WORLD TRADE ORGANIZATION

WT/DS296/R
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TABLE OF KEY ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Full Title / Meaning
AD Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
ASP	Average Selling Price
BOK	Bank of Korea
CBO	Collateralized Bond Obligation
CHB	Choheung Bank
CLO	Collateralized Loan Obligation
CRA	Agreement of Financial Institutions for Promoting Corporate Restructuring (Corporate Restructuring Agreement)
CRPA	Corporate Restructuring Promotion Act
CVD	Countervailing Duties
D/A	Document against Acceptance

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

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation of Case
Argentina - Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515 Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Brazil – Aircraft (Article 21.5 – Canada II)	Panel Report, *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW/2, adopted 23 August 2001, DSR 2001:X, 5481
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, as upheld by the Appellate Body Report, WT/DS70/AB/R, DSR 1999:IV, 1443
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC - Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by the Appellate Body Report, WT/DS219/AB/R
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
Mexico - Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345
Thailand - H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701 Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, DSR 2001:VII, 2741

Short Title	Full Case Title and Citation of Case
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*

I. INTRODUCTION

A. COMPLAINT OF KOREA

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

1.2 On 18 August 2003, Korea requested further consultations with the US pursuant to the same provisions cited in its initial request, with regard to anC17 1.5 -0.83531counsthvailTj 2duty ord

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

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

Chairman: Mr. Hardeep Puri

Members: Mr. John Adank
Mr. Michael Mulgrew

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

C. PANEL PROCEEDINGS

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

1.11 The Panel submitted its Interim Report to the parties on 17 Noveh0 Tc 0 Tw (1.11) eIas is90n5 0 T75

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

2.5 The ITC published a Preliminary injury determination on 27 December 2002[12] and a Final injury determination on 11 August 2003.[13] The DOC published a Preliminary Determination on 7 April 2003 with an affirmative finding for Hynix Semiconductors,

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

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

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

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

(k) Article 1.1 because *inter alia,* the DOC erroneously assumed that every Korean private financial institution involved in its subsidy investigation was under the direction or entrustment of the Government of Korea even without sufficient evidence regarding that particular bank;

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

(m) Articles 1.1 and 14 because *inter alia,* the DOC disregarded market benchmarks for measuring benefit established by a foreign bank operating in the Korean market that extended financing to Hynix during the period of investigation;

(n) Articles 1.1 and 14 because *inter alia*

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

B. UNITED STATES

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

IV. ARGUMENTS OF THE PARTIES

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

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

V. ARGUMENTS OF THE THIRD PARTIES

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

VI. INTERIM REVIEW

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

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

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

Demand (para. 7.368 of the Interim Report)

6.7 The US argues

adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore,

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

7.8 The DOC found that these financial contributions were provided by four public bodies and a larger number of private bodies entrusted or directed by the GOK. We shall refer to Hynix's public

private body is entrusted or directed by the government, an investigating authority must demonstrate an explicit and affirmative government action addressed to that particular private body, entrusting or directing a particular task or duty. If we find that Article 1.1(a)(1)(iv) does not require an explicit act addressed to a particular entity entrusting or directing a particular task or duty, Korea's claims also require us to consider the more factual issue of whether the DOC properly found that there was

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

7.21 The US submits that, although Korea cites essentially the same dictionary definitions, it does not proffer an interpretation of the meaning ofUS

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

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

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

(ii) Evaluation by the Panel

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

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

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

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

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

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

7.31 As noted by the panel in *US – Export Restraints*, the dictionary meaning of the word "entrust" is, *inter alia*, to "give (a person, etc.) the responsibility for a task . . . Commit the . . . execution of (a task) *to* a person . . . ."[45] The word "direct" is defined, *inter alia*, as to "[g]ive authoritative instructions to; order (a person) *to do* . . . order the performance of."[46] We agree with the *US – Export Restraints* panel that "[i]t follows from the ordinary meanings of the two words "entrust" and "direct" that the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction)."[47]

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

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

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

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

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

7.35 Since the second and third elements identified by the *US – Export Restraints* panel are aspects of the first element, we consider that the manner, or degree of detail in which the addressee and object of the act of delegation or command is specified will depend on the form that the act of delegation or command may take. Thus, while a greater degree of specificity may be expected in respect of

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issue, the evidence must demonstrate that each private entity allegedly providing, or participating in, a financial contribution was entrusted or directed by the government to do so.[54]

The context of the terms "entrusts or directs"

7.36 Korea states that it has stressed the "who" that is being entrusted or directed because the entrustment or direction must apply to "a private body". According to Korea, this contextual language "1 ".Th according to that argut s -24.7584-0.2Tc 0 Tw1692 Tw (1.06 16.5 08.5 0 f61 -1o do so.) Treaers--

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

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

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

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

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

7.41 Although Article 31(1) of the

7.44

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

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

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

(ii) GOK Control Over Hynix's Creditors

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

The GOK's role as lender/signalling

7.53 Korea notes that the DOC found that:

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

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

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

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

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

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

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

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

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

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

7.56 In considering the DOC's analysis of the GOK's role as lender, we note the US statement that "[t]he DOC never found that signalling in and of itself amounted to entrustment or direction. Rather, the DOC considered the government's creation of the KDB Fast Track Programme – which benefit

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

7.67 Korea submits that the US makes several serious mischaracterizations regarding the CRPA. Korea asserts that the US argument that the Creditors' Council gave only limited options ignores the context of the restructuring. According to Korea, in the context of restructuring, the creditors either hammer out an agreement that most can accept, or the company goes into bankruptcy. Korea asserts

of a real choice, since each of the three was structured to maximize benefits to Hynix and to minimize the creditors' abilities to exercise basic creditor rights. The US argues that even the third option was highly favourable to Hynix because it required creditors to forgive their debt on very unfavourable terms. Specifically, creditors that exercised the third option could only exercise their appraisal rights for 25 per cent

exercise of its shareholder rights. We do not co

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

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

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

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

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

7.87 Although the GOK questionnaire response should perhaps have made a reference to the request for mediation by three of the four option 3 creditors, we consider that there was in any event sufficient information on the record to bring into question the DOC's determination that creditors "controlling" the Creditors' Council were able to "set the terms for all banks." In these circumstances, we do not consider that an objective and impartial investigating authority could properly have found, on the basis of the CRPA, that "the terms on which these creditor banks terminated their relationship with Hynix were dictated by the banks that mattered in this case, namely the large government-owned and controlled creditorscredit07for med8.mstdee tederat t for msuor aditoirss to appitorsa ban that 2.75 T0 -0.1236t

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

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

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

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

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

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

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

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

Threats against creditors

KFB

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

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

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

7.110 The US submits that a *The asserte713 (-) Tj a82.75 Tnted cot m297 Tc625 488 Tc 0 Tw (.") Tj 7.5*

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

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

7.112 The US asserts that, in its *Final Determination*, the DOC noted there were multiple press stske2 H30iei aB86eo32 479follow337e6.09 7 -23 (someon the u0 .479 333D -0ted t5(d 1rer11 7 TcNo,9oo Ho.or

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

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

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

KorAm

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

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

7.120 The US submits that the DOC found that the GOK made threats against KorAm Bank when the bank refused to participate in the May 2001 restructuring. The US asserts that the bank had refused, contending that Hynix had failed to deliver a written pledge to use its best effort to reduce its debt. According to the US, the FSS severely rebuked KorAm, with one FSS official stating: "If KorAm does not honour the agreement, we will not forgive the bank."[138] The US asserts that the "rSom3(rSom7t

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

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

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

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

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

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

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

Hana Bank

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

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

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

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

7.129 Since the Panel has no reason to believe that the DOC had the actual *Korea Herald* article before it when making its determination, we proceed on the basis that the DOC relied on the footnote contained in the abovementioned paper. If that is so, we note that the DOC had no means of gauging the accuracy of the report, and was unaware of the context in which the alleged threat was made. In addition, we note that the footnote provided no details of the powers that the FSS could allegedly exercise against renegade creditors. An objective and impartial investigating authority would not have treated a simple reference to a footnote in an article as sufficient proof of such a significant issue as government entrustment or direction.

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

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

[146] Id..

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

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

Disciplining credit rating agencies

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

7.132 The US submits that the GOK disciplined credit rating agencies for giving Hynix a low credit rating. The US asserts, for example, that on 22 January 2001, the Korea Investors Service, one of three local rating firms, downgraded Hyundai Electronics' corporate bonds to a speculation-grade credit rating. The US argues that the FSC, concerned that this lower rating might endanger Hynix's eligibility for the KDB Fast-Track Kocd prswiftly ThAcrpodg to doe

restructuring. Indeed, it is presumably for this reason that there is no reference to the alleged coercion of credit rating agencies in the findings of the DOC set forth in the *Preliminary Determination*, the *Final Determination*, or the *D4 al edu0.566lxlandumj 10.5 5 0 TD /F3 11.25 Tf -0.875 Tw (Tw (of).j 22.5 T*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

meeting "at the request of the lead creditor bank 'to urge creditor banks to execute resolutions made by creditors'."[167] In our view, the fact that a regulatory authority attends a meeting of creditors at the request of the lead creditor in order to urge – and not instruct – creditor banks to execute resolutions made by creditors would not allow an investigating authority to properly conclude that such attendance amounted to governmental entrustment or direction of creditors to participate in the restructuring. The fact that the resolutions at issue in these proceedings had already been "made by creditors" prior to the attendance of any FSS/FSC officials would indicate to an impartial and objective investigating authority that the officials' attendance could not have caused those resolutions to be adopted.

(iv) The DOC's single programme approach

7.142 The DOC found:

> Rather than view each of the measures taken by the financial institutions that participated in Hynix' restructuring as separate events, these actions are appropriately examined as part of a single programme that occurred over a short, ten-month period. The objective of this programme was the complete financial restructuring of Hynix in order to maintain the company as an ongoing concern. Each of the measures taken over the period from December 2000 through October 2001 [] reflected a pattern of GOK practices to ensure the continued viability of Hynix. Many of these events were overlapping and had the effect of reinforcing each other with respect to the goal of keeping Hynix operating. (footnote deleted)[168]

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

Arguments of the Parties

7.144 According to Korea, the timing of the different events contradicts the DOC theory of a single programme. Korea asserts that the most significant aspect of Hynix's restructuring -- Hynix's October 2001 restructuring -- occurred almost one year after the initial financial transactions. Korea submits that the October 2001 restructuring had no meaningful connection to the earlier transactions. According to Korea, at the time of the May 2001 restructuring, Hynix advisors, industry experts, and the global financial markets all expected the DRAM market to recover, as it had in prior cycles, rather than develop as the worst year in DRAM market history. Korea asserts moreover that no one expected the downturn to be reinforced and exacerbated by the terrorist attack of 11 September 2001,

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

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

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

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

7.154 Finally, we note the DOC's assertion that each of the financial contributions could be linked by the fact that they "reflected a pattern of GOK practices to ensure the continued viability of Hynix."[173] On the basis of the *Decision Memorandum*, we understand such "pattern of GOK practices" to be a reference to GOK entrustment or direction.[174] In light of the preceding analysis, however, we consider that the DOC determination contained little evidence of GOK entrustment or

7.155

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

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

> The Korean government promotes lending to certain types of borrowers as a matter of policy, which we may feel compelled to follow. The Korean Government has promoted, and, as a matter of policy, may continue to attempt to promote lending to certain types of borrowers. It generally has done this by requesting banks to participate in remedial programmes for troubled corporate borrowers and by identifying sectors of the economy it wishes to promote and making low interest loans available to banks and financial institutions who lend to borrowers in these sectors. The government has in this manner promoted low-income mortgage lending and lending to high technology companies. We expect that all loans made pursuant to government policies will be reviewed in accordance with our credit review policies. However, government policy may influence us to lend to certain sectors or in a manner in which we would not in the absence of the government policy.[179]

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

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

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

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

[178] *Kookmin Bank Prospectus*

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

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

7.170 Korea submits that government "influence" does not amount to entrustment or direction in the meaning of Article 1.1(a)(1)(iv) of the *SCM Agreement*. In addition, Korea asserts that the above expert statement actually undercuts the DOC's theory, since it provides further evidence that (even if "influence" does amount to entrustment or direction) the GOK could not and did not "influence" commercial banks such as Kookmin Bank, Hana Bank, and Shinhan Bank. Korea submits that, at the very best, the DOC has perhaps established some link between alleged GOK action and the GOK-owned and -

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

7.173 However, we agree with Korea's first argument that evidence of government "influence" does

7.177 In sum, although the DOC established that the GOK had a policy to save Hynix, and that the GOK had a certain capacity to influence Group B and C creditors, we consider – on the basis of a thorough and global review of all the reasoning set forth by the DOC in light of the standard set forth in Article 1.1(a)(1)(iv) of the *SCM Agreement* - that the DOC did not properly demonstrate that the GOK availed itself of that capacity to entrust or direct all Group B and C creditors to participate in all four of the financial contributions at issue. For this reason, we consider that the DOC could not properly have found that there was sufficient evidence to support a generalized finding of entrustment or direction with respect to private bodies spanning multiple creditors and multiple transactions over the period of investigation. There are simply too many irregularities and shortcomings in the DOC's reasoning to properly sustain such a broad determination.

7.178 For the above reasons, we conclude that the DOC's determination of GOK entrustment or direction of Hynix's Group B and C creditors is inconsistent with Article 1.1(a)(1)(iv) of the *SCM Agreement*.

2. Benefit

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

7.180 In considering potential market benchmarks for determining whether (a) the restructuring loans and (b) the restructuring debt-for-equity swaps undertaken by the Group A,-

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

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

7.184 Korea also complains that the DOC dismissed out of hand all of the third party studies

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

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

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

justified based only the potential for future return. The US asserts that the DOC has considered and rejected on many occasions the argument that inside investors should be held to a different investment standard than outside investors, since the prevailing economic theory for explaining normal

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

(i) Arguments of the parties

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

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

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

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

through the framework by its cred

subsidy, contrary to Korea's argument that the term "use" *must* be read to have both a "quantitative and qualitative component."[205]

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

7.206 The DOC's finding of specificity related to the alleged subsidies provided by Group A, B and C creditors respectively. Whereas we understand the DOC's reference to GOK "direct[ion]" of loans and other benefits to relate to the participation of Group B and C creditors, we consider that the reference to GOK "provid[ing]" such loans and other benefits relates to the participation of Group A creditors. On this basis, we understand that the DOC found that the alleged subsidies provided by Group B and C creditors are specific because of the role allegedly played by the GOK in entrusting and directing those creditors to save a specific entity, i.e., Hynix. In other words, the DOC's finding of specificity in respect of Group B and C creditors was based on its finding of GOK entrustment or direction of private creditors to participate in the single programme of Hynix restructuring. We recall, however, that we have found that the DOC's determination of government entrustment or direction is factually flawed, and inconsistent with Article 1 of the *SCM Agreement*. 7.206

D. ITC INJURY INVESTIGATION

7.210 Korea claims that the US acted inconsistently with:

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

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

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

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

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

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

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

7.211 In light of our findings in respect of subsidization, it is not strictly necessary for us to consider Korea's claims against the ITC's *Final Injury Determination.* We shall do so

7.214 Article 15.1 of the *SCM Agreement* provides:

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

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

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

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

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

Figure 8 America's Market Share by Supplier Brand

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

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

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

Figure 9. US Market Shares

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

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

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

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

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

7.230 The US submits that there are multiple ways under Article 15.2 of the *SCM Agreement* to examine subsidized subject import volume. The US asserts that, based upon the clear text of Article 15.2, which uses the disjunctive terms "either" and "or," analysis of the volume of subject imports should include consideration of the absolute volume of subsidized subject imports, a significant increase in the volume of subsidized subject imports in absolute terms, a significant increase in the volume of subsidized subject imports relative to production in the importing Member, or a significant increase in the volume of subsidized subject imports relative to consumption in the or a signia2001,evel thficant increasat importorts in aifi Tw (an,) Tj 0 -12.75 61 -0.0826 TD -0.0116 Tw (relat

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

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

(ii) Evaluation by the Panel

7.233 There are three ways in which an investigating authority may comply with the Article 15.2 requirement to "consider whether there has been a significant increase in subsidized imports."[224] First, the investigating authority may consider whether there has been a significant increase in the volume of subsidized imports in absolute terms. Second, the investigating authority may consider whether there has been a significant increase in the volume of subsidized imports relative to domestic production. Third, the investigating authority may consider whether there has been a significant increase in the volume of subsidized imports relative to domestic consumption. Article 15.2 provides

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

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

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

The volume of subject imports relative to domestic consumption

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

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

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

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

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

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

[229] We note that Article 13.1 of the *DSU* provides in relevant part that "[a] Member should respond

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

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

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

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

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

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

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

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

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

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

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

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

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

The volume of subject imports relative to domestic production

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

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

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

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

[234] We note Korea's argument that the closure of HSME is relevant to the ITC's determination regarding the causal link between the allegedly subsidized imports and injury suffered by the domestic industry (see para. 236 of Korea's First Written Submission, and para. 194 of Korea's Second Written Submission). In certain circumstances, the closure of HSME (and therefore the reason for the increase in subject imports) may well have had a bearing on causation. ue TD 0.1cTj -144 m offshore542 Tc 0 Tw 1928

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

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

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

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

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

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

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

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

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

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

subsidized subject imports undersold domestic like product at high margins (often over 20 per cent), and at increasing frequencies (from 51 per cent of possible comparisons in 2000 to 56 per cent in 2001 and 70 per cent in 2002). The US asserts that the conclusions drawn from this analysis are

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

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

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

> Most purchasers did not identify a price leader in the US market. This is not surprising in a commodity industry characterized by frequent (even biweekly) price changes such as the DRAM product market. Nevertheless, *** purchasers of DRAM products contacted by staff regarding lost sales and lost revenue allegations identified Hynix as a source of lowfects

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

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

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

7.276 Article 15.4 of the *SCM Agreement* provides:

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

(i) Arguments of the parties

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

7.278 Korea acknowledges that the ITC recognized the existence of the business cycle in the DRAM industry, but argues that the ITC completely ignored the implication of this business cycle when analyzing the causes of the deterioration of the domestic industry's financial condition over the

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

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

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

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

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

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

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

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

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

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

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

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

7.286 The US also asserts that, in any event, Korea's specific arguments about individual domestic producers are also flawed. For example, the US argues that some of the data that Korea cites in its submission pertain to the global DRAMs market or the global operations of Micron or Infineon, not just their US operations, whereas the ITC's impact

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

(ii) Evaluation by the Panel

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

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

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

7.289 The ITC assessed the business cycle in its discussi Tc 1.1733gesors, eredctf thesuber izin ampo thaj -36 -12.7

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

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

7.293 We do not attach any relevance to the fact that the ITC's consideration of the business cycle is set forth in a part of the report of the *Final Injury Determination* other than the "Impact of SubjectTw (othns,Tc 0

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

Research and development

producer had been downgraded, whereas Korea has pointed to record evidence to the effect that two domestic producers apparently had ready access to capital markets at least in 2000 and 2001, there may be some basis for reasonable disagreement regarding the ITC's analysis of the domestic industry's access to capital markets. However, we do not consider that the fact that two domestic producers may have had continued access to capital mar

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

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

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

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

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

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

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

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

(ii) Evaluation by the Panel

7.317

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

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

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

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

(i) Arguments of the parties

7.323 Korea asserts that, beyond the need to establish through positive evidence a causal link, the competent authorities must -?ond the need to s8u6f/F5 11.2ndustic indus.25lthed6f1.25TD 0 Tnlems caused by other factors. According to Korea, this obligation of "non-attribution" stand2nd2nd bedrock principle of WTO treaty text to avoid excessive trade re1.2ies.

7.324 Korea notes that the non-attribution obligation is ic iunique to the *SCM Agreement*. Korea notes that there is identical language contained in Article 3.5 of the *AD Agreement*

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

7.326

The Role of Non-Subject Imports

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

7.330 Korea refers in this regard to the abovementioned Figure 9 market share data (see para. 7.224 *supra*). Korea asserts that the evidence before the ITC demonstrated that non-subject imports accounted for a six

Capacity Increases

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

Micron's "Admitted" Technological and Production Difficulties

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

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

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

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

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

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

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

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

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

Non-subject imports

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

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

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

[291] *Final Injury Determination*, at 26, n. 177 (Exhibit GOK-10).
[292] *See, e.g.*,

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

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

Product Life Cycle

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

Demand

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

Supply

7.345 The US asserts that, contrary to Korea's contention[299]7725 0 TD -0.1731 T62 11.25

prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition

and distinguished the injurious effects of other known factors from those of the alleged subsidized imports. We note that the Appellate Body has clarified that the ITC was "free to choose the methodology it [would] use" to separate and distinguish the injurious effects of other factors from those of the alleged subsidized imports. We also note that Korea has acknowledged that the ITC was

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

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

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

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

Decline in demand

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

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

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

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

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

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

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

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

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

7.366 Although the ITC clearly acknowledged the negative impact of slowing demand (in part resulting from the decline in demand for PCs), we do not consider that the ITC properly explained how it ensured that the injury caused by such decline in demand was not attributed to alleged subsidized imports. In particular, although the ITC acknowledged that it played "some role" in the state of the domestic industry, it did not explain what that "role" was, nor how that "role" differed role

boom-bust nature of the business cycle is caused by discrepancies between supply and demand.[330] However, Korea's argument is different, in that it is addresses the injurious effects of a slowing of the growth in demand unrelated to the business cycle, i.e., caused by the decline in demand for products using DRAMs such as PCs. The fact that such slowing demand is distinct from the operation of the business cycle is confirmed by the ITC referring separately to "slowing demand" and "the operation of the DRAMs business cycle" in the same sentence. In the absence of any meaningful explanation of the nature and extent of the injurious effects of the slowing in demand, it is not apparent from the face of the *Final Injury Determination* whether, or how, the ITC separated and distinguished the injury

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

(i) Arguments of the parties

7.372 Korea claims that the ITC defined the subject imports and domestic industry inconsistently, preventing a proper examination of imports under Article 15.2, or the domestic industry under Article 15.4, of the *SCM Agreement.*

7.373 Korea asserts that the evidence before the ITC demonstrated that for some DRAM producers, the assembly/casing stage is often undertaken in a different country from where the design and wafer fabrication are done. Korea asserts that an important question in the case, therefore, became what was the appropriate country of origin of a DRAM for which production occurred in two countries; that is, whether a particular DRAM shipment is to be considered a Hynix product from Korea, a product of the US or a "non-subject" import from another country.

7.374 Korea notes that the DOC ruled that subject merchandise only includes those Hynix DRAMs for which the wafer was fabricated in Korea. The DOC ruled that if a Hynix DRAM was "fabbed" in Korea but underwent assembly/casing in another country, the finished DRAM would still be considered "subject merchandise" -- allegedly subsidized imported DRAMs from Korea. Korea notes that, with respect to US produced DRAMs, the ITC adopted the same "wafer fabrication controls" approach that the DOC utilized for defining subject merchandise. The ITC ruled that a DRAM would be considered " or a

at HSME, but cased in Korea (since Hynix had no casing facilities in the US), were not in the scope of the investigation or subject to any eventual countervailing duty order.

7.379 The US asserts that the ITC defined shipments of "domestic" products to include "DRAMs and DRAM modules made from (1) United States fabricated dice, regardless of assembly location, and (2) Samsung Korean-fabricated dice that were assembled in the United States (***), and (3) 3rd-source-fabricated dice that were assembled in the United States."[332] The US asserts that the ITC defined shipments of "non-subject" imports to include "Samsung Korean-fabricated and 3rd-source-fabricated dice that were not cased in the United States."[333]

7.380 The US claims that Korea is asking the Panel to find that the ITC was required to use a methodology that is not required by the *SCM Agreement* and that is internally inconsistent. The US asserts that the methodology used by the ITC in this investigation was consistent with the *SCM Agreement*, internally consistent, and avoided data errors. The US argues that the ITC, applying its normal six-factor test, examined whether certain production-related activities, if conducted in the US, were sufficient to warrant treating the companies engaging in those activities as domestic producers. The US asserts that, as part of this inquiry, the ITC considered whether assembly of uncased DRAMs into cased DRAMs constituted sufficient production-related activities to include companies that assembled uncased DRAMs into cased DRAMs in the domestic industry. The US asserts that the ITC found that assembly operations involved sufficient production-related activity to constitute domestic production, and noted the absence of any dispute that the output of DRAM assembly operations – cased DRAMs – were part of the domestic like product. The US submits that, in light of its finding that assembly operations were sufficient production-related activities to constitute domestic production, the ITC included companies that assembled DRAMs in the US in the domestic industry, and treated the output of those operations – cased DRAMs – as shipments of the domestic industry.

7.381 The US notes that Korea does not dispute the ITC's application of its six-factor test to determine what activities were sufficient to warrant treating the companies engaging in those activities in the US as domestic producers. The US also notes that Korea does not dispute the ITC's definition of the domestic industry as those producers that fabricate DRAMs in the US and those producers that assemble DRAMs in the US, but not module "packagers" or fabless design houses. The US notes, therefore, that Korea does not challenge the ITC's determination based on Article 16 of the *SCM Agreement*. The US argues that, instead, Korea would have the ITC define the domestic industry for certain purposes as "producers of the domestic like product," but then abandon that definition when it comes to calculating industry shipments. According to the US, however, having found what constituted domestic production, having defined the domestic industry as producers of the domestic like product engaged in those production activities, and having found no basis to exclude any producer from the domestic industry, it was objective for the ITC to have applied the same, rather than a different, definition of the domestic industry for purposes of calculating the shipments of the domestic industry. The US argues that including companies in the domestic industry and in turn relying on their compiled financial information for one purpose while applying a different definition of domestic production for purposes of assessing trade data (*i.e.*, US shipments, market share, etc.) would be anomalous.

(ii) Evaluation by the Panel

7.382 The ITC defined the domestic industry as the producers of a domestic like product. As a result, the question arose as to what activities constitute domestic production activities, i.e., when could an entity be said to be producing a domestic like product. The ITC determined that both fabbing and assembly/casing constitute domestic production activities. Such determination meant that

[332] *See, e.g., Final Injury Determination*, at 6-11, 17 n.103, Table IV-5 n.1 (Exhibit GOK-10).
[333] *See, e.g., Final Injury Determination*, at 6-11, Table IV-5 n.2 (Exhibit GOK-10).

7. Conclusion

7.387 In light of the above, we find that the ITC's *Final Injury Determination* did not properly ensure that injury caused by one known factor other than the allegedly subsidized imports was not attributed to the allegedly subsidized imports, contrary to Article 15.5 of the *SCM Agreement*. We therefore conclude that the ITC's *Final Injury Determination*, and the *Final Countervailing Duty Order* based thereon, are inconsistent with Article 15.5 of the *SCM Agreement*, and that the US is therefore in violation of that provision.

7.388 We reject Korea's claims that the US violated:

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

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

- Article 15.4 because *inter alia*,

account for the fact that representatives of the US domestic industry are never permitted to attend any part of the verification proceedings.

7.398 The US is of the view that, while Article 12.6 gives Korea the right to object to the investigations conducted within its territo

7.409 Korea's claims concern the propriety of the DOC's investigation, and the consistency of the DOC's determinations of GOK entrustment or direction and specificity with Articles 1 and

H. THE LEVY OF COUNTERVAILING DUTIES – ARTICLE 19.4 OF THE *SCM AGREEMENT* AND ARTICLE VI.3 OF THE *GATT 1994*

7.416 Korea claims that the US has levied countervailing duties in excess of the value of alleged

come into play. Korea argues that the decision by the US to impose the countervailing duty order in this case thus violates Article 10 and 32.1.

7.423 The US asserts that Korea's claims under Articles 10 and 32.1 of the *SCM Agreement* are dependent claims, in that they depend upon a finding of an inconsistency with an obligation contained in some other provision of the *SCM Agreement* or *GATT 1994*. The US asserts that, because the US has not acted inconsistently with any such other provisions, the countervailing duty order is, by definition, not inconsistent with Articles 10 or 32.1.

7.424 We note that Korea's Article 10 and 32.1 claims are dependent on its claims against the DOC subsidy determinations and the ITC's injury determinations. Thus, to the extent that we reject those claims, there is no basis to find that the ITC's injury determinations are inconsistent with Articles 10 and 32.1. To the extent that we uphold those claims, we do not consider it necessary to make a finding under Articles 10 and 32.1.

J. ARTICLE 22.3 OF THE *SCM AGREEMENT*

7.425 Korea submits that the ITC's *Final Injury Determination* failed to comply with Article 22.3 of the *SCM Agreement*, which provides:

> Each [public] notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.

7.426 Korea asserts that the ITC's public determination failed to provide sufficient detail on important issues regarding the volume and price effects of the alleged subsidized imports, and the causal link between alleged subsidized imports and the injury to the domestic industry.

7.427 The US submits that the ITC's *Final Injury Determination* complied with Article 22.3.

7.428 We note that Korea's Article 22.3 claim is dependent on its claims under Articles 15.1, 15.2 and 15.5 of the *SCM Agreement*. Thus, to the extent that we reject those claims, there is no basis to find that the ITC's *Final Injury Determination* is inconsistent with Article 22.3. To the extent that we uphold those claims, we do not consider it necessary to make a finding under Article 22.3. Since the ITC's *Final Injury Determination* is inconsistent with Article 15.5 in respect of part of the ITC's non-attribution analysis, the adequacy of the ITC's public notice in respect of that part of its non-attribution analysis is immaterial.[347]

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 For the reasons set forth above, we conclude that the DOC's *Final Subsidy Determination*, the ITC's *Final Injury Determination*, and the *Final Countervailing Duty Order* based thereon, are inconsistent with Articles 1, 2 and 15.5 of the *SCM Agreement*. We therefore conclude that the US is in violation of those provisions of the *SCM Agreement*.

8.2 For the above reasons, we reject Korea's claims that the US violated:

- Article 2 in so far as Korea's claim concerns the DOC's finding the alleged subsidies provided by Group A creditors were specific;

[347] We note that such an approach is consistent with that adopted by previous panels, including *Guatemala – Cement II* (para. 8.291, note 48), Appellate Body Report, *EC – Bedlinen (Article 21.5 – India)* (para. 6.259), and *Argentina – Poultry Anti-Dumping Duties* (para. 7.293).