR 1998:III, 1033
Brazil – EEC Milk	GATT Panel Report, *Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community* ("*Brazil – EEC Milk*"), adopted 28 April 1994, BISD 41S/II/467
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, as upheld by the Appellate Body Report, WT/DS70/AB/R, DSR 1999:IV, 1443
Canada – Dairy	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057
Canada – Dairy (Article 21.5 – New Zealand and US)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001, DSR 2001:XIII, 6829
Canada – Dairy (Article 21.5 – New Zealand and US II)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second R*

Short Title	Full Case Title and Citation
US – Countervailing Duty Investigation on DRAMS	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, 21 February 2005
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003
US – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, 5767
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European*

TABLE OF ABBREVIATIONS USED IN THIS REPORT

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

Abbreviation	Definition
Micron	Micron Technology, Inc.
Panel Report	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, 21 February 2005
Samsung	Samsung Electronics Co., Ltd
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
Tokyo Round Subsidies Code	*Agreement on Interpretation and App4.6cess Measures*

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

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

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

AB-2005-4

Present:

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

I. Introduction

1. The United States and Korea each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* (the "Panel Report").[1] Ts dr(mb)-lingipant5(posirs (D

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

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

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

5. In the Panel Report, circulated to Mved f33i(7 TD0.0027 Tc(19.2352 Tc0.0002 Tw[(125be)5.5TT6 1 ci

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

6. The Panel rejected Korea's claims that the United States acted inconsistently with Articles 2[12], 12.6, 15.2, 15.4, and 15.5[13] of the *SCM Agreement*.[14]

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

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

II. Arguments of the Participants and the Third Participants

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

1. Request for Consultations under Article 4.4 of the DSU

10. The United States appeals the Panel's finding that

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

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

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

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

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

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

> a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments[.]

[29]Panel Report, para. 7.31.

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

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

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

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

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

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

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

[31]

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

17. Referring to the definition of the term "compelling", the United States argues that a standard of "compelling" evidence would appear to require evidence that "forces" or "obliges" a fact-finder to reach a particular conclusion, or evidence that is "overwhelming"[36] or "irrefutable".[37] In the United States' v( )-5.40008 Tq26(ates)-5nder to

20. In particular, the United States alleges that the Panel employed this "piecemeal approach"[42] at several points in its analysis of the USDOC's finding on entrustment or direction. The United States points to the Panel's examination of various items of evidence relied on by the USDOC—including

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

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

(iii) Burden of Proof

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

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

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

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

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

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

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

(iv) *Ex post* Rationalization

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

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

28. In support of this argument, the United States refers to Article 22.5 of the *SCM Agreement*, which provides that an agency's published determination at the end of a CVD investigation "shall contain ... all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". In the United States' view, this provision addresses what must be contained in a final determination and, by its plain language, does not require an investigating authority "to cite to every piece of record evidence that supports its reasons for the i2.8251 TD0. hav by 1(ure)-3(o)-1

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

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

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

(i) Non-record Evidence

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

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

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

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

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

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

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

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

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

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

(ii) Standard of Review

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

4. Benefit and Specificity

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

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

42. Korea further submits that the Panel's proper understanding of the context of the terms "entrusts" and "directs" supports its interpretation. Korea rejects the United States' reading of the term "practice" in Article 1.1(a)(1)(iv) as implying that entrustment or direction cannot be limited to an official programme, but may also include broader "practices". Korea argues that "[t]he term 'practices' refers to *what* is being entrusted or directed, not *whether* such types of governmental is be9/ ingovhavde

relating to the interpretation of Article 1.1(a)(1)(iv) and that, in fact, the United States is "trying to

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

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

(i) Reviewing the Totality of the Evidence

48. Korea challenges the United States' allegation that the Panel evaluated the evidence in a manner that required that each piece of evidence, *in and of itself*, demonstrate entrustment or direction. Korea submits that, although the Panel did look at individual pieces of evidence, it did not state that each piece of evidence, *in and of itself*

(ii) Circumstantial Evidence

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

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

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

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

(iii) Burden of Proof

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

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

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

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

(iv) *Ex post* Rationalization

56. Korea submits that the Panel correctly identified evidence submitted by the United States as *ex post* rationalizations and requests the Appellate Body to uphold the Panel's findings refusing to consider such evidence. Referring to Article 22.5 of the *SCM Agreement*, Korea contends that an investigating authority must cite, in its published determination, *every* piece of record evidence that supports the agency's reasons for the imposition of TD0.001l6e .6(ed o/1321 Tc0.)14

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

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

59. Furthermore, Korea disagrees with the United States' assertion that the newspaper and journal articles disregarded by the Panel were cited by the USDOC in the Direction of Credit Memorandum. Korea submits, first, that certain of the articles

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

4. Benefit and Specificity

65. Korea submits that the United States' sole argument with regard to benefit and specificity is that the Panel based its conclusions on its allegedly erroneous findings with respect to GOK entrustment or direction.[98]

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

68.

71. The United States argues that Korea has misunderstood the analysis and findings of the Panel. In the United States' view, the Panel addressed GOK coercion and threats against Hynix creditors as evidence of entrustment or direction generally, rather than specifically in relation to the Fast Track

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

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

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

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

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

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

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

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

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

III. Issues Raised in This Appeal

88. The following issues are raised in this appeal:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii)

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

This language was followed by a list of provisions with which Korea considered "these determinations" to be inconsistent.[134] Another round of consultations was held on 1 October 2003, prior to which Korea and the United States exchanged correspondence indicating that they disagreed about the conformity of Korea's request for consultations with Article 4.4 of the DSU.[135] Korea submitted a request for the establishment of a panel on 19 November 2003.[136] The request identified the USDOC's CVD order and stated that it "was the

respect of the CVD order.[140] The Panel disagreed, noting that Korea's second request for

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

B.

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

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

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

> Any request for consultations sha

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

101. For these reasons, we

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

105. Korea's challenge relates to a different aspect of the Panel's interpretation of Article 1.1(a)(1)(iv). In particular, Korea appeals the Panel's finding that certain evidence relied on

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

110. The term "entrusts" connotes the action of giving responsibility to someone for a task or an object.[172] In the context of paragraph (iv) of Article 1.1(a)(1), the government gives responsibility to a private body "to carry out" one of the types of functions listed in paragraphs (i) through (iii) of Article 1.1(a)(1). As the United States acknowledges[173], "delegation" (the word used by the Panel) may be a means by which a government gives responsibility to a private body to carry out one of the functions listed in paragraphs (i) through (iii). Delegation is usually achieved by formal means, but delegation also could be informal. Moreover, there may be other means, be they formal or informal, that governments could employ for the same purpose. Therefore, an interpretation of the term "entrusts" that is limited to acts of "delegation" is too narrow.

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

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

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

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

[171]*Ibid*

111. As for the term "directs", we note that some of the definitions—such as "give authoritative instructions to" and "order (a person) *to do*"—suggest that the person or entity that "directs" has authority over the person or entity that is directed. In contrast, some of the other definitions—such as "inform or guide"—do not necessarily convey this sense of authority. In our view, that the private body under paragraph (iv) is directed "*to carry out*

"direction" cannot be inadvertent or a mere by-product of governmental regulation.[184] This is consistent with the Appellate Body's statement in

116. In sum, we are of the view that, pursuant to paragraph (iv), "entrustment" occurs where a government gives responsibility to a private body, and "direction" refers to situations where the government exercises its authority over a private body. In both instances, the government uses a private body as proxy to effectuate one of the types of financial contributions listed in paragraphs (i) through (iii). It may be difficult to identify precisely, in the abstract, the types of government actions that constitute entrustment or direction and those that do not. The particular label used to describe the governmental action is not necessarily dispositive. Indeed, as Korea acknowledges, in some circumstances, "guidance" by a government can constitute direction.[187] In most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction. The determination of entrustment or direction will hinge on the particular facts of the case.[188]

2. The United States' Appeal

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

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

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

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

[188]

118. As Korea explains [193], the issue raised on appeal by the United States—that is, the range of government actions that constitute entrustment or direction—was not the main interpretative issue before the Panel. Instead, the Panel was considering whether entrustment or direction needs to be demonstrated on the basis of explicit (as opposed to im

3. Korea's Cross-appeal

120. We turn to Korea's cross-appeal, which challenges the Panel's finding that certain evidence referred to by the USDOC was "sufficient for an objective and impartial investigating authority to

occurred *because of* 'KFB's failure to participate in th

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

A. *Introduction*

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

128. The United States alleges multiple errors in the Panel's application of Article 1.1(a)(1)(iv) to the facts of this case, in particular, with respect to the Panel's review of the USDOC's evidence. First, the United States claims that the Panel erred in applying an "evidentiary standard"[215] that required evidence of entrustment or direction to be "probative and compelling".[216] Secondly, the United States argues that the Panel erred in its approach to the examination of the USDOC's evidence under

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

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

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

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

132. In its analysis of entrustment and direction, the USDOC examined, in particular, four financial transactions. The first was an 800 billion won syndicated bank loan (the "December 2000 syndicated loan") extended to Hynix at the end of 2000 in order to finance short-term debt that

DRAMS[233] market, and adopted by Hynix and its creditors in October 2001 (the "October 2001 restructuring").[234] This restructuring plan was formulated under the CRPA, a codification under Korean law of the corporate workout methods utilized informally under the CRA. The creditors' council governing this restructuring plan (the "October 2001 Creditors' Council") provided Hynix's creditors with three options: (i) extend new loans to Hynix; (ii) convert a certain amount of Hynix's

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

C. *"Probative and Compelling" Evidentiary Standard*

136. We begin our analysis with the United States' ch

evidence that "force[d]" or "oblige[d]" it to find entrustment or direction.[246] Korea submits that the term "compelling", in the context in which it was used by the Panel, is more properly understood in a sense similar to "probative", merely to describe evidence tending to persuade the decision-maker of a

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

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

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

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

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

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

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

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

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

259*259*

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

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

1. Examining Individual Pieces of Evidence

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

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

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

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

[263]*Ibid*.

[264]*Ibid*.

[265]*Supra*, para. 135.

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

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

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

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

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

150. In our view, having accepted an investigating authority's approach, a panel normally should examine the probative value of a piece of evidence in a similar manner to that followed by the investigating authority. Moreover, if, as here, an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding of entrustment or direction, a panel reviewing such a determination normally should consider that evidence in its totality, rather than individually, in order to assess its probative value with respect to the agency's determination.[276] Indeed, requiring that each piece of circumstantial evidence, on its own, establish entrustment or direction effectively precludes an agency from finding entrustment or direction on the basis of circumstantial evidence.[277] Individual pieces of circumstantial evidence, by their very nature, are not likely to establish a proposition, unless and until viewed in conjunction with other pieces of evidence.

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

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

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

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

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

151. Furthermore, in order to examine the evidence in the light of the investigating authority's methodology, a panel's analysis usually should seek to review the agency's decision on its own terms, in particular, by identifying the inference drawn by the *agency* from the evidence, and then by considering whether the evidence could sustain that inference. Where a panel examines whether a piece of evidence could directly lead to an ultimate conclusion—rather than support an intermediate inference that the agency sought to draw from that particular piece of evidence—the panel risks constructing a case different from that put forward by the investigating authority.[278] In so doing, the panel ceases to *review* the agency's determination and embarks on its own *de novo* evaluation of the investigating authority's decision. As we explain below[279], panels may not conduct a *de novo* review of agency determinations.

152. In this case, as we observed above[280], the USDOC relied on the evidence to arrive at certain factual conclusions as an intermediate step in its analysis *before* finding entrustment or direction. These intermediate factual conclusions were: (i) the GOK pursued a policy of preventing the financial collapse of Hynix; (ii) the GOK held control or influence over Hynix's Group B and C creditors; and (iii) the GOK pressured certain of Hynix's Group B and C creditors into participating in the financial restructuring. A proper assessment by the Panel, therefore, would have considered whether the individual piece of evidence being examined could tend to support—not establish in and of itself—the *particular intermediate factual conclusion* that the USDOC was seeking to draw from it. By looking instead to whether such evidence directly supported a finding of entrustment or direction, the Panel determined certain pieces of evidence not to be probative when, in fact, had they been properly viewed in the framework of the USDOC's examination, their relevance would not have been overlooked.

2. Examining the Totality of the Evidence

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

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

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

[280]*Supra*, para. 135.

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

154. We note, first, that the Panel's discussion of the *totality* of the evidence appears to be primarily a summation of errors that the Panel found in the course of its review of the individual pieces of evidence. Such errors undoubtedly would affect an examination of the *totality* of the evidence, as these pieces would constitute the evidence the Panel would consider as a whole in assessing the evidentiary support of the USDOC's finding

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

In its determination, the USDOC stated:

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

In our view, the admission by Kookmin Bank that "government policy" might lead it to extend loans that it otherwise might not offer, and the existence of a GOK policy to save Hynix, should have

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

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

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

E. *Admissibility of Evidence*

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

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

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

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

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

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

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

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

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

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

[297]*Ibid*.

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

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

> ... a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments [.]

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

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

298

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

168.

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

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

175. The United States brings its challenge under Article 11 of the DSU, which requires that a panel "make an objective assessment of the matter before it". The Appellate Body has stated previously that, when assessing an investigating authority's determination, a panel may not fault the agency for failing to take into account facts that it could not reasonably have known.[328] A panel must therefore limit its examination to the facts that the agency should have discerned from the evidence on record. Where a panel reads evidence with the "benefit of hindsight", it fails to consider how the evidence should have fairly been understood at the time of the investigation, and thereby fails to make an "objective assessment" in accordance with Article 11 of the DSU.[329]

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

[324]*Id.*

176.

G. *Standard of Review*

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

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

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

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[337]Panel Report, para. 7.3.

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

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

[340]*Ibid*.

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

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

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

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

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

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

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

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

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

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

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

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

186. In the light of the above, we are of the view that the "objective assessment" to be made by a panel reviewing an investigating authority's subsidy determination will be informed by an examination of whether the agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination.[351] Such explanation should be discernible from the published determination itself. The explanation provided by the investigating authority—with respect to its factual findings as well as its ultimate subsidy determination—should also address alternative explanations that could reasonably be drawn from the evidence, as well as the reasons why the agency chose to discount such alternatives in coming to its conclusions.[352]

187. A panel may not reject an agency's conclusions simply because the panel would have arrived at a different outcome if it were making the determination itself. In addition, in the absence of an allegation that the agency failed to investigate sufficiently or to collect certain information[353], a panel must limit its examination to the evidence that was before the agency during the course of the investigation, and must take into account all such evidence submitted by the parties to the dispute. In other words, a panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the investigating authority. A failure to apply the proper standard of review constitutes legal error under Article 11 of the DSU.[354]

188. These general principles reflect the fact that a panel examining a subsidy determination should bear in mind its role as *reviewer* of agency action, rather than as *initial trier of fact*. Thus, a panel examining the evidentiary basis for a subsidy determination should, on the basis of the record evidence before the panel, inquire whether the evidence and explanation relied on by the investigating

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

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

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

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

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

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

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

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

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

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

191.

193. Because this conclusion is the sole basis for the Panel's finding of inconsistency with

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

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

197. Furthermore, we do not consider that the participants have addressed sufficiently, in their submissions, those issues that we might need to examine if we were to complete the analysis in this case, including, for example: (i) whether the probative value of certain pieces of evidence is affected by our modification of the Panel's interpretation of the terms "entrusts" and "directs"; (ii) the probative value of the United States evidence improperly excluded by the Panel; (iii) the relevance of certain factual disagr5.6i)8(m)7.7(ine ane)innte thetse parmsmotota9(and p7(. Inel')s)-c

contribution confers a "benefit".[368] In addition, the *SCM Agreement* requires that a subsidy be

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

202.

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

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

208. The Panel did not examine these issues further. Consequently, there are neither sufficient findings by the Panel nor undisputed facts contained in the record to allow us to conduct our own analysis of Korea's claims regarding benefit and specificity.[378] We recall that it is not sufficient to determine that there is a "financial contribution by a government or any public body" in order to find that there is a "subsidy" under Article 1.1 of the *SCM Agreement*. This provision also requires that "a benefit is thereby conferred". Article 1.2 requires, in addition, that the subsidy be "specific". Because the Panel's findings on benefit and specificity were premised exclusively on its conclusion relating to entrustment or direction, there is insufficient basi

VIII. Findings and Conclusions

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

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

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

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

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

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

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

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

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

(C) finds

Annex I

WORLD TRADE ORGANIZATION

WT/DS296/5
1 April 2005

(05-1309)

Original: English

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

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

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

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

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

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

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

[1]Panel Report, paragraphs 7.175-7.178.

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

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

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

(d) The Panel failed to consider certain reco

Annex III

WORLD TRADE ORGANIZATION

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

Original: English

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

Request for Consultations by Korea

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

My authorities have instructed me to request consultations with the Government of the United States pursuant to Article 4 of the Understanding of the Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article 30 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), and Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), with regard to US Department of Commerce's ("DOC") affirmative preliminary and final countervailing duty determinations, published on 7 April 2003 at 68 Fed. Reg. 16766 and 23 June 2003 at 68 Fed. Reg. 37122 in *Dynamic Random Access Memory Semiconductors from the Republic of Korea* (case number C-580-851), US International Trade Commission's affirmative

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

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

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

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

Annex V

WORLD TRADE ORGANIZATION

WT/DS296/2
21 November 2003

(03-6239)

Original: English

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

Request for the Establishment of a Panel by Korea

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

On 11 August 2003, the United States published a final countervailing duty order in the US *Federal Register* in the matter of *Dynamic Random Access Memory Semiconductors (DRAMS) from the Republic of Korea*

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

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

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

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

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

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

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

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

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