EUROPEAN COMMUNITIES – COUNTERVAILING MEASURES ON DRAMS FROM KOREA

WT/DS299

THIRD PARTY SUBMISSION

OF THE

UNITED STATES OF AMERICA

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I. INTRODUCTION

1. The United States welcomes this opportunity to present its views in this dispute, in which Korea challenges the imposition by the European Communities ("EC") of countervailing duties on DRAMs from Korea. As the Panel already knows from the first submissions of the parties, the United States also has imposed countervailing duties on DRAMs from Korea, and the U.S. action is presently before a WTO dispute settlement panel in WT/DS296.

2. It should come as no surprise that the determinations of the U.S. and EC authorities are not identical, and that the issues raised in this dispute and in WT/DS296, likewise, are not identical. For one thing, the authorities had before them different factual records. For another, 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 authorities may properly apply different methodologies to a similar factual situation.

3. However, notwithstanding their differences, both disputes raise issues of systemic importance. It is on those issues that the United States will comment in this submission.

II. GENERAL ISSUES

A. Standard of Review

4. The United States agrees with the EC that the issue of standard of review "is not all that complicated."[1] The parties appear to agree that Article 11 of the DSU sets forth the standard of review for this Panel. Article 11 calls for panels 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 ... ." With respect to disputes involving a determination made by a domestic authority based upon an administrative record, the Appellate Body, in *US – Cotton Yarn*, summarized the role of a panel under Article 11 as follows:

> [P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assess whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.[2]

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[1] *First Written Submission by the European Communities* (11 June 2004), para. 41 [hereinafter "EC First Submission"].

[2] *US – Cotton Yarn*, para. 74.

5. Thus, it is clear that the Panel's task is not to determine whether there was material injury or subsidization, but rather whether the EC authorities properly established the facts and evaluated them in an unbiased and objective way. Put differently, the Panel's task is to determine whether a reasonable, unbiased person, looking at the same evidentiary record as the EC authorities, could have – not would have – reached the same conclusions as did those authorities.

6. Korea professes not to disagree with this approach, but it actually does. A careful reading of Korea's first submission shows that Korea does not really challenge the evidence on which the EC authorities relied. Instead, Korea directs the Panel to look at other evidence and/or asserts that the EC authorities should have used different methodologies to compile or analyze the evidence.

7. In other words, even though Korea spends an enormous amount of time talking about "positive evidence," at its core, Korea's argument is not really about the nature of the evidence on which the EC determinations were based. Instead, Korea implores the Panel to reweigh the evidence in the hope of obtaining a different outcome. Indeed, early in its first submission, Korea highlights its vulnerability on this point by insisting that this "dispute does not involve any impermissible 'second guessing' of decisions by the competent authorities."[3] Korea protests too much, and we trust that the Panel will see Korea's arguments for what they are: nothing more than an impermissible request for this Panel to conduct a *de novo* review.

B. Burden of Proof

8. At the end of its discussion of standard of review, Korea asserts that the investigating authority bears the burden of proof.[4] This is a remarkable assertion for which Korea offers no citation.

9. The SCM Agreement imposes obligations on the authorities that they must satisfy, but the burden of proving that those obligations have not been satisfied, as under any WTO agreement, is on the complaining party. For example, in *US – Wool Shirts*, which involved a transitional safeguard under Article 6 of the *Agreement on Textiles and Clothing*, the complaining party – India – argued that because the transitional safeguard was an exception to basic WTO principles, the burden of proof was on the party imposing the safeguard to justify its action. The Appellate Body rejected this argument, finding that it was "up to India to put forward evidence and legal argument sufficient to demonstrate that the transitional safeguard action by the United States was

[3] *First Written Submission by the Republic of Korea* (7 May 2004), para. 15 [hereinafter "Korea First Submission"].

[4] Korea First Submission, paras. 31-32.

inconsistent with the obligations assumed by the United States under Articles 2 and 6 of the *ATC*."[5]

10. Accordingly, the burden is on Korea to prove that the EC acted in a WTO-inconsistent manner. The burden is not on the EC to prove that it acted in a WTO-consistent manner.

C. Positive Evidence

11. Another recurrent theme in Korea's first submission is the allegation that the determinations of the EC authorities were not based upon "positive evidence." Korea not only makes this accusation with respect to the provisions of the SCM Agreement that require that determinations be based upon positive evidence – Articles 2.4 (specificity) and 15.1 (injury) – but also with respect to provisions that do not so require – Articles 1 (financial contribution) and 14 (benefit).[6]

12. The Appellate Body has commented on "positive evidence" as follows:[7]

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

13. Lacking familiarity with the record before the EC, the United States will not offer any view on whether the evidence relied upon by the EC authorities was "affirmative," "objective," "verifiable" and "credible." The key point here is that Korea's argument is not really about whether the evidence relied upon by the EC authorities was "positive evidence." Instead, and notwithstanding its repeated protestations to the contrary, what Korea wants is for the Panel to reweigh the evidence relied upon by the EC authorities.

14. This can be seen, for example, in Korea's discussion of price effects.[8] Korea repeatedly asserts that the findings of the EC authorities regarding price effects were not based upon "positive evidence." However, Korea never explains why the evidence upon which the EC authorities relied does not qualify as "positive evidence." Instead, Korea alleges that there was other "positive evidence" that the EC ignored,[9] or that the "positive evidence" relied upon by the

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[5] *US – Wool Shirts*, page 16.

[6] *See, e.g.,* Korea First Submission, para. 31 ("To find a countervailable subsidy, the investigating authority must affirmatively prove the existence of each element of a subsidy based on positive evidence ... .").

[7] *US – Hot-Rolled Steel*, para. 192.

[8] Korea First Submission, paras. 135-182.

[9] *See, e.g.*, Korea First Submission, paras. 162-171.

authorities was "insufficient."[10] Neither one of these criticisms goes to the nature of the evidence relied upon by EC authorities, but instead goes to the authorities' weighing of the evidence that was before them. Korea wants the Panel to reweigh that evidence.

III. ISSUES CONCERNING SUBSIDY IDENTIFICATION AND CALCULATION

A. Korea's Approach to the "Entrusts or Directs" Standard Under Article 1.1(a)(1)(iv) of the SCM Agreement Is Incorrect

15. One of the central issues in this dispute appears to be the finding of the EC authorities that the GOK entrusted or directed private financial institutions to provide subsidies to that much-troubled company, Hynix. Korea argues that the EC authorities erred in so finding. However, it appears to be Korea that is in error insofar as its approach to the "entrusts or directs" standard under Article 1.1(a)(1)(iv) of the SCM Agreement is concerned.

1. There Is No Special Evidentiary Standard Applicable to Article 1.1(a)(1)(iv)

16. With respect to the EC's finding that the GOK directed private financial institutions to provide subsidies to Hynix, Korea advocates a special evidentiary standard for "entrustment or direction." According to Korea, government action amounts to entrustment or direction only where it is "clear and unambiguous"[11] or "specific and compelling."[12] Furthermore, discerning whether government action amounts to entrustment or direction demands "increased scrutiny."[13]

17. This assertion by Korea is completely unsupported. Neither Article 1.1(a)(1)(iv) itself nor any other provision of the WTO agreements supports the notion that some sort of special evidentiary standard exists for purposes of determining the existence of entrustment or direction. Instead, the applicable standard is the general evidentiary standard that applies in any dispute governed by Article 11 of the DSU. In this regard, the United States respectfully refers the Panel to the discussion of Article 11 set forth in Section II.A, above.

18. As part of its proposed evidentiary standard for entrustment or direction, Korea also argues that the evidence of entrustment or direction must be in a particular form; *i.e.*, an "explicit" government command.[14] Korea's use of the term "explicit" suggests that government entrustment or direction may only be evidenced by a formal or official command. Subparagraph (iv), however, cannot be limited in the manner Korea suggests.

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[10] Korea First Submission, para. 182.
[11] Korea First Submission, para. 405.
[12] Korea First Submission, para. 406.
[13] Korea First Submission, para. 411.
[14] Korea First Submission, para. 396.

19. The ordinary meaning of entrustment or direction includes, but is not limited to, an order or command.[15] Furthermore, governments have many tools at their disposal to effectuate a policy of subsidization. An interpretation of subparagraph (iv) that would rule out automatically, and in all cases, any government direction not expressed in writing would render Article 1.1(a)(1)(iv) virtually meaningless. In the absence of evidence to the contrary – and Korea has not provided any – the Panel must conclude that Members did not intend that governments be able to evade the subsidy disciplines by using less formal – but no less effective – methods to entrust or direct private parties to provide subsidies.[16]

2. Article 1.1(a)(1)(iv) Does Not Require a Bank-by-Bank, Transaction-by-Transaction Analysis of the Sort Described by Korea

20. Korea also asserts that the evidentiary standard of entrustment or direction under Article 1.1(a)(1)(iv) requires *a* government command to *an* explicitly named private body to take *an* explicitly identified action at *an* explicit point in time.[17] It is obvious from the provision's text that Article 1.1(a)(1)(iv) imposes no such requirement; the provision simply does not go into that level of detail.

21. Moreover, as a general evidentiary matter, any piece of evidence or fact can be relevant, provided it demonstrates, either individually or in conjunction with other evidence, whether or not a government entrusted or directed private bodies to provide financial contributions. The relative importance of each piece of evidence or fact can only be determined in the context of a particular case, and not on the basis of generalities.

22. Korea attempts to glean some textual support for its bank-by-bank, transaction-by-transaction standard by citing the use of the singular "a" financial contribution in the text of

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[15] The SCM Agreement does not define the terms "entrusts" and "directs." Therefore, one must look to the ordinary meaning of these terms. "Entrust" is defined in relevant part as "Invest with a trust; give (a person, etc.) responsibility for a task ... . Commit the execution of (a task) to a person ... ." *The New Shorter Oxford English Dictionary* (1993). Thus, if a government gives a "private body" responsibility to carry out what might otherwise be a governmental subsidy function of the type listed in subparagraphs (i)-(iii) of Article 1.1(a)(1), there would be a financial contribution within the meaning of Article 1.1(a)(1). Definitions of the word "direct" include "Cause to move in or take a specified direction; turn towards a specified destination or target"; "Give authoritative instructions to; to ordain, order (a person) *to do* (a thing) *to be done*; order the performance of" or "Regulate the course of; guide with advice". *The New Shorter Oxford English Dictionary* (1993). Additional definitions of "direct" include "Inform or guide (a person) as to the way; show or tell (a person) the way (to)"; and "govern the actions ... of." *The New Shorter Oxford English Dictionary* (1993). Thus, when a government "gives responsibility to", "orders", or "regulates the activities of" a private body such that one or more of the type of functions referred to in subparagraph (iv) is carried out, there is entrustment or direction by the government.

[16] Indeed the Appellate Body has cautioned against interpretations that "elevate form over substance and that permit Members to circumvent ... subsidy disciplines ... ." *Canada – Dairy Products*, para. 110. Although the Appellate Body was addressing export subsidy disciplines under the Agreement on Agriculture, its reasoning applies with equal force to the SCM Agreement.

[17] Korea First Submission, para. 396.

Article 1.1(a)(1).[18] However, applying Korea's logic to the text with respect to each of the elements of a countervailable subsidy reveals the fatal flaw in Korea's approach. Korea is correct that the text says "a" financial contribution. The text of Articles 1 and 2 of the SCM Agreement also use the singular "a" in referring to benefit, subsidy and specificity. If "a" financial contribution were interpreted to mean government direction to "a" particular bank, then specificity would be considered always in the context of, for example, an individual bank's loan to "a" beneficiary. The subsidy, therefore, would always be specific. Thus, Korea's "a"/singular argument would render Article 2 of the SCM Agreement a nullity, and, for that reason alone, should be rejected by the Panel.[19]

23. Even more significant, though, is the fact that Korea's "a"/singular argument overlooks the fact that use of the singular does not rule out a meaning that encompasses the plural of that term. In particular, the definition of the term "body", as used in "a private body" in subparagraph (iv), provides that the term "body" may refer to a single entity or more than one entity.[20] The ordinary meaning of the text of Article 1.1(a)(1)(iv), therefore, does not rule out government entrustment or direction to multiple private creditors as a group. To suggest, as Korea does, that entrustment or direction can *only* be found on a bank-specific basis, truly elevates form over substance.

3. Korea's Reliance on *US – Export Restraints* Is Misplaced

24. Korea's reliance on *US – Export Restraints* for its bank-by-bank, transaction-by-transaction evidentiary standard also is misplaced.[21] The panel in *US – Export Restraints* addressed a very different issue; *i.e.*, whether a hypothetical restriction on exports could constitute entrustment or direction under Article 1.1(a)(1)(iv).[22] Specifically, the panel opined as to whether a government's prohibition on exports of a particular input constituted entrustment or direction to owners of those goods to sell to domestic purchasers, thereby increasing domestic supply of the input to the benefit (in the form of lower prices) of domestic producers of

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[18] Korea First Submission, para. 410.

[19] *See US – Offset Act*, para. 7.114.

[20] *See The New Shorter Oxford English Dictionary* (1993) ("body" may refer to the singular, *e.g.*,"an individual, a person," or the plural, *e.g.*, "an aggregate of individuals"); *see also*, *US – Countervailing Measures*, para. 108 (discussing "a benefit" to "a recipient", Appellate Body stated that "a recipient" could mean more than one entity).

[21] Korea First Submission, paras. 409-410, discussing *US – Export Restraints*.

[22] The EC incorrectly suggests that a Canadian export restraint was at issue in *US – Export Restraints*. EC First Submission, paras. 279-283. In fact, there was neither an agency determination nor an actual export restraint at issue. Instead, Canada was challenging U.S. measures that Canada incorrectly claimed required U.S. authorities to treat export restraints as financial contributions. Thus, the panel's discussion of entrustment or direction under subparagraph (iv) was entirely in the abstract, and is best regarded as *obiter dicta*. In the view of the United States, however, this factual correction increases – rather than diminishes – the force of the EC's arguments concerning *US – Export Restraints*.

downstream products. Thus, the cited portion of the *US – Export Restraints* report is of limited (if any) relevance to the instant dispute.

25. Furthermore, even if this Panel should accept the premise that "the act of entrusting and that of directing 'necessarily carry with them the element of an explicit and affirmative action, be it delegation or command'",[23] there is no basis in the SCM Agreement for transforming the general concept of an "element of an explicit and affirmative action" into a "strict" evidentiary standard calling for express proof of formal government action on a bank-by-bank, transaction-by-transaction basis. The only purpose such a standard could have would be to make it easier for government-directed corporate bailouts to circumvent the disciplines of the SCM Agreement.

4. The Existence of Government Entrustment or Direction Must Be Determined by Reference to the Actions of the Government

26. Korea also argues that the behavior of private parties is relevant to whether there is government entrustment or direction. According to Korea, the phrase in subparagraph (iv) – "in no real sense, differs from practices normally followed by governments" – means that the private body must, in effect, become "the instrumentality of the government" and that "any discretion" left to the private body would mean that "the action can no longer be imputed to the government."[24] In other words, one must gauge the behavior of private bodies to know whether there was government entrustment or direction.

27. The United States disagrees with the premise of Korea's argument. As a general matter, Article 1.1 is concerned with whether the government made a "financial contribution," as that term is defined in Article 1.1(a)(1). The focus of Article 1.1(a)(1), including subparagraph (iv), therefore, is on "the action of the government" in making the "financial contribution,"[25] and the existence of a government financial contribution – whether direct or indirect – is determined in reference to the actions of the government. Thus, the text of subparagraph (iv) does not support Korea's position. Indeed, Korea's focus on the motives of the private bodies conflicts with its acknowledgment that the "perceived" or "confirmed" reaction by private entities "cannot be the basis on which the Member's compliance with its treaty obligations under the WTO is established."[26]

28. In addition, subparagraph (iv) requires that the financial contribution at issue "would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments." The text does not elaborate on what constitutes a function "which would normally be vested in the government" and that "in no real sense, differs from practices normally followed by governments." Significantly, however, this textual phrase

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[23] *Export Restraints*, para. 8.29.
[24] Korea First Submission, para. 406.
[25] *Canada – Aircraft*, para. 156.
[26] Korea First Submission, para. 413 (emphasis in original).

modifies "functions illustrated in subparagraphs (i) to (iii) above", *i.e.*, transferring funds, foregoing revenue, and providing or procuring goods. The issue, then, is whether the financial contribution functions at issue in a particular case are ordinarily performed by governments. Whether a practice differs, in any real sense, from practices normally followed by governments depends on the circumstances relating to the government and the financial contribution in question.

29. The functions at issue in this dispute are various financial measures (falling within subparagraph (i), transfer of funds) used to bail out an important, major company that was failing. While not all governments intervene in the market to provide subsidies to bail out failing companies, there are many instances in which governments do. In the case of Hynix, the private banks were acting in the place of the GOK in funding a government-directed bailout of a major Korean manufacturer. As such, the private banks were performing functions "which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments." There is no support for the notion that any discretion left to private bodies vitiates the governmental action. The focus in determining entrustment or direction is on the government's actions, not the effects of that action on, or the reaction to it by, those affected, even if those effects or reactions are expected.[27]

5. Summary

30. In sum, there is no distinct evidentiary standard for government entrustment or direction found in Article 1.1(a)(1)(iv) or elsewhere in the SCM Agreement or other WTO agreements. There is no requirement that evidence of government entrustment or direction take the form of a formal command, whether in writing or otherwise. And, there is no requirement for express proof of bank-by-bank, transaction-by-transaction government entrustment or direction.

31. Rather, the evidentiary standard in this dispute, as in any similar dispute where Article 11 of the DSU furnishes the standard, is whether there is a reasoned and adequate explanation of how the facts support the investigating authority's determination. The determination at issue here – whether there is government entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement – requires consideration of whether a government "gave responsibility to", "ordered", or "regulated the activities of" private bodies to "carry out" financial contribution functions, such as the transfer of funds. More specifically, the issue before the Panel is whether a reasonable, unbiased person looking at the totality of the evidence before the EC authorities could have reached the same conclusion as did those authorities; namely, that the GOK entrusted and directed private financial institutions to bail out the financially distraught Hynix.

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[27] *See, e.g.*, Korea First Submission, paras. 407, 413, 414; *see also US – Export Restraints*, para. 8.42 (emphasis in original).

B. Korea's Discussion of "Facts Available" Under Article 12.7 of the SCM Agreement

32. Korea criticizes the use of "facts available" by the EC authorities. However, Korea's discussion of "facts available" and Article 12.7 of the SCM Agreement reflect several errors of interpretation.

33. By way of background, when an investigating authority conducts a countervailing duty investigation, it relies upon respondent parties – both the interested Member and interested parties – to provide information necessary for making its determination. In cases where interested Members or interested parties frustrate the proceedings, either by withholding requested information or otherwise significantly impeding the investigation, Article12.7 of the SCM Agreement provides for the use of the facts available.[28]

34. Article 12.7, however, does not instruct authorities as to which facts on the record must be relied upon in making determinations. Nor does Article 12.7 instruct authorities as to how to assess or weigh the evidence on the record. Notwithstanding the silence of Article 12.7 on such matters, it seems obvious that where a party denies access to information, that fact would be part of the evidentiary record. Based upon a party's denial of access to information, the investigating authority can properly draw inferences concerning the reliability of other information provided by that party. Thus, an investigating authority can draw reasonable inferences from all of the facts on the record, and choose to rely, or place greater weight, upon information provided by other sources.

35. Korea suggests, however, that in the face of evidence on the record of a party's non-cooperation, the SCM Agreement *requires* authorities to ignore such evidence, and instead base their determinations solely upon the facts provided by the very source that selectively provided the requested information.[29] Korea's argument is flawed in several respects. First, it assumes that the only facts available to authorities are those provided by the respondent party or government. However, other facts are often on the record, including publicly available information and information provided by domestic interested parties.

36. Second, under Korea's approach, a respondent can pick and choose the information that an investigating authority must use in making a determination. Following Korea's logic, an interested party could supply information favorable to its position, while withholding unfavorable information. Under Korea's theory, only the information selectively provided by the

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[28] 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.

[29] Korea First Submission, paras. 329-330.

interested party could be used to make a determination. Such an absurd requirement would allow parties to manipulate the investigative process to obtain whatever results they desired, a result that hardly can be what the drafters of Article 12.7 intended.[30] The Panel should reject an interpretation of Article 12.7 that is aimed at preventing authorities from making determinations on the basis of all of the facts available on the record, including the fact that a party has withheld or denied access to necessary information.

37. Next, in an apparent rush to challenge nearly every aspect of the facts available applied by the EC, Korea goes so far as to use Annex II of the AD Agreement in an attempt to expand the scope of Article 12.7 of the SCM Agreement.[31] Based upon its reading of Annex II, Korea seeks to create a series of requirements for determinations made under Article 12.7 of the SCM.[32] To be clear, no annex or appendix governing "Best Information Available" exists in the SCM Agreement. Korea's assertion that certain, self-selected requirements contained in Annex II of the AD Agreement must apply to determinations made under Article 12.7 of the SCM Agreement is contrary to basic principles of treaty interpretation. One of those basic principles – repeatedly recalled by the Appellate Body – is that general rules of treaty interpretation neither require nor condone the importation into a treaty of words that are not there or concepts that were not intended.[33] It cannot be disputed that insofar as the SCM Agreement is concerned, the words of Annex II of the AD Agreement "are not there."

38. Certainly Annex II, like every other provision of the WTO agreements, may provide context for purposes of interpreting Article 12.7 of the SCM Agreement, although the conclusions to be drawn from considering Annex II as context can be debated. However, one contextual conclusion is beyond debate; namely, that no comparable annex exists in the SCM Agreement.[34] The Panel, therefore, must give meaning to the express absence of any annex or any textual reference to the requirements contained in Annex II of the AD Agreement. In particular, the Panel should reject Korea's efforts to do what the drafters did not; namely, make select portions of Annex II applicable to determinations under Article 12.7 of the SCM Agreement.

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[30] Indeed, it is ironic for Korea to be making such an argument, given that elsewhere it accuses the EC of "cherry-picking" data. Korea First Submission, para. 108, note 84.

[31] Annex II of the AD Agreement is entitled "Best Information Available In Terms of Paragraph 8 of Article 6."

[32] Korea First Submission, paras. 331-336.

[33] *India – Patent Protection*, paras. 41-42.

[34] Korea asserts that the absence of something like Annex II in the SCM Agreement can be attributed to the fact that the SCM Agreement, unlike the Antidumping Agreement, applies to Members, as well as to private companies. This argument is both irrelevant and incorrect. The argument is irrelevant because regardless of the reasons therefor, there is no counterpart to Annex II in the SCM Agreement, and the provisions of Annex II cannot be read into the SCM Agreement. The argument is incorrect because Article 6.11(ii) of the Antidumping Agreement expressly declares that "the government of the exporting Member" is an "interested party" for purposes of the Agreement.

39. Finally, Korea insists that even if an investigating authority's application of facts available is justified under the circumstances, that application should be limited to be "proportionate to the alleged non-cooperation or impediment."[35] Korea provides absolutely no textual support for this assertion. To the contrary, under Article 12.7, the use of facts available depends upon whether "necessary information" is provided. If necessary information is withheld, or an investigating authority is denied access to such information, the authority must draw inferences and reach conclusions using whatever facts are available in order to complete its investigation.

40. In sum, the United States is of the view that Article 12.7 does not prevent authorities from drawing inferences and reaching conclusions based upon the facts available, including the fact that a party has withheld information, or the fact that a party has denied the investigating authority access to information. The Panel should reject Korea's attempts to rewrite the SCM Agreement by importing select provisions from the AD Agreement.[36]

C. The Identification and Calculation of "Benefit" Under Articles 1.1 and 14 of the SCM Agreement

41. Korea argues that for *every* type of financial contribution, the relevant market from which to source the benchmark is a "primary market benchmark"; *i.e.*, the market of the particular Member at issue.[37] Korea's interpretation ignores the plain language of Article 14. Furthermore, Korea's reliance on *Softwood Lumber* in support of its argument is misplaced.

42. At the outset, it should be noted that Article 14 leaves the methodology for determining the existence and amount of benefit to the Members. Article 14 states that "any method used by the investigating authority" must be provided for in the national law or implementing regulations. The use of the term "any" confirms that there is not a *single* calculation method dictated by the SCM Agreement. As further confirmation that Article 14 does not prescribe a single or precise methodology, the chapeau continues, "Furthermore, *any such method* shall be consistent with the following guidelines." (Emphasis added). As the Appellate Body confirmed in *Softwood Lumber*: "The reference to '*any*' method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient."[38] Thus, the only substantive limitations imposed on the calculation methodology can be found in subparagraphs (a)-(d) of Article 14, which contain "guidelines" on calculation methodologies.

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[35] Korea First Submission, paras. 340-341.

[36] The United States will not address the specific factual aspects of the EC's investigation, except to note that Korea's argument that the EC did not sufficiently inform Korea of the information sought before resorting to facts available seems to be a claim more properly made under Article 12.1 of the SCM Agreement. No such claim, however, appears to be within the terms of reference of the Panel.

[37] Korea First Submission, paras. 417-421.

[38] *US – Softwood Lumber*, para. 91.

43. Subparagraphs (a) and (d) of Article 14 contain language that explicitly identifies the relevant market from which to source the benchmark. Concerning equity capital, Article 14(a) focuses on "the usual investment practice ... of private investors *in the territory of that Member*" (emphasis added). Concerning goods or services, Article 14(d) focuses on the "prevailing market conditions for the good or service in question *in the country of provision or purchase ...* ." (emphasis added).

44. In contrast, subparagraphs (b) and (c) of Article 14 do not contain similarly limiting language. Concerning loans, subparagraph (b) focuses on "the amount the firm would pay on a comparable commercial loan which the firm could actually obtain *on the market*" (emphasis added). Concerning loan guarantees, Article 14(c) focuses on "the amount that the firm would pay on a comparable commercial loan absent the government guarantee."

45. Thus, subparagraphs (a) and (d) contain territorial limitations on the relevant benchmark; subparagraphs (b) and (c) do not. Nevertheless, Korea argues that it is "implicit" in the use of the term "comparable" in subparagraphs (b) and (c) that "comparisons be made using the experience of private actors *in the market of the Member*, since that experience is necessarily the most comparable" (emphasis added).[39] Such an argument runs afoul of a basic principle of treaty interpretation. As noted above, the Appellate Body has found that "the principles of treaty interpretation set out in Article 31 of the Vienna Convention ... neither require nor condone the imputation into a treaty of words that are not there ... ."[40] The Panel should reject Korea's attempt to do just that.

46. Korea also argues that a preference for the use of benchmarks from the market of the Member under investigation is reflected in the Appellate Body's recent report in *Softwood Lumber*.[41] Korea's reliance on *Softwood Lumber* is misplaced. The Appellate Body's findings in that dispute were limited to subparagraph (d) of Article 14, which contains the phrase "in the country of provision or purchase."[42] There is no such territorial limitation language in subparagraphs (b) and (c). The use of different words in different subparagraphs of the same article suggests an intent on the part of the drafters to convey different meanings.[43] The Panel, therefore, should reject Korea's "primary benchmark" test.[44]

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[39] Korea First Submission, para. 417.

[40] *India – Patent Protection*, para. 45.

[41] Korea First Submission, paras. 419-421.

[42] *See US – Softwood Lumber*, para. 82. Even with the explicit territorial limitations language contained in Article 14(d), the Appellate Body concluded that there may be case-specific circumstances which would necessitate use of a benchmark other than private prices in the country of provision. *See US – Softwood Lumber*, paras. 98-103.

[43] *See Australia – Salmon*, para. 123, note 69 ("In view of the very different language used in paragraph 4 of Annex [of the *SPS Agreement*] for the two types of risk assessments, we do not believe that it is correct to diminish the substantial differences between these two types of risk assessments ... .").

[44] Korea First Submission, para. 421.

D. Finding of Specificity Under Article 2

47. Article 2.1(c) establishes that, even if a subsidy has the "appearance" of being widely available throughout an economy, it may nevertheless be specific if, *inter alia*, as a matter of fact, the subsidy is predominantly used by or granted in disproportionately large amounts to certain enterprises. The criteria set forth in Article 2.1(c) are objective criteria relating to the number of users or actual use of a subsidy program, rather than the structure or legal eligibility of a subsidy program.

48. Korea suggests that the EC was required to examine the size and capital of Hynix in relation to the size and capital intensity of all companies undergoing debt restructurings and to consider that debt restructuring aid allocated among participating creditors on a *pro rata* basis, taking into account their existing debt holdings.[45] Article 2.1(c) does not contain *any* requirements regarding how a disproportionate use analysis is to be conducted, much less the specific analytical methods Korea asserts are required. Furthermore, carried to its logical conclusion, Korea's analytical approach would generate absurd results. Under Korea's approach, the more indebted a company is, the more subsidies it may receive without risking a finding of specificity.

IV. ISSUES CONCERNING THE DETERMINATION OF INJURY

A. Under the SCM Agreement, Subject Import Volume May be Examined in a Number of Different Ways

49. In its first submission, Korea focuses on whether the increase in subject import volume relative to consumption in the EC was significant; *i.e.*, whether there was a significant increase in Hynix's share of the EC market over the period examined. Korea asserts that there was no such significant increase in market share.[46] The United States is not familiar enough with the factual record of the EC's investigation to have a view as to whether there was such a significant increase.

50. From a legal perspective, however, the United States observes that Korea's emphasis on the significance of any increase in market share is not justified by the text of Articles 15.1 and 15.2 of the SCM Agreement. For an injury determination, Article 15.1 requires, *inter alia*, an objective examination of "both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products." (footnote omitted). In turn, SCM Agreement Article 15.2 provides, in pertinent part, that:

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[45] Korea First Submission, paras. 653, 655.

[46] *See, e.g.*, Korea's First Submission, paras. 138-142.

> [w]ith regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member.

Based upon the clear text of the SCM Agreement, which uses the disjunctive terms "either" and "or," analysis of the volume of subject imports should include consideration of the absolute volume of subsidized subject imports, as well as whether there was a significant increase in the volume of subsidized subject imports in absolute terms, a significant increase in the volume of subsidized subject imports relative to production in the importing Member, or a significant increase in the volume of subsidized subject imports relative to consumption in the importing Member. The last sentence of SCM Agreement Article 15.2 specifies that "no one or several" of the Article 15.2 factors "can necessarily give decisive guidance."

51. Thus, there is no requirement that there be an increase in subsidized import volume, let alone that an investigating authority find a "significant" increase in subsidized import volume relative to consumption. This is logical, because imports can have adverse price effects without gaining market share – for example, if they force the domestic industry to lower its prices in order to retain its share of the market. In a market for a fungible commodity where information is disseminated rapidly and prices can change frequently – as is the case with respect to DRAMs – it is quite possible that low-priced imports can have adverse price effects with little or no gain in market share.

B. Under the SCM Agreement, a Finding of Price Undercutting Is Not a Prerequisite to a Finding of Injurious Price Effects, and the Significance of Any Price Undercutting Depends on the Particular Factual Circumstances of the Case

52. Korea asserts that the EC examined price undercutting using three different methodologies, finding no undercutting based on the first, and finding undercutting 29 percent of the time under the second and 41 percent of the time under the third methodology. Korea asserts that in this case, the EC departed from its usual practice without providing adequate explanation for doing so, and implies that even the frequencies of undercutting found by the EC are insufficient.

53. The United States observes that other panels have found that it is for the investigating authorities in the first instance to select methodologies to analyze the price effects of subject imports. Articles 15.1 and 15.2 of the SCM Agreement do not specify any particular methodology to be used in making this analysis.[47]

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[47] *See, e.g., EC – Pipe Fittings*, para. 7.284; *Thailand – H-Beams*, para. 7.159 (interpreting the corresponding provisions of the AD Agreement).

54. Under the disjunctive language of Article 15.2, there is no requirement that the investigating authority find any price undercutting at all. Thus, there is certainly no requirement that subsidized subject imports undercut the domestic industry's prices or did so with a particular frequency or magnitude, let alone that investigating authorities find that subject imports were the lowest-priced product throughout the period examined.

55. It is the United States' view that the conditions of competition and business cycle distinctive to the industry are factual circumstances specific to an investigation that are relevant in ascertaining the significance of undercutting in a given case, and that an investigating authority will explain in its injury determination the significance of any undercutting in the context of the particular case.

C. Under Article 15 of the SCM Agreement, a Finding of Price Leadership Is Not a Prerequisite to a Determination of Material Injury

56. In addition to its assertion that Hynix was losing market share during the period examined, Korea asserts that the EC largely ignored its own finding that there is no such thing as a price leader in this market. According to Korea, this finding "should have called into serious doubt whether Hynix could really be the source of 'significant' price effects."[48] Korea intimates that there was a need for evidence of Hynix's price leadership for an affirmative material injury determination. Notably, however, Korea fails to identify any requirement under Article 15 of the SCM Agreement to find price leadership, because there is no such requirement.

V. CONCLUSION

57. The United States appreciates the opportunity to provide its views in this dispute and hopes its comments will be useful to the Panel in its deliberations.

[48] *See, e.g.*, Korea's First Submission at paras. 137, 149-150.