JAPAN - COUNTERVAILING DUTIES ON DYNAMIC RANDOM ACCESS MEMORIES FROM KOREA

(WT/DS336)

THIRD PARTY SUBMISSION OF THE UNITED STATES OF AMERICA

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I. Introduction

1. The United States welcomes this opportunity to provide the Panel with its views in this dispute, in which Korea challenges the imposition by Japan of countervailing measures on dynamic random access memories (DRAMs) from Korea. As the Panel knows, the United States, as well as the European Communities, have imposed countervailing measures on DRAMs from Korea as a result of Korea's subsidization of Hynix Semiconductor, Inc. ("Hynix").[1]

2. Because the U.S. Department of Commerce and the U.S. International Trade Commission had before them a factual record different from that before the Japanese investigating authority ("JIA"), the decisions are not alike in all respects. In addition, the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") does not prescribe in detail the methodologies that go into a determination of the existence and amount of a countervailable subsidy, and different investigating authorities may properly apply different methodologies to a similar factual situation.

3. While the present dispute is therefore different in some respects from the dispute involving the U.S. measures, it raises a number of significant issues from a systemic and legal perspective on which the United States provides its views in this submission. In particular, the United States addresses certain issues relating to: (1) Japan's request for a preliminary ruling on certain claims advanced by Korea in its panel request; (2) the proper burden of proof and standard of review to be applied in evaluating the claims raised by Korea, and evidentiary obligations of the investigating authority; (3) the JIA's subsidy determination; and (4) the JIA's injury determination.

II. Procedural Issues

A. Claims 10 and 15 of Korea's Panel Request Fail to Satisfy the Requirements of DSU Article 6.2

4. Under Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), "[t]he request for the establishment of a panel shall ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The Appellate Body has stated that "where the articles listed establish not one single, distinct obligation, but rather multiple obligations … the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2."[2]

5. In its preliminary ruling request, Japan argues that Items 9, 10 and 15 in Korea's panel request "fail to comply with Korea's obligation under DSU Article 6.2 to 'present the problem clearly,'" principally because each "alleges violations of entire Articles without any indications of the paragraphs, subparagraphs or the specific obligation therein that Japan allegedly

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[1] Korea's challenge to the U.S. subsidization determination was unsuccessful. *See US – DRAMS (AB)*. The EC's determination was evaluated by a WTO panel as well. *See EC – DRAMS*.

[2] *Korea – Dairy Safeguard (AB)*, para. 124.

breached."[3] In its response to Korea's first submission, Japan additionally requests that the Panel find outside the terms of reference those claims regarding obligations that were raised in connection with items in Korea's panel request other than those which Korea now references in its first written submission.[4] The United States offers the following views on Items 10 and 15.

6. In Item 10, Korea's panel request refers to Article 15 of the SCM Agreement in its entirety and states that "Japan improperly found material injury caused by the allegedly subsidized imports without proper evidentiary or legal foundations."[5] As Japan notes, Article 15 contains a number of different paragraphs, which themselves contain multiple sub-obligations, any one of which could be implicated by Korea's broad assertion that Japan's finding of material injury caused by the allegedly subsidized imports lacked "proper evidentiary or legal foundations."[6]

7. In its response, Korea argues that Item 10 was intended to be "read in conjunction with" Item 11, and that Item 10 was in fact intended to "address[] the general legal and procedural errors flowing from" the specific error described in Item 11 relating to Article 15.5. Setting aside the question of how Japan or the third parties were expected to understand that Item 10 "flowed from" the claim that *followed* it in Korea's request, Korea's explanation sheds little light on the "problem" at issue in Item 10. Korea asserts that "[o]nce the Panel reviews the arguments actually presented on injury issues ... it will become obvious" that Item 10 is sufficiently clear. However, this assertion rests on the presumption that a panel request can be cured through subsequent submissions.[7] As the Appellate Body has previously found, this is not the case: "Defects in the request for the establishment of a panel cannot be 'cured' in the subsequent submissions of the parties during the panel proceedings."[8] The fact that Korea is unable even at this stage in the proceeding to articulate the "problem" Item 10 is intended to address simply illustrates further that the claim is insufficiently clear and hence does not satisfy the requirements of DSU Article 6.2.

8. In Item 15, Korea states that Japan breached Articles 10, 11, 12, 14, 15, 22, and 32.1 of the SCM Agreement and Articles VI:3 and X:3 of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) because it "failed to conduct a thorough and complete investigation, and failed to conduct its investigation and make determinations in accordance with fundamental substantive and procedural requirements." Like the claims discussed above, as Japan notes, Item 15 is exceedingly vague, cites to a number of articles containing multiple obligations, and

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[3] Preliminary Ruling Request of Japan, para. 8; First Written Submission of Japan, para. 23.

[4] First Written Submission of Japan, para. 23.

[5] Request for the Establishment of a Panel by Korea, WT/DS336/5 (May 18, 2006).

[6] *Id.*; *see also* Preliminary Ruling Request of Japan, para. 16.

[7] Response of Korea to Preliminary Ruling Request of Japan, para. 24.

[8] *US -- German Steel (AB)*, para. 127.

provides no indication of the "problem" that is the subject of the dispute. Past panels have found, for example, that references to Article 6, Article 9, or Article 12 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (AD Agreement) are not sufficiently specific to satisfy the requirements of Article 6.2 of the DSU.[9] Here, Korea has listed analogous provisions in the SCM Agreement in their entirety, as well as a number of additional provisions that likewise contain multiple obligations. Korea asserts that it has listed these various provisions because "no single provision of the WTO Agreements ... requires investigating authorities to respect the 'due process' rights of the individual parties involved in countervailing duty proceedings."[10] Yet the fact that "due process" issues may be implicated in a number of different provisions of the Agreements does not excuse Korea from identifying the problem and the specific obligations in the Agreements that are implicated.

9. A panel request that fails to identify specific subprovisions of articles containing multiple obligations can nonetheless be considered to satisfy the requirements of Article 6.2 if it "also sets forth facts and circumstances describing the substance of the dispute"[11] or if there are "textual similarities" between the panel request and relevant paragraphs, subparagraphs, or clauses.[12] Yet Korea's request provides no indication of *how* Japan allegedly failed to make a determination in accordance with "fundamental substantive and procedural requirements." Therefore, insofar as the articles referenced therein contain multiple obligations, those aspects of Item 15 do not meet the standard established under Article 6.2 and, like Item 10, should be considered outside of the Panel's terms of reference.

B. Analysis of "Prejudice" to the Respondent Should Not Preclude the Panel from Issuing a Timely Preliminary Ruling on DSU Article 6.2 Issues

10. Korea further asserts that "'prejudice' to the responding party from alleged insufficiency of a panel request can only be established by a consideration of the 'actual course of panel proceedings'" and therefore "a panel cannot rule on a respondent's claim under Article 6.2 until the end of the process."[13] Korea cites to no language in Article 6.2 that would support such an assertion, and the text does not so provide. Indeed, such a reading would effectively foreclose parties from obtaining preliminary rulings regarding compliance with DSU Article 6.2. While panels are not *required* in all cases to make findings prior to the conclusion of the proceedings, evaluation of prejudice to the respondent does not preclude them from doing so, and panels have

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[9] *EC – Cast Iron Fittings (Panel)*, para. 7.14(7) (discussing Articles 6, 9 and 12 of the AD Agreement); *Thailand – H-Beams (Panel)*, paras. 7.28-7.29 (discussing Article 6 of the AD Agreement).

[10] Response of Korea to Preliminary Ruling Request of Japan, para. 26.

[11] *Mexico – HFCS (Panel)*, para. 7.15.

[12] *US – OCTG from Argentina (Panel)*, para. 7.47.

[13] Response of Korea to Preliminary Ruling Request of Japan, paras. 30 and 36.

in the past issued preliminary rulings regarding DSU Article 6.2 well before the proceedings have concluded.[14]

11. Korea's argument appears to rest upon a mischaracterization of references by certain panels and the Appellate Body to the "course of the panel proceedings" in analyzing compliance with DSU Article 6.2. While the Appellate Body suggested in *US – German Steel* that submissions "may" be consulted to "confirm the meaning" of words used in a panel request and "as part of the assessment of whether the ability of the respondent to defend itself was prejudiced," it did not state that such submissions *must* be consulted, and indeed as noted such a statement would lack support in the text of Article 6.2.[15] Likewise, in *Korea – Dairy Safeguard*, the Appellate Body rejected Korea's request for a preliminary ruling because Korea had failed to demonstrate prejudice, but did not suggest that the conclusion of panel proceedings was a precondition to establishing prejudice.[16] Nor does the report of the panel in *Mexico – HFCS* support Korea's position. In that dispute, the panel stated that the totality of the U.S. request set out the claims with sufficient precision, and hence met the requirements of DSU Article 6.2.[17] The panel did not find a general requirement for panels to await the conclusion of proceedings before ruling on a preliminary ruling request.

12. Korea's interpretation of DSU Article 6.2 would substantially compromise the ability of respondents and third parties to participate effectively in panel proceedings where a complaining party has made a number of vague assertions of breaches of WTO obligations. As previous panels have noted, early rulings on claims under Article 6.2 save "time and resources"[18] that as a result may be expended responding to legitimate claims. As the Appellate Body noted in *Korea – Dairy Safeguard*, "Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant."[19] Parties should not be required to respond to claims that are insufficient to inform them of the basis for the complaint, and, with respect to a panel's terms of reference, DSU Article 6.2 does not preclude panels from issuing preliminary rulings as soon as practicable where, as here, such rulings are warranted. In effect, Korea invites the Panel to endorse a "prejudice" standard that facilitates gamesmanship and litigation tactics on the part of complaining parties. Korea suggests that *any* panel request submitted by a complaining party, no

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[14] *E.g.*, *Korea – Commercial Vessels (Panel)*, para. 7.2 (discussing rulings on preliminary ruling requests issued prior to first meeting of the panel); *EC – Cast Iron Fittings (Panel)*, para. 7.14 (describing ruling on EC's preliminary ruling request issued at the first substantive meeting with the parties); *Indonesia – Autos*, paras. 14.3-4 (describing ruling on Indonesia preliminary ruling request issued at the first substantive meeting with the parties).

[15] *US – German Steel (AB)*, para. 127.

[16] *Korea – Dairy Safeguard (AB)*, para. 131.

[17] *Mexico – HFCS (Panel),* paras. 7.16-17.

[18] *Id.,* para. 7.2.

[19] *Korea – Dairy Safeguard (AB)*, para. 124.

matter how vague or ambiguous, may be deemed sufficient to support a claim, provided that the complaining party can, by its very last submission, articulate the basis of its complaint. The Panel should reject this invitation. And in any event, as discussed above, flaws in a panel request cannot be "cured" by later submissions or excused by lack of prejudice. A panel request is either in breach of Article 6.2 of the DSU or it is not – Article 6.2 does not say that the panel request *plus* the subsequent submissions to a panel are to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. The panel request is to be evaluated without recourse to subsequent submissions.

III. Burden of Proof, Standard of Review, and Evidence

A. Burden of Proof

13. In a WTO dispute settlement proceeding, the burden of proof with respect to a particular claim or defense rests with the party that asserts such claim or defense.[20] In a dispute challenging the application of countervailing duty measures, the complaining party must present a *prima facie* case of breach of the relevant articles of the SCM Agreement.[21] In this proceeding, it is up to Korea as the complaining party "to put forward evidence and legal argument sufficient to demonstrate" a breach of a particular provision.[22] The role of the Panel is not to make the case for either party, although it may pose questions in order to clarify the arguments.[23]

14. In its submission, Korea often appears to advance facts and arguments without specifying the legal obligations that it asserts are breached as a result, or identifies legal obligations it claims have been breached without indicating the arguments that support its conclusion.[24] As the Appellate Body noted in *US – Gambling*, "[a] *prima facie* case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to each of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from

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[20] *US – Wool Shirts (AB)*, p. 14.

[21] *EC – DRAMS (Panel)*, para. 7.7. Elsewhere in its submission, Korea references a GATT 1947 panel report suggesting that "it would be reasonable to expect that" the Member whose measure has been challenged "should establish the existence" of the facts supporting its determination "when such action is challenged." Swedish Antidumping Duties, L/328, 23 February 1955, 3S/81, para. 15. This statement does not reflect the burden of proof in WTO proceedings, as clarified by the Appellate Body.

[22] *US – Wool Shirts (AB)*, p. 16. *See also EC – Hormones (AB)*, para. 98 (explaining that complaining party "must establish a *prima facie* case of inconsistency with a particular provision of" the covered agreement).

[23] *EC – DRAMS (Panel)*, para. 7.7 (citing *Thailand – H-Beams (AB)*, para. 136).

[24] *See e.g.*, First Written Submission of Korea, paras. 231-36 (discussing why JIA's benefit analysis "cannot be sustained" but citing to no WTO provisions); *id*., paras. 253-257 (discussing why JIA's specificity analysis "cannot be upheld" but citing to no WTO provisions); *id*., paras. 258-262 (stating that failure to consider change in ownership was inconsistent with SCM Articles 10, 14, 19 and 21 but not explaining how the articles give rise to an inconsistency.)

it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments."[25]

15. In portions of its submission, most notably with respect to its claims involving specificity, benefit, and change in ownership, Korea discusses the JIA determination at length but does not indicate how particular provisions of the SCM Agreement have been breached by that determination. For example, in its discussion of specificity in paragraphs 253 through 257 of its submission, Korea recites a number of arguments but does not refer to any provision of the SCM Agreement, instead simply asserting that JIA's analysis "cannot be upheld."[26] Likewise, while Korea occasionally references language in Article 14 in discussing benefit in paragraphs 231 through 252, it does not explain precisely how the provision in which that language is found was relevant to the aspects of the JIA's analysis that it discusses.[27] Similarly, in arguing that the JIA's failure to consider alleged change in ownership was WTO-inconsistent, Korea cites a string of provisions of the SCM Agreement, but does not indicate why Japan's actions were inconsistent with those particular provisions.[28] As the Appellate Body has observed, it is not the Panel's role to identify which particular provisions of the SCM Agreement Korea might be invoking and how the text of those provisions have been breached.[29] Absent such an analysis with respect to these claims, the United States submits that Korea has not established a *prima facie* case.

B. Standard of Review

16. While Korea does not discuss in its first written submission the standard of review that it believes applies in this proceeding, certain aspects of its arguments suggest that it misunderstands the proper standard of review that a panel should apply when reviewing the WTO-consistency of an investigating authority's countervailing duty determination.

17. Article 11 of the DSU provides that a panel's role is to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." A panel is bound by its terms of reference, and cannot make findings on a matter outside its terms of reference.[30]

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[25] *US – Gambling (AB)*, paras. 140-41.

[26] First Written Submission of Korea, paras. 253-57.

[27] *Id.*, paras. 231-52.

[28] *Id.*, paras. 258-62.

[29] *US – Gambling (AB)*, paras. 140-41.

[30] *See Brazil – Desiccated Coconut (AB)*, p. 22 (explaining that terms of reference establish jurisdiction of panels).

18. The Appellate Body has further clarified the role of a panel when reviewing an investigating authority's decision to impose countervailing measures. In *US – DRAMS*, the Appellate Body explained that the "objective assessment" to be made under Article 11 by a panel reviewing an investigating authority's subsidy determination "will be informed by an examination of whether the agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination."[31] Significantly, a panel "may not reject an agency's conclusions simply because the panel would have arrived at a different outcome if it were making the determination itself."[32] Thus, it is well established that a panel may not conduct a *de novo* review of the evidence before the investigating authority or substitute its own judgment for that of the investigating authority.[33] A panel is a reviewer of agency action, not the initial trier of fact.[34]

19. In portions of its submission, Korea appears to suggest, incorrectly, that it is the Panel's responsibility to reweigh the evidence or take evidence into consideration that was not before the investigating authority.[35] For example, in an attempt to explain the behavior of lenders participating in the restructuring of Hynix, Korea advances an alternative theory to the JIA's findings of entrustment or direction and benefit, based upon certain academic articles regarding principles of corporate finance and restructuring theory, evidence that appears not to have been contained in the record before the investigating authority.[36] Based on these documents, Korea asserts that aspects of the JIA's decision are "contrary to economic theory and to the actual experience of formal 'bankruptcy' proceedings and informal workouts" and therefore argues that the determination is invalid.[37] However, the SCM Agreement does not require an investigating authority to take into consideration economic theories that are not on the record of the proceedings in making its decision. Furthermore, as the Appellate Body noted in *US – Lamb Meat*, a panel may not conclude that a decision is "not reasoned" simply because an alternative explanation is found to be "plausible." Rather, the explanation under review must be found not "adequate in the light of that alternative explanation."[38]

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[31] *US – DRAMS (AB)*, para. 186.

[32] *Id.*, para. 187.

[33] *Id.*

[34] *Id.*, para. 188.

[35] *E.g.*, *US – Hot Rolled Steel (Panel)*, para. 7.235 (noting that "[i]t is however, not for us to reweigh and re-evaluate the data that were before the USITC").

[36] *See, e.g.*, First Written Submission of Korea, paras. 43-57 and accompanying footnotes; First Written Submission of Japan, paras. 81, 83-84, 208.

[37] First Written Submission of Korea, para. 134.

[38] *US – Lamb Meat (AB),* para. 106.

20. Korea's alternate explanation of creditor behavior does not address the basic question required under the standard of review articulated in DSU Article 11: whether the JIA provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings and how those findings supported its overall determination. In effect, Korea would have the Panel substitute its own judgment for that of the JIA, based on Korea's theory of creditor behavior and evidence not on the record of the underlying proceeding.

C. Evidence

21. Korea makes a number of incorrect assertions regarding the nature of the evidence that an investigating authority must identify and how it must analyze that evidence in making its determination. In particular, throughout its submission, Korea claims that there exists a general obligation for an investigating authority to identify "positive evidence demonstrating the existence of each element required for the imposition of antidumping or countervailing duties."[39] In support of this assertion, Korea cites two specific provisions in the SCM Agreement which refer to "positive evidence": Article 15.1, regarding an injury finding in connection with a serious prejudice analysis, and Article 2.4, regarding specificity. Korea's claim that these provisions can be read to support a general "positive evidence" standard for all other elements, however, is not supported by the text of the SCM Agreement – which does not contain similar language elsewhere – and has previously been rejected by the Appellate Body.

22. With regard to similar assertions made by Korea specifically as to entrustment or direction, the Appellate Body in *US – DRAMS* found that while Article 12 of the SCM Agreement contains a requirement that a decision of the investigating authority as to the existence of a subsidy "can only be based on" evidence on the record of that agency, and that this requirement "applies equally to evidence used to support a finding of a financial contribution under Article 1.1(a)(1)(iv)," there is "no basis in the SCM Agreement or in the DSU to impose upon an investigating authority a particular standard for the evidence supporting its finding of entrustment or direction."[40] As the Appellate Body's findings suggest, beyond where expressly provided, the SCM Agreement does not contain specific standards regarding the evidence that investigating authorities must use to support their determinations.

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[39] First Written Submission of Korea, para. 141; *see also* para. 220 ("While the JIA might have rejected the creditor's description of the analysis they performed, it did not present any positive evidence demonstrating that the creditors had actually failed to perform a rational analysis.").

[40] *US – DRAMS (AB)*, para. 186.

IV. Subsidy Determination

A. Korea's Objection to the JIA's Treatment of Several Banks as "Interested Parties" Is Based Upon an Incorrect Interpretation of the SCM Agreement

23. Korea claims that the JIA improperly treated various financial institutions as "interested parties" and inappropriately applied facts available when these financial institutions failed to respond to requests for information.[41] Specifically, Korea argues that these financial institutions cannot be considered "interested parties" within the meaning of Article 12.9 of the SCM Agreement because they were not directly affected by the outcome of the JIA's determination.[42] Korea's claim is contrary to the correct interpretation of the SCM Agreement, as clarified by past DSB recommendations and rulings.

24. When an investigating authority conducts a countervailing duty investigation, it relies upon both the interested Member and interested parties to provide information necessary for making its determination. In cases where "any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation," Article 12.7 of the SCM Agreement provides for the use of facts available.[43]

25. Korea's narrow interpretation of "interested party" is contradicted by the text of Article 12.9 of the SCM Agreement, which provides that "interested parties" "shall" include certain entities, such as foreign exporters or producers of the product under investigation, but then specifies that "This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties."[44] Thus, Article 12.9 provides that certain entities *must* be treated as interested parties; at the same time, it gives Members the *discretion* to treat *other* parties as interested parties. Article 12.9 does not provide a basis for concluding that an investigating authority is restricted from identifying certain parties as "interested."

26. Furthermore, the ordinary meaning of the term "interested" supports the conclusion that an entrusted or directed entity may be considered an "interested party" under the SCM Agreement. The term "interested" means, among other things, "having an interest or

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[41] First Written Submission of Korea, paras. 153-164.

[42] *Id.*, para. 159.

[43] Specifically, Article 12.7 states in full:

> In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

[44] SCM Agreement, Article 12.9 (emphasis added).

involvement; not impartial."[45] Korea's assertion that only entities with "an interest in the outcome of the proceeding," and that have a "case" to present to the investigating authorities, may be deemed "interested parties" reflects an overly narrow interpretation of the term that is at odds with its ordinary meaning. An allegedly entrusted or directed entity may well have an "interest" or "involvement" in the proceeding. For example, how the investigating authority characterizes a company's operations in connection with a finding of entrustment or direction may affect the company's reputation and lending practices.[46]

27. Korea's narrow reading of Article 12.9 is also at odds with how the term "interested party" is used elsewhere in the SCM Agreement. Article 23 of the SCM Agreement provides that judicial review must be made available to interested parties that participated in the proceedings and that are "directly and individually affected by the administrative actions." The United States agrees with Japan that this provision suggests that an investigating authority may properly deem entities to be interested parties, even where such entities are not "directly and individually affected" and therefore do not have an "interest" in the "outcome" of the proceeding, in the narrow sense that those terms are used by Korea.[47]

28. Likewise, the panel's findings in *EC – DRAMS* support the conclusion that an investigating authority may apply facts available when a third party entity fails to cooperate with an investigation. There, the panel found that the EC investigating authority did not err in applying facts available after Citibank, a Hynix lender and financial adviser,[48] failed to provide requested information.[49] Notably, the panel rejected Korea's argument that application of facts available was not appropriate because, in Korea's view, Hynix was being blamed for Citibank's failure to respond.[50] Consistent with the reasoning of the *EC – DRAMS* panel, the United States disagrees with Korea's claim that is "patently unfair" to apply facts available to Hynix for the failure of certain financial institutions to respond to the JIA's requests for information.[51]

29. Finally, as the panel in *US – Hot Rolled Steel* observed (referring to the parallel facts available provision in the Antidumping Agreement):

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[45] *See* First Written Submission of Japan, para. 551 and n.803 (quoting Concise Oxford Dictionary, p. 737).

[46] For this reason, it is not surprising that, as Korea notes, "[n]one of the creditor banks reported being influenced by government pressure to save Hynix." First Written Submission of Korea, para. 215.

[47] First Written Submission of Japan, paras. 553-54.

[48] *EC – DRAMS*, paras. 7.263-7.267.

[49] *Id.*, paras. 7.266-7.267.

[50] *Id.*, para. 7.266.

[51] *See* First Written Submission of Korea, para. 160. Additionally, Korea's reliance on the Appellate Body report in *US – Hot-Rolled Steel* is misplaced. In the passage quoted by Korea, the Appellate Body addressed the reasonableness of the burden placed upon an exporter by an investigating authority, not the definition of "interested party" or the question of on whom the burden should fall. *Id.*, para. 162, fn.149.

> Article 6.8 ensures that an investigating authority will be able to complete an investigation and make determinations under the AD Agreement on the basis of facts even in the event that an interested party is unable or unwilling to provide necessary information within a reasonable period.[52]

30. In cases involving entrustment or direction, relevant information may be held not only by the foreign producer and the government of the allegedly subsidizing Member, but also by the third parties who have been entrusted or directed. Therefore, the ability to resort to facts available when a third party fails to provide information ensures that an investigating authority will be able to complete an investigation and make determinations. If the investigating authority cannot obtain information from these third parties – and cannot, in such instances, rely upon the facts available – its ability to render determinations will be compromised. Thus, allegedly entrusted or directed entities may be considered "interested parties" within the meaning of Article 12.9 of the SCM Agreement, and their failure to provide information may properly result in the use of facts available by an investigating authority.

B. Korea's Interpretation of the "Entrusts or Directs" Standard Under Article 1.1(a)(1)(iv) of the SCM Agreement is Incorrect

31. One of the central issues in this dispute is the finding of the JIA that the Government of Korea ("GOK") entrusted or directed various financial institutions to provide financial contributions to the company, Hynix. Korea argues that the JIA erred in so finding.[53] However, the United States submits that Korea errs in several respects in its interpretation of the "entrusts or directs" standard under Article 1.1(a)(1)(iv) of the SCM Agreement, and in its interpretation of the evidence required to support a finding of entrustment or direction.

1. No Special Evidentiary Standard Applies to Article 1.1(a)(1)(iv)

32. With respect to the JIA's finding that the GOK entrusted or directed financial institutions to provide financial contributions to Hynix, Korea advances a special evidentiary standard for "entrustment or direction." Referencing the Appellate Body report in *US – DRAMS,* Korea asserts that the evidence relied upon by an investigating authority in cases involving entrustment or direction must be "probative and compelling."[54]

33. Korea's proposition is not supported by the text of the WTO agreements, as clarified by the Appellate Body report. As discussed in Part II, above, neither Article 1.1(a)(1)(iv) itself nor any other provision of the WTO agreements supports the notion that a special evidentiary

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[52] *US - Hot Rolled Steel (Panel)*, para. 7.51.

[53] First Written Submission of Korea, para. 167.

[54] *Id.*, para. 196.

standard exists for purposes of determining the existence of entrustment or direction.[55] Rather, pursuant to Article 12.2 of the SCM Agreement, an investigating authority must support its decision as to the existence of a subsidy based on the evidence on the record.

34. Contrary to Korea's assertion, the Appellate Body's report in *US – DRAMS* states that an investigating authority is not required to base its determination on a "qualitative standard higher than that contemplated by the SCM Agreement."[56] The evidentiary question in this dispute, therefore, is whether, consistent with Article 12.2, a reasonable, objective decision-maker, looking at *all* the evidence on the investigation record, could have concluded that the record supports a finding of entrustment or direction by Korea.[57]

2. Korea's Objection to the Evidence Relied Upon by the JIA Is Based Upon An Incorrect Interpretation of the Term "Entrusts or Directs"

35. In support of its claim that the JIA's determination regarding entrustment or direction was not supported by sufficient evidence, Korea concedes that the JIA described a number of facts in its determination regarding entrustment or direction in connection with the restructuring of Hynix, but argues that the determination was insufficient because "there is actually no evidence that the Korean government told any of the creditors what to do in any of the restructurings."[58] Korea's argument appears to suggest that, in order to establish entrustment or direction, an investigating authority must have evidence of a "direct" or "actual" government delegation or command. This interpretation is unsupported by the text of the SCM Agreement, as clarified by prior panel and Appellate Body findings.

36. Article 1.1(a)(1)(iv) does not require that a government's entrustment or direction be conveyed to a private body in any particular form, such as a formal or official delegation or command. As previous panels and the Appellate Body have noted, the ordinary meaning of entrustment or direction is not limited to acts of delegation or command.[59] Although entrustment or direction "should invariably take the form of an affirmative act," the act need not be explicit

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[55] *See US – DRAMS (AB)*, para. 138 ("We agree with the participants that neither the SCM Agreement nor the DSU explicitly articulates a standard for the evidence required to substantiate a finding of entrustment or direction under Article 1.1(a)(1)(iv).").

[56] *Id.*, para. 139.

[57] *See EC – DRAMS*, para. 7.6 ("We are, therefore, fully conscious of the fact that it is not the role of the Panel to perform a *de novo* review of the evidence which was before the investigating authority at the time it made its determination. We will, therefore, examine whether on the basis of the record before it, a reasonable and objective investigating authority could have reached the conclusions the EC investigating authority reached with regard to the determination of subsidization and injury.").

[58] First Written Submission of Korea, para. 144.

[59] *See, e.g.*, *US – DRAMS (AB)*, para. 118.

or formal.[60] Indeed, as the panel observed in *EC – DRAMS*, an interpretation of subparagraph (iv) that would not address government entrustment or direction not directly expressed would "significantly undermine[]" the "focus" of Article 1.1(a)(1)(iv):

> After all, this provision is supposed to encapsulate those instances where the government attempts to execute a particular policy by operating through a private body. In other words, it is trying to ensure that indirect government action does not fall outside the scope of the *SCM Agreement.* If we were to limit the scope of Article 1.1(a)(1)(iv) to only those instances where the government acted 'explicitly', governments would be able to circumvent their commitments under this provision by removing those elements that were 'explicit'.[61]

Thus, subparagraph (iv) is not limited in the manner Korea suggests.

37. Korea also appears to introduce an additional requirement of governmental "intent" or "motive" to a finding of entrustment or direction. It argues that in addition to showing that the government entrusted or directed private bodies to provide financial contributions to a third party, an investigating authority must also demonstrate that providing assistance to the third party, and "not some other motive," was the reason for the government action.[62] This new criterion for entrustment or direction has no support in the text of the SCM Agreement. While under the terms of Article 1.1(a)(1)(iv) an investigating authority must determine that a government has entrusted or directed a third party "to carry out" one of the functions listed in Article 1.1(a)(1)(i)-(iii), this does not support the conclusion that the authority must determine that the action of the government was "intended to execute a policy of providing assistance to the third party."[63] Although it is possible that intent or motive may be evidence of entrustment or direction, the text demonstrates that an investigating authority need not establish motive in order to make such a determination.

3. An Investigating Authority Need Not Demonstrate That the Entrustment or Direction Occurred at the Expense of the Creditors

38. Building upon its incorrect argument regarding governmental "intent", Korea also suggests that the JIA could not reach a finding of entrustment or direction absent a finding that the Korean government intended to save Hynix "at the expense of its creditors."[64] Korea argues that the JIA needed evidence that the Korean government forced Hynix's creditors to engage in

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[60] *EC – DRAMS*, para. 7.57; *US – DRAMS (Panel)*, para. 7.42.

[61] *EC – DRAMS*, para. 7.57 n.65.

[62] First Written Submission of Korea, para. 195; *see also id.*, para. 197.

[63] *Id.*, paras. 195 and 197.

[64] *Id.*, para. 200.

transactions that "were not in their own interests."[65] Korea argues repeatedly that Hynix's "going concern" value was greater than its liquidation value,[66] and that Hynix's financial performance after restructuring "validates" the decisions of its creditors.[67] None of these arguments are supported by the text of the Agreement.

39. There is no requirement in Article 1.1(a)(1)(iv) of the SCM Agreement that an investigating authority demonstrate that government entrustment or direction operates at the expense of, or against the interests of, the private bodies entrusted or directed.[68] Indeed, it is possible that a government may delegate responsibility to a private body to carry out a financial contribution, and that in the long run that financial contribution might lead to advantages for the private body. While evidence that creditors were disadvantaged by the actions in question may be relevant to a finding that entrustment or direction occurred, it is not a prerequisite to such a finding under the terms of the Agreement. Moreover, how the subsidy recipient ultimately fared after receipt of the financial contribution is irrelevant to the question of whether there was entrustment or direction at the time the financial contribution was made. Thus, the future performance of Hynix has no bearing on a proper analysis under Article 1.1(a)(1)(iv).

40. The existence of entrustment or direction under Article 1.1(a)(1)(iv) is determined by reference to the actions of the government, as well as the financial condition of the recipient firm *at the time the financial contribution is made*. As long as the investigating authority reasonably concludes based on the record that there is evidence that a government has entrusted or directed a body to provide a financial contribution, Article 1.1(a)(1)(iv) is satisfied.[69]

4. Reliance Upon the Totality of the Evidence In Establishing Entrustment or Direction Is Appropriate

41. Korea acknowledges that an investigating authority may review evidence of entrustment or direction "as a whole."[70] It appears, however, that Korea has selectively extracted certain portions of the JIA's evidence relied upon in its finding of entrustment or direction –

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[65] *Id.*, paras. 200, 203.

[66] *Id.*, paras. 212-213.

[67] *Id.*, para. 107.

[68] In this regard, it should be noted that, as the Appellate Body stated in *Canada – Aircraft*, "the word 'benefit', *as used in Article 1.1*, is concerned with the 'benefit *to the recipient*' and not with the 'cost to government'." *Canada – Aircraft (AB)*, para. 155 (emphasis in original).

[69] Indeed, as the Appellate Body observed in *US – DRAMS*, a private body's refusal to carry out a function with which it was entrusted or directed "does not...on its own, mean that the private body was not entrusted or directed." *US – DRAMS (AB)*, para. 124. Thus, the consequences of the entrustment or direction – including the ultimate financial impact on the private body in question – are not necessary to establish whether entrustment or direction in fact occurred.

[70] First Written Submission of Korea, paras. 194 and 200-205, and Attachment 3.

specifically, newspaper reports of statements by Korean government officials expressing their intent to keep Hynix alive and describing actions taken by Hynix's creditors – and infers that this evidence alone was the basis for the JIA's determination.[71] Korea proceeds to critique evidence cited in JIA's analysis on a piecemeal basis, contrary to the holistic approach that JIA appears to have used in its determination.[72]

42. As noted by the Appellate Body, "if ... an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding of entrustment or direction, a panel reviewing such a determination normally should consider that evidence in its totality, rather than individually, in order to assess its probative value with respect to the agency's determination."[73] Insofar as the JIA appears to have adopted this approach, the Panel should evaluate whether the evidence as a whole supports the determination, and should avoid looking at individual pieces of evidence in isolation as advocated by Korea in its submission.

C. Korea's Interpretation of "Financial Contribution" Is Inconsistent With Article 1.1(a)(1) of the SCM Agreement

43. Korea argues that a "direct transfer of funds" occurs only when "money" is conveyed from the government (or government-directed body) to the subsidy recipient.[74] To the extent that a transaction does not involve a literal conveyance of "money," Korea argues that it may be more appropriately analyzed as "revenue foregone" within Article 1.1(a)(1)(ii). Korea's interpretation of the term "direct transfer of funds" is inconsistent with the provisions of Article 1.1(a)(1) and at odds with prior findings of WTO panels and the Appellate Body.

1. "Conveyance of Money" from the Government to the Subsidy Recipient Is Not Required To Find a Direct Transfer of Funds Under Article 1.1(a)(1)(i)

44. Before this Panel, Korea argues that loan restructuring, debt-to-equity swaps, reduction of loan interest rates, conversion of existing interest payments into principal, and debt forgiveness are not "direct transfers of funds" because "there is no conveyance of money" to the recipient.[75] Korea is incorrect. Article 1.1(a)(1)(i) provides that a financial contribution may arise where "a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees)." Thus, the provision specifies a number of *examples* of instruments that may result in a direct transfer of

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[71] *Id.*

[72] *Id.*

[73] *US – DRAMS (AB)*, paras. 150-151.

[74] First Written Submission of Korea, para. 173 (a financial contribution occurs where the "government gives the recipient *money*.") (emphasis in original).

[75] *Id.*, paras. 167, 175-176.

funds, but does not suggest that Article 1.1(a)(1)(i) is limited to the enumerated instruments.[76] Nothing in the text of the agreement supports Korea's narrow interpretation of Article 1.1(a)(1)(i), particularly Korea's suggestion that "funds" only refers to "money;" indeed, prior panels have concluded that the types of transactions that Korea claims do not constitute "direct transfers of funds" may in fact qualify as such.[77]

45. Korea's conclusion that the French and Spanish texts of the SCM Agreement support its "money changing hands" interpretation of "direct transfer of funds" is unsupported by the ordinary meaning of those terms.[78] The translations provided by Korea in fact contradict its own assertions. For example, the French "*transfert*" (transfer) is defined as "an act by which a person transmits a legal right to another,"[79] and "*fonds*" (funds) is defined as "cash money, and in general, monetary assets."[80] The transmission of a legal right may include a range of activity in addition to the simple "conveyance of money," and "monetary assets" may include a range of instruments other than "money." Together these terms encompass debt-to-equity swaps, interest rate reductions, and interest forgiveness or deferrals.

46. Moreover, in *Korea – Commercial Vessels* the panel specifically recognized that:

> [I]nterest reductions and deferrals are similar to new loans, as they involve a renegotiation/extension of the terms of the original loan. We see no reason why loans would constitute financial contributions while interest reductions and deferrals would not. Further, we consider that interest/debt forgiveness is comparable to a cash grant . . . . All of these transactions, therefore, constitute direct transfers of funds in the sense of Article 1.1(a)(1)(i) of the SCM Agreement. Regarding debt-for-equity swaps, we note that equity infusions are explicitly listed as a type of direct transfer of funds in Article 1.1(a)(1)(i). Since we have also found that debt forgiveness constitutes a direct transfer of funds, we see no reason why a combination of equity infusion and debt forgiveness should fall outside the scope of that provision.

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[76] *See Korea – Commercial Vessels*, para. 7.412 ("The fact that the listed kinds of direct transfers of funds (grants, loans, and equity infusions) are identified as only examples clearly indicates that there may well be other types of instruments that would equally constitute direct transfers of funds in the sense of Article 1.1(a)(1)(i).")

[77] *See EC – DRAMS*, para. 7.92 (finding that a refinancing of funds is a direct transfer within Article 1.1(a)(1)(i)); *Korea – Commercial Vessels*, paras. 7.123, 7.126 (stating that preferential interest rates constitute a direct transfer of funds), paras. 7.411-7.413 (finding that debt-to-equity swaps, interest rate reductions, and interest forgiveness or deferrals all constitute direct transfers of funds within the meaning of Article 1.1(a)(1)(i)).

[78] First Written Submission of Korea, paras. 169-171.

[79] *Id.*, para. 169, fn. 156.

[80] *Id.,* para. 169, fn. 157.

Thus, the *Korea – Commercial Vessels* panel found that, contrary to what Korea now asserts, loan restructuring, debt forgiveness and debt-to-equity swaps are direct transfers of funds. In light of the foregoing, the Panel should conclude that Article 1.1(a)(1) does not require that a direct transfer of funds be demonstrated by evidence of the "conveyance of money" from one person to another.

2. Article 1.1(a)(1)(ii) Does Not Require That Loan Modifications and Debt-to-Equity Swaps Be Analyzed As Government Revenue Otherwise Foregone

47. Korea argues that modifications of existing loan terms and debt-to-equity swaps can only be defined as "revenue foregone" under Article 1.1(a)(1)(ii) of the SCM Agreement.[81] As such, Korea argues that the JIA failed to analyze whether such transactions fell within the purview of Article 1.1(a)(1)(ii).[82] Korea also submits that the JIA should have analyzed the revenues that the various creditors could have expected after modifications were made to the terms of Hynix's outstanding debt, compared to the revenues they could have expected if those modifications had not been made.[83] Contrary to Korea's assertions, an investigating authority is not required to analyze loan modifications or debt-to-equity swaps as revenue foregone under Article 1.1(a)(1)(ii) of the SCM Agreement.

48. Nothing in the text of Article 1.1(a)(1)(i) obligated the JIA to treat these transactions as foregone revenue under Article 1.1(a)(1)(ii). Further, in the context of Article 1.1(a), the term "revenue" refers to forms of *government* revenue, such as taxes, duties, or other monies collected by a government,[84] rather than income or profit by a creditor, as Korea seems to suggest.[85] Under this reading of the provision, Article 1.1(a)(1)(ii) is designed to capture an entirely different set of transactions than Article 1.1(a)(1)(i). Previous panels have recognized, as discussed above, that loan restructuring and debt-to-equity swaps may be considered direct transfers of funds under Article 1.1(a)(1)(i) of the SCM Agreement.[86] Given the text of Article 1.1(a)(1)(ii), as clarified by the findings of prior panels, the Panel should reject Korea's assertion that loan restructurings and debt-to-equity swaps must be considered "foregone revenue."

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[81] *Id.*, paras. 176-178.

[82] *Id.*, para. 180.

[83] *Id.*

[84] *See e.g.*, *US – FSC (AB),* para. 90; *Canada – Autos (AB)*, para. 91.

[85] First Written Submission of Korea, para. 183.

[86] *See e.g., Korea – Commercial Vessels*, para. 7.411 (finding that debt-to-equity swaps, interest rate reduction, interest forgiveness or deferrals all constitute direct transfers of funds within the meaning of Article 1.1(a)(1)(i)).

D. Korea's Approach to the Benefit Analysis Under the SCM Agreement Misidentifies the Government Financial Contribution that Confers the Benefit

49. Korea argues that the government "financial contribution" that confers a benefit is the government's action of entrustment or direction,[87] and that therefore the investigating authority was required to evaluate whether the action of entrustment or direction made Hynix "better off."[88] Korea's approach to the benefit analysis, however, is inconsistent with Article 1.1 of the SCM Agreement because it misidentifies the proper "financial contribution" by which the existence of a benefit is determined, and is otherwise unworkable as a practical matter.

50. Article 1.1 of the SCM Agreement defines a subsidy as a government financial contribution that confers a "benefit." The SCM Agreement does not define the term "benefit." However, in *Canada – Aircraft*, the panel found that a benefit exists where "the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution."[89] In reviewing that report, the Appellate Body affirmed that a benefit exists where "the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution."[90] In determining the existence of a benefit, therefore, the issue is the position of the *recipient* "but for" or "absent" the government's financial contribution. Korea's emphasis on whether the "restructuring made the *creditors* ... 'better off'" is thus misplaced.[91]

51. The Appellate Body has stated that the point of comparison for determining the existence of a benefit is "the marketplace"; *i.e.*, a benefit exists where the financial contribution is received on terms more favorable than those available in the market.[92] Following the reasoning of the Appellate Body, the *Brazil – Aircraft (Article 21.5)* panel concluded that the concept of a comparison market necessarily means a "*commercial* market, i.e., a market undistorted by government intervention."[93] In other words, only by comparison to a market undistorted by the government's financial contribution is it possible to determine whether the recipient is better off than it otherwise would have been absent the financial contribution.

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[87] First Written Submission of Korea, para. 228.

[88] *Id.*, para. 228-29.

[89] *Canada – Aircraft (Panel)*, para. 9.112.

[90] *Canada – Aircraft (AB)*, para. 157.

[91] First Written Submission of Korea, para. 242 (emphasis added). Indeed, Korea's reasoning borders on the "cost to government" approach to benefit analysis rejected by the Appellate Body in *Canada – Aircraft*.

[92] *Id.*

[93] *Brazil – Aircraft (Article 21.5) (Panel)* , para. 5.29 (emphasis in original).

52. Article 14 of the SCM Agreement does not contain a definition of the concept of benefit referenced in Article 1.1(b). Rather, Article 14 provides guidelines that must be followed in establishing "methods" for applying that concept to particular types of financial contributions. Therefore, each guideline in Article 14 must be interpreted in a manner that is consistent with the meaning of the term "benefit" as used in Article 1.1 of the SCM Agreement. These guidelines, like the panel and Appellate Body findings quoted above, make clear that identifying the financial contribution is the first step in a benefit analysis. It is here that Korea errs.

53. Korea argues that in a case of entrustment or direction, the benefit must be conferred by the government action of entrusting or directing the private creditors and not by the receipt by Hynix of the actual financial contributions, that is, the various transactions of economic value.[94] Korea's argument, however, is flawed. Korea misidentifies the "financial contribution" by which the existence of a benefit is determined under Article 1.1. Further, Korea's theory of benefit would be impossible for an investigating authority to apply.

54. According to Korea, the proper benefit inquiry is whether the government's entrustment or direction of the private creditors made Hynix better off than a non-government entrusted or directed restructuring would have.[95] In other words, Korea claims that the "financial contribution" by which a benefit is determined is the government action of entrusting or directing the private creditors. This is incorrect. In essence, Korea confuses the two-step financial contribution analysis required under Article 1.1(a)(1)(iv) in cases of entrustment or direction with the analysis required under Article 1.1(b) to determine the existence of a benefit.

55. Under Article 1.1(a)(1)(iv), there is a "financial contribution" if, first, a government entrusts or directs a private body to carry out one of the functions in subparagraphs (i)-(iii) and, second, the private body provides the actual contribution, or transaction of economic value. However, when it comes to the benefit analysis, the relevant part of the two-step "financial contribution" is the contribution, or transaction of economic value, itself, not the government entrustment or direction.

56. In other words, the term "financial contribution," as stated in Article 1.1(a)(1), necessarily refers to the functions of the types listed in subparagraphs (i) through (iii), irrespective of whether the case is one of government entrustment or direction. The term does not, as Korea improperly asserts, refer to the government action of entrusting or directing. Notably, in *US – DRAMS*, the Appellate Body found that "a finding of entrustment or direction, by itself, does not establish the existence of a financial contribution."[96] Again, for cases of government entrustment or direction, the investigating authority must find that the government has entrusted or directed a private body to carry out a transaction of economic value, as listed in

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[94] *See* First Written Submission of Korea, para. 228.

[95] *See id.*, paras. 228-229.

[96] *US – DRAMS (AB)*, para. 124.

subparagraphs (i) through (iii) of Article 1.1(a)(1). The entrustment or direction allows the investigating authority to attribute the private body's financial contribution to the government.[97] That financial contribution, that transaction of economic value, in essence is treated as being made by the government. It is treated as government action. Consequently, contrary to Korea's argument, the transaction of economic value is what must confer the benefit, and not the action of entrusting or directing itself.[98]

57. Further, Korea's argument would be nearly impossible to apply. Korea's approach to the benefit analysis would involve comparing the government entrusted or directed restructuring to a hypothetical non-government entrusted or directed restructuring. Depending on the facts, it may be extremely difficult for an investigating authority to identify such a hypothetical restructuring, and such a standard could require significant guesswork.[99]

58. Moreover, Korea is incapable of applying its own interpretation of "financial contribution" to its benefit analysis. When at the end of its benefit analysis Korea finally discusses Article 14 (albeit in a very general manner), Korea does not apply the meaning of the term "financial contribution" for which it advocates. Instead, its analysis turns on whether the "terms of the government loan made the recipient 'better off' than the available market alternatives."[100] Thus, Korea's approach would entail analysis of hypothetical scenarios that Korea itself appears to be incapable of further defining or applying.

59. For these reasons, Korea's benefit analysis is inconsistent with the SCM Agreement. The "financial contribution" that confers a benefit is the transaction of economic value, not the action of government entrustment or direction. Entrustment or direction is merely an analytical concept for purposes of determining whether a private body's financial contribution may be properly treated as a government financial contribution.

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[97] *See id.*, para. 108 ("[T]he terms 'entrusts' and 'directs' in paragraph (iv) identify the instances where seemingly private conduct may be attributable to a government for purposes of determining whether there has been a financial contribution within the meaning of the SCM Agreement."). Notably, the Appellate Body did not say that the terms "entrust" and "directs" identify a type of financial contribution; rather, they identify instances where a private body's financial contribution can be treated as a government financial contribution.

[98] The panel in *EC – DRAMS* looked at the actual financial contribution, or transaction of economic value, in determining the existence of a benefit. It examined whether a reasonable market investor would have purchased the convertible bonds that Hynix's creditors purchased. *See* paras. 7.203, 7.205.

[99] Further, the mere fact that other companies had engaged in similar types of general corporate and financial restructuring would not lead to the conclusion that the government entrusted or directed restructuring did not result in a benefit.

[100] First Written Submission of Korea, para. 251.

E. Privatization Jurisprudence Is Irrelevant to Determining the Benefit From a Debt-to-Equity Swap

60. Citing the Appellate Body report in *US – Countervailing Measures on Certain EC Products*, Korea argues that the JIA was required to consider the effect of the change in Hynix's share ownership during the December 2002 restructuring on Hynix's benefit, and that its failure to do so was inconsistent with Articles 10, 14, 19, and 21 of the SCM Agreement.[101] As noted in Part II above, given that Korea fails to specify how Japan's actions were inconsistent with these particular provisions, it does not appear to have established a *prima facie* case. Nonetheless, the United States offers the following observations regarding Korea's claim.

61. In *US – Countervailing Measures on Certain EC Products*, the issue was whether a benefit from a non-recurring financial contribution "continues to exist following a transfer of ownership of a state-owned enterprise to a new private owner at arm's length and for fair market value, where the government retains no 'controlling interest in the privatized producer' and transfers all or substantially all the property."[102] However, as the Appellate Body noted in that proceeding, the panel did not examine "whether a 'benefit', within the meaning of the SCM Agreement, would be extinguished following a change in ownership under circumstances different from those in the 12 cases under consideration."[103]

62. Both Korea and Japan appear to agree that the factual circumstances in this proceeding are different in a number of important respects from those at issue in *US – Countervailing Measures*. The portion of the Appellate Body report quoted by Korea makes clear that the Appellate Body's findings pertain to *privatization*. The passage repeatedly uses the word "privatization" and reaffirms the finding that an investigating authority, "when presented with information directed at proving that a 'benefit' no longer exists *following a privatization*," must determine whether the countervailing measure is still warranted.[104] Here, neither Korea nor Japan has asserted that Hynix was the subject of a privatization.

63. A debt-to-equity swap, in which creditors exchange the debt owed them for equity shares in a firm, is not the same as the privatization of a state-owned firm, and Korea has not demonstrated that a privatization occurred in this case: it has not asserted that the government owned Hynix prior to the debt-to-equity swap and that, through the swap, it transferred all or substantially all of Hynix to a new private owner, retaining no controlling interest for itself.

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[101] *See id.*, paras. 261-262.

[102] *US – Countervailing Measures on Certain EC Products (AB)*, para. 85.

[103] *Id.*, para. 85 n.177.

[104] First Written Submission of Korea, para. 261 n.222 (quoting *US – Countervailing Measures on Certain EC Products (AB)*, para. 144) (emphasis added).

64. Further, the question posed by privatization analysis is whether the privatization of a firm extinguishes the benefit received from a *prior* financial contribution.[105] As Korea notes, the privatization methodology described above applies to an analysis of the benefit from subsidies "received before the change in ownership."[106] Privatization, according to the Appellate Body, might extinguish the benefit conferred upon a firm by a financial contribution provided *prior to* the privatization. Here, however, it is the restructuring itself that the JIA concluded *conferred* the benefit. For these reasons, the United States submits that the Appellate Body's assessment of privatization in *US – Countervailing Measures on Certain EC Products* is irrelevant to the analysis of whether the December 2002 debt-to-equity swap resulted in a benefit to Hynix.

V. Injury Determination: Articles 15.5 and 19.1 of the SCM Agreement Do Not Require the Authority to Demonstrate a Causal Link Between Subsidy Practices at Issue and Injury

65. Korea's claim that JIA's injury determination is inconsistent with Articles 15.5 and 19.1 of the SCM Agreement proceeds from the premise that these provisions require authorities to demonstrate a causal link between the subsidy practice(s) at issue and the material injury experienced by the domestic industry. Korea's interpretation of Articles 15.5 and 19.1 is inconsistent with their language and prior reports discussing them.

66. The first sentence of Article 15.5 of the SCM Agreement reads as follows:

> It must be demonstrated that the subsidized imports are, through the effects[47] of subsidies, causing injury within the meaning of this Agreement.
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> _____
>
> [47] As set forth in paragraphs 2 and 4.

Article 19.1 of the SCM Agreement reads as follows:

> If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.

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[105] *See, e.g.*, *US – Countervailing Measures on Certain EC Products (AB)*, paras. 87, 121, 125, 158.

[106] First Written Submission of Korea, para. 261.

67. The subject of both the first sentence of Article 15.5 and the third clause of Article 19.1 is the same: "the subsidized imports." Thus, under each provision, it is the "subsidized imports" that must be causing injury.

68. This conclusion is buttressed by the second sentence of Article 15.5, which states that "[t]he 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 "demonstration" that the first clause of this sentence references is the same thing that "must be demonstrated" for purposes of the first sentence of Article 15.5. The second sentence of Article 15.5 emphasizes that this "demonstration" concerns "the subsidized imports." The second sentence of Article 15.5 does not mention subsidy practices at all.

69. Additionally, footnote 47 of the SCM Agreement explains the meaning of the term "the effects of subsidies" in the first sentence of Article 15.5 (and language parallel to that used in that sentence appears in Article 19.1). Thus, the text of the Agreement provides no basis for Korea's view that the phrase "effects of subsidies" appears in isolation in the first sentence of Article 15.5 and consequently must be assigned an Article-specific meaning by the Panel.[107] Instead, Footnote 47 indicates that the pertinent "effects of subsidies" are those set forth in Articles 15.2 and 15.4.

70. Neither Article 15.2 or 15.4 of the SCM Agreement requires an authority to make an independent assessment of the effects of the subsidy itself. Each concerns the "subsidized imports." Article 15.2 requires the authority to consider "the volume of the subsidized imports" and "the effects of subsidized imports on prices." Article 15.4 concerns examination of "the impact of the subsidized imports on the domestic industry."

71. Consequently, footnote 47 to the SCM Agreement indicates that an authority properly conducts the assessment of the "effects of subsidies" referenced in the first sentence of Article 15.5 by examining the volume, price effects, and impact of the subsidized imports. Thus, the first sentence of Article 15.5, along with its footnote, directs an authority to ascertain that the *subsidized imports* are causing injury. It does not require the authority to conduct a separate or independent examination of the effects of *subsidy practices*.

72. A GATT panel that examined the first sentence of Article 6:4 of the Tokyo Round *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreements on Tariffs and Trade* ("Tokyo Round Subsidies Code") reached the same

[107] Korea's proffered interpretation of Article 15.5 would essentially render footnote 47 a nullity. This is contrary to the general principle that "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." *Japan – Alcohol (AB)*, para. 4.3.

conclusion. The first sentence of Article 6:4 of the Tokyo Round Subsidies Code is virtually identical to the first sentence of Article 15.5 of the SCM Agreement.[108]

73. Specifically, in *United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*,[109] complainant Norway raised the same argument that Korea does here. It asserted that an authority must show a causal connection between any injury incurred and the subsidy practices themselves. The panel rejected Norway's argument as contrary to the principle of effective treaty interpretation. The panel emphasized the manner in which Article 6:4 of the Tokyo Round Subsidies Code was worded indicated that primary focus of the causation analysis was on the effects of the *subsidized imports*, rather than the effects of the *subsidy*.[110]

74. WTO panel and Appellate Body reports reinforce the notion that the *Atlantic Salmon* panel's interpretation of the first sentence of Article 6:4 of the Tokyo Round Subsidies Code is fully applicable to the nearly identical wording of the first sentence of Article 15.5 of the SCM Agreement.

75. This includes the *US – Hot-Rolled Steel* Appellate Body report which Korea cites. Contrary to Korea's assertion, *Hot-Rolled Steel* did not reject the "general approach to causation issues" articulated in the *Atlantic Salmon* reports.[111] The Appellate Body did decline to follow reasoning articulated in the *Atlantic Salmon* reports with respect to the question of how an

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[108] The only differences are that Article 6:4 used the term "the subsidy" while Article 15.5 uses the word "subsidies," and the cross-references in the footnotes are different, reflecting the different enumeration of the SCM Agreement and the Tokyo Round Subsidies Code.

[109] SCM/153 (adopted 28 April 1994) (*"US – Atlantic Salmon"*). Adopted GATT panel reports such as this are, in the words of the Appellate Body:

> an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.

Japan – Alcohol (AB), para. 5.6.

[110] *U.S. – Atlantic Salmon*, paras. 335-339. The U.S. International Trade Commission (USITC) prepared a single opinion dealing with the injury issues in the simultaneous antidumping and countervailing duty investigations concerning Atlantic Salmon from Norway. GATT panels issued separate reports on the consistency of the injury determination in the antidumping duty investigation with the Tokyo Round *Agreement on Implementation of Article VI of the General Agreements on Tariffs and Trade* and on the consistency of the injury determination in the countervailing duty investigation with the Tokyo Round Subsidies Code. In the report concerning the antidumping duty investigation, the Panel similarly concluded that the USITC did not act inconsistently with the GATT when its causation analysis focused on the effects of dumped imports rather than on the effects of dumping. *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, paras. 565-571 (adopted 27 April 1994).

[111] The United States observes that Japan agrees with the proposition that Korea has read too broadly the Appellate Body's criticism of the *Atlantic Salmon* report. First Written Submission of Japan, para. 599.

authority may implement the obligation articulated in the third sentence of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement not to attribute to dumped or subsidized imports injury caused by other factors.[112] However, nothing in *Hot-Rolled Steel* purported to reject or disapprove the reasoning of the *Atlantic Salmon* reports with respect to the question of how an authority satisfies the causal link requirement in the first sentence of Article 3.5 of the AD Agreement. (The first sentence of Article 3.5 of the AD Agreement is virtually identical to the first sentence of Article 15.5 of the SCM Agreement.) This is apparent from the language the Appellate Body used to explain how authorities must demonstrate that they satisfy the non-attribution obligation:

> [I]nvestigating authorities must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of the other factors.[113]

76. This statement indicates that Article 3.5 of the AD Agreement requires the identification of the injurious effects of the *dumped imports*.[114] Under the same logic, Article 15.5 of the SCM Agreement requires the identification of the injurious effects of *subsidized imports*. Thus, the *Hot-Rolled Steel* report supports the same conclusion as does *Atlantic Salmon*: the focus of the causal link requirement in the first sentence of Article 15.5 of the SCM Agreement is on the effects of the subsidized imports rather than the effects of the subsidy practices at issue.

77. This reading is further supported by the two previous panel reports addressing Korean challenges to countervailing duty measures on DRAMs.[115] Each panel rejected Korean claims that an investigating authority breached the causal link requirement articulated in the first sentence of Article 15.5 of the SCM Agreement. In each report, the respective panel stated that the authority did not act inconsistently with this requirement by performing an analysis that correlated the market share of the subject imports with declines in market share and profitability of domestic producers.[116] Thus, in both reports, the panels considered injury caused by the *subsidized imports* to be the focus of Article 15.5. Indeed, the panel report addressing the U.S.

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[112] *US – Hot-Rolled Steel (AB),* para. 226.

[113] *Id.*, para. 226. Although in *Hot-Rolled Steel* the Appellate Body discussed only the AD Agreement, Articles 3.5 of the AD Agreement and 15.5 of the SCM Agreement are worded virtually identically. For this reason, previous Panels addressing disputes concerning Article 15.5 of the SCM Agreement have looked for guidance to prior reports discussing Article 3.5 of the AD Agreement. *See US – DRAMS (Panel)*, para. 7.353.

[114] The Appellate Body has indicated likewise in subsequent reports. Appellate Body Report, *EC – Cast Iron Fittings*, para. 175 ("Article 3.5 requires that an investigating authority establish a 'causal relationship' between *dumped imports* and the domestic industry's injury.") (emphasis added).

[115] *EC – DRAMS*; *US – DRAMS (Panel).*

[116] *EC – DRAMS*, paras. 7.401-7.402; *US – DRAMS (Panel)*, para. 7.320.

measures emphasized this conclusion by stating that Article 15.5 "requires the investigating authority to determine that 'subsidized imports' – as opposed to any subsidized brand – are causing injury."[117]

VI. Conclusion

78. The United States thanks the Panel for providing an opportunity to comment on the issues at stake in this proceeding, and hopes that its comments will prove to be useful.

[117] *US – DRAMS (Panel)*, para. 7.320. Additionally, each DRAM panel report cited to a relevant portion of the *Hot-Rolled Steel* Appellate Body report concerning non-attribution, in which the Appellate Body stated:

> We emphasize that the particular methods and approaches by which WTO members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known factors is not specified by the Anti-Dumping Agreement.

US – Hot-Rolled Steel (AB), para. 224. As these Panels found, this analysis is equally applicable to Article 15.5 of the SCM Agreement. *EC – DRAMS*, para. 7.405; *US – DRAMS (Panel)*, paras. 7.352-7.353. Consequently, authorities cannot be compelled to use a specific method to address causation requirements under Article 15.5.