ANNEX C

REBUTTAL SUBMISSIONS OF PARTIES

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5. The evidence before the EC demonstrates unequivocally that, when analyzed properly, Hynix' market share ***did not increase at all***, but rather decreased over the period examined. Moreover, based on an objective examination, the increase of value and units was also not significant even if the merger effects with LGS were not properly considered. Finally, even if the EC's analysis of the volume of subsidized imports somehow complied with Article 15.2, the lack of positive evidence and objective examination means that the EC has still violated Article 15.1.

2. The EC's finding of significant price undercutting is not supported by positive evidence or objective examination

6. The EC found competition in the DRAM market takes place largely on price. Yet, the evidence showed that Hynix steadily lost market share in the EC market from 1999 through 2001, the years prior to and including the year in which Hynix allegedly benefited from subsidies. This steady loss of market share cannot be reconciled with the EC's own observations regarding price undercutting. Although the EC claims that "it is quite *possible* for a company to be price undercutting, but losing market share for other reasons," it never provides any examples of such "other reasons". More importantly, the EC does not point to any record evidence that such "other reasons" were, in fact, behind Hynix' decreased market share. Such speculation does not satisfy the obligations of Article 15.1 and Article 15.2.

7. The EC defends its flawed price comparison methodology – comparing Hynix' monthly average prices with individual daily prices for Community producers – with a truism that Article 15.2 does not specify any particular methodology to be used to analyze underselling and price effects. But the EC must demonstrate why its approach is correct, and the Panel must determine whether the EC's conclusion of significant price undercutting is based on positive evidence.

8. Finally, even if the Panel believes that the EC somehow complied with Article 15.2 in its pricing analysis, it must still assess whether the EC pricing analysis in this case meets the independent obligation under Article 15.1. For the reasons stated above, Korea submits that the EC did not meet that obligation.

C. THE EC DID NOT ADEQUATELY CONSIDER THE CONDITION OF THE DOMESTIC INDUSTRY

9. Article 15.4 of the *SCM Agreement* establishes that the national authority must examine all of the enumerated injury factors. But the EC did not address wages, a specific factor under Article 15.4, and it did not make sufficient data available to be able to analyze what a proper analysis of "wages" would have produced. The EC also effectively states it does not have to consider statements of its own domestic industry that have a direct bearing on the Article 15.4 factors. Korea finds this position problematic, as it provides for no accountability.

10. Contrary to EC claims that the "economic downturn" in the DRAM market is "a question of causation rather than assessing the condition of the domestic industry," the DRAM business cycle is an overarching consideration that should inform an objective assessment of more discrete economic factors. Yet, nowhere does the EC actually address this cycle alone, or as context in understanding other economic factors.

11. Finally, Korea reiterates that the EC has not explained adequately why just three of 13 enumerated factors should compel its conclusion that the domestic industry was suffering material injury. While an objective examination of the facts and a reasoned explanation of the analysis would include such consideration, we find nothing in the EC's determination to this end. It is inadequate under Article 15.4.

D. THE EC FAILS TO EXPLAIN HOW ITS DETERMINATION SATISFIES THE LEGAL REQUIREMENT TO ESTABLISH A CAUSAL RELATIONSHIP AND TO SEPARATE AND DISTINGUISH OTHER FACTORS

1. The EC has failed to show a causal relationship

12. The EC injury analysis is premised in large part on an erroneous and inappropriate finding of an absolute increase in subject imports, with or without including LGS. Even if this approach complies with Article 15.2, this approach does not comply with Article 15.5 read in light of Article 15.1. And even if Article 15.5 were read so narrowly as to permit a finding of causal relationship in this situation, the analysis is still not objective, and would at the very least represent another aspect of the EC determination's that is inconsistent with Article 15.1.

13. The evidence before the EC demonstrated that there was no correlation between the trends in Hynix's market share and either the domestic industry's market share or the domestic industry's financial performance. The EC has therefore not demonstrated the requisite causal relationship required by Article 15.5.

2. The EC did not properly separate and distinguish causes

14. The EC's *Definitive Regulation* was inconsistent with the requirements of Article 15.5 because the EC did not separate and distinguish the injurious effects of other factors. The EC erroneously dismissed the role of the drop in demand for 2001, ignoring compelling evidence by every industry observer that the drop in demand, along with the accompanying "inventory burn," were critical factors for understanding the domestic worldwide drop in prices in 2001. The EC ignored evidence on changes in relative capacity that confirmed the dominant role of other suppliers who increased their capacity much more than Hynix. Although the EC tried to address the role of unsubsidized imports, it either ignored or distorted the key evidence.

15. The standard imposed by Article 15.5 does not allow the EC simply to assert its conclusions. The EC was required to explain how it ensured that the injurious effects of the dramatically slowing of demand were not included in the assessment of the injury ascribed to subsidized imports. Because the EC's determination does not do this, the determination is inconsistent with Article 15.5 of the *SCM Agreement.*

II. SUBSIDY ISSUES

A. THE EC'S INTERPRETATION AND APPLICATION OF "FACTS AVAILABLE" IS INCONSISTENT WITH ARTICLE 12.7

1. A responding party does not bear the burden and potential consequences of an investigating member's ambiguity

16. The EC believes facts available are warranted in situations where a responding Member failed to anticipate what the investigating Member considered to be "necessary information". This approach is untenable. The investigating Member must define the "necessary information" and adequately communicate its expectations to the responding Member. To find otherwise would force a responding Member to bear the burden and potential consequences of an investigating Member's ambiguity or failure to request what it considers to be "necessary information".

B. ARTICLE 1.1(A)(1)(IV) IMPOSES AFFIRMATIVE LIMITS ON THE SCOPE OF "ENTRUSTS OR DIRECTS"

1. The meaning of "entrusts or directs" imposes legal limits

22. The Agreement text is the foundation of every Member's obligations; it is not to be given effect only when it suits a Member's purpose. Yet, the EC chooses to ignore the core meaning of "entrusts" and "directs" as provided in Article 1.1(a)(1)(iv). The core meaning of "entrusts" requires that there be something to be entrusted. When a bank makes a loan or forgives a debt that is not pursuant to some government programme, there is nothing to be entrusted. Similarly, the core meaning of "directs" is the concept of requiring something, or giving an order. Any doubts the EC attempts to raise through alternative English definitions of these terms, can be resolved by referring to the French and Spanish texts of the same provision, both of which use a word that translates into English as "order".

23. The EC tries to downplay the relevance of *US-Export Restraints*, which provided a careful analysis of the "entrusts or directs" standard, by arguing that the panel in that case considered a different factual context. But this effort to distinguish *Export Restraints* fails on two levels. First, the panel in that case was clearly offering its own reading of the specific text at issue here. The factual context may have been different, and so the application of the standard to those facts may differ. But the panel first developed its textual interpretation of the meaning of "entrusts or directs". Second, that panel also wisely explained the problems with an overbroad reading of "entrusts or directs". The panel noted that "governments intervene in markets in various ways," and distinguished carefully between such interventions and ".

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direction. The panel in *US-Export Restraints* rejected an "effects test" for entrustment or direction, and so should this Panel.

4. KDB programme

4. The EC did not and has not justified its benefit findings with respect to the individual transactions at issue in this dispute

(a) Syndicated loan

36. With respect to the Syndicated Loan, the EC failed to benchmark the KFB, KEB and KDB loans against the loans of the other seven banks involved. Moreover, it is clear in comparing the EC's provisional and definitive regulation that the EC simply confused the distinction between financial contribution and benefit. When a provisional assessment provides an analysis of benefit that demonstrates no benefit, and the authority changes that determination solely on the basis of allegations related to entrustment or direction, there is an obvious problem. Even if KEB, KDB, and KFB were actually ordered to participate in the Syndicated Loan, that fact does not answer the question of whether the participation of seven other banks can serve as a benchmark. Thus, the EC failed to measure what was received by Hynix and what was available to Hynix on the market, inconsistent with its obligations under Articles 1.1(b) and 14(b).

(b) KEIC insurance

37. The EC found that KEIC insurance was an export subsidy. As an export subsidy, that insurance would be governed by Annex I of the *SCM Agreement*, and namely paragraph (j). The measure of benefit as prescribed by paragraph (j) is the difference between the premium paid and the premium required to cover the long-term operating costs and losses of the programme. The EC did not measure benefit on that basis. The EC has also not responded to a more fundamental calculation issue that relates to the nature of D/A financing. In short, it is a credit facility allowing for short-term financing (typically 90 days) for export transactions. It never constituted a loan for USD600 million, which was the credit ceiling of the facility. In any case, the EC has not appropriately measured what was received with what was available on the market.

(c) KDB programme

38. The EC goes to great lengths to discredit potential benchmarks for and other evidence suggesting the commercial basis of participation in the KDB programme by Hynix creditors and investors. But the EC does not even attempt to take on the June 2001 USD 1.25 billion GDR and the reality that international investors were willing to commit significant capital to Hynix, not unlike the commitment made by Hynix creditors and investors through the KDB programme and related CBO/CLO programme. Ultimately, the EC should not have found that the KDB programme constituted a grant in the amount of the bonds refinanced under the programme. Capital was available to Hynix such that benchmarks could have been utilized, consistent with the obligation to measure what was received against what was available on the market under Articles 1.1(b) and 14.

(d) May 2001 restructuring

39. The EC's treatment of the May 2001 restructuring suffers from the same fatal flaw as its treatment of the syndicated loan, and namely the use of evidence concerning financial contribution as a substitute for benefit. In a proper analysis, The EC should have compared the convertible bond interest rates with applicable market interest rates, consistent with Articles 1.1(b) and 14 of the *SCM Agreement* and *Canada – Aircraft.* By treating the alleged convertible bond purchase benefit as a grant and thus failing to conduct the appropriate comparison of what was received versus what was available on the market, the EC failed to meet its obligations under the Agreement.

(e) October 2001 restructuring

40. The EC's benefit analysis of the October restructuring applies rigid profit maximization assumptions without any objective consideration of the underlying facts. It considered Hynix'

financial condition in a vacuum without considering the DRAM market in which Hynix operated or the circumstances surrounding its existing investors. In sum, the EC did not develop any appropriate benchmark for the October restructuring, and instead improperly assumed a grant. It justified neither action, inconsistent with its obligations under Articles 1.1(b) and 14 to measure what was received with what was available on the market, as further elaborated by the Appellate Body in *US – Softwood Lumber.*

D. THE EC HAS NOT JUSTIFIED MAINTAINING ITS CALCULATION ERRORS

41. The EC does not justify its calculation errors. With respect to the KDB programme, the EC argues that Hynix never raised the fact that the EC was effectively double counting benefit from the KDB Programme bonds by not deducting those bonds swapped for convertible bonds as part of the May 2001 restructuring. This is incorrect. The record plainly shows that Hynix specifically warned the EC about this error in its 30 June 2003 comments on the EC's Final Disclosure. The EC's failure to correct the error plainly identified by Hynix is inconsistent with Articles 1.1(b) and 14.

42. Another fundamental error in the EC's approach to the KDB programme was its treatment of interest-bearing instruments as grants. The EC now places all the burden on Korea, arguing that Hynix never claimed that interest should be deducted from the KDB debenture calculation. But Hynix's argument was that the grant methodology should have never been applied in the first place. The EC should have at least considered the matter and deducted the interest paid.

43. The EC also refuses to acknowledge the problems inherent in its grant methodology when it comes to the October 2002 restructuring programme, determining that loans, with interest terms and interest paid, are grants. Because the EC never took the interest payments into account, it did not accurately establish the alleged benefit to Hynix, inconsistent with Articles 1.1(b) and 14 of the *SCM Agreement.*

44. The EC's position on its use of an erroneous value with respect to the amount of debt rolled over as part of the October 2001 restructuring is perhaps its most indefensible argument. Hynix alerted the EC to the error in the total amount being used. The EC's only apparent defence is that Hynix should not have been surprised because it responded to Hynix' comments and informed Hynix what value was being used. That statement is not a defence to the error.

E. THE EC SPECIFICITY ARGUMENTS ARE INADEQUATE

45. As a legal matter, to the extent that the EC's findings on financial contribution are found inconsistent with the *SCM Agreement*

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F. THE EC'S DETERMINATION IS INCONSISTENT WITH ARTICLES 19.4, 10 AND 32.1 OF THE *SCM AGREEMENT* AND ARTICLE VI:3 OF GATT 1994

48. In choosing to use Hynix' unconsolidated sales, the EC confuses the scope of the investigation (DRAMs) with the question of which product and entity benefited from the alleged subsidies. It is not because the EC investigated the DRAMs market that subsidies granted to Hynix can automatically be viewed as benefiting only Hynix as a parent entity and only with regard to DRAMs. By taking this approach, the CVD duties imposed by the EC exceed the limits imposed by Article 19.4 of the *SCM Agreement* and Article VI:3 of GATT 1994.

49. Moreover, every violation of the specific provisions of the *SCM Agreement* identified above triggers a parallel violation of Articles 10 and 32.1 once the decision to impose duties was made.

III. CONCLUSION

50. For all of these reasons, we respectfully request the Panel to make the findings set forth in paragraph 676 of Korea's First Submission.

ANNEX C-2

EXECUTIVE SUMMARY OF THE EUROPEAN COMMUNITIES' REBUTTAL SUBMISSION

I. FACTS, EVIDENCE, BURDEN OF PROOF

1. The EC would like to re-iterate the following points.

2. The burden of proof in these Panel proceedings is on Korea.

3. The investigating authority relied on the totality of the facts and evidence available.

4. The facts are as set out in the regulations, which have been summarised by the EC in its pleadings.

5. Hardly any of the facts are contested by Korea. There is no basis for this Panel to make any findings in relation to uncontested facts. There is no basis for this Panel to enquire into the evidence on which the investigating authority relied in order to substantiate uncontested facts.

6. Where Korea does contest facts, it generally does so on the basis of bare assertions. It does not adduce any evidence to support its assertions. In this scenario, Korea's assertions must be rejected; there is no basis for this Panel to make any findings in relation to such facts; and there is no basis for this Panel to enquire into the evidence on which the investigating authority relied when establishing such facts.

7. In short, the starting place for this Panel's considerations is not the evidence relied on by the investigating authority, it is the evidence relied on by Korea in these proceedings, if any. Absent any such evidence, Korea has failed to make out any case at all, and that is an end of the matter.

8. If Korea does adduce evidence merely equivalent to the evidence on which the investigating authority relied, this Panel must still find in favour of the EC. To succeed, Korea must adduce evidence that establishes a *prima facie* case, that is not rebutted by the record evidence relied on by the EC investigating authority.

II. THE WHOLE IS MORE THAN THE SUM OF THE PARTS

9. The views that Korea continues to peddle reflect basic and alarming egregious legal errors. The moment has probably come to take a step back from the thicket of facts, to reflect on, and to get straight, a couple of basic matters.

10. Articles 1 and 14 of the *SCM Agreement* refer to a subsidy, a financial contribution, a benefit. All in the singular.

11. The *SCM Agreement* contains no express rule about the investigation period, and the choice of the year 2001 in this case, selected because it coincides with the most recent financial year in Korea

12. Having decided what the investigation period will be, an investigating authority goes about gathering the evidence and facts on the basis of which it will make its determination. Typically, as in the present case, the investigating authority will gather hundreds or even thousands of facts.

13. Having gathered the facts, an investigating authority will decide how to structure and characterise them. Nothing in the *SCM Agreement* would prevent an investigating authority from considering, in the same investigation, more than one subsidy, more than one financial contribution, more than one benefit. And the investigating authority can, if it wishes, *analyse the facts* in this *compartmentalised* way. But nothing in the *SCM Agreement* obliges an investigating authority to proceed in that way. Articles 1 and 14 are drafted in the singular. If an investigating authority proceeds on the basis that there is one subsidy, one financial contribution and one benefit, *even if broken down into different elements*, neither a complainant nor a Panel can simply assume that, in doing so, the investigating authority acts inconsistently with Articles 1 and 14 of the *SCM Agreement*. There is simply no basis for such an assumption, and to assert that there is a breach of the *SCM Agreement* solely on that basis would certainly be legally erroneous.

14. In the context of the *Anti-Dumping Agreement* (which Korea has agreed may be relevant context), the Appellate Body has made it clear, in the *EC-Bed Linen* case and other cases, that an investigating authority makes a (singular) finding of dumping in relation to a (singular) product concerning a (singular) domestic industry.

15. What did the investigating authority do in this case? Evidently, it broke down the hundreds of facts it had gathered during the investigation into a number of elements, in order to facilitate its task. In doing this, it examined, on their merits, the facts relating to individual programmes and banks. However, at the same time, the investigating authority repeatedly stated that it based its determination on the *totality of the evidence and facts available*. The investigating authority made this statement with such frequency that it simply cannot be ignored by this Panel. What does it mean?

16. It means that, in effect, the investigating authority *also* considered the whole picture. One big picture. In the singular. That also explains why the EC eventually imposed one countervailing duty – not five. This is why the investigating authority considered that all the facts and evidence that go, for example, to the question of financial contribution were equally or almost equally relevant in relation to all the elements of the subsidy - from the Syndicated Loan through to the October 2001 Rescue Package. This Panel must not allow itself to be mislead by Korea's attempts, based on certain aspects of the mere form of the measure at issue, to deconstruct the investigating authority's determination into something it is not (several legally *compartmentalised* determinations). This Panel must look beyond the form of the measure at issue, and judge what the investigating authority actually did – i.e. in addition to an examination of the facts relating to individual programmes and banks *also* an examination and reliance on the totality of the facts and evidence available.

19. A threshold legal question before this Panel is therefore this : was the investigating authority entitled to rely on the totality of the facts and evidence available? If the answer to this question is yes (and the EC is certain that the answer is yes), then all or almost all of Korea's claims and arguments may be dismissed forthwith, because they simply relate to something quite different from what the investigating authority actually did.

20. The first and most obvious point is : why not? What provision of the *SCM Agreement* obliges an investigating authority to proceed otherwise? Korea cites none because there is none. In many respects, that observation is sufficient to dispose of the case.

21. If, contrary to what an investigating authority actually did, a complainant in DSU proceedings or for that matter a Panel begins to deconstruct and atomise the totality of the facts and evidence available to the investigating authority, where does this process stop? Especially in a case such as the present one, which involves such extraordinary factual detail and complexity.

A. DOWN TO THE LAST WON

22. Let us first consider the problem in documentary or material or substantive terms. Take, for example, something like the KEIC Guarantee. The investigating authority viewed this as one element of the subsidy to Hynix. Korea essentially invites this Panel to assess it as if it were in a separate and isolated legal compartment from the other elements of the subsidy. Korea even goes further, and tries to get the Panel to assess it in relation to each bank (although this reflects a basic misunderstanding of the analysis conducted by the investigating authority). But why stop there? Why not deconstruct the facts even further and look at every single transaction that benefited from the KEIC Guarantee in a legally isolated compartment? Then presumably Korea would argue that the investigating authority was obliged to show GOK direction in relation to each specific export transaction (no doubt there are hundreds or even thousands of them). Why not down to each last won? Indeed, to follow Korea's logic would be to raise the evidential threshold so high as to render circumvention of the *SCM Agreement* a simple matter. There is simply no basis in the *SCM Agreement* for Korea, or for that matter this Panel, to impose its view about what single approach must, in all cases, be the correct one.

B. THE TIME IS NOW

23. One may also consider the matter from a temporal perspective. Korea assumes that a fact more generally associated with an earlier part of the investigation must be considered irrelevant to a later part of the investigation. Why? What provision of the *SCM Agreement* does Korea refer to? It is perfectly possible, for example, that a subsidy is granted at the beginning of the investigation period, whilst material injury only emerges towards the end of the investigation period. Nothing in the *SCM Agreement* prevents an investigating authority from relating these facts to each other – or indeed from finding a *causal link* between them. Why should the situation be any different for other facts, such as those relating to financial contribution?

24. Under the *Anti-Dumping Agreement* (which Korea has agreed may be relevant context), all other things being equal, domestic transactions, on the basis of which normal value is established, might be situated towards the beginning of an investigation period, and export transactions towards the end – there is no problem. Article 2.4 of the *Anti-Dumping Agreement* requires an investigating authority to make the comparison "at as nearly as possible the same time" – and the same time for these purposes, absent problems such as a high inflationary environment or exchange rate issues, may well be the whole year of the investigation period, which for this purpose may be treated as a *time singularity*. The *SCM Agreement* contains no equivalent provision because there is no such comparison under the *SCM Agreement* – but the basic point remains the same : having selected its investigation period (which is not seriously contested by Korea in this case), nothing in the *SCM Agreement* obliges an investigating authority to make the kind of temporal sub-divisions that Korea advocates in this case.

25. In this case there were numerous respects in which the various elements of the subsidy overlapped with each other, as outlined in some detail in the regulations and the EC's first written submission, and as otherwise appears from the record.

C. HERDING

26. Similar comments may be made regarding Korea's attempts to persuade this Panel to consider the situation of each bank in an isolated and compartmentalised way. That is not what the investigating authority did, and nothing in the *SCM Agreement* obliges it to proceed in that way.

27. Does a shepherd and his dog direct a herd of sheep? Yes. Does a shepherd entrust his dog with the herding of his sheep? Yes. In this case, the totality of the facts and evidence shows that the GOK did everything it could, through legislation and through its behaviour, to keep the banks together, as one unit, for as long as possible. That no doubt explains the kind of threats issued to banks like KFB and Koram who had the temerity to attempt to step out of line, particular in the early stages. It also no doubt explains why the CFICs were structured in such a way as to keep all the banks in the fold, for as long as possible. In these circumstances, an investigating authority is perfectly entitled to base itself on facts and evidence about entrustment or direction of the herd as a whole. Nothing in the *SCM Agreement* obliges an investigating authority to consider the situation in relation to each animal in the herd in an artificially isolated and compartmentalised way.

28. Indeed, in this respect, the situation is highly reminiscent of the classic cartel situation, in which, for example, it is discovered that the sales directors of a dozen competitors met clandestinely in a hotel. They all protest innocence, but written evidence is found that indicates that more than half of them were engaged in price fixing. There is also a wealth of incriminating evidence suggesting the same was more than likely the case with respect to the others. It is perfectly reasonable that, on the basis of the totality of the facts and evidence available, the remaining companies may also be considered to hav hFn,.5 -12.t074 Tion the

III. THE LG SEMICON MERGER

31. Article 15.2 of the *SCM Agreement* refers to a "significant increase in subsidised imports" (either in absolute terms or relative to production or consumption in the importing Member). To determine whether or not there is an "increase", it is necessary to make a comparison – that is, to make at least two measurements, one before and one after, and to compare them.

32. Evidently, the basic idea behind Article 15.2 of the *SCM Agreement* is to consider whether or not there is any evidence that the subsidy has had an impact on the flow of imports from a particular source. That means that an investigating authority will basically aim to catch a period before the period in which the subsidy occurred, and compare it with the period during which there was subsidisation. In this way it will be able to consider whether or not there is an increase in exports/imports coincident with the subsidy.

33. The *SCM Agreement* contains no rule about the overall time frame to be used by an investigating authority when considering this matter. In this case the investigating authority used the 4 years 1.1.1998 to 31.12.2001, which was perfectly lawful, and which is not seriously contested by Korea.

34. The *SCM Agreement* also contains no rule about how to divide the time frame up for comparison purposes. In this case the investigating authority essentially used annual periods, which was perfectly lawful, and which is not seriously contested by Korea.

35. Similarly, there is no rule in the *SCM Agreement* about the investigation period in respect of subsidy. The investigating authority chose 2001, which was reasonable and perfectly lawful, and which is not seriously contested by Korea.

36. Having established this framework, the investigating authority in this case started by considering the volume of exports/imports from the subsidised company, Hynix, during 2001, the period during which it was determined that there was a subsidy. It then looked back at imports during the preceding 3 years from the same source.

37. At this point, one may say, for the sake of the discussion, that the investigating authority was, at least in theory, faced with a choice about what it would consider "the same source" to be. One option was to look at all the imports during the earlier three year period that came from the firm Hynix (and this is what the investigating authority in fact did). A second option was, according to Korea, to look at all the imports from the *production facilities* that were under Hynix's control in 2001, even if they were not under Hynix's control in the earlier years. This choice is, in fact, fairly typical of the kinds of choices that investigating authorities have to make in economic law investigations.

38. Korea complains that, because the investigating authority chose the first option, it acted inconsistently with Article 15.2 of the *SCM Agreement.* Why? What provision of the *SCM Agreement* imposes any obligation on an investigating authority in this respect? There is simply no such obligation in Article 15.2 of the *SCM Agreement.* All that provision requires is that an investigating authority consider whether or not there has been an increase. If the drafters had wished to impose a particular method, they could easily have done so – but they chose not to. Korea might, in this particular case, assert that, stepping into the shoes of the investigating authority, it would have preferred one method rather than another – and the Panel might or might not agree – but that is entirely beside the point. This Panel cannot re-do the investigation. It cannot add to or diminish the rights and obligations of the Members as provided for in the *SCM Agreement.*

39. The EC takes the view, in this specific context, that great care should be exercised in "piercing the corporate veil" – an enterprise notoriously fraught with difficulty and the potential for

introducing subjectivity. In this context the EC preferred the objective test of looking at the firm Hynix and tracing its behaviour back in time. Article 15.1 of the *SCM Agreement* requires an objective

11 August 2003, when the Definitive Regulation was adopted. It did not therefore exist on 23 January 2004, the date on which this Panel was established. This Panel cannot therefore make any findings or recommendations in relation to the Provisional Regulation. Thus, all Korea's claims and arguments in respect of the Provisional Regulation must be dismissed. At the very least, this Panel need not, and should not, make any recommendations in relation to the Provisional Regulation.

52. This view is confirmed by Article 3.3 DSU which states that the basic aim of the dispute settlement system is "the prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements *are being* impaired by measures taken by another Member." (emphasis added). Any recommendations or rulings by the DSB shall therefore "be aimed at achieving a satisfactory settlement of the matter" (Article 3.4 of the DSU) - which cannot be the case if there is no matter to settle (i.e. if the measure does not exist and is not being applied). In the same vein, Article 3.7 of the DSU provides that "before bringing a case a Member shall exercise its judgment as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute."

B. KOREA HAS MADE NO CLAIM PURSUANT TO ARTICLE 17 OF THE SCM AGREEMENT

53. In any event Korea has made no claim pursuant to Article 17 of the *SCM Agreement*. Absent any such claim, the Provisional Regulation must be considered consistent with Article 17 of the *SCM Agreement*, and there is therefore no basis for this Panel to find that the Provisional Regulation is inconsistent with the *SCM Agreement*. This view is confirmed by Article 17.4 of the *Anti-Dumping Agreement* (which Korea has admitted may be relevant context), according to which provisional measures may only be subject to dispute settlement if they are inconsistent with Article 7.1 of the *Anti-Dumping Agreement* (which concerns provisional measures). For this reason also all Korea's claims and arguments in respect of the Provisional Regulation must be dismissed.