

**WORLD TRADE
ORGANIZATION**

WT/DS336/AB/R
28 November 2007

(07-5231)

Original: English

**JAPAN – COUNTERVAILING DUTIES ON
DYNAMIC RANDOM ACCESS MEMORIES FROM KOREA**

AB-2007-3

Report of the Appellate Body

I.	Introduction.....	1
II.	Arguments of the Participants and the Third Participants	5
A.	<i>Claims of Error by Japan – Appellant</i>	5
1.	The JIA's Determination of Entrustment or Direction with respect to the December 2002 Restructuring	5
2.	The JIA's Determination of Benefit with respect to the December 2002 Restructuring.....	9
3.	Calculation of the Amount of Benefit.....	9
4.	Benefit Calculation Methods	12
5.	Allocation of Benefit	14
B.	<i>Arguments of Korea – Appellee</i>	16
1.	The JIA's Determination of Entrustment or Direction with respect to the December 2002 Restructuring	16
2.	The JIA's Determination of Benefit with respect to the December 2002 Restructuring.....	18
3.	Calculation of the Amount of Benefit.....	18
4.	Benefit Calculation Methods	21
5.	Allocation of Benefit	23
C.	<i>Claims of Error by Korea – Other Appellant</i>	24
1.	The JIA's Determination of Benefit with respect to the October 2001 Restructuring.....	24
2.	Interested Parties.....	26
3.	Direct Transfer of Funds.....	27
4.	Causation of Injury	28
D.	<i>Arguments of Japan – Appellee</i>	31
1.	The JIA's Determination of Benefit with respect to the October 2001 Restructuring.....	31
2.	Interested Parties.....	32
3.	Direct Transfer of Funds.....	34
4.	Causation of Injury	35
E.	<i>Arguments of the Third Participants</i>	37
1.	European Communities.....	37
2.	United States	39
III.	Issues Raised in This Appeal	40
IV.	The JIA's Determination of Entrustment or Direction with respect to the December 2002 Restructuring	41
A.	<i>The Panel's Review of the JIA's Determination of Entrustment or Direction</i>	47
B.	<i>The Panel's Conclusion under Article 1.1(a)(1)(iv) of the SCM Agreement</i>	51

V.	The JIA's Determination of Benefit with respect to the December 2002 Restructuring.....	52
A.	<i>The Panel's Review of the JIA's Analysis of Commercial Reasonableness</i>	53
1.	The Independence of the Deutsche Bank Report.....	54
2.	The Substance of the Deutsche Bank Report.....	56
B.	<i>Conclusion</i>	57
VI.	Calculation of the Amount of Benefit.....	58
VII.	Benefit Calculation Methods	64
VIII.	Allocation of Benefit.....	70
1.	Article 19.4 of the <i>SCM Agreement</i>	71
2.	Article 11 of the DSU	72
IX.	The JIA's Determination of Benefit with respect to the October 2001 Restructuring	74
X.	Interested Parties	78
XI.	Direct Transfer of Funds.....	83
XII.	Causation of Injury	86
XIII.	Business Confidential Information	93
XIV.	Findings and Conclusions	94
ANNEX 1	Notification of an Appeal by Japan under Article 16.4 and Article 17 of the <i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i> (DSU), and under Rule 20(1) of the <i>Working Procedures for Appellate Review</i>	
ANNEX II	Notification of an Other Appeal by Korea under Article 16.4 and Article 17 of the <i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i> (DSU), and under Rule 23(1) of the <i>Working Procedures for Appellate Review</i>	

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
<i>EC – Countervailing Measures on DRAM Chips</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>Japan – DRAMs (Korea)</i>	Panel Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/R, circulated to WTO Members 13 July 2007
<i>Korea – Commercial Vessels</i>	Panel Report, <i>Korea – Measures Affecting Trade in Commercial Vessels</i> , WT/DS273/R, adopted 11 April 2005
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>US – Countervailing Measures on Certain EC Products</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, 5
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US – Lead and Bismuth II</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595
<i>US – Norwegian Salmon CVD</i>	GATT Panel Report, <i>Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway</i> , SCM/153, adopted 28 April 1994, BISD 41S/576
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW and Corr.1, adopted 9 May 2006
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report, WT/DS267/AB/R

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Definition
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
BCI	Business confidential information
Deutsche Bank Report	A restructuring plan prepared by Deutsche Bank that was made available to Hynix's creditors at the time they undertook the December 2002 Restructuring (Exhibit KOR-20 submitted by Korea to the Panel)
DRAMs	Dynamic random access memories
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
Elpida	Elpida Memory, Inc.
Final Determination	The JIA's final determination of the investigation, dated 20 January 2006, as provided for in paragraph 6 of Article 7 of Japan's Customs Law (Law No. 54 of 1910), with respect to DRAMs originating in the Republic of Korea (Notification No. 352 of the Ministry of Finance dated 4 August 2004) (Exhibit JPN-1(b))
Four Creditors	Four of Hynix's private creditors—KEB, Woori Bank, Chohung Bank, and NACF
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
GOK	Government of Korea
<i>Guidelines</i>	Japan's Guidelines for Procedures Relating to Countervailing and Anti-dumping Duties
Hynix	Hynix Semiconductor, Inc.
JIA	Japan's investigating authorities
JIA's Final Determination, Annex 1 (Essential Facts)	The essential facts forming the basis of the JIA's final determination regarding the countervailing duty investigation with respect to DRAMs from Korea (Exhibit JPN-2(b); Exhibit KOR-3) annexed to the JIA's Final Determination
JIA's Final Determination, Annex 3 (Rebuttals and Surrebuttals)	The JIA's response to the comments and rebuttals that had been submitted (Exhibit JPN-4(b); Exhibit KOR-4) annexed to the JIA's Final Determination
KDB	Korea Development Bank
KEB	Korea Exchange Bank
KEIC	Korea Export Insurance Corporation

Abbreviation	Definition
Micron	Micron Japan, Ltd.
NACF	National Agriculture Cooperative Federation
Other Creditors	The private creditors (apart from the Four Creditors) that also participated in the October 2001 and December 2002 Restructurings
Panel Report	Panel Report, <i>Japan – DRAMs (Korea)</i>
Restructurings	Debt-restructuring programmes entered into by Hynix and its creditors in October 2001 and December 2002
<i>SCM Agreement</i>	<i>Agreement on Subsidies and Countervailing Measures</i>
<i>Tokyo Round Subsidies Code</i>	<i>Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade</i>
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679</i>
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review, WT/AB/WP/5, 4 January 2005</i>
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>

WORLD TRADE ORGANIZATION
APPELLATE BODY

**Japan – Countervailing Duties on Dynamic
Random Access Memories from Korea**

Japan, *Appellant/Appellee*
Korea, *Other Appellant/Appellee*

European Communities, *Third Participant*
United States, *Third Participant*

AB-2007-3

Present:

Unterhalter, Presiding Member
Ganesan, Member
Sacerdoti, Member

I. Introduction

1. Japan and Korea each appeals certain issues of law and legal interpretation developed in the Panel Report, *Japan – Countervailing Duty Investigation on Dynamic Random Access Memories from Korea* (the "Panel Report").¹ The Panel was established to consider a complaint by Korea concerning the imposition of countervailing duties by Japan on imports of dynamic random access memories ("DRAMs") from Korea.

2. The countervailing duty investigation in this case was initiated by Japan on 4 August 2004, in response to an application submitted by Elpida Memory, Inc. ("Elpida") and Micron Japan, Ltd. ("Micron"). The Korean company investigated was Hynix Semiconductor, Inc. ("Hynix"). Japan's investigating authorities (the "JIA") sent questionnaires to a number of parties, including the Government of Korea (the "GOK"), Hynix, and certain Korean financial institutions.² The period of investigation for determining the existence of subsidies was 1 January to 31 December 2003, while the period of investigation for determining injury was 1 April 2001 to 31 March 2004.

3. On 21 October 2005, the JIA informed the GOK and the parties involved in the proceeding of the essential facts under consideration (the "Essential Facts"), pursuant to Article 12.8 of the *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement"). In the Essential Facts, the JIA found that certain debt-restructuring programmes entered into by Hynix and its creditors (the "Restructurings") in October 2001 and December 2002 were countervailable subsidies and calculated

¹WT/DS336/R, 13 July 2007.

²Panel Report, para. 2.1.

a countervailing duty rate of 27.2 per cent on imports of DRAMs from Korea, manufactured by Hynix.³

4. The JIA provided the GOK and the parties involved in the proceedings with the opportunity to submit comments and rebuttals on the Essential Facts. In the JIA's final determination dated 20 January 2006 (the "Final Determination")⁴, the JIA confirmed the findings set out in the Essential Facts. Annexed to the Final Determination were these Essential Facts ("JIA's Final Determination, Annex 1 (Essential Facts)") and the JIA's response to the comments and rebuttals that had been submitted ("JIA's Final Determination, Annex 3 (Rebuttals and Surrebuttals)").⁵

5. Japan gave public notice of the Final Determination and announced the imposition of countervailing duties in *Cabinet Order Relating to Countervailing Duty Levied on Dynamic Random Access Memory, Etc.*, (Cabinet Order No. 13)⁶ and *Announcement by the Ministry of Finance No. 35*⁷, published in Issue No. 4264 and Special Issue No. 17 of the *Official Gazette*, respectively, both dated 27 January 2006.

6. Before the Panel, Korea alleged that Japan had acted inconsistently with its obligations under Articles 1, 2, 10, 11, 12, 14, 15, 19, 21, 22, and 32 of the *SCM Agreement*, as well as under Articles VI:3 and X:3 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").⁸

7. On 7 May 2007, a confidential version of the Panel Report, containing business confidential information ("BCI"), was issued to the parties to the dispute. The Panel Report, excluding the BCI, was circulated to Members of the World Trade Organization (the "WTO") on 13 July 2007. The Panel concluded that the JIA had improperly found government "entrustment or direction" of four of Hynix's private creditors—Korea Exchange Bank (the "KEB"), Woori Bank, Chohung Bank, and National Agriculture Cooperative Federation (the "NACF") (collectively, the "Four Creditors")—to participate in the December 2002 Restructuring, contrary to Article 1.1(a)(1)(iv) of the *SCM Agreement*.⁹ In addition, the Panel found that the JIA had improperly determined that the

³Panel Report, para. 2.2. See also Final Determination, para. 19.

⁴Final determination of the investigation, as provided for in paragraph 6 of Article 7 of the Customs Tariff Law (Law No. 54 of 1910), with respect to DRAMs originating in the Republic of Korea (Notification No. 352 of the Ministry of Finance dated 4 August 2004) (Exhibit JPN-1(b) submitted by Japan to the Panel).

⁵Panel Report, para. 2.3.

⁶Exhibit KOR-1 submitted by Korea to the Panel; Exhibit JPN-7 submitted by Japan to the Panel. See also Panel Report, para. 2.4.

⁷Exhibit KOR-2 submitted by Korea to the Panel; Exhibit JPN-7 submitted by Japan to the Panel. See also Panel Report, para. 2.4.

⁸Panel Report, para. 3.1.

⁹*Ibid.*, paras. 7.254 and 8.2(a).

December 2002 Restructuring conferred a "benefit" on Hynix, contrary to Articles 1.1(b) and 14 of the *SCM Agreement*.¹⁰ With respect to both the October 2001 and December 2002 Restructurings, the Panel found that the JIA had improperly calculated the amount of benefit conferred on Hynix, contrary to Articles 1.1(b) and 14 of the *SCM Agreement*.¹¹ The Panel also found that the JIA had used methods to calculate the amount of benefit that were not provided for in Japan's national legislation or implementing regulations, contrary to the chapeau of Article 14 of the *SCM Agreement*.¹² Finally, the Panel found that Japan had acted inconsistently with Article 19.4 of the *SCM Agreement* by levying countervailing duties in 2006 to offset some of the subsidies provided by the October 2001 Restructuring, even though the JIA had found that the relevant subsidies applied only from 2001 to 2005.¹³

8. The Panel rejected Korea's claims that the JIA had improperly found government "entrustment or direction" of the Four Creditors to participate in the October 2001 Restructuring, contrary to Article 1.1(a)(1)(iv) of the *SCM Agreement*¹⁴, and that the JIA had improperly found that the October 2001 Restructuring conferred a "benefit" on Hynix, contrary to Articles 1.1(b) and 14 of the *SCM Agreement*.¹⁵ In addition, the Panel disagreed with Korea that the JIA had improperly treated Hynix's creditors as "interested parties", and improperly applied "facts available" and made adverse inferences, contrary to Articles 12.7 and 12.9 of the *SCM Agreement*.¹⁶ The Panel also rejected Korea's claim that the JIA had acted inconsistently with Article 1.1(a)(1)(i) of the *SCM Agreement* by improperly finding that the October 2001 and December 2002 Restructurings involved "direct transfer[s] of funds".¹⁷ Finally, the Panel rejected Korea's claim that the JIA had failed to demonstrate that the subsidized imports were, "through the effects of subsidies", causing injury, contrary to Articles 15.5 and 19.1 of the *SCM Agreement*.¹⁸

¹⁰Panel Report, paras. 7.282 and 8.2(b).

¹¹*Ibid.*, paras. 7.316 and 8.2(c).

¹²*Ibid.*, paras. 7.334 and 8.2(d).

¹³*Ibid.*, paras. 7.361 and 8.2(e).

¹⁴*Ibid.*, paras. 7.252 and 8.1(a).

¹⁵*Ibid.*, paras. 7.298 and 8.1(b).

¹⁶*Ibid.*, paras. 7.398 and 8.1(c).

¹⁷*Ibid.*, paras. 7.446 and 8.1(d). The Panel also dismissed Korea's claims that the JIA had failed to properly determine the specificity of the October 2001 and December 2002 Restructurings, contrary to Article 2 of the *SCM Agreement*, and that the JIA had failed to determine whether a benefit had continued to exist following changes in the ownership of Hynix, contrary to Articles 10, 14, 19, and 21 of the *SCM Agreement*. (*Ibid.*, para. 8.1(e) and 8.1(f)) However, these findings of the Panel are not subjects of this appeal.

¹⁸See *ibid.*, paras. 7.425 and 8.1(g).

9. In the light of its findings, the Panel recommended that Japan bring its measure into conformity with its obligations under the *SCM Agreement*.¹⁹

10. The Panel declined to rule on certain additional claims made by Korea under Articles 1, 2, 19.4, and 32.1 of the *SCM Agreement* and Article VI:3 of the GATT 1994.²⁰ The Panel also declined a request by Korea, under Article 19.1 of the DSU, that the Panel suggest that the countervailing duties imposed by Japan on imports of DRAMs from Hynix be immediately rescinded, and that any countervailing duties collected by Japan on such imports be refunded. The Panel held that the modalities of implementation of its recommendation are, in the first place, for Japan to determine.²¹

11. On 30 August 2007, Japan notified the Dispute Settlement Body (the "DSB"), pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretation developed by the Panel and filed a Notice of Appeal²² pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").²³ On 10 September 2007, Japan filed an appellant's submission. On 11 September 2007, Korea notified the DSB, pursuant to paragraph 4 of Article 16 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretation developed by the Panel and filed a Notice of Other Appeal²⁴ pursuant to Rule 23(1) of the *Working Procedures*. On 14 September 2007, Korea filed an other appellant's submission.²⁵ On 24 September 2007, Korea and Japan each filed an appellee's submission.²⁶ On the same day, the European Communities and the United States each filed a third participant's submission.²⁷

12. By letter dated 12 September 2007, Japan requested authorization from the Appellate Body Division hearing the appeal to correct certain "clerical errors" in its appellant's submission, pursuant to Rule 18(5) of the *Working Procedures*. On 14 September 2007, the Division invited all participants and third participants to comment on Japan's request. None of the participants or third

¹⁹Panel Report, para. 8.6.

²⁰*Ibid.*, para. 8.3. Although Korea made certain arguments under Article 22 of the *SCM Agreement* and Article X:3 of the GATT 1994, the Panel did not make any findings in respect of these provisions.

²¹*Ibid.*, paras. 8.7 and 8.8.

²²WT/DS336/8 (attached as Annex I to this Report).

²³WT/AB/WP/5, 4 January 2005.

²⁴WT/DS336/9 (attached as Annex II to this Report).

²⁵Pursuant to Rule 23(3) of the *Working Procedures*.

²⁶Pursuant to Rules 22 and 23(4) of the *Working Procedures*.

²⁷Pursuant to Rule 24(1) of the *Working Procedures*.

participants objected to Japan's request. On 18 September 2007, the Division authorized Japan to correct the "clerical errors" in its appellant's submission.

13. The oral hearing in this appeal was held on 11 October 2007. The participants and third participants presented oral arguments and responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by Japan – Appellant*

1. The JIA's Determination of Entrustment or Direction with respect to the December 2002 Restructuring

14. Japan argues that the Panel committed several errors in its review of the JIA's finding that the GOK "entrusted or directed" the Four Creditors to participate in the December 2002 Restructuring. In particular, Japan submits that the Panel acted inconsistently with Article 11 of the DSU by limiting the scope of its analysis to only a restructuring plan prepared by Deutsche Bank that was made available to Hynix's creditors at the time they undertook the December 2002 Restructuring (the "Deutsche Bank Report")²⁸ and by considering that the Deutsche Bank Report played "a central role" in the JIA's determination of "entrustment or direction".²⁹ In so doing, the Panel disregarded the fact that the JIA's determination was based on the totality of the evidence on record, including various other pieces of circumstantial evidence and intermediate findings made by the JIA based on that evidence. According to Japan, the JIA's assessment of the Deutsche Bank Report constituted "only a part of the JIA's intermediate findings of commercial reasonableness, which in turn was only a part of the overall entrustment or direction determination."³⁰ Japan argues that other intermediate findings relied upon by the JIA and allegedly accepted by the Panel include the JIA's findings that the GOK: (i) had an intent to save Hynix from financial collapse; (ii) had previously provided subsidies to Hynix through various subsidy programmes, including the October 2001 Restructuring; (iii) had the ability to influence the Four Creditors through, *inter alia*, its shareholding power; and (iv) was directly involved in the December 2002 Restructuring.³¹ In Japan's view, the Panel's failure to consider these other pieces of evidence and findings by the JIA is inconsistent with the standard of review articulated by the Appellate Body in *US – Countervailing Duty Investigation on DRAMS*. In particular, Japan argues that, "if ... an investigating authority relies on individual pieces of

²⁸Exhibit KOR-20 submitted by Korea to the Panel. See also Panel Report, paras. 7.158 and 7.159.

²⁹Japan's appellant's submission, para. 44.

³⁰*Ibid.*, para. 45.

³¹*Ibid.*

circumstantial evidence viewed together as support for a finding of entrustment or direction, a panel ... normally should consider that evidence in its totality ... in order to assess its probative value with respect to the investigating authority's determination."³² Japan further asserts that the Panel's approach would make it impossible for an investigating authority to rely on the totality of evidence, because "a flaw in its assessment of one of many pieces of evidence would necessarily invalidate the entire determination."³³

15. In addition, Japan contends that the Panel erred in its examination of certain findings made by the JIA regarding the Deutsche Bank Report. In particular, the Panel failed to properly analyze a number of press reports relied upon by the JIA as evidence "to impugn the commercial reliability of the Deutsche Bank Report."³⁴ Instead, the Panel "required that an individual piece of evidence, in and of itself, establish the JIA's intermediate factual finding of the intervention by the GOK in the preparation of the Deutsche Bank Report."³⁵ Japan asserts that a part of the context relied upon by the JIA "consisted of the countervailing duty investigations that both the European [Communities] and the United States had commenced at the time."³⁶ For Japan, the Panel's failure to consider this context is another example of how "the Panel did not review the JIA's determination, but rather made its own *de novo* determination of how strong it considered an item of evidence in isolation."³⁷

16. Japan also argues that the Panel reviewed each of the nine press reports relied upon by the JIA in isolation, and examined whether each report taken alone "could establish the GOK's intervention in the Deutsche Bank Report".³⁸ Specifically, Japan submits that the fourth and fifth press reports indicated that "the GOK was pushing creditors to sell Hynix despite a lack of viable buyers and resistance from the creditors."³⁹ For Japan, when read together with the preceding reports, as well as with the eighth and ninth reports, these reports demonstrate that the GOK initiated discussions with Hynix's creditors, "then ventured on to push creditors into selling Hynix, then, when it became apparent that such a sale was unlikely, the GOK pushed to keep Hynix as a going-concern."⁴⁰ Japan argues that, in the light of the GOK's "aggressive manner in intervening in determining the process of

³²Japan's appellant's submission, para. 67 (quoting Appellate Body Report, *US — Countervailing Duty Investigation on DRAMS*, para. 150, and referring to paras. 152 and 154).

³³*Ibid.*, para. 70.

³⁴*Ibid.*, para. 76 (quoting Panel Report, para. 7.169).

³⁵*Ibid.*, para. 80.

³⁶*Ibid.*, para. 86.

³⁷*Ibid.*, para. 88. (emphasis omitted)

³⁸*Ibid.*, para. 91.

³⁹*Ibid.*, para. 102.

⁴⁰*Ibid.*

restructuring Hynix, it is apparent that the GOK's interventions were linked to the content of [the] Deutsche Bank Report."⁴¹

17. Disagreeing with the Panel's piecemeal approach, Japan asserts that "the question the Panel had to answer was not whether the individual pieces of evidence directly supported a finding of government intervention into the Deutsche Bank Report."⁴² Rather, "the Panel's task was to consider whether the JIA came to a reasonable and objective conclusion ... based on all pieces of evidence in their totality, which was the method by which the JIA considered such evidence."⁴³ In Japan's view, "[e]ven where a panel reviews individual pieces of evidence it must do so in its capacity as the reviewer of the investigating authority's determination, not as the initial trier of fact[s]."⁴⁴

18. Moreover, according to Japan, the Panel failed to make an objective assessment of the JIA's findings in respect of the substance of the Deutsche Bank Report. Japan argues that the JIA did not seek to draw an intermediate finding that any one of the discrepancies it had identified in the Deutsche Bank Report "impugned the commerciality" of that Report. Nor "did the JIA deny the commercial nature of the Deutsche Bank Report, as suggested by the Panel."⁴⁵ Instead, the JIA found that each of the Four Creditors should have undertaken a "close examination" of the grounds for Deutsche Bank's recommendations because the Deutsche Bank Report was not "objective material" and did not constitute "a sufficient basis for the commercial financing judgment of experienced financial institutions" when viewed in the light of other evidence on record.⁴⁶

19. Japan also faults the Panel for allegedly examining the issue of whether the Deutsche Bank Report favoured Hynix over its creditors. According to Japan, this was not a conclusion that the JIA sought to draw. In Japan's view, by misstating the JIA's conclusions, the Panel failed to make an objective review, in accordance with Article 11 of the DSU.⁴⁷

20. In addition, Japan claims that the Panel acted inconsistently with Article 11 of the DSU by making a finding regarding a contract involving Deutsche Bank although Korea did not submit sufficient "evidence and argument to establish a *prima facie* case based on" that issue.⁴⁸ According

⁴¹Japan's appellant's submission, para. 102.

⁴²*Ibid.*, para. 117.

⁴³*Ibid.*

⁴⁴*Ibid.*

⁴⁵*Ibid.*, para. 150.

⁴⁶*Ibid.* (referring to JIA's Final Determination, Annex 1 (Essential Facts), para. 350 (with respect to KEB); and paras. 355, 358, and 363 (with respect to Woori Bank, Chohung Bank, and NACF)).

⁴⁷*Ibid.*, para. 124.

⁴⁸*Ibid.*, para. 138.

to Japan, the Panel collected the evidence of the relevant "contract *ex officio* in March 2007 well after both Panel sessions and the submission of all arguments by the parties"⁴⁹ and failed to provide Japan with any meaningful opportunity to present its views regarding the contract, thereby disregarding Japan's due process rights. Japan further asserts that the Panel also "disregard[ed] Japan's due process rights in making a finding on [this] issue".⁵⁰

21. Moreover, Japan claims that the Panel erred in treating certain of Japan's arguments—specifically, arguments relating to the way the Deutsche Bank Report analyzed the rate of return to Hynix's creditors under a liquidation scenario—as *ex post* rationalizations. In support of its contention, Japan points to various passages in the JIA's determination, arguing that, contrary to what the Panel found, the JIA did in fact make the relevant findings in its determination. According to Japan, the Panel failed to make an objective assessment of the matter before it, as required under Article 11 of the DSU, by refusing to consider these findings by the JIA.⁵¹

22. Finally, Japan argues that the Panel erred in finding that an error in the Deutsche Bank Report, said to have been admitted by Hynix, did not require correction.⁵² Japan claims that "[n]owhere in its Report did the Panel consider [the] effect of the correction of the error or the meaning thereof in accordance with what the JIA analyzed."⁵³ Japan asserts that the Panel failed to understand the JIA's assessment of the evidence and the conclusions drawn by the JIA based on that evidence and, instead, made a *de novo* review of the evidence to reach its own findings.

23. For all these reasons, Japan submits that the Panel failed to apply a proper standard of review and thereby exceeded the bounds of its discretion under Article 11 of the DSU. Japan, therefore, requests the Appellate Body to reverse the Panel's finding that the JIA "did not have a proper basis for finding that the Four Creditors were entrusted or directed by the [GOK] to participate in the December 2002 [R]estructuring", contrary to Article 1.1(a)(1)(iv) of the *SCM Agreement*.⁵⁴

⁴⁹Japan's appellant's submission, para. 135.

⁵⁰*Ibid.*, para. 139.

⁵¹*Ibid.*, paras. 154-158 (referring to JIA's Final Determination, Annex 3 (Rebuttals and Surrebuttals), para. 496; and JIA's Final Determination, Annex 1 (Essential Facts), para. 343).

⁵²*Ibid.*, para. 159 (referring to Panel Report, para. 7.244).

⁵³*Ibid.*, para. 162.

⁵⁴*Ibid.*, para. 32 (referring to Panel Report, paras. 7.252-7.254, and 8.2(a)).

2. The JIA's Determination of Benefit with respect to the December 2002 Restructuring

24. Japan requests the Appellate Body to reverse the Panel's finding that the JIA improperly determined the existence of "benefit" with respect to the December 2002 Restructuring. According to Japan, the Panel conducted no substantive analysis of the JIA's determination of benefit regarding the December 2002 Restructuring and based its finding on this issue solely on its finding with respect to "entrustment or direction". As this finding of the Panel was erroneous, its finding on the existence of benefit should also be rejected.⁵⁵

3. Calculation of the Amount of Benefit

25. Japan requests the Appellate Body to reverse the Panel's finding that Japan acted inconsistently with Articles 1.1(b) and 14 of the *SCM Agreement* by improperly calculating the amount of benefit conferred on Hynix through the October 2001 and December 2002 Restructurings.

(a) Calculation of the Amount of Benefit by Reference to an Outside Investor Standard

26. Japan challenges the Panel's finding that the JIA calculated the benefit of equity infusions and loans on the basis of an exclusively outside investor benchmark. In Japan's view, the Panel erroneously understood that the investment perspectives of inside investors were fundamentally different from those of outside investors. Japan also disagrees with the Panel's finding that there was no dispute between the parties that the investment perspectives of inside and outside investors differ.⁵⁶ Instead, Japan submits that the "basic standard" that the JIA applied to both inside and outside investors, with respect to both the October 2001 and December 2002 Restructurings, was the same, in that "they both seek to maximize profits or minimize losses."⁵⁷ Japan submits that, by overlooking the fact that the JIA calculated the amount of benefit based on this consideration, the Panel made a *de novo* review to reach its own finding that the JIA's methodology was based exclusively on the outside investor benchmark.⁵⁸

27. In support of its contention, Japan refers to the Panel's understanding of the term "normal commercial perspective" as used by the JIA in its determination.⁵⁹ Although Japan does not dispute that this term may refer to the outside creditors' perspective in certain contexts, Japan argues that it

⁵⁵Japan's appellant's submission, para. 168.

⁵⁶*Ibid.*, para. 183 (referring to Panel Report, para. 7.310).

⁵⁷*Ibid.*, para. 187. See also *ibid.*, paras. 183-185.

⁵⁸*Ibid.*, para. 188.

⁵⁹*Ibid.*, para. 191 (referring to Panel Report, para. 7.307).

had also provided a "fuller explanation" that the Panel disregarded—namely, that the JIA used the term to refer also to the inside investor's perspective.⁶⁰

28. Japan further alleges that the Panel erred in finding that "appraisals by credit rating companies are an 'exclusive' reference" to outside investors.⁶¹ According to Japan, the input from credit rating agencies does not determine the creditworthiness of a company for only new, outside investors. Moreover, the JIA's determination acknowledged that existing creditors also use ratings provided by credit rating agencies to determine the question of additional financing to existing borrowers.

29. Japan also argues that Article 14 of the *SCM Agreement*, which contains guidelines for the calculation of the amount of benefit, does not distinguish between outside and inside investors, nor does it set forth a specific methodology for dealing with companies in a specific financial situation. Japan asserts that the Panel overlooked the "considerable leeway" accorded to WTO Members to adopt a reasonable methodology to calculate the amount of benefit conferred by a subsidy.⁶² For Japan, in doing so, the Panel erroneously interpreted Article 14 of the *SCM Agreement* "as imposing an obligation to adopt a [particular] methodology based on a so-called inside investor standard."⁶³ Japan further asserts that the JIA adopted its methodology considering the record evidence that was available to it through the investigation process, as required by Article 12.2 of the *SCM Agreement*, and that, by "finding that the JIA should have calculated the amount of benefit based on an inside investor benchmark, the Panel implicitly required the JIA to have based its Final Determination on something other than evidence on the record."⁶⁴

(b) Calculation of the Amount of Benefit from the Perspective of the Recipient

30. Japan challenges the Panel's finding that "the JIA should not have treated the value of the equity that Hynix gave in return for the financing as zero, as Hynix had to dilute the ownership of existing shareholders in return."⁶⁵ Japan disagrees with the Panel for various reasons.

⁶⁰Japan appellant's submission, para. 191 (referring to Japan's response to Question 31 posed by the Panel, paras. 125-131).

⁶¹*Ibid.*, para. 198 (referring to Panel Report, footnote 507 to para. 7.307).

⁶²*Ibid.*, para. 205 (referring to Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.213).

⁶³*Ibid.*

⁶⁴*Ibid.*, para. 208.

⁶⁵*Ibid.*, para. 219 (referring to Panel Report, para. 7.313).

31. Japan submits first that Korea did not assert that dilution had occurred in this case.⁶⁶ Secondly, even if it had occurred, this would have taken place at the level of shareholders, and not at the level of Hynix.⁶⁷ Thirdly, no provision in Article 14 of the *SCM Agreement* sets forth "any rigid rules that purport to contemplate every conceivable factual circumstance"⁶⁸, nor is there a rule that investigating authorities must consider the dilution of ownership in the case of equity infusions. Japan further argues that, as the JIA has established that Hynix would not be able to provide any value to the creditors in the debt-to-equity swap, it was consistent with Article 1.1(b) and Article 14 of the *SCM Agreement* for the investigating authority to have concluded that the value of the shares provided in return for the financing received is zero in this case. Japan also argues that the JIA did not disregard "the value of the equity provided in return" nor did it only look at the amount of credits exchanged with the equity."⁶⁹ Rather, the JIA examined these issues and, on the basis of record evidence, determined that the value of such equity was zero.⁷⁰

(c) Other Arguments

(i) *Whether Korea Made a Prima Facie Case*

32. Japan argues that the Panel "had no basis to consider" whether the JIA calculated the amount of benefit from the perspective of outside investors, because Korea did not make such an argument.⁷¹ As a result, the Panel should not have made the finding that the JIA used an outside investor standard to reach its conclusion that "the JIA improperly calculated the amount of benefit conferred by the October 2001 and December 2002 [R]estructurings."⁷² Japan suggests that the Panel acted inconsistently with Article 11 of the DSU by considering a claim for which Korea did not establish a *prima facie* case.

(ii) *Calculation of the Amount of Benefit on the Basis of "Facts Available"*

33. Japan submits that the Panel erred in finding that the JIA calculated the amount of benefit using "facts available".⁷³ Instead, Japan asserts, the JIA "used information on the record, which was obtained from independent first-hand sources, such as the Bank of Korea, British Bankers'

⁶⁶Japan's appellant's submission, para. 220.

⁶⁷*Ibid.*

⁶⁸*Ibid.*, para. 221 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 92).

⁶⁹*Ibid.*, para. 227.

⁷⁰*Ibid.*

⁷¹*Ibid.*, para. 234.

⁷²*Ibid.* (quoting Panel Report, para. 7.315).

⁷³*Ibid.*, para. 243.

Association, Standard & Poor[']s, and the Korean National Tax Service."⁷⁴ According to Japan, the JIA was not required to use the information on other debt restructurings in Korea—information which was not provided to the JIA—because no parties had suggested that such information should be used to establish the benchmark for the Restructurings.⁷⁵ Japan asserts that the Panel acted inconsistently with Article 11 of the DSU by failing to consider these arguments presented by Japan. In Japan's view, the Panel's approach amounts to a "denial of Japan's due process right of defense", because it prevented Japan from responding to an argument that was made by Korea for the first time during the course of the Panel proceedings.⁷⁶

4. Benefit Calculation Methods

34. Japan challenges the Panel's findings regarding the benefit calculation methods used by the JIA, pursuant to Article 14 of the *SCM Agreement*, on two grounds. First, Japan claims that the Panel erroneously interpreted the provisions of the chapeau of Article 14 of the *SCM Agreement*. Secondly, Japan claims that the Panel failed to examine, in a manner consistent with Article 11 of the DSU, whether the "method[s] used" by the JIA were properly "provided for"⁷⁷ in Japan's *Guidelines for Procedures Relating to Countervailing and Anti-Dumping Duties* (the "*Guidelines*").

35. Japan argues that, although the Panel adopted a broad meaning of "method" to mean "a mode of procedure; a (defined or systematic) way of doing a thing"⁷⁸, the Panel incorrectly applied this meaning. Japan contends, for instance, that the Panel implied that the chapeau "requires" these "methods" to be "reduced" to a particular level of detail in a Member's national legislation or implementing regulations⁷⁹, in this case, to the specific mathematical formulae used by the JIA to calculate the benefit (that is, Formula 1 and Formula 2). For Japan, the Panel's interpretation suggests that detailed aspects of potential *applications* of the methods must be spelled out in a way that would leave no room for an investigating authority to adapt "methods" to the particular facts of an investigation, thereby rendering Article 14 "meaningless".⁸⁰ In support of its view, Japan refers to the Panel Report in *EC – Countervailing Measures on DRAM Chips* and the Appellate Body Report in

⁷⁴Japan's appellant's submission, para. 243 (referring to JIA's Final Determination, Annex 1 (Essential Facts), paras. 92 and 99).

⁷⁵*Ibid.*, paras. 243 and 244.

⁷⁶*Ibid.*, para. 237.

⁷⁷*Ibid.*, para. 255.

⁷⁸*Ibid.*, para. 257 (referring to Panel Report, para. 7.328; and quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993) Vol. 1, p. 1759).

⁷⁹*Ibid.*, para. 258 (referring to Panel Report, para. 7.330).

⁸⁰*Ibid.*, para. 259.

US – Softwood Lumber IV, which, Japan argues, both recognized that paragraphs (a)-(d) of Article 14 contain fairly general approaches to the calculation of benefit, and therefore illustrate the inherent flexibility in the chapeau of Article 14 to adapt to different factual situations of particular investigations.⁸¹

36. Japan argues further that the term "provided for" in the chapeau of Article 14 indicates a fairly general obligation for Members under that provision. The dictionary definition of the term "provided for" includes a reference to "enable or allow (something to be done)", which, in Japan's view, allows greater latitude than the term "set forth".⁸² For Japan, this means that a Member's legislation or implementing regulations should be considered consistent with the chapeau of Article 14 if they "enable" or "allow" the investigating authority to adopt a formula as a means of applying the method to calculate benefit in a specific case.

37. In support of its position, Japan points to the broadly defined calculation methods—that is, the "gamma" and "same person" methods—that were at issue in *US – Countervailing Measures on Certain EC Products*.⁸³ Japan notes that these "methods" were only "general statements of an approach", and were not expressed as mathematical or algebraic formulae.⁸⁴ Japan further contends that the Panel's interpretation of "methods" would render the right of Members to impose countervailing duties *inutile*, because it would require that Members foresee "each and every possible form" of financial contributions to determine and specify calculation methods in advance.⁸⁵ In addition, Japan argues that the Panel erroneously attached the transparency obligation in the second sentence of the chapeau of Article 14 (that is, the requirement that the application of the method be "transparent" and "adequately explained") to the obligation to "provide for" "methods", instead of linking the transparency obligation to the *application* of the benefit calculation methodology used in specific determinations.⁸⁶ For Japan, the distinction made in the chapeau between the "method" and its "application" confirms that the method itself need not be spelled out precisely.⁸⁷

⁸¹ Japan's appellant's submission, paras. 260-263 (referring to Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.213; and Appellate Body Report *US – Softwood Lumber IV*, para. 92).

⁸² *Ibid.*, para. 265 (quoting *Concise Oxford English Dictionary*, 10th ed., (Oxford, 2002), p. 1151).

⁸³ *Ibid.*, para. 266 (referring to, *inter alia*, Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 129).

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, para. 267.

⁸⁶ *Ibid.*, paras. 270 and 271 (referring to Panel Report, para. 7.327).

⁸⁷ *Ibid.*, para. 272.

38. In addition, Japan contends that, even under the Panel's interpretation of the chapeau, the Panel failed to properly review whether the "method[s] used" were "provided for" in Japan's *Guidelines*. Specifically, Japan argues that its *Guidelines* did "provide for" the "method[s] used" by the JIA to calculate the benefit conferred by the loans, equity infusions, and debt forgiveness, in this case.⁸⁸ According to Japan, the Panel reviewed only a part of the relevant provisions of the *Guidelines*, and then confused how the *Guidelines* "provided for" the methods to be used with the *application* of those methods. Although Japan's *Guidelines* may not directly refer to the integers or variables used in Formula 1 and Formula 2, the Panel overlooked how the *Guidelines* in fact "provide for" the methods, in at least "broad terms", in the elements corresponding to these integers.⁸⁹ According to Japan, the Panel's review of the mathematical formulae used by the JIA and its disregard of the JIA's explanation therein, amounts to a *de novo* review of the evidence, contrary to Article 11 of the DSU.⁹⁰

5. Allocation of Benefit

39. Japan appeals the Panel's finding that Japan "levied countervailing duties 'in excess of the amount of the subsidy found to exist', contrary to Article 19.4 of the *SCM Agreement*".⁹¹ Japan disagrees with the Panel that "the JIA's decision to allocate the benefit conferred by certain of the non-recurring subsidies resulting from the October 2001 [R]estructuring" to the years 2001 to 2005 meant that "Japan imposed countervailing duties in 2006 on imports which the JIA itself had found were not subsidized at the time of imposition."⁹²

40. Japan submits that "'the amount of the subsidy found to exist' [under Article 19.4] is the amount found in the final determination."⁹³ Japan maintains that "Article 19.1 does not require a prospective analysis [of] the situation after the time of the investigation."⁹⁴ Japan disagrees with the Panel that the use of the present tense in Article 19.1 of the *SCM Agreement* suggests that "countervailing duties may be imposed if subsidized imports, *i.e.*, imports that are presently subsidized, are presently causing injury." For Japan, "[t]he use of the present tense in Article 19.1

⁸⁸Japan's appellant's submission, paras. 278-280 (referring to Article 13(1)(iv), Article 13(1)(iii), and Article 13(1)(ii) of the *Guidelines*).

⁸⁹*Ibid.*, para. 282. Japan further explains how this is the case with respect to the integers used in Formula 2 (for "the amount of the subsidy") with respect to debt forgiveness and equity infusions (*ibid.*, para. 286) and in Formula 1 (for "calculating benefit") with respect to loan and loan maturity extensions. (*Ibid.*, para. 289).

⁹⁰*Ibid.*, para. 290.

⁹¹*Ibid.*, para. 294 (referring to Panel Report, para. 7.361).

⁹²Panel Report, para. 7.360.

⁹³Japan's appellant's submission, para. 301.

⁹⁴*Ibid.*, para. 313.

refers to the *concurrent* existence of subsidization, injury and the causal link, not to the fact that such events are *presently* occurring at the time of imposition."⁹⁵ Japan finds support for its position in the Appellate Body Report in *Mexico – Anti-Dumping Measures on Rice*, where the Appellate Body found that, "[i]n order to determine whether injury caused by dumping exists when the investigation takes place, 'historical data' may be used."⁹⁶

41. Japan finds further support for its position in "the lack of explicit language of a prospective determination [in Article 19.1]".⁹⁷ Japan contrasts this with the words "foreseen and imminent" in Article 15.7 and "likely to lead to continuation or recurrence of subsidization or injury" in Article 21.3. Japan asserts that the lack of such prospective language in Article 19.1 demonstrates that no prospective analysis of the situation after the time of the investigation is required.⁹⁸ Furthermore, Japan submits that the Panel did not explain why "only the amount of non-recurring subsidies has to be updated while findings of other elements for the imposition of the duty, such as the amount of recurring subsidies, the amount of products covered by these subsidies, injury, and causal relationship, may remain as of the period of investigation."⁹⁹

42. In addition, Japan claims that the Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU, when it found that the use of a five-year allocation period by the JIA "is a finding (even if only implicit) that the benefit will expire after a period of five years."¹⁰⁰ Japan explains that "the purpose of the JIA's calculation was merely to determine the amount of the subsidies conferred in 2003, the period of investigation in this case."¹⁰¹ According to Japan, "the Panel erred in equating a division by five of the total amount of the non-recurring subsidies to a determination that the subsidy would cease to exist after five years."¹⁰² Japan maintains that "the JIA did not make any finding that the subsidy would expire in 2005 or any finding of the amount of subsidy that Hynix would receive in 2006."¹⁰³

⁹⁵Japan's appellant's submission, para. 322. (original emphasis)

⁹⁶*Ibid.*, paras. 324 and 325 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 166 (footnotes omitted)).

⁹⁷*Ibid.*, para. 313.

⁹⁸*Ibid.*

⁹⁹*Ibid.*, para. 327.

¹⁰⁰*Ibid.*, para. 333 (referring to Panel Report, para. 7.360).

¹⁰¹*Ibid.*

¹⁰²*Ibid.*, para. 335.

¹⁰³*Ibid.*, para. 333.

B. *Arguments of Korea – Appellee*

1. The JIA's Determination of Entrustment or Direction with respect to the December 2002 Restructuring

43. Korea rejects Japan's allegation that the Panel acted inconsistently with Article 11 of the DSU in its review of the JIA's determination of "entrustment or direction" of the Four Creditors by the GOK with respect to the December 2002 Restructuring. In Korea's view, the standard of review applied by the Panel was entirely consistent with the standard identified by the Appellate Body in *US – Countervailing Duty Investigation on DRAMS* and in subsequent cases.¹⁰⁴

44. Korea submits that a review of the Panel's decision confirms that the Panel "refused to substitute its judgment for that of the JIA, as long as it found that the JIA's interpretation of the evidence was reasonable and, as a result, an investigating authority 'could properly' have reached the conclusion the JIA reached."¹⁰⁵ In addition, the Panel recognized that the JIA had based its finding of entrustment or direction on a consideration of "the totality of numerous items of evidence obtained"¹⁰⁶, and did not purport to re-weigh the evidence. Nor, in Korea's view, did the Panel require the JIA to demonstrate that each item of evidence would, when considered individually, support a finding of entrustment or direction. Rather, the Panel rightly "undertook only to analyze whether the JIA's factual findings were consistent with the underlying evidence."¹⁰⁷

45. Korea argues that, when an investigating authority "claims that its decision is supported by the interplay of various enumerated items of evidence considered in their 'totality,' then its decision can only be upheld if its findings concerning all of the enumerated items are found to be sound."¹⁰⁸ If, "instead, the investigating authority's finding on any single item is shown to be erroneous, then the investigating authority must be required to reconsider whether the remaining items, without the discredited item, would be sufficient to support the original conclusion."¹⁰⁹

46. Korea observes that the Panel, in this case, "found significant errors in the JIA's evaluation of certain critical items of evidence."¹¹⁰ In fact, the "[e]vidence that the JIA specifically identified as

¹⁰⁴ Korea's appellee's submission, paras. 53-55 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 186-188; and Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 93 and 99).

¹⁰⁵ *Ibid.*, para. 56.

¹⁰⁶ *Ibid.*, para. 78 (referring to Panel Report, paras. 7.51, 7.73, 7.96, 7.102, 7.172, 7.182, and 7.253).

¹⁰⁷ *Ibid.*, para. 78.

¹⁰⁸ *Ibid.*, para. 60.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, para. 63.

supporting its conclusions actually did not support its conclusions at all."¹¹¹ In such circumstances, the Panel rightly concluded that the JIA's determination of entrustment or direction was not consistent with the evidence or with Japan's obligations under the *SCM Agreement*. Korea adds that, "[f]or present purposes, the critical point is that the JIA determination that was before the Panel did not provide a correct analysis that justified the JIA's ultimate conclusions."¹¹² As a result, "the Panel had no choice but to rule that the JIA's findings were inconsistent with Japan's obligations under the relevant agreements."¹¹³ In Korea's view, it would have been improper "for the Panel to try to construct a correct analysis for the JIA that would justify the imposition of countervailing duties."¹¹⁴

47. Korea also disagrees with Japan's assertion that the Panel committed errors in its review of the JIA's findings with respect to the Deutsche Bank Report. In Korea's view, the Panel's findings concerning the reliability of the Deutsche Bank Report, the importance of that Report to the JIA's finding relating to commercial reasonableness, and the importance of that finding to the JIA's overall finding of entrustment or direction are all factual findings that are not subject to appellate review under Article 17.6 of the DSU because "a panel's finding concerning the meaning of an investigating authority's determination is a factual issue."¹¹⁵

48. In any event, Korea rejects Japan's contention that the Panel failed to properly examine the nine press reports indicating that the GOK had intervened in the preparation of the Deutsche Bank Report. As Korea sees it, the Panel considered the press reports both individually and collectively and found that a reasonable and impartial investigating authority could not have reached the conclusion drawn by the JIA based on that evidence.¹¹⁶

49. In addition, Korea submits that the Panel did not err in considering the relevance of certain evidence that Japan itself had submitted in support of its initial arguments to the Panel. In Korea's view, the Panel's consideration of such evidence did not constitute a denial of Japan's due process rights.

50. Korea also contests Japan's assertion that the Panel erred by rejecting as *ex post* rationalizations certain arguments made by Japan relating to the way the Deutsche Bank Report analyzed the rate of return to Hynix's creditors under a scenario of liquidation. Korea observes that

¹¹¹Korea's appellee's submission, para. 63.

¹¹²*Ibid.*, para. 65.

¹¹³*Ibid.*

¹¹⁴*Ibid.*

¹¹⁵*Ibid.*, para. 77.

¹¹⁶*Ibid.*, paras. 87-92.

the JIA did not address those issues in its determination of entrustment or direction. Under such circumstances, the Panel was correct in rejecting Japan's arguments as *ex post* rationalizations.

2. The JIA's Determination of Benefit with respect to the December 2002 Restructuring

51. Korea submits that Japan's challenge of the Panel's finding regarding the JIA's December 2002 benefit determination is based on a mischaracterization of the Panel's approach. First, Korea argues that, although Japan states that the Panel's findings concerning the existence of benefit "were wholly dependent on its finding on *subsidization*"¹¹⁷, what Japan meant was that the Panel's decision was wholly dependent on its finding that there was no "entrustment or direction", and hence no "financial contribution". Korea asserts that the premise of Japan's argument is incorrect, because the Panel actually held that the JIA's finding that Hynix's creditors had failed to undertake a "commercially reasonable" analysis was not supported by the evidence. In Korea's view, Japan is hoping that the Appellate Body will apply its arguments relating to entrustment or direction to the benefit issue. Korea contends, however, that such an approach is not consistent with the Appellate Body's *Working Procedures*, or with the principle of due process.¹¹⁸ In these circumstances, the Appellate Body should dismiss Japan's arguments relating to the Panel's finding on benefit for the December 2002 Restructuring. Assuming that the Appellate Body were to consider Japan's arguments, Korea requests the Appellate Body to find that the Panel was correct in concluding that the JIA did not have a proper basis for rejecting the Deutsche Bank Report, and that the Panel was correct in making the consequential finding on benefit.

3. Calculation of the Amount of Benefit

52. As a general matter, Korea argues that Japan is challenging a number of factual findings of the Panel relating to the calculation of the amount of benefit that are not subject to appellate review under Article 17.6 of the DSU. Despite its objections to the nature of Japan's claims, Korea nonetheless addresses Japan's arguments "for the sake of completeness".¹¹⁹

(a) Calculation of the Amount of Benefit by Reference to an Outside Investor Standard

53. Korea does not dispute that rational investors seek to maximize profits or minimize losses. Korea emphasizes, however, that this does not mean that the same result is reached when an

¹¹⁷Korea's appellee's submission, para. 125 (referring to Japan's appellant's submission, paras. 167 and 168). (original emphasis)

¹¹⁸*Ibid.*, paras. 128 and 129.

¹¹⁹*Ibid.*, para. 138.

investment decision is taken from an insider and outsider perspective, or that all investors will analyze the same investment in the same manner.¹²⁰ Korea argues that investors' returns differ depending on their pre-existing investments, which may give rise to claims on the insolvent company's future income so that an investment that would be rejected by an outsider may be accepted by an insider.¹²¹

54. Korea contends that the Panel rightly found that the JIA's actual calculation of the amount of benefit was based solely on the determination that no outside investor would have provided new loans to, or invested in, Hynix, and that the JIA did not properly establish the market benchmark for measuring benefit. For Korea, the Panel's findings that the terms "commercial market" and "normal commercial perspective" refer to the perspective of an outside investor¹²² are factual and beyond the scope of appellate review.¹²³ Further, Korea submits that Japan's argument seems to be based on a "shifting definition of the investor's 'perspective'".¹²⁴ Although Japan acknowledged before the Panel that this reference was intended to refer solely to an outside perspective, it now claims on appeal that the Panel failed to recognize that the JIA used the terms in some contexts to refer to an inside perspective, and that the term "perspective" refers to a principle of profit maximization.¹²⁵ In any event, Korea submits that there is no evidence that the JIA actually considered whether a rational creditor would have engaged in restructuring Hynix in the absence of alleged government interference.¹²⁶

55. Korea argues that Japan's claims under Article 14 in respect of equity infusions and loans are fundamentally flawed for two reasons: first, the restructuring transactions were not equity infusions or loans, but were transactions involving creditors with existing debts; and, secondly, Article 14 requires a consideration of "usual investment practices of private investors" (for equity infusions and comparable commercial loans). Both require the consideration of the specific terms of the transactions, and not, as Japan suggests, the use of rigid rules that compare debt restructurings to dissimilar transactions (that is, to *new* equity investments and *new* loans by outside investors).¹²⁷ Korea also submits that Japan's reliance on Article 12.2 is "inapposite", because this provision does not imply that an investigating authority is exonerated from the requirements of the *SCM Agreement* simply because it does not have sufficient evidence. Further, Korea posits that there is no

¹²⁰Korea's appellee's submission, paras. 140 and 143.

¹²¹*Ibid.*

¹²²*Ibid.*, para. 148 (referring to Japan's appellant's submission, paras. 190-202).

¹²³*Ibid.*, para. 149.

¹²⁴*Ibid.*, para. 150.

¹²⁵*Ibid.*

¹²⁶*Ibid.*, para. 151.

¹²⁷*Ibid.*, paras. 156-159.

inconsistency in the Panel's finding that the determination of the existence of a benefit did not require evidence of what (hypothetical) market-based inside investors would have done.¹²⁸

56. Korea argues that the Panel properly found the JIA's benefit calculation to be inconsistent with the JIA's "premise that existing creditors would possibly provide additional funding in order to maximize the recovery of credit".¹²⁹ For Korea, the Panel's finding is consistent with the evidence concerning the accounting treatment of the debts by Hynix's creditors. Korea also argues that neither Hynix nor its creditors treated the equity that Hynix provided to creditors in the debt-to-equity swaps as having a zero value.¹³⁰

(b) Calculation of the Amount of Benefit from the Perspective of the Recipient

57. In Korea's view, the Panel correctly considered the JIA's benefit analysis to be focused on the net cost to creditors, rather than the net benefit to Hynix (the recipient) and that the JIA failed to take account of the fact that the additional shares issued to creditors would dilute the ownership shares of existing creditors. Korea rejects Japan's assertion that Korea never "pointed out" that dilution actually occurred as being based on the wrong assumption that the Panel had to base its determination on Korea's arguments and evidence. In any event, Korea did in fact point this out to the Panel.¹³¹

58. Furthermore, characterizing dilution as a cost to shareholders, but not to Hynix, would mean that debt-to-equity swaps were considered as two separate transactions involving the company, on the one hand, and existing shareholders, on the other hand. It would also imply that there could never be a benefit to the recipient irrespective of the actual terms of the swap.¹³² Korea also points out that the idea that a company bears the cost of equity capital is commonplace in financial analysis. Finally, Korea asserts that, in the end, the equity did not have a zero value in either the accounting records of Hynix or the banks, or on the Korean stock market.¹³³

¹²⁸Korea's appellee's submission, paras. 162 and 163.

¹²⁹*Ibid.*, para. 164 (referring to Panel Report, para. 7.92).

¹³⁰*Ibid.*, paras. 166-168.

¹³¹*Ibid.*, para. 171 (referring to Korea's first written submission to the Panel, para. 258).

¹³²*Ibid.*, paras. 172 and 173.

¹³³*Ibid.*, para. 176.

(c) Other Arguments

(i) *Whether Korea Made a Prima Facie Case*

59. Korea argues that Japan's claim is based on a misunderstanding of what is required to establish a *prima facie* case. To do so, a complaining party does not need to anticipate every argument that a panel might choose to consider. Further, a panel is not constrained to consider only arguments and evidence cited by either party; it must examine and consider all the evidence before it.¹³⁴ Finally, Korea claims that it did argue before the Panel that the JIA improperly used an outside investor standard for both the October 2001 and December 2002 Restructurings.¹³⁵

(ii) *Calculation of the Amount of Benefit on the Basis of "Facts Available"*

60. Regarding the use of "facts available" in calculating the amount of benefit, Korea argues that this was not a case where interested parties refused to cooperate. There were sound reasons why the information on the restructuring of other Korean companies was not provided to the JIA, in particular, that Hynix did not itself have that information. Additionally, Korea argues that Hynix's creditors that did participate in other restructurings could not share that information because it was confidential.¹³⁶

61. Korea also argues that the JIA itself had never explicitly stated that it had adopted an outside investor standard based on "facts available" due to the inability of certain financial institutions to provide information. The Panel was therefore correct in dismissing Japan's argument as *ex post* rationalization.¹³⁷ According to Korea, even if the JIA had intended to use "facts available", this would be inconsistent with Article 12 of the *SCM Agreement*.

4. Benefit Calculation Methods

62. Korea argues that the calculation methods used by the JIA to calculate the amount of benefit provided to Hynix (found in paragraphs 90-106 of the JIA's Final Determination, Annex 1 (Essential Facts)) do not conform to the requirements of the chapeau of Article 14 of the *SCM Agreement*. Korea further notes that Formula 1 and Formula 2, found by the Panel not to have been "provided for" in Japan's *Guidelines*, were only part of what Korea had argued was the entire "benefit-calculation

¹³⁴Korea's appellee's submission, para. 178.

¹³⁵*Ibid.*, para. 179 (referring to Korea's first written submission to the Panel, para. 125, in turn quoting JIA's Final Determination, Annex 1 (Essential Facts), paras. 230, 298, and 376; as well as Korea's first written submission to the Panel, paras. 229-230).

¹³⁶*Ibid.*, para. 182.

¹³⁷*Ibid.*, para. 183.

system" used by the JIA.¹³⁸ Apart from these mathematical formulae, Korea also refers to the "methodological approaches" to the benefit calculation referred to in paragraphs 90-106 of the JIA's Final Determination, Annex 1 (Essential Facts).

63. Korea agrees with the Panel's characterization of the mathematical formulae and the methodological approaches contained in paragraphs 90-106 of the JIA's Final Determination, Annex 1 (Essential Facts) as the "methods used" for purposes of the chapeau of Article 14, because, according to Korea, they meet the definition of "method" proposed by Japan and adopted by the Panel.¹³⁹ Korea notes, however, that certain parts of these mathematical formulae and methodological approaches were not described anywhere in Japan's legislation or *Guidelines*.¹⁴⁰

64. Korea deems "inapposite" Japan's argument that the Panel Report in *EC – Countervailing Measures on DRAM Chips* indicates that investigating authorities must have flexibility in defining benefit calculation methods. Korea argues that the Panel in that case was actually examining the consistency of methods adopted by an investigating authority with the guidelines set forth in paragraphs (a)-(d) of Article 14, and not the procedural requirements under the first sentence of the chapeau.¹⁴¹ Further, Korea argues that Japan's contention that the "methods" must provide flexibility to adapt to specific cases fails because there was no specific tailoring to the facts in this case. Rather, the formulae used by the JIA were largely copied "verbatim" from the published regulations of the United States Department of Commerce.¹⁴²

65. Korea argues that Japan's equation of the term "provided for" with "enable" or "allow" does not fit the context of the chapeau and would render the first sentence of the chapeau meaningless.¹⁴³ Korea contends that both the French and Spanish versions of the term "provided for" translate into "shall be previewed", which cannot be shown to have occurred in this case.¹⁴⁴ Korea further contends that, at a minimum, the term "provided for" requires that the broad "framework" and "general approach" of the benefit calculation method be set forth in a Member's legislation or regulations. In

¹³⁸Korea's appellee's submission, para. 191.

¹³⁹*Ibid.*, para. 193 (referring to Japan's first written submission to the Panel, para. 528, in turn quoting *New Shorter Oxford Dictionary*, p. 1759).

¹⁴⁰*Ibid.*, paras. 194-197. In this regard, Korea refers to specific paragraphs in JIA's Final Determination, Annex 1 (Essential Facts) relating to, *inter alia*, the treatment of debt-to-equity swaps as "equity infusions" and extensions of maturities of existing loans as "loans"; the allocation of subsidies over time; and the interest rates for creditworthy and uncreditworthy companies.

¹⁴¹*Ibid.*, paras. 200 and 204.

¹⁴²*Ibid.*, para. 205.

¹⁴³*Ibid.*, para. 209.

¹⁴⁴*Ibid.*, para. 210 (referring to the French and Spanish versions of Article 14, which refer to "sera prévue" and "estará previsto").

this regard, Korea claims that, even under a broad interpretation of that term, it could not be said that the rules described in paragraphs 90-106 of the JIA's Final Determination, Annex 1 (Essential Facts) were "provided for" by Japan; neither could these rules be considered as case-specific applications of the framework provided in Japan's *Guidelines*, since the JIA never attempted to explain in its determination why the facts of this case mandated the adoption of these rules. In fact, Korea argues, several of the rules used by the JIA are not even mentioned in the *Guidelines*.¹⁴⁵

66. For these reasons, Korea requests the Appellate Body to uphold the finding of the Panel that Formula 1 and Formula 2 were "methods" that were not "provided for" in Japan's legislation or regulations.

5. Allocation of Benefit

67. Korea agrees with the Panel that Japan "levied countervailing duties 'in excess of the amount of the subsidy found to exist', contrary to Article 19.4 of the *SCM Agreement*."¹⁴⁶ Korea maintains that it "never claimed that the JIA was required to update its decision based on more recent information." Instead, Korea contended that the JIA's decision, "based on [its] analysis of the situation in 2003 ..., necessarily indicate[s] that the benefit of the subsidies received in 2001 did not extend beyond 2005."¹⁴⁷ In Korea's view, the JIA's determination was based on "an assumption that the subsidies had a life of five years, and that 2003 was the third year of the allocation for the alleged benefits from the October 2001 [R]estructuring and the second year of the allocation for the alleged benefits from the December 2002 [R]estructuring."¹⁴⁸ With respect to the benefit from the October 2001 Restructuring, Korea submits that, under the JIA's determination, a subsidy received

¹⁴⁵Korea's appellee's submission, paras. 213-215. In this regard, Korea refers to the five rules that it claims are not "provided for" in the *Guidelines*. In particular, paragraph 214 of Korea's appellee's submission reads, in relevant part:

A number of the rules announced by the JIA in its [Final Determination, Annex 1 (Essential Facts)] simply do not have any corresponding "framework" in Japan's regulations. For example, the [Essential] Facts establishes rules that: (1) extensions of loan maturities will be "deemed" to be new loans, (2) debt-equity swaps will be "deemed" to be equity infusions, (3) equity infusions and debt forgiveness will be considered to provide benefits over several years, and will therefore be allocated over time, (4) the allocation period for such subsidies shall reflect the average useful life of the recipients assets, as defined in the relevant tax laws, (5) a different interest rate will be used to discount future cash flows for creditworthy and uncreditworthy borrowers.

¹⁴⁶*Ibid.*, paras. 224-226 (referring to Panel Report, paras. 7.349-7.361).

¹⁴⁷*Ibid.*, para. 223.

¹⁴⁸*Ibid.*, para. 220.

in 2001 would provide benefits from 2001 through 2005.¹⁴⁹ It would "not provide benefits in 2006, because 2006 would be outside the five-year life of the subsidy."¹⁵⁰

68. Korea finds contextual support for its position in Article 19.1, which provides that a countervailing duty may be imposed "unless the subsidy or the subsidies are withdrawn". Korea explains that, "even if a subsidy was found to exist during the investigation period, no duty may be imposed if the subsidy is withdrawn, and thus ceases 'to exist,' prior to the final determination."¹⁵¹ In Korea's view, this implies that "a countervailing duty may be imposed only where the subsidy—and its benefit—continues to exist at the time the decision to impose the duty is made."¹⁵²

69. Finally, with respect to Japan's claim under Article 11 of the DSU, Korea asserts that "the number of years over which the 'subsidy amount is allocated' equalled the five-year 'useful life of the facilities stipulated in Korean law'".¹⁵³ Korea argues that "[t]he consequence of that determination was that the subsidies ceased to have a 'continuous effect,' and could not be 'allocated' once that period had expired."¹⁵⁴ In Korea's view, this was not a *de novo* determination; it was a necessary consequence of the JIA's own determination.¹⁵⁵

C. *Claims of Error by Korea – Other Appellant*

1. The JIA's Determination of Benefit with respect to the October 2001 Restructuring

70. Korea challenges the Panel's conclusion that the JIA could properly find that the October 2001 Restructuring conferred a "benefit" on Hynix in accordance with Articles 1.1(b) and 14 of the *SCM Agreement*.

71. First, Korea alleges that the Panel failed to review whether the alleged government action made Hynix "better off".¹⁵⁶ Korea refers to findings of the Appellate Body in *Canada – Aircraft* and argues that the Panel's approach improperly conflated the two distinct concepts of "financial contribution" and "benefit" in Article 1.1 of the *SCM Agreement*.¹⁵⁷ Korea contends that, under the

¹⁴⁹Korea's appellee's submission, para. 221.

¹⁵⁰*Ibid.*

¹⁵¹*Ibid.*, para. 227.

¹⁵²*Ibid.*

¹⁵³*Ibid.*, para. 243 (referring to JIA's Final Determination, Annex 1 (Essential Facts), para. 99).

¹⁵⁴*Ibid.*

¹⁵⁵*Ibid.*

¹⁵⁶Korea's other appellant's submission, para. 29.

¹⁵⁷*Ibid.*, para. 41.

Panel's analysis, a finding that there has been "entrustment or direction" was, by itself, a sufficient basis for a finding that a benefit exists. For Korea, the Panel's approach results in reading the separate benefit requirement of Article 1.1(b) out of the *SCM Agreement*.¹⁵⁸

72. Secondly, Korea disagrees with the Panel that evidence that Hynix's creditors relied on non-commercial considerations when deciding to extend further credit to Hynix "indicates terms more favourable than those available from the market (as the market is presumed to operate on the basis of commercial considerations)."¹⁵⁹ Korea alleges that, for the Panel, "the mere fact that Hynix's creditors failed to undertake a market-consistent analysis before entering into the October 2001 [R]estructuring indicated that the terms of the [R]estructuring they approved *must* have been more favourable than the terms of a purely market-driven restructuring."¹⁶⁰ Korea submits that the Panel's focus on the analysis actually performed by the creditors may be probative of the creditor's subjective *intent* in entering into those transactions and that this intent may be relevant to the analysis of "entrustment and direction". In Korea's view, however, it "does not permit any conclusion as to whether the 'recipient' *actually* received a benefit."¹⁶¹ Korea states that footnote 475 of the Panel Report, which was inserted at the interim review stage, "purported to address" this issue. Yet, in Korea's view, the Panel failed to explain why a creditor's imperfect analysis, based on incomplete information, cannot lead to the same result as would have been obtained in the market. According to Korea, "[i]t is always possible to be right for the wrong reasons."¹⁶²

73. Thirdly, Korea asserts that the JIA failed to take into account the content of the analyses prepared by Anjin Accounting and the Monitor Group. According to Korea, those analyses demonstrated that the alleged Korean government action had not conferred a benefit on Hynix, because it was comparable with what Hynix would have been able to obtain from other creditors who were not subjected to alleged government entrustment or direction.¹⁶³ Korea concedes that those reports were not finalized until after the October 2001 Restructuring was completed, but they were available to the JIA at the time it conducted its benefit examination, and should have been taken into account by the Panel. Korea asserts that, by disregarding the content of those two reports, the Panel improperly shifted the burden of proof from the Member seeking to impose countervailing duties to the Member whose exports are subject to the duty.

¹⁵⁸Korea's other appellant's submission, para. 43.

¹⁵⁹*Ibid.*, para. 39; and Panel Report, para. 7.276.

¹⁶⁰Korea's other appellant's submission, para. 39. (original emphasis)

¹⁶¹*Ibid.*, para. 44. (original emphasis)

¹⁶²*Ibid.*, para. 46.

¹⁶³*Ibid.*, para. 56.

2. Interested Parties

74. Korea argues that, by failing to properly consider that entities designated as "interested parties" under Article 12.9 of the *SCM Agreement* must "have an interest in the outcome of an investigation", the Panel improperly found that the JIA was correct in including certain financial institutions as "interested parties", and that the JIA did not err in applying "facts available". In this way, the JIA prejudiced Hynix's interests, thereby acting inconsistently with Article 12.7 of the *SCM Agreement*.

75. Korea submits that, by its ordinary meaning, the term "interested parties" relates to persons who are "affected or involved" in something.¹⁶⁴ Korea argues that the Panel was wrong in rejecting its argument that this "involvement" must be in the "outcome of the investigation" rather than, more broadly, in the "matter under investigation".¹⁶⁵ Additionally, according to Korea, the ordinary meaning of the term "interested" does not include entities that may have participated in matters giving rise to the dispute, but no longer have any interest in the dispute.

76. Korea argues that, although Article 12.9 does not set forth a "definition" of "interested parties", the list of entities in subparagraphs (i) and (ii) nonetheless provides a "strong indication" of the type of characteristics "interested parties" should have, namely, that they must be "directly affected" by the outcome of the investigation and therefore must have a "clear interest" in the proceedings.¹⁶⁶ Korea also refers to Articles 12.3 and 12.8 of the *SCM Agreement*, which provide that "interested parties" must be given the opportunity to present their "cases" and "defend their interests". For Korea, these provisions "make no sense if the term ... [is] defined to include entities that had no 'interests' in the proceeding, and thus no 'case' to present".¹⁶⁷

77. Korea also contends that the Panel's interpretation failed to give effect to the object and purpose of the provisions of the *SCM Agreement*. According to Korea, the Panel failed to "come to grips with the fundamental issue"¹⁶⁸ in this case, which is that, when an "interested party" is designated as such, and fails to provide the requested information, Article 12.7 allows the

¹⁶⁴Korea's other appellant's submission, para. 112 (referring to Panel Report, para. 7.387).

¹⁶⁵*Ibid.*

¹⁶⁶*Ibid.*, para. 114. At the oral hearing, Korea rejected Japan's arguments that Article 23 indicates that there may be "interested parties" with no interest in the outcome of the proceedings. According to Korea, Article 23 provides that an "interested party" who had an interest in the outcome might not be allowed to pursue judicial review if the administrative agency did not take any action against that party (for instance, if the agency found that an exporter did not receive subsidies and thus did not impose any countervailing duties). However, Korea contends, this does not mean that the exporter had no interest in the outcome of the proceedings.

¹⁶⁷*Ibid.*, paras. 116 and 119.

¹⁶⁸*Ibid.*, para. 120.

investigating authorities to make a decision on the basis of "facts available". In this case, the JIA chose to designate all banks participating in Hynix's Restructurings as "interested parties", regardless of their interest in the outcome of the investigation. When some of those banks failed to respond, the JIA "penalized" Hynix for their noncooperation, through the application of "facts available."¹⁶⁹ Korea further argues that, in failing to properly construe the purpose of Article 12.7, the Panel also ignored the risk that an "innocent respondent may face when an investigating authority makes a decision based on the non-responsiveness of some third party that the respondent has no ability to control."¹⁷⁰

78. Finally, Korea argues that the analysis by the Panel was inconsistent with its duty to conduct an objective assessment of the matter, pursuant to Article 11 of the DSU.¹⁷¹ Specifically, Korea submits that the Panel's statement that the absence of a definition of "interested party" explicitly requiring an interest in the outcome of the investigation indicates that "no such requirement exists", was inconsistent with the interpretative analysis that is required under the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").¹⁷²

3. Direct Transfer of Funds

79. Korea appeals the Panel's finding that the JIA could properly characterize the modification of loan repayment terms (including extensions of the maturities of existing loans, reductions of the interest rates on existing loans, and conversion of interest to principal) and debt-to-equity swaps as transactions involving "direct transfer[s] of funds" within the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement*.¹⁷³ For Korea, transactions that merely change the terms of existing claims or the legal nature of the recipient's obligations, and do not involve the provision of money to the alleged subsidy recipient, are not "direct transfer[s] of funds" within the ordinary meaning of that term.¹⁷⁴ Korea submits that "a 'transfer' of 'funds' occurs only when money changes hands from the government (or government-directed private body) to the subsidy recipient."¹⁷⁵ By way of contrast, Korea argues that, when "a lender agrees to extend the maturities of existing loans, or to reduce the

¹⁶⁹Korea's other appellant's submission, paras. 120 and 121. Korea refers to, *inter alia*, para. 7.288 of the Panel Report to rebut the Panel's statement that it could not identify any instances in which the JIA had penalized Hynix for using "facts available". (*Ibid.*, footnote 77 to para. 121)

¹⁷⁰*Ibid.*, para. 125.

¹⁷¹*Ibid.*, paras. 108-110 (referring to Panel Report, para. 7.386).

¹⁷²Korea's other appellant's submission, para. 108 (quoting Panel Report, para. 7.386). Korea contends that this error was exacerbated by the Panel's statement that Korea's interpretation would only be accepted by "*necessary* implication". (Korea's other appellant's submission, para. 110 (quoting Panel Report, para. 7.386) (emphasis added by Korea))

¹⁷³Panel Report, para. 7.446.

¹⁷⁴Korea's other appellant's submission, para. 133.

¹⁷⁵*Ibid.*, para. 134.

interest rates on existing loans, or to convert existing interest payment obligations into loan principal, or to write-off loans entirely", existing claims are modified without providing any money to the borrower.¹⁷⁶ For the same reason, debt-to-equity swaps are not to be considered as transfers of funds. Korea concedes, however, that these transactions might constitute "revenue ... foregone" in the sense of subparagraph (ii) of Article 1.1(a)(1).

80. Korea alleges that the Panel incorrectly "collapsed" the distinction between "direct transfer of funds" in subparagraph (i) and "revenue ... foregone" in subparagraph (ii) by "expanding the meaning of the term 'transfer of funds' beyond recognition."¹⁷⁷ If the phrase "direct transfer[s] of funds" covered transactions that reduced or modified the recipient's liabilities, there would be no need for a separate provision addressing situations in which "revenue that is otherwise due is foregone or not collected".¹⁷⁸ In Korea's view, the classification of a "financial contribution" under the different subparagraphs of Article 1.1(a)(1) does not depend on the nature of the recipient's obligation to the government (or government-entrusted or -directed entity). Instead, the financial contribution is defined by the nature of the contribution from the government to the recipient.¹⁷⁹ Under the Panel's interpretation, "any transaction in which the government agrees to forego revenue can be reconceived as a new 'grant'."¹⁸⁰ For Korea, this would effectively read subparagraph (ii) out of the *SCM Agreement*.

4. Causation of Injury

81. Korea argues that, under the first sentence of Article 15.5 of the *SCM Agreement*, it is not sufficient to show that the subsidized imports have caused injury to the domestic industry, there must also be a demonstration that the injury is caused "through the effects of subsidies."¹⁸¹ Korea argues that the Panel erred by effectively reading the phrase "through the effects of subsidy" out of Article 15.5 of the *SCM Agreement*, and thereby permitted countervailing duties to be imposed to offset injury that was not being caused by the subsidies in question. Korea asserts that the Panel expanded the scope of the countervailing measures to situations in which there are no trade distortions caused by subsidies.¹⁸²

¹⁷⁶Korea's other appellant's submission, para. 137.

¹⁷⁷*Ibid.*, para. 153.

¹⁷⁸*Ibid.*, para. 136 (referring to subparagraphs (i) and (ii) of Article 1.1(a)(1) of the *SCM Agreement*).

¹⁷⁹*Ibid.*, para. 147.

¹⁸⁰*Ibid.*, para. 153.

¹⁸¹*Ibid.*, para. 72.

¹⁸²*Ibid.*, para. 60.

82. According to Korea, the Panel's interpretation of the term "through the effects" is not consistent with the ordinary meaning, context, or negotiating history of the relevant provisions of the *SCM Agreement*.¹⁸³ Korea submits that "it is possible that imports that happened to be subsidized may cause injury to domestic producers through mechanisms that have nothing to do with subsidies."¹⁸⁴ For example, the imports might take sales away from the domestic producers because they are more innovative or of better quality or more attuned to customer desires. For Korea, in such cases, "there might be a basis for finding that 'imports' (which were the subject of a finding of subsidies) had caused injury to the domestic producers." However, there would be no basis for finding that the imports, that happened to be subsidized, had caused injury "through the effects of subsidies".¹⁸⁵ Further, Korea contends that the Panel's interpretation of the term "through the effects" cannot be reconciled with the text of Article 19.1, which repeats this term and sets forth the substantive conditions for the imposition of a countervailing duty.¹⁸⁶

83. In addition, Korea submits that Article 15.5 should be interpreted as requiring the same type of "but for" causation analysis that has been developed under Article 6.3 of the *SCM Agreement* in relation to "serious prejudice" that has occurred through the "effect of the subsidy".¹⁸⁷ The fact that Article 6 establishes a different injury standard than Article 15 does not mean that Article 15 permits a different type of causal nexus between subsidies and injury. Korea argues that the Panel erroneously read the language in Article 11.2 of the *SCM Agreement* as indicating that the only evidence needed to establish that "injury to a domestic industry is caused by subsidized imports 'through the effects of the subsidies'" is evidence concerning the evolution and effects of imports.¹⁸⁸ Korea contends that there is nothing in the *SCM Agreement* to indicate that the standard for initiating an investigation under Article 11.2 is the same as the standard for making an affirmative injury determination under Article 15. According to Korea, it would hardly be surprising that Article 11.2 might allow investigations to be initiated based on evidence that would not be sufficient to permit the imposition of duties. Korea also submits that the word "include" in Article 11.2 is usually understood to introduce a non-exhaustive list of examples, so there may be other information that is required under that Article.

84. Korea contends that the Panel's interpretation is also inconsistent with the object and purpose of the *SCM Agreement*, which seeks to ensure that countervailing duties are imposed only where

¹⁸³Korea's other appellant's submission, paras. 70-91.

¹⁸⁴*Ibid.*, para. 74.

¹⁸⁵*Ibid.*, para. 75.

¹⁸⁶*Ibid.*, paras. 76-79.

¹⁸⁷*Ibid.*, paras. 80-84 (referring to Panel Report, *Korea – Commercial Vessels*, paras. 7.612-7.616).

¹⁸⁸*Ibid.*, para. 88 (quoting Panel Report, paras. 7.416 and 7.417).

necessary to offset subsidies that cause injury or threat thereof to the domestic industry.¹⁸⁹ Korea argues that the Panel's interpretation is also inconsistent with the negotiating history of the *SCM Agreement*, because Articles 15.5 and 19.1 have their origins in the *Tokyo Round Subsidies Code*, and in particular Articles 4.4 and 6.4 of that Code.¹⁹⁰ Finally, Korea takes issue with the Panel's reliance on the findings of the panel in *US – Norwegian Salmon CVD* under the *Tokyo Round Subsidies Code*¹⁹¹ because "the 'precedential status' of that decision is irrelevant."¹⁹² Korea further suggests that, in *US – Hot-Rolled Steel*, the Appellate Body rejected the "general approach to causation issues" adopted by the *US – Norwegian Salmon CVD* panel.¹⁹³

85. On the facts of this case, Korea contends that the JIA failed to demonstrate that injury had been caused by subsidized imports "through the effects of subsidies". Korea alleges, in this regard, that the JIA disregarded Hynix's arguments that the alleged subsidies did not affect the prices or volumes of exports. To the contrary, the JIA found that any harm caused by Hynix's exports were an effect of the subsidy because Hynix would not have been in operation, or able to export, in the absence of subsidies.¹⁹⁴ Korea contends that, in so doing, the JIA assumed that defaults on outstanding debts by Hynix would result in liquidation and cessation of operations. According to Korea, the JIA's assumption was erroneous, because the bankruptcy of Hynix could simply have resulted in corporate reorganization, rather than liquidation and cessation of operations.¹⁹⁵

86. Korea submits that "contrary to what the JIA appeared to believe, 'bankruptcy' is not a synonym for piece-meal liquidation."¹⁹⁶ Instead, "bankruptcy" is a legal process, which affords a debtor protection from its creditors while the debtor's future is being determined. According to Korea, as a general matter, "Korean bankruptcy law favors reorganization over liquidation" and, consequently, there is no reason to believe that, if Hynix had filed for "bankruptcy", it would have ceased operations.

87. Korea further requests the Appellate Body to complete the legal analysis in this regard, and find that the JIA's finding concerning "the effect of the subsidies" is based on "unsupported

¹⁸⁹Korea's other appellant's submission, paras. 95-97.

¹⁹⁰*Ibid.*, paras. 92-94.

¹⁹¹*Ibid.*, para. 98 (referring to Panel Report, para. 7.412).

¹⁹²*Ibid.*, para. 102.

¹⁹³*Ibid.*, para. 100 (referring to Appellate Body Report, *US – Hot Rolled Steel*, para. 226).

¹⁹⁴*Ibid.*, para. 61.

¹⁹⁵*Ibid.*, paras. 61-64.

¹⁹⁶*Ibid.*, para. 63.

assumptions regarding the consequences of default by an insolvent debtor", and disregards "the bankruptcy laws that would actually apply in the case of default".¹⁹⁷

D. *Arguments of Japan – Appellee*

1. The JIA's Determination of Benefit with respect to the October 2001 Restructuring

88. Japan supports the Panel's finding that the JIA had properly determined that the October 2001 Restructuring conferred a benefit on Hynix. Japan submits that, contrary to assertions by Korea, the Panel did not state that "a finding that there has been 'entrustment or direction' is, by itself, a sufficient basis for finding that a benefit exists."¹⁹⁸ Japan maintains that "the Panel's finding is based on a comparison of the particular factual situations in this case".¹⁹⁹ Japan submits that the Panel confirmed the JIA's finding that, at the time of the October 2001 Restructuring, Hynix could not have obtained financial resources from the market.

89. Japan disagrees with Korea that the Panel upheld "the JIA's benefit finding solely on the assumption that a restructuring approved by creditors who fail to undertake a sufficient economic analysis must have more favourable terms than a restructuring adopted in a purely market-driven transaction."²⁰⁰ For Japan, the Panel's finding regarding the "non-commercial nature of Hynix's private creditors' decisions to extend financing to Hynix in the October 2001 Restructuring was not only based on insufficient economic analysis, but also their consideration of other factors which are not related to the financial conditions of Hynix."²⁰¹ In that respect, Japan argues that the Panel found that a number of facts confirmed the JIA's finding of the non-commercial nature of Woori Bank's²⁰² and Chohung Bank's²⁰³ decisions. Japan maintains that these facts demonstrate that the non-commercial nature of the decisions by Hynix's private creditors was not solely based on their insufficient analysis of the terms of the October 2001 Restructuring and the unavailability of the reports by Anjin Accounting and the Monitor Group.²⁰⁴

90. Finally, with respect to Korea's argument that the Panel "improperly shift[ed] the burden of proof from the Member seeking to impose countervailing duties to the Member on whom the duties

¹⁹⁷Korea's other appellant's submission, para. 64 and footnote 34 thereto.

¹⁹⁸Japan's appellee's submission, para. 35 (quoting Korea's other appellant's submission, para. 43).

¹⁹⁹*Ibid.*, para. 36.

²⁰⁰*Ibid.*, para. 42 (quoting Korea's other appellant's submission, para. 40).

²⁰¹*Ibid.*, paras. 43, 52, and 53.

²⁰²*Ibid.*, para. 52 (referring to Panel Report, para. 7.136).

²⁰³*Ibid.*, para. 53 (referring to Panel Report, paras. 7.137 and 7.138).

²⁰⁴*Ibid.*, para. 54.

will be imposed"²⁰⁵, Japan asserts that Korea as the complaining party should have established a *prima facie* case. In Japan's view, Korea failed to establish before the Panel that the terms of the October 2001 Restructuring were consistent with market outcomes. As a consequence, the Panel made no factual finding in this respect, and the Appellate Body therefore "need not consider this issue".²⁰⁶

2. Interested Parties

91. Japan argues that Korea's other appeal regarding the Panel's interpretation of the term "interested parties" should be rejected by the Appellate Body.²⁰⁷ Japan agrees with the Panel that the express terms of Article 12.9 of the *SCM Agreement* provide that the list of entities enumerated in subparagraphs (i) and (ii) of that provision is not exhaustive; it is merely indicative.²⁰⁸ Japan argues that Korea's definition cannot be reconciled with Article 12.9, because the entities listed there do not necessarily "have an interest in the outcome of the investigation", as suggested by Korea.²⁰⁹ Japan also submits that the Panel correctly rejected Korea's argument that the term "allowing" in Article 12.9 means that there must be a "request" from a party prior to its designation as an "interested party".²¹⁰

92. Japan contends that the negotiating history of Article 12.9, and Articles 12.3, 12.8, and 23 of the *SCM Agreement*, support the Panel's interpretation of "interested parties" as not necessarily requiring an "interest in the outcome of the investigation".²¹¹ Contrary to Korea's suggestion that Articles 12.3 and 12.8 would make no sense if entities designated as "interested parties" had no "cases" to present, and no "interests to defend", there is nothing in these provisions that limits interest in the investigation to a "pecuniary interest" in the outcome of the investigation.²¹² Furthermore, Japan argues that the Korean financial institutions designated as "interested parties" by the JIA did have "cases" to present, and that some actually availed themselves of the opportunity to "defend their

²⁰⁵Japan's appellee's submission, para. 62 (quoting Korea's other appellant's submission, para. 54).

²⁰⁶*Ibid.*, paras. 65 and 66.

²⁰⁷*Ibid.*, para. 116.

²⁰⁸*Ibid.*, paras. 118-120.

²⁰⁹*Ibid.*, paras. 129-131.

²¹⁰*Ibid.*, para. 132. Japan also refers to other provisions in the *SCM Agreement* where the term "request" is explicitly stated when the drafters intended to make this a condition for "allowing" something. Similarly, Japan refers to provisions where the term "allow" is used, as the Panel suggests, to indicate that a Member may "allow" something generally through national legislation or implementing regulations without a specific request. (*Ibid.*, footnote 203 to para. 132)

²¹¹*Ibid.*, paras. 133-140.

²¹²*Ibid.*, para. 139.

interests".²¹³ Japan also refers to Article 23, which provides that only those "interested parties" who participated in the investigation, and who are "directly and individually affected" by the administrative action, have judicial review rights. For Japan, this signifies that there must be a subset of "interested parties" not "directly or indirectly affected" by administrative actions relating to final determinations.²¹⁴

93. In Japan's view, Korea's argument regarding the use of "facts available" under Article 12.7 is based on a mischaracterization of the balance between, on the one hand, due process rights of "interested parties", and, on the other hand, the obligation of an investigating authority to complete its investigation. Japan argues that the due process rights of "interested parties" under Article 12 are not unlimited, and are subject to the discretion of investigating authorities to use "facts available".²¹⁵ Articles 12.7 and 12.9 must be read to allow investigating authorities the flexibility to meet their informational needs in making a determination, which may differ from case to case. In this instance, the specific needs of the investigation required information relating to private bodies that were allegedly being "entrusted or directed". Japan contends that the use of "facts available" was proper in this case, and that Korea failed to identify any instances to substantiate its allegation that it was not, and that Hynix was "punished" for the actions of entities that "it could not control".²¹⁶

94. For Japan, it is incorrect to say that there was no evidence that the banks designated as "interested parties" had a continuing interest in Hynix or in the outcome of the investigation.²¹⁷ In fact, the evidence shows that all the financial institutions in question are creditors of Hynix and became shareholders of Hynix.²¹⁸

95. Regarding Korea's allegation that the Panel's reasoning was inconsistent with Article 11 of the DSU, Japan contends that no such claim was made by Korea in its Notice of Other Appeal. Even if it were to be considered by the Appellate Body, it should be rejected, since the Panel's reasoning demonstrates that it did not treat the lack of an explicit reference in Article 12 of the *SCM Agreement* to an "interest in the outcome of an investigation" as dispositive of the issue of whether an "interested party" must have such an interest.²¹⁹

²¹³Japan's appellee's submission, para. 140.

²¹⁴*Ibid.*, paras. 136 and 137.

²¹⁵*Ibid.*, para. 142.

²¹⁶*Ibid.*, para. 147 (quoting Korea's other appellant's submission, para. 126).

²¹⁷*Ibid.*, para. 148 (referring to Korea's other appellant's submission, para. 121).

²¹⁸*Ibid.*, para. 154.

²¹⁹*Ibid.*, paras. 121-125.

3. Direct Transfer of Funds

96. Japan asserts that Korea puts forward an overly narrow definition of the term "funds". In Japan's view, the term "funds" is to be understood as "financial resources" having "monetary or exchangeable value".²²⁰ This is confirmed by the fact that the *SCM Agreement* provides an illustrative list of "direct transfer[s] of funds" in Article 1.1(a)(1)(i). Japan argues that this provision refers to grants, loans, and equity infusion as examples, rather than as items on an exhaustive list. This indicates that the *SCM Agreement* contemplates direct transfers of funds other than "grants, loans, and equity infusion".²²¹

97. In addition, Japan submits that Korea's interpretation of the term "transfer of funds" is inconsistent with the object and purpose of the *SCM Agreement*, which includes "disciplining" the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies.²²² However, excluding substantial modification of the terms of existing loans, or an exchange into equity of monetary value equivalent to existing debt, from the definition of "direct transfer of funds", "would open the door to potential abuse of the subsidies and offer an easy way of circumventing the disciplines of the *SCM Agreement*."²²³ Japan finds support for its view in the Appellate Body Report in *US – Softwood Lumber IV*, which it understands to have rejected "a narrow reading of the term 'goods' in Article 1.1(a)(1)(iii) of the *SCM Agreement*"²²⁴, in order to prevent circumvention of subsidy disciplines.²²⁵

98. With respect to debt-to-equity swaps, Japan makes reference to Article 1.1(a)(1)(i), which specifically lists "equity infusion" as an example of a "direct transfer of funds". Japan submits that a debt-to-equity swap is one method of making an equity infusion and, therefore, a type of direct transfer of funds.²²⁶ Finally, in response to Korea's allegation that the Panel "collapsed" the distinction between "direct transfer of funds" in subparagraph (i) and "revenue ... foregone" in

²²⁰Japan's appellee's submission, para. 162.

²²¹*Ibid.*

²²²*Ibid.*, para. 169 (referring to, *inter alia*, Appellate Body Report, *US – Softwood Lumber IV*, paras. 64 and 95).

²²³*Ibid.*, para. 170.

²²⁴*Ibid.*, para. 169.

²²⁵*Ibid.*

²²⁶*Ibid.*, para. 177.

subparagraph (ii) of Article 1.1(a)(1), Japan argues that the mere overlap of the scope of subparagraphs (i) and (ii) does not render subparagraph (ii) *inutile*.²²⁷

4. Causation of Injury

99. Japan requests the Appellate Body to reject Korea's appeal regarding the Panel's interpretation of the phrase "through the effects of subsidies" in Articles 15.5 and 19.1 of the *SCM Agreement* for the reasons given by the Panel.²²⁸ Specifically, Japan contends that, in challenging the Panel's interpretation of the phrase "through the effects" in Article 15.5, Korea fails to make reference to footnote 47 attached to that phrase.²²⁹

100. Additionally, Japan argues that the Panel's interpretation is supported by the non-attribution provision in the third sentence of Article 15.5.²³⁰ Japan argues that the Appellate Body has clarified with regards to Article 3.5 of the *Anti-Dumping Agreement*—which has almost identical wording as Article 15.5 of the *SCM Agreement*—that, in making a finding on causation, the injurious effects of any known other factors must be separated and distinguished from the injurious effects of the dumped imports.²³¹ As is the case with dumped imports, there is no separate requirement for investigating authorities to separate and distinguish the effects of the subsidies from the effects of the subsidized imports.²³²

101. Japan further argues that paragraphs 2-4 and 6-7 of Article 15 of the *SCM Agreement* provide further context. They "all refer to the effects of the subsidized imports, rather than to the effects of the subsidies."²³³ With regard to Korea's arguments concerning Article 11.2, Japan argues that it is well established that elements that investigating authorities must analyze at the time of initiation of the countervailing duty determination do not differ from elements relevant for preliminary and final determinations.²³⁴ Japan submits, further, that the Panel's reference to the Panel Report in *US – Norwegian Salmon CVD* in support of its conclusions was appropriate because, as an adopted report, it constitutes part of the *GATT acquis*.²³⁵ With regard to Korea's reliance on

²²⁷Japan's appellee's submission, para. 183.

²²⁸*Ibid.*, paras. 77-112.

²²⁹*Ibid.*, paras. 80-82.

²³⁰*Ibid.*, para. 83.

²³¹*Ibid.*, para. 84 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 223).

²³²*Ibid.*, para. 86.

²³³*Ibid.*, para. 88.

²³⁴*Ibid.*, para. 90.

²³⁵*Ibid.*, para. 93 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14, DSR 1996:I, 97, at 108).

subsequent Appellate Body reports, Japan contends that the Appellate Body found in *US – Hot-Rolled Steel* that the GATT panel in *US – Norwegian Salmon CVD* had merely adopted an interpretation of non-attribution that was at odds with the requirements of Article 3.5 of the *Anti-Dumping Agreement*.²³⁶

102. With regard to Article 6.3 of the *SCM Agreement*, Japan believes that Korea ignores the basic difference between Parts II and III of the *SCM Agreement*, on the one hand, and Part V of the *SCM Agreement*, on the other hand, as recognized by the panel in *US – Upland Cotton*.²³⁷ Japan recalls that the panel in that case expressly stated that the references in Articles 5(c) and 6.3(c) in Part III to the "effect of the subsidy" contrast with the language used in Part V of the *SCM Agreement* where Article 15.5 is found.²³⁸

103. Japan further submits that the duty of a treaty interpreter to give meaning to each term of the Agreement does not necessarily imply that each term imposes an additional obligation.²³⁹ Rather, in this case, the term "through the effects" serves to clarify and confirm that Article VI of the GATT 1994 and Article 15.5 of the *SCM Agreement* actually provide for the same obligation.²⁴⁰ Without this clarification, it could have been argued, for instance, that Article VI requires a link between the effects of subsidization and injury, and that Article 15.5 required an additional link between subsidized imports and injury.²⁴¹ Japan also considers that the term "through the effects" in Article 19.1 simply clarifies the elements that an investigating authority must establish before imposing countervailing duties.²⁴²

104. Finally, Japan argues that Korea's arguments regarding the "bankruptcy" of Hynix, misconstrues the JIA's determination, which is, in any event, not a legal finding but, rather, a factual determination removed from the scope of appellate review. Japan contends that specific statements made by the JIA—namely, that "Hynix was in a financial situation such that it could not raise funds from the commercial market", "subsidies provided by the [GOK] to Hynix enabled Hynix to maintain and continue its production and export of DRAM products", and "[a]s the result," Hynix "caused the price of domestic products to fall"—were all factual findings by the JIA based on the evidence on

²³⁶Japan's appellee's submission, para. 94.

²³⁷*Ibid.*, paras. 97-99 (referring to Panel Report, *US – Upland Cotton*, para. 7.1177).

²³⁸*Ibid.*, para. 99 (referring to Panel Report, *US – Upland Cotton*, para. 7.1227).

²³⁹*Ibid.*, para. 102.

²⁴⁰*Ibid.*

²⁴¹*Ibid.*

²⁴²*Ibid.*, para. 103.

record.²⁴³ Further, Japan argues that Korea's arguments on "bankruptcy" stem from a misunderstanding of the term "*hatan*" used in the JIA's determination, which refers to bankruptcy in the general sense (rather than the legal sense), as a collapse of the financial state of a company or the inability to continue business.²⁴⁴ The term in Japanese for legal bankruptcy is "*hasan*".²⁴⁵ Japan argues that, as the difference between the meaning of the terms "*hasan*" and "*hatan*" shows, the JIA did not determine that Hynix would proceed with a legal bankruptcy procedure and then be liquidated; rather, the JIA found that "Hynix escaped failure, or in other words was able to continue business, because of the subsidies from the GOK."²⁴⁶

E. *Arguments of the Third Participants*

1. European Communities

105. First, with respect to the standard of review, the European Communities argues that the task of a panel, under Article 11 of the DSU, is to consider objectively the facts in the light of the law. According to the European Communities, it is well established that, under the *SCM Agreement*, panels may not conduct a *de novo* evaluation of the investigating authority's decision. The European Communities refers to the Panel's finding that "the JIA could not properly have relied on the Deutsche Bank Report as a basis for concluding that the participation of the Four Creditors in the December 2002 [R]estructuring was not commercially reasonable".²⁴⁷ The European Communities is not able to express a view on whether the Panel in fact conducted such a *de novo* evaluation in its finding of entrustment or direction, thus committing an error in law, because substantial parts of the confidential Panel Report provided to the parties have been omitted from the public version of the Panel Report on the grounds that they contain BCI.²⁴⁸

106. Secondly, regarding the use of BCI references in the Panel Report, the European Communities submits that it is unable to follow the Panel's reasoning because the public version of its Report, as given to third parties and other Members of the WTO, is "full of blanks stemming from an alleged need to protect [BCI]", in particular, concerning the question of "entrustment or direction". In

²⁴³Japan's appellee's submission, para. 109 (referring to JIA's Final Determination, Annex 1 (Essential Facts), para. 550).

²⁴⁴*Ibid.*, para. 110.

²⁴⁵*Ibid.* (referring to JIA's Final Determination, Annex 1 (Essential Facts), paras. 110, 159, 189, 231, 267, 281, 299, 326, and 376). In fact, Japan contends, Korea recognizes the difference between these Japanese terms, because it translates the term "*hatan*" as "failed", "collapse", "liquidation", or "bankruptcy" interchangeably.

²⁴⁶*Ibid.*

²⁴⁷European Communities' third participant's submission, para. 5 (quoting Panel Report, para. 7.247).

²⁴⁸*Ibid.*, para. 8.

the European Communities' view, an appropriate balance needs to be struck both in legal terms and in practical terms regarding the protection of BCI. However, the European Communities is concerned that, in the present case, that balance has not been struck, and that this procedure may not be consistent with the DSU and in particular with the procedural requirements of Articles 12.7, 16, 17.10, and 18.2 thereof.²⁴⁹

107. Thirdly, regarding the Panel's finding on "benefit", the European Communities submits that the Panel did not expressly state anywhere in its Report that a benefit was conferred on Hynix because the GOK entrusted or directed private parties, nor that a benefit was not conferred because the GOK did not entrust or direct private parties. According to the European Communities, the conclusions are more subtle and hinge on the notion of "commercial reasonableness" that the Panel uses in its analyses of both "entrustment and direction" and "benefit".²⁵⁰

108. In addition, regarding the term "interested parties", the European Communities supports the Panel's finding that it was reasonable for the JIA to designate 16 financial institutions that provided financing to Hynix as "interested parties" in the investigation. The European Communities agrees with the Panel's analysis of Article 12 of the *SCM Agreement* and requests the Appellate Body to uphold the Panel's interpretation of "interested party".²⁵¹

109. The European Communities argues, as regards the benefit calculation methods used by the JIA, that the Panel failed to establish that Formula 1 and Formula 2 used by the JIA were inconsistent with the methods laid down in Japan's *Guidelines* so as to justify the conclusion that the "methods used" were not provided for (or foreseen) in Japan's national legislation or implementing regulations. The Panel findings require, at least in fact, if not in law, that any detailed formula that an investigating authority intends to use should be laid down in the national legislation or implementing regulations. In the European Communities' view, this Panel finding is inconsistent with the chapeau of Article 14 of the *SCM Agreement* and therefore the Appellate Body should reverse it.²⁵²

110. In addition, the European Communities supports Japan's appeal of the Panel's finding on benefit allocation and submits that, if an allocation period for a non-recurring subsidy has expired, then the benefit of that subsidy has normally ceased to exist and "withdrawal" of the subsidy shall not normally require the re-payment of any funds. However, in the European Communities' view, the Appellate Body does not need to rule on this issue, because the mere expiry of the allocation period

²⁴⁹European Communities' third participant's submission, paras. 10-29.

²⁵⁰*Ibid.*, paras. 30-31.

²⁵¹*Ibid.*, paras. 35-37.

²⁵²*Ibid.*, paras. 38-44.

does not amount to "withdrawal", which, according to the European Communities, requires some positive legal or administrative action by the Member that granted the subsidy.²⁵³

111. Finally, regarding causation, the European Communities submits that once a subsidy to a company has been allocated to a specific product, it may reasonably be determined that the subsidy has had the effect of lowering the price of that product (that is, "but for" the subsidy, the price would be higher), so that the effect of the subsidized imports and the effect of the subsidy in practice amount to the same thing. For the European Communities, the situation under Part III of the *SCM Agreement* is not fundamentally different, even if under Part V of the *SCM Agreement* the particular focus is on imports, given the nature of the countervailing remedy to be imposed.²⁵⁴

2. United States

112. The United States argues that the JIA's calculation of the benefit from the debt-to-equity swaps was inconsistent with Article 14(a) of the *SCM Agreement*.²⁵⁵

113. The United States disagrees with the Panel's finding that the JIA improperly countervailed the entire amount of the debt-to-equity swaps for two reasons. First, the United States submits that the Panel's finding "misses the critical point that the commercial market *would not have provided an equity infusion to Hynix*".²⁵⁶ As the commercial market would not have provided an equity infusion (which, unlike a loan, does not need to be repaid), it is reasonable to treat the entire equity infusion as conferring a benefit.

114. Secondly, the United States submits that the Panel's "conflation" of Hynix and its shareholders reveals the type of "internal inconsistency" for which the Panel itself "chastised" the JIA.²⁵⁷ The Panel's rationale was that Hynix would have to dilute the ownership of existing shareholders upon receipt of the equity infusion and, therefore, that Hynix did not receive a benefit in the entire amount of that infusion. According to the United States, "the need to dilute the ownership of existing shareholders, even if true as a factual matter, is irrelevant" because "Hynix was the recipient of the financial contribution, not the shareholders", and any dilution would affect only the existing shareholders, not Hynix.²⁵⁸ In the United States' view, a distinction has to be made between a company and its shareholders. Otherwise, a situation in which a government entity holding shares in

²⁵³European Communities' third participant's submission, paras. 45-47.

²⁵⁴*Ibid.*, paras. 32-34.

²⁵⁵United States' third participant's submission, paras. 4-5.

²⁵⁶*Ibid.*, para. 3. (original emphasis)

²⁵⁷*Ibid.*, para. 4.

²⁵⁸*Ibid.* (referring to Panel Report, *Korea – Commercial Vessels*, paras. 7.419-7.423).

a company makes a further equity infusion into the company might not confer a benefit, under the theory that the shareholder has only benefited itself.²⁵⁹ The United States further submits that the panel in *Korea – Commercial Vessels* rejected this approach, in the context of a "financial contribution" analysis.²⁶⁰

III. Issues Raised in This Appeal

115. The following issues are raised in the appeal filed by Japan:

- (a) whether, in its review of the JIA's determination of "entrustment or direction" of the Four Creditors with respect to the December 2002 Restructuring, the Panel acted inconsistently with Article 11 of the DSU by failing to examine the JIA's evidence in its totality; and, consequently, whether the Panel erred in finding that the JIA's determination is inconsistent with Article 1.1(a)(1)(iv) of the *SCM Agreement*;
- (b) whether the Panel erred in finding that the JIA acted inconsistently with Articles 1.1(b) and 14 of the *SCM Agreement* by determining that the December 2002 Restructuring conferred a benefit on Hynix;
- (c) whether the Panel erred in finding that the JIA improperly calculated the amount of benefit conferred on Hynix by the October 2001 and December 2002 Restructurings in violation of Articles 1.1(b) and 14 of the *SCM Agreement*; and in failing to make an objective assessment of the matter before it, as required by Article 11 of the DSU;
- (d) whether the Panel erred in finding that the methods used by the JIA to calculate the benefit conferred on Hynix by the October 2001 and December 2002 Restructurings were not provided for in Japan's national legislation or implementing regulations, as required by the chapeau of Article 14 of the *SCM Agreement*; and in failing to make an objective assessment of the matter before it, as required by Article 11 of the DSU; and
- (e) whether the Panel erred in finding that Japan acted inconsistently with Article 19.4 of the *SCM Agreement* by levying countervailing duties on imports which the JIA itself had found were not subsidized at the time of imposition of the duty; and in failing to make an objective assessment of the matter before it, as required by Article 11 of the DSU.

²⁵⁹United States' third participant's submission, para. 4.

²⁶⁰*Ibid.*

116. The following issues are raised in the other appeal filed by Korea:

- (a) whether the Panel erred in finding that the JIA's determination that the October 2001 Restructuring conferred a benefit on Hynix is not inconsistent with Articles 1.1(b) and 14 of the *SCM Agreement*;
- (b) whether the Panel erred in finding that the JIA did not act inconsistently with Articles 12.7 and 12.9 of the *SCM Agreement* by including certain financial institutions as "interested parties" and by using "facts available" for those financial institutions that failed to provide information;
- (c) whether the Panel erred in finding that the JIA could properly characterize the transactions at issue in the October 2001 and December 2002 Restructurings as transactions involving "direct transfer[s] of funds" within the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement*; and
- (d) whether the Panel erred in finding that the JIA did not act inconsistently with Articles 15.5 and 19.1 of the *SCM Agreement*, because the JIA had not demonstrated separately that the alleged subsidized imports were, "through the effects of the subsidies", causing injury within the meaning of the *SCM Agreement*.

IV. The JIA's Determination of Entrustment or Direction with respect to the December 2002 Restructuring

117. We begin our consideration of the issues raised in this appeal by examining Japan's claim that the Panel adopted an erroneous approach to its review of the determination of "entrustment or direction" by Japan's investigating authorities (the "JIA") with respect to a debt-restructuring programme entered into by Hynix Semiconductor, Inc. ("Hynix") and its creditors in December 2002.

118. In its determination, the JIA concluded that four of Hynix's private creditors—Korea Exchange Bank (the "KEB"), Woori Bank, Chohung Bank, and National Agriculture Cooperative Federation (the "NACF") (the "Four Creditors")—had been entrusted or directed by the Government of Korea (the "GOK") within the meaning of Article 1.1(a)(1)(iv) of the *SCM Agreement* to participate in the debt-restructuring programmes entered into by Hynix and its creditors (the "Restructurings") in October 2001 and December 2002²⁶¹, and that their participation in the Restructurings amounted to "financial contributions" within the meaning of subparagraph (i) of Article 1.1(a)(1). The JIA made no finding of entrustment or direction in respect of the remaining

²⁶¹Panel Report, para. 7.50.

creditors that also participated in the Restructurings (the "Other Creditors").²⁶² The Panel summarized the reasoning underpinning the JIA's finding of entrustment or direction as follows:

In a nutshell, the JIA found that the decisions of the Four Creditors to participate in the [R]estructurings were not commercially reasonable, and could therefore only be explained by some external, non-commercial factor, namely the involvement in the [R]estructurings of the [GOK]. To support this explanation various statements by Government ministers, officials and others, and non-attributed statements, and various circumstances relating to the [R]estructurings, were referred to in the JIA's determination as circumstantial evidence of entrustment or direction. It was the totality of this evidence that was the basis for the JIA's finding.²⁶³

119. Before the Panel, Korea claimed that Japan had acted inconsistently with its obligations under Article 1.1(a) of the *SCM Agreement* because the JIA did not have a proper basis for its finding that the GOK entrusted or directed the Four Creditors to participate in the October 2001 and December 2002 Restructurings.²⁶⁴ In particular, Korea argued that the JIA's determination of entrustment or direction was based on a so-called "syllogism" consisting of three premises²⁶⁵: (i) the GOK's intent to "keep Hynix alive"; (ii) that no rational creditor would have entered into the restructuring transactions in view of Hynix's poor and deteriorating financial condition; and (iii) the lack of evidence establishing that the Four Creditors had conducted a sufficient analysis of the commercial reasonableness of the October 2001 and December 2002 Restructurings before entering into them.²⁶⁶ For Korea, "each of the premises of the JIA's syllogism was flawed, because they were based on presumptions rather than evidence."²⁶⁷ The Panel noted that Korea did not challenge the basic methodological approach adopted by the JIA. Rather, it challenged the validity of several intermediate conclusions reached by the JIA to arrive at its determination of entrustment or direction.²⁶⁸

120. The Panel identified, at the outset, the standard of review that it intended to apply in its examination of the JIA's subsidy determination. On the basis of Article 11 of the DSU, and the

²⁶²Panel Report, para. 7.50.

²⁶³*Ibid.*, para. 7.51.

²⁶⁴*Ibid.*, para. 7.52.

²⁶⁵At the oral hearing, Korea indicated that, although its argument is, strictly speaking, not a "syllogism", it nevertheless contends that the JIA had relied on these three premises for its finding on entrustment or direction.

²⁶⁶See Panel Report, para. 7.57.

²⁶⁷*Ibid.*, para. 7.59.

²⁶⁸*Ibid.*, para. 7.61.

guidance provided by the Appellate Body in *US – Countervailing Duty Investigation on DRAMS* and *US – Softwood Lumber VI (Article 21.5 – Canada)*, the Panel stated:

We are, therefore, conscious of the fact that it is not our role to perform a *de novo* review of the evidence which was before the JIA at the time it made its determination. We will examine whether on the basis of the record before it, a reasonable and objective investigating authority could have reached the conclusions that the JIA reached. Our task is first to understand what the JIA decided and how it came to those decisions. Our examination of those decisions will be informed by whether the JIA 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. At the same time, we believe that our examination of the JIA's conclusions must be critical and searching, and that we would not be fulfilling our function if we were to simply defer to the conclusions of the JIA.²⁶⁹

121. The Panel began its analysis by examining certain "legal, interpretational and evidentiary" issues raised by the parties' claims and arguments.²⁷⁰ First, with respect to the concept of "entrustment or direction" under Article 1.1(a)(1)(iv) of the *SCM Agreement*, the Panel noted the clarification provided by the Appellate Body that a finding of entrustment or direction "requires that the government give responsibility to a private body—or exercise its authority over a private body—in order to effectuate a financial contribution."²⁷¹ Secondly, with respect to the evidentiary standard, the Appellate Body stated that "neither the *SCM Agreement* nor the DSU explicitly articulates a standard for the evidence required to substantiate a finding of entrustment or direction", and that neither the *SCM Agreement* nor the DSU imposes upon an investigating authority "[any] particular standard for the evidence supporting its finding of entrustment or direction."²⁷² The Panel therefore held that, in addressing the substantive arguments made by the parties, it will "simply examine whether or not the JIA's evidence could support its conclusion of entrustment or direction."²⁷³

122. Having thus set out the standard of review, the Panel turned to examine the JIA's determination of entrustment or direction with respect to the October 2001 and December 2002 Restructurings. Based on its review of the evidence relied upon by the JIA with respect to the

²⁶⁹ Panel Report, para. 7.43 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 186-188; and Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93). (footnote omitted)

²⁷⁰ *Ibid.*, para. 7.61.

²⁷¹ *Ibid.*, para. 7.62 (quoting Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 138).

²⁷² *Ibid.*, para. 7.77 (quoting Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 138).

²⁷³ *Ibid.*, para. 7.81.

October 2001 Restructuring, the Panel held that such evidence "could properly be interpreted as indicating that the [GOK] had a preference for the continued existence of Hynix, and that the [GOK] was prepared to intervene directly in the Hynix restructuring process."²⁷⁴ The Panel found that certain reports regarding announcements made by the Economic Ministers in July 2001, relied upon by the JIA, could properly be interpreted by an objective and impartial investigating authority "as evidence that the [GOK] intended to pursue the restructuring of Hynix beyond the May 2001 [R]estructuring."²⁷⁵ The Panel concluded, referring to certain statements emanating from one Hynix creditor and a statement concerning the Korea Development Bank (the "KDB") relied upon by the JIA, that:

... an objective and impartial investigating authority might properly conclude from these statements, read in light of relevant evidence regarding the October 2001 [R]estructuring, that the [GOK] was directly involved in the December 2002 [R]estructuring, and that this was because the [GOK]'s intent was that Hynix should be saved.²⁷⁶

123. After a review of certain other evidence before the JIA, the Panel further found that "the JIA could properly have concluded that the balance of the record evidence did indicate that the [GOK] was prepared to intervene directly in the Hynix restructuring process"²⁷⁷ and that:

[f]aced with evidence of government pressure on Hynix creditors in the recent past, and evidence that the [GOK] was prepared to intervene directly in order to preserve Hynix as a going concern at the time of the October 2001 and December 2002 [R]estructurings, ... the JIA could properly have concluded that the [GOK] had the political intent to save Hynix at the time of those [R]estructurings—through direct intervention if necessary—even if not all of the record evidence pointed in this direction.²⁷⁸

124. Summing up its review of the evidence before it, the Panel found, with respect to the first premise of Korea's syllogism, that "the JIA could properly have concluded that the [GOK] intended to save Hynix at the time of the October 2001 and December 2002 [R]estructurings."²⁷⁹

125. The Panel then turned to assess Korea's argument that the evidence on record did not support the JIA's conclusion that the decisions of the Four Creditors to participate in the Restructurings were based on non-commercial considerations. The Panel rejected Korea's argument insofar as it related to

²⁷⁴Panel Report, para. 7.105.

²⁷⁵*Ibid.*, para. 7.107.

²⁷⁶*Ibid.*, para. 7.109.

²⁷⁷*Ibid.*, para. 7.113. (footnote omitted)

²⁷⁸*Ibid.*, para. 7.113.

²⁷⁹*Ibid.*, para. 7.114.

the October 2001 Restructuring.²⁸⁰ However, with respect to the December 2002 Restructuring, the Panel found that the JIA had erred in concluding that the Four Creditors' participation in that Restructuring was based on non-commercial considerations. The Panel's review of this issue focused on the JIA's treatment of a restructuring plan prepared by Deutsche Bank that was made available to Hynix's creditors at the time they undertook the December 2002 Restructuring (the "Deutsche Bank Report").²⁸¹ After an analysis of various aspects of the Deutsche Bank Report, the Panel concluded that "the JIA's determination that the Deutsche Bank Report did not provide the existing creditors with a proper commercial basis for participating in the December 2002 [R]estructuring was not reasonable and objective."²⁸²

126. The Panel summed up the results of its analysis of entrustment or direction as follows:

[W]e note that the JIA's determination of entrustment or direction was based on "the totality of numerous items of evidence obtained". We also note that the JIA began its summary of its determination of entrustment or direction regarding the December 2002 [R]estructuring by referring to its finding that the Four Creditors' decisions to participate in that [R]estructuring "were not based on commercial consideration[s]". Commercial reasonableness therefore played an important role in the JIA's finding of entrustment or direction. As noted above, the JIA's finding that the Four Creditors' participation in the [R]estructuring was not commercially reasonable was to a great extent based on its rejection of the Deutsche Bank Report. Our finding that the JIA erred in both its formal and substantive analysis of the Deutsche Bank Report therefore invalidates the JIA's finding that the Four Creditors' participation in the December 2002 [Restructuring] was not commercially reasonable, revealing a fatal flaw in the JIA's determination of entrustment or direction. While the JIA also based its determination of entrustment or direction on evidence that the [GOK] "was in a position to be able to exercise sufficient influence on" the Four Creditors, and that the [GOK] "had the political intent to have Hynix survive", and "had been ascertaining at all times the progress of discussion of the December 2002 Program", the JIA declined to find that such evidence in and of itself (i.e., absent consideration that the [R]estructuring was not commercially reasonable) demonstrated that the [GOK] gave responsibility to the Four Creditors, or actually exercised any authority over the Four Creditors, in order to effectuate the December 2002 [R]estructuring. Since the JIA made no such finding, there is no basis for us to conclude whether or not the JIA

²⁸⁰Panel Report, para. 7.252. Korea does not appeal this finding by the Panel.

²⁸¹Exhibit KOR-20 submitted by Korea to the Panel. See Panel Report, paras. 7.155-7.247.

²⁸²*Ibid.*, para. 7.245.

could properly have relied on such evidence (absent consideration that the [R]estructuring was not commercially reasonable) to make a determination of government entrustment or direction. It is not our role to conduct a *de novo* examination of that issue by asking whether such a finding could have been made by the JIA.²⁸³

127. The Panel concluded that, because the JIA could not properly have found that the Four Creditors' participation in the December 2002 Restructuring was not commercially reasonable, the JIA did not have a proper basis for its determination that the Four Creditors were entrusted or directed by the GOK to participate in the December 2002 Restructuring, contrary to Article 1.1(a)(1)(iv) of the *SCM Agreement*.²⁸⁴

128. On appeal, Japan alleges several errors in the Panel's review of the JIA's determination of entrustment or direction with respect to the December 2002 Restructuring. Japan contends, first, that the Panel erred by limiting the scope of its review to the Deutsche Bank Report in isolation, without considering, as did the JIA, whether the evidence in its totality supported the JIA's finding of entrustment or direction.²⁸⁵ For Japan, the Panel's approach would make it impossible for an investigating authority to rely on the totality of evidence, because under the Panel's approach "a flaw in [the investigating authority's] assessment of one of many pieces of evidence would necessarily invalidate the entire determination."²⁸⁶ Besides challenging the Panel's review of the JIA's overall finding of entrustment or direction, Japan also finds fault with the Panel's review of the JIA's intermediate finding on the commercial reasonableness of the Four Creditors' participation in the December 2002 Restructuring. In particular, Japan contends that the Panel employed an improper approach to its review of the JIA's findings with respect to the Deutsche Bank Report and did not give adequate consideration to other circumstantial evidence supporting the JIA's conclusion.²⁸⁷ In the light of these alleged errors, Japan claims that the Panel failed to comply with its obligations under Article 11 of the DSU and requests us to reverse the Panel's finding on entrustment or direction with respect to the December 2002 Restructuring.²⁸⁸

129. Korea disputes Japan's submissions and contends that the Panel's findings with respect to the commercial reasonableness of the Four Creditors' participation in the restructuring process are factual findings that are beyond the scope of appellate review. In any event, Korea rejects Japan's allegation that the Panel acted inconsistently with Article 11 of the DSU in its review of the JIA's determination

²⁸³Panel Report, para. 7.253.

²⁸⁴*Ibid.*, para. 7.254.

²⁸⁵Japan's appellant's submission, para. 63.

²⁸⁶*Ibid.*, para. 70.

²⁸⁷*Ibid.*, para. 74.

²⁸⁸Japan's appellant's submission, para. 166.

of entrustment or direction. First, according to Korea, the standard of review applied by the Panel was consistent with the standard identified by the Appellate Body in *US – Countervailing Duty Investigation on DRAMS* and in subsequent cases.²⁸⁹ Secondly, Korea submits that a review of the Panel's decision confirms that the Panel "refused to substitute its judgment for that of the JIA" and that, viewed as a whole, the Panel did not engage in a *de novo* review.²⁹⁰ Korea also disagrees with Japan's assertion that the Panel committed errors in its review of the JIA's findings with respect to the Deutsche Bank Report.

130. The participants do not contest the Panel's articulation of the standard of review.²⁹¹ Japan contends, rather, that the Panel erred in its *application* of the standard of review as prescribed by Article 11 of the DSU, and as clarified by the Appellate Body in *US – Countervailing Duty Investigation on DRAMS* and *US – Softwood Lumber VI (Article 21.5 – Canada)*. We therefore turn to consider whether the Panel properly applied the standard of review in its assessment of the JIA's determination of entrustment or direction with respect to the December 2002 Restructuring.²⁹²

A. *The Panel's Review of the JIA's Determination of Entrustment or Direction*

131. The Appellate Body has previously found that "when an investigating authority relies on the totality of circumstantial evidence, this imposes upon a panel the obligation to consider, in the context of the *totality* of the evidence, how the *interaction* of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation."²⁹³ In addition, if an investigating authority explains that the totality of the evidence supports the conclusion reached, a panel must undertake a critical examination of whether, in the light of the evidence on record, the investigating authority's conclusion was reasoned and adequate.²⁹⁴ The Appellate Body has also said that errors in an investigating authority's examination of individual pieces of evidence "undoubtedly would affect an examination of the *totality* of the evidence, as these pieces would constitute the evidence the Panel would consider as a whole in assessing the evidentiary

²⁸⁹ Korea's appellee's submission, paras. 53-55 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 186-188; and Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93).

²⁹⁰ *Ibid.*, paras. 56 and 57.

²⁹¹ Japan's and Korea's responses to questioning at the oral hearing.

²⁹² We note that Korea has *not* appealed the Panel's finding that the JIA had a proper basis for finding that the GOK entrusted or directed the Four Creditors to participate in the October 2001 Restructuring. (See Panel Report, para. 7.252) The Panel's finding of entrustment or direction, as it relates to the October 2001 Restructuring, therefore stands.

²⁹³ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 157. (original emphasis)

²⁹⁴ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

support of [an investigating authority's] finding of entrustment or direction."²⁹⁵ Finally, we recall the Appellate Body's statement that, "in order to examine the evidence in the light of the investigating authority's methodology, a panel's analysis usually should seek to review the agency's decision on its own terms, in particular, by identifying the inference drawn by the *agency* from the evidence, and then by considering whether the evidence could sustain that inference."²⁹⁶

132. The Panel in this case recognized that the JIA based its determination of entrustment or direction on "the totality of numerous items of evidence obtained".²⁹⁷ In particular, the Panel acknowledged that the JIA relied on evidence that the GOK "'was in a position to be able to exercise sufficient influence on' the Four Creditors, and that the [GOK] 'had the political intent to have Hynix survive', and 'had been ascertaining at all times the progress of discussion of the December 2002 [Restructuring]'.²⁹⁸ However, the Panel found that it had "no basis" to assess whether the JIA could have sustained its finding on entrustment or direction by recourse to evidence other than the evidence concerning commercial reasonableness. The Panel reasoned that since the JIA had not undertaken such an exercise, the Panel could not do so, as this would amount to a *de novo* review.²⁹⁹

133. We disagree with the approach adopted by the Panel. The JIA came to its finding on entrustment or direction based upon a consideration of the totality of evidence before it. It is not evident to us that the JIA accorded such decisive weight to the issue of commercial reasonableness as to render insignificant other evidence relating to the GOK's intent to save Hynix and its intervention in the restructuring process. The JIA made a holistic assessment of the evidence before it. While commercial reasonableness, in particular the Deutsche Bank Report, may have been an important factor in its considerations, it is unreasonable to expect the JIA to have engaged upon an enquiry as to whether other evidence would, by itself, have sustained its finding on entrustment or direction.³⁰⁰ This is because the JIA cannot be expected to proceed on the basis that certain aspects of its reasoning would later be found to be faulty.

²⁹⁵ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 154. (original emphasis)

²⁹⁶ *Ibid.*, para. 151. (original emphasis)

²⁹⁷ Panel Report, paras. 7.51, 7.73, and 7.253 (referring to JIA's Final Determination, Annex 1 (Essential Facts), paras. 285 and 288; and JIA's Final Determination, Annex 3 (Rebuttals and Surrebuttals), para. 20).

²⁹⁸ *Ibid.*, para. 7.253 (referring to JIA's Final Determination, Annex 1 (Essential Facts), para. 370).

²⁹⁹ *Ibid.*, para. 7.253. In its appellant's submission, Japan disputes the Panel's assertion that the JIA "declined" to find that such other evidence was sufficient to support the JIA's conclusion of entrustment or direction. (Japan's appellant's submission, para. 71)

³⁰⁰ See footnote 304 of this Report.

134. The Panel should have considered whether the remaining evidence before the JIA provided an objective basis for finding entrustment or direction, notwithstanding the Panel's conclusion that the JIA's assessment of the Deutsche Bank Report was flawed. That could only have been done by considering the totality of the evidence, including, in particular, the evidence relating to the intent and involvement of the GOK in the Restructurings. This is particularly so given the Panel's earlier findings that "the JIA could properly have concluded that the balance of the record evidence did indicate that the [GOK] was prepared to intervene directly in the Hynix restructuring process"³⁰¹ and that, "[f]aced with evidence of government pressure on Hynix creditors in the recent past, and evidence that the [GOK] was prepared to intervene directly in order to preserve Hynix as a going concern at the time of the October 2001 and December 2002 [R]estructurings, ... the JIA could properly have concluded that the [GOK] had the political intent to save Hynix at the time of those [R]estructurings—through direct intervention if necessary—even if not all of the record evidence pointed in this direction".³⁰² The Panel did not undertake such an examination, and thereby failed properly to apply the required standard of review.

135. We recognize that there may be cases in which certain intermediate findings may be so central to the ultimate conclusion of an investigating authority that an error at an intermediate stage of reasoning may invalidate the final conclusion. Indeed, an evaluation of the significance of the different factors considered by an investigating authority is at the heart of the assessment a panel must make. What a panel should not do is to have recourse to an *a priori* "syllogism" that accords presumptive weight to certain propositions. This is all the more so when this was not the approach to the evaluation of the evidence adopted by the investigating authority.

136. In this case, the Panel's finding on the GOK's intent and involvement in the restructuring process—that the JIA could properly have concluded that the GOK intended to save Hynix and that the GOK was prepared to intervene directly in the Hynix restructuring process—is common to both the October 2001 and December 2002 Restructurings.³⁰³ The Panel found that the October 2001 Restructuring involved entrustment or direction on the basis of its upholding the JIA's determination that the participation of the Four Creditors in that Restructuring was not commercially reasonable. The Panel found that the December 2002 Restructuring did not involve entrustment or direction

³⁰¹Panel Report, para. 7.113.

³⁰²*Ibid.* See also *ibid.*, paras. 7.109 and 7.114.

³⁰³*Ibid.*, paras. 7.113 and 7.114.

because it concluded that the JIA had not properly established that the participation of the Four Creditors in that Restructuring was not commercially reasonable. Thus, it seems to us that the sole basis on which the Panel came to different conclusions on entrustment or direction in the two Restructurings was its findings on the commercial reasonableness of the Four Creditors' participation in those Restructurings.

137. The Panel did not adequately explain why a finding of commercial reasonableness, by itself, was indispensable for the ultimate finding of entrustment or direction. We are unable to discern from the JIA's determination that the JIA considered commercial reasonableness to be indispensable for its ultimate finding of entrustment or direction. Even if the Panel were correct that the JIA's finding on commercial unreasonableness lacked evidentiary support, that alone would not necessarily invalidate the JIA's determination of entrustment or direction. As we have stated above, the Panel should have considered whether, in the light of the remaining evidence, the JIA could nevertheless have reached its finding on entrustment or direction.³⁰⁴

138. We recognize that the commercial unreasonableness of the financial transactions is a relevant factor in determining government entrustment or direction under Article 1.1(a)(1)(iv) of the *SCM Agreement*, particularly where an investigating authority seeks to establish government intervention based on circumstantial evidence. However, this does not mean that a finding of entrustment or direction can never be made unless it is established that the financial transactions were on non-commercial terms. A finding that creditors acted on the basis of commercial reasonableness, while relevant, is not conclusive of the issue of entrustment or direction. A government could entrust or direct a creditor to make a loan, which that creditor then does on commercial terms. In other words,

³⁰⁴We note, in this regard, that the JIA's determination refers to, *inter alia*, certain other evidence suggesting that the GOK was in a position to control or influence the decisions of the Four Creditors: the GOK's shareholding power in the Four Creditors; a Memorandum of Understanding entered into between certain of the Four Creditors and a government body (the Korea Deposit Insurance Corporation); and bank debt guarantees provided by the GOK. (See JIA's Final Determination, Annex 1 (Essential Facts), paras. 58, 60-63, 79-81, 351, 356, and 359) The Panel did not examine this evidence. See also *supra*, para. 134.

as a conceptual matter, there could be entrustment or direction by the government, even where the financial contribution is made on commercially reasonable terms.³⁰⁵

139. In the light of the above, we *find* that the Panel did not conduct an objective assessment of the matter before it, as required by Article 11 of the DSU, because it failed to examine whether the JIA's evidence in its totality supported the JIA's finding of entrustment or direction.

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

140. Following its examination of the evidence and intermediate findings underlying the JIA's determination of entrustment or direction, the Panel concluded that "the JIA did not have a proper basis for finding that the Four Creditors were entrusted or directed by the [GOK] to participate in the December 2002 [R]estructuring, contrary to Article 1.1(a)(1)(iv) of the *SCM Agreement*."³⁰⁶

141. We have found that the Panel applied an erroneous approach to its analysis of the JIA's finding of entrustment or direction and, thereby, failed to apply the proper standard of review in accordance with Article 11 of the DSU. In our view, this invalidates the basis for the Panel's conclusion, quoted above, that the JIA could not have properly found entrustment or direction.³⁰⁷ Because this conclusion is the sole basis for the Panel's finding of inconsistency with

³⁰⁵At the oral hearing, Korea acknowledged that the issues of entrustment or direction and of benefit are two separate legal requirements and that the commerciality of the financial contributions is more relevant to determine the issue of benefit. We also note that, in response to Question 64 posed by the Panel, Korea asserted that:

[a]s a conceptual matter, sub-paragraph (iv) of Article 1.1(a) does not limit a finding of "entrustment or direction" to situations in which private entities are forced by a government to undertake actions that are not in their own interests. A government could, for example, order a bank to make a loan on commercial terms to a creditworthy borrower. In such cases, there might be entrustment or direction, but there would also be no benefit to the recipient —and, as a result, there would be no subsidy.

(Panel Report, para. 7.66)

The Panel understood Korea to accept that:

... as a legal matter, ... an investigating authority may find the existence of a financial contribution on the basis of entrustment or direction of private bodies, even if those private bodies are not required to act contrary to their own interests.

(*Ibid.*, para. 7.67)

³⁰⁶*Ibid.*, para. 7.254.

³⁰⁷We note that Korea agrees that a finding of error under Article 11 of the DSU, with respect to the Panel's standard of review, would require a reversal of the Panel's finding that the JIA's determination is inconsistent with Article 1.1(a)(1)(iv) of the *SCM Agreement*. (Korea's response to questioning at the oral hearing)

Article 1.1(a)(1)(iv) of the *SCM Agreement*, we *reverse* the Panel's finding, in paragraphs 7.254 and 8.2(a) of the Panel Report, that the JIA's determination of entrustment or direction of the Four Creditors by the GOK with respect to the December 2002 Restructuring is inconsistent with Article 1.1(a)(1)(iv) of the *SCM Agreement*. In these circumstances, for purposes of assessing the Panel's review of the JIA's entrustment or direction determination, we find it unnecessary to examine Japan's arguments regarding the issue of commercial reasonableness.³⁰⁸

142. We note that neither participant has requested, in its written submission, that we complete the legal analysis by undertaking our own review of the JIA's finding of entrustment or direction if we were to reverse the Panel's finding of inconsistency with Article 1.1(a)(1)(iv) of the *SCM Agreement*. At the oral hearing, Korea tentatively suggested that we complete the analysis but recognized the difficulty of such a task. We do not consider that the participants have addressed sufficiently, in their submissions, those issues we might need to examine in order to complete the analysis in this case, including the probative value of certain evidence not considered by the Panel. In these circumstances, we are not in a position to, and therefore do not, complete the analysis to reach our own conclusion on the consistency of the JIA's determination of entrustment or direction with Article 1.1(a)(1)(iv) of the *SCM Agreement*.

V. The JIA's Determination of Benefit with respect to the December 2002 Restructuring

143. The Panel found that "the JIA's erroneous analysis (in form and substance) of the Deutsche Bank Report invalidated the JIA's finding that the Four Creditors' participation in the December 2002 [Restructuring] was not commercially reasonable."³⁰⁹ As the Panel also found that "the JIA determined benefit by reference to the market, and commercial reasonableness"³¹⁰, the Panel concluded that the JIA's determination of "benefit" for the December 2002 Restructuring was inconsistent with Articles 1.1(b) and 14 of the *SCM Agreement*.³¹¹

144. Japan requests that we reverse the Panel's finding that the JIA improperly determined the existence of benefit for the December 2002 Restructuring. According to Japan, the Panel conducted

³⁰⁸In response to questioning at the oral hearing, Japan agreed that we would not be required to examine Japan's arguments regarding commercial reasonableness to the extent that we agree with Japan that the Panel erred in its review of the finding of entrustment or direction by the JIA under Article 1.1(a)(1)(iv) of the *SCM Agreement* with respect to the December 2002 Restructuring. However, we address these arguments in Section V of this Report in the context of our examination of the JIA's determination of benefit with respect to the December 2002 Restructuring.

³⁰⁹Panel Report, para. 7.282.

³¹⁰*Ibid.* In the light of its finding, the Panel did not consider it necessary to examine other issues raised by Korea relating to the JIA's determination of benefit with respect to the December 2002 Restructuring. (*Ibid.*, para. 7.285)

³¹¹*Ibid.*, para. 8.2(b).

no substantive or independent analysis of the JIA's determination of benefit and based its finding on this issue solely on its earlier finding on government entrustment or direction. As the finding of the Panel on entrustment or direction was, according to Japan, erroneous, the Panel's finding on the benefit issue should also be rejected.³¹²

145. Korea contends that Japan's appellant's submission does not satisfy the requirements of Rule 21(2) of the *Working Procedures* and the requirements of due process. Korea asserts, in particular, that it had "not been given adequate notice of the nature of Japan's arguments or an adequate opportunity to refute them".³¹³

146. Japan provides extensive arguments, in its appellant's submission, to support its assertion that the Panel's review of the JIA's determination of entrustment or direction is erroneous.³¹⁴ As we see it, a careful reading of Japan's appellant's submission should have indicated to Korea that these arguments are also relevant with respect to the Panel's review of the JIA's benefit determination. Therefore, in our view, Japan's appellant's submission satisfies the requirements of Rule 21(2) of the *Working Procedures* and of due process.

147. We proceed to examine the Panel's review of the JIA's analysis of the commercial reasonableness of the Four Creditors' participation in the December 2002 Restructuring in order to assess whether the Panel erred in its finding on the JIA's benefit determination. In doing so, we note that the Panel's finding concerning the JIA's benefit determination was premised on the Panel's previous finding that the JIA failed to properly establish that the participation of the Four Creditors in the December 2002 Restructuring "was based on non-commercial considerations".³¹⁵

A. *The Panel's Review of the JIA's Analysis of Commercial Reasonableness*

148. In its determination, the JIA rejected the Deutsche Bank Report as proof of the commercial reasonableness of the Four Creditors' participation in the December 2002 Restructuring "for both formal and substantive reasons".³¹⁶ As to form, the JIA questioned the independence of the Deutsche Bank Report on, *inter alia*, the basis that the GOK had intervened in the preparation of that Report.³¹⁷ As to substance, the JIA found that the Deutsche Bank Report contained discrepancies, which "should

³¹²Japan's appellant's submission, para. 168.

³¹³Korea's appellee's submission, para. 129.

³¹⁴Japan's appellant's submission, Section II.

³¹⁵Panel Report, para. 7.282.

³¹⁶*Ibid.*, para. 7.159.

³¹⁷JIA's Final Determination, Annex 1 (Essential Facts), para. 341.

have been easy for a person who engages in the corporate financing business to identify"³¹⁸, and concluded therefore that "the Deutsche Bank Report, reviewed from the aspect of its content as well, is not a sufficient basis for the commercial financing judgment of experienced financial institutions."³¹⁹

149. Japan argues that the Panel committed several errors in its examination of the Deutsche Bank Report. First, although the Panel examined the evidence regarding nine press reports allegedly showing the GOK's intervention in the preparation of the Deutsche Bank Report, it failed to consider these press reports in their totality and in the context in which the JIA made its finding. Secondly, the Panel committed errors in its review of the JIA's analysis of the relevance of certain evidence, including misstating some of the JIA's findings, and examining an issue for which Korea did not even present relevant evidence or arguments. Thirdly, the Panel erred by rejecting certain arguments by Japan as *ex post* rationalizations. According to Japan, the Panel's approach was inconsistent with its obligations under Article 11 of the DSU.

150. Korea disagrees with Japan's assertion that the Panel committed errors in its review of the JIA's findings with respect to the Deutsche Bank Report.³²⁰ Korea also rejects Japan's contention that the Panel failed to properly examine the press reports relied upon by the JIA to indicate that the GOK had intervened in the preparation of the Deutsche Bank Report.

151. We begin by examining Japan's arguments relating to the "formal" reasons underlying the JIA's rejection of the Deutsche Bank Report.

1. The Independence of the Deutsche Bank Report

152. Japan submits that the JIA relied upon certain press reports in their totality as evidence "in order to impugn the commercial reliability of the Deutsche Bank Report, and to therefore find that the decisions made by the Four Creditors to enter into the December 2002 [R]estructuring were not commercially based."³²¹ According to Japan, the Panel failed to follow the same approach. Instead, the Panel "required that an individual piece of evidence, in and of itself, establish the JIA's intermediate factual finding of the intervention by the GOK in the preparation of the Deutsche Bank Report."³²²

³¹⁸JIA's Final Determination, Annex 1 (Essential Facts), para. 345.

³¹⁹*Ibid.*

³²⁰Korea's appellee's submission, para. 77.

³²¹Japan's appellant's submission, para. 76 (quoting Panel Report, para. 7.169).

³²²*Ibid.*, para. 80.

153. We disagree with Japan's characterization of the Panel's reasoning. The Panel stated:

Although we necessarily begin by reviewing the reports individually, we also consider them collectively, in case aspects of different [press reports relied on by the JIA] together might support a finding of government intervention even where reports taken individually do not.³²³ (footnote omitted)

154. Thus, contrary to what Japan suggests, the Panel did not fail to consider the press reports collectively. Rather, it found that "the reports relied on by the JIA—whether read in isolation or as a whole—provide precious little support for a finding that the [GOK] intervened in the preparation of the Deutsche Bank Report."³²⁴

155. Japan also faults the Panel's examination of the issue of whether the Deutsche Bank Report favoured the interests of Hynix over those of the creditors.³²⁵ As we see it, Japan mischaracterizes the Panel's reasoning on this issue; the Panel merely examined the question of whether the JIA could properly have called into question the independence of the Deutsche Bank Report on the basis of certain evidence on record.

156. Japan further submits that the Panel erred by making a finding on the relevance of a consultancy contract, although "Korea did not submit necessary evidence and argument to establish a *prima facie* case" in this regard.³²⁶ Moreover, according to Japan, the Panel collected the evidence of the relevant "contract *ex officio* in March 2007 well after both Panel sessions and the submission of all arguments by the parties"³²⁷ and failed to provide the parties with an opportunity to present their views on the relevance of the contract for the purpose of its analysis.

³²³Panel Report, para. 7.172.

³²⁴*Ibid.*, para. 7.182. In particular, the Panel reported that its analysis of the press reports as a whole had found that:

... out of the nine reports relied on by the JIA, only one (the sixth) suggests that the government did intervene in the Deutsche Bank Report. ... Furthermore, there is nothing in the other reports which might add weight to a finding of government intervention in the preparation of the Deutsche Bank Report, based on the sixth report. As such, we consider that the reports relied on by the JIA—whether read in isolation or as a whole—provide precious little support for a finding that the [GOK] intervened in the preparation of the Deutsche Bank Report.

(*Ibid.*) (footnotes omitted)

³²⁵See Japan's appellant's submission, paras. 120-124 (referring to Panel Report, paras. 7.166 and 7.167). See also *ibid.*, subheading II.4.(b)(ii), p. 40.

³²⁶*Ibid.*, para. 138.

³²⁷*Ibid.*, para. 135.

157. Contrary to what Japan appears to suggest, the relevant consultancy contract was not submitted to the Panel for the first time at the end of the Panel proceedings.³²⁸ Instead, Japan had included it as an exhibit to its first written submission to the Panel.³²⁹ We agree with Korea in this respect that "[t]he Panel's consideration of a contract that Japan itself submitted in support of its initial arguments obviously does not constitute a denial of Japan's due process rights."³³⁰ Japan's reference to Korea's failure to establish a *prima facie* case is also misguided. In this case, the Panel rightly conducted its own assessment of the relevance of the consultancy contract.

2. The Substance of the Deutsche Bank Report

(a) Whether the Panel Properly Rejected Certain of Japan's Arguments as *Ex Post* Rationalizations

158. Japan claims that the Panel erred in treating as *ex post* rationalizations certain of Japan's arguments relating to the way in which the Deutsche Bank Report analyzed the rate of return to creditors under the liquidation scenario.³³¹ In Japan's view, the Panel acted inconsistently with its obligations under Article 11 of the DSU by refusing to consider Japan's arguments.³³² Korea contests Japan's assertion and points out that the JIA did not address those issues in its determination of "entrustment or direction". The Panel was therefore correct in rejecting them as *ex post* rationalizations.

159. In our view, it follows from the requirement that the investigating authority provide a reasoned and adequate explanation for its conclusions, that the underlying rationale behind those conclusions be set out in the investigating authority's determination. It is on the basis of the rationale or explanation provided by the investigating authority that a panel must examine the consistency of the determination with a covered agreement, including whether the investigating authority has adequately explained how the facts support the determination it has made. Just as a panel must focus in its review on the rationale or explanation provided by the investigating authority in its report, so, too, is the respondent Member precluded during the panel proceedings from offering a new rationale or explanation *ex post* to justify the investigating authority's determination.³³³

³²⁸Japan acknowledged this in response to questioning at the oral hearing.

³²⁹Exhibit JPN-02-368 submitted by Japan to the Panel.

³³⁰Korea's appellee's submission, para. 101.

³³¹Japan's appellant's submission, paras. 155 and 158 (referring to Panel Report, paras. 7.216 and 7.220, respectively).

³³²*Ibid.*, para. 158.

³³³See Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 159 and footnote 293 thereto.

160. Based on our review of the Panel's analysis, we find that the Panel was correct in concluding that Japan's arguments in this respect were *ex post facto* rationalizations and thus fell outside the scope of the Panel's review. We therefore dismiss this ground of Japan's appeal.

(b) Admission of Error by Hynix

161. The Panel observed that the final alleged "discrepancy" in the Deutsche Bank Report identified by the JIA was an error, allegedly admitted by Hynix, which when corrected would have had the effect of reducing each of the recovery rates under the going concern scenarios by a certain amount.³³⁴

162. Japan argues that "[n]owhere in its Report did the Panel consider the effect of the correction of the error or the meaning thereof in accordance with what [the] JIA analyzed."³³⁵ In this way, according to Japan, the Panel acted inconsistently with Article 11 of the DSU by making a *de novo* review of the evidence to reach its own findings. We disagree with Japan. As we see it, the Panel properly examined the evidence before it and found that the alleged error was "nothing more than a typographical error" that did not require correction.³³⁶ This finding appears to be reasonable and within the discretion of the Panel. Therefore, we see no reason to disturb the Panel's finding that "Hynix had not identified any analytical error that required correction."³³⁷

B. *Conclusion*

163. We are not persuaded by Japan's argument that the Panel failed to comply with its obligations under Article 11 of the DSU in its review of the JIA's analysis of commercial reasonableness. To the contrary, it seems to us that the Panel conducted an objective appraisal of the JIA's determination of commercial reasonableness. Based on its analysis, the Panel found that "the JIA's rejection of the Deutsche Bank Report played a central role in its conclusion that the participation of the Four Creditors in the December 2002 [R]estructuring was not commercially reasonable to the extent that it coloured the JIA's assessment of the Four Creditors' internal analyses of the [R]estructuring."³³⁸ Recalling its finding that an objective and impartial investigating authority could not have rejected the Deutsche Bank Report on the grounds selected by the JIA, the Panel determined that "the JIA could not properly have relied on the Deutsche Bank Report as a basis for concluding that the participation

³³⁴ Panel Report, para. 7.239 (referring to JIA's Final Determination, Annex 3 (Rebuttals and Surrebuttals), para. 502).

³³⁵ Japan's appellant's submission, para. 162.

³³⁶ Panel Report, para. 7.244.

³³⁷ *Ibid.*

³³⁸ *Ibid.*, para. 7.247.

of the Four Creditors in the December 2002 [R]estructuring was not commercially reasonable."³³⁹ We see no reason to disturb this finding by the Panel.

164. Accordingly, we *uphold* the Panel's finding, in paragraphs 7.282 and 8.2(b) of the Panel Report, that the JIA acted inconsistently with Article 1.1(b) and Article 14 of the *SCM Agreement* by improperly determining that the December 2002 Restructuring conferred a benefit on Hynix.

VI. Calculation of the Amount of Benefit

165. Before the Panel, Korea claimed that the JIA erred in calculating the amount of benefit conferred by the financial transactions that constituted the October 2001 and December 2002 Restructurings, because the JIA did not assign any value to what Hynix provided in return and did not take into account the creditors' existing claims. According to Korea, "a proper analysis of these transactions requires consideration of all parts of the exchanges—not only the value of whatever the recipient received, but also the value of whatever the recipient gave in return."³⁴⁰ In the light of "Korea's extensive argumentation regarding the differences between the investment perspectives of inside and outside investors in respect of insolvent companies"³⁴¹, the Panel considered that Korea was "essentially arguing that the JIA calculated the amount of benefit [exclusively] from the perspective of outside investors".³⁴²

166. With respect to the JIA's calculation of the amount of benefit resulting from debt-to-equity swaps, the Panel observed that "Japan has not denied, that the formula used by the JIA to calculate the amount of benefit of the debt-to-equity swaps is the formula used in other jurisdictions to calculate the subsidy benefits from outright grants."³⁴³ Noting Korea's argument that "an investigating authority's analysis of a debt-to-equity swap cannot look only at the forgiveness of debt, and ignore the value of the equity provided in return"³⁴⁴, the Panel agreed with the panel in *EC – Countervailing Measures on DRAM Chips* that "[f]or the recipient, a loan clearly has a different value than a grant as it involves a debt that is owed to someone and will appear as such in a company's balance sheet." The Panel also

³³⁹Panel Report, para. 7.247.

³⁴⁰*Ibid.*, para. 7.299.

³⁴¹*Ibid.*, para. 7.305.

³⁴²*Ibid.*

³⁴³*Ibid.*, para. 7.311.

³⁴⁴*Ibid.*

stated that, "in a benefit analysis, it is the perspective of the recipient that is important, not that of the provider of the financial contribution."³⁴⁵

167. The Panel summed up its analysis of the benefit conferred by the debt-to-equity swaps as follows:

We note that the JIA did not explicitly treat the debt-to-equity swaps as grants. Nevertheless, the JIA did conclude that the value of the equity was zero. We recall that the JIA did so because "the major issue in the October 2001 Program and December 2002 Program was not to recover the equity infusion, but to maximize the recovery of the credit." In doing so, the JIA addressed the issue from the perspective of Hynix's creditors, rather than from the position of Hynix itself. ... [W]e consider that such an approach erroneously overstates the amount of benefit conferred on the recipient, for it overlooks the perspective of the recipient, *i.e.*, Hynix, which must dilute the ownership of existing shareholders in return. We therefore find this to have been a further flaw in the JIA's calculation of the amount of benefit.³⁴⁶ (footnote omitted)

168. On the basis of the above analysis, the Panel concluded that the JIA calculated the amount of benefit conferred by the October 2001 and December 2002 Restructurings inconsistently with Articles 1.1(b) and 14 of the *SCM Agreement*.³⁴⁷

169. On appeal, Japan requests that we reverse this finding of the Panel. According to Japan, the Panel acted inconsistently with Article 11 of the DSU in reaching this conclusion. As we see it, Japan's challenge is based on three main arguments.³⁴⁸ First, Japan disputes the Panel's assertion that the JIA calculated the benefit conferred by the financial transactions at issue on the basis of an exclusively outside investor benchmark.³⁴⁹ Secondly, Japan contests the Panel's conclusion that the JIA should not have treated the value of the equity that Hynix gave in return for the debt-to-equity swaps as zero.³⁵⁰ Thirdly, Japan argues that dilution is irrelevant in this case, given that it would have taken place at the level of shareholders, and not at the level of Hynix.³⁵¹

170. By contrast, Korea submits that the Panel rightly considered the JIA's amount of benefit analysis to be focused on the net cost to creditors, rather than on the net benefit to Hynix, the

³⁴⁵Panel Report, para. 7.312 (quoting Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.212).

³⁴⁶*Ibid.*, para. 7.313.

³⁴⁷*Ibid.*, paras. 7.316 and 8.2(c).

³⁴⁸Japan's appellant's submission, para. 172.

³⁴⁹*Ibid.*, para. 188.

³⁵⁰*Ibid.*, para. 219.

³⁵¹*Ibid.*, para. 220.

recipient; and, further, rightly found that the JIA failed to take account of the fact that the additional shares issued to creditors would dilute the ownership interest of existing shareholders.

171. We begin by examining Japan's contention that the Panel erred in finding that the JIA had calculated the amount of benefit by reference to an "exclusively outside investor benchmark".³⁵² According to Japan, the "basic standard" that the JIA applied to both inside and outside investors was the same: "they both seek to maximize profits or minimize losses."³⁵³ Japan submits that the JIA calculated the amount of benefit based on this standard, and not by reference to an "exclusively outside investor benchmark".³⁵⁴ At the oral hearing, Japan referred to this standard as a "rational investor" standard.³⁵⁵ Japan also disputes that it admitted before the Panel that an "inside investor" standard was the appropriate benchmark for this case.³⁵⁶

172. We do not consider the distinction between inside and outside investors to be helpful in order to determine the appropriate benchmark for calculating the amount of benefit under Articles 1.1(b) and 14 of the *SCM Agreement*.³⁵⁷ The terms of a financial transaction must be assessed against the terms that would result from unconstrained exchange in the relevant market. The relevant market may be more or less developed; it may be made up of many or few participants. By way of example, there are now well-established markets in many economies for distressed debt, and a variety of financial instruments are traded on these markets. In some instances, the market may be more rudimentary. In other instances, it may be difficult to establish the relevant market and its results. But these informational constraints do not alter the basic framework from which the analysis should proceed. We also do not consider that there are different standards applicable to inside and to outside investors. There is but one standard—the market standard—according to which rational investors act.

173. Article 14 of the *SCM Agreement*, entitled "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient", provides guidance as to how the relevant market shall be identified. Specifically, with respect to "government provision of equity capital", Article 14(a) stipulates that such equity infusions "shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice of private investors in the territory of that Member". In respect of loans, Article 14(b) provides that "a loan by a government shall not be

³⁵²Japan's appellant's submission, para. 190.

³⁵³*Ibid.*, para. 187.

³⁵⁴*Ibid.*, para. 190.

³⁵⁵Japan's response to questioning at the oral hearing.

³⁵⁶*Ibid.*

³⁵⁷Japan and Korea agreed with this view at the oral hearing. The European Communities argued that there is no distinction between an inside and an outside investor standard and that there are no two separate standards. (European Communities' response to questioning at the oral hearing)

considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market." In the latter case, "the benefit shall be the difference between these two amounts." Thus, under Article 14(a), the benchmark is "the usual investment practice of private investors", and under Article 14(b), the benchmark is "the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market." Neither of these benchmarks makes a distinction between "outside" or "inside" investors. Rather, they suggest that the investigating authority calculate the amount of benefit conferred on the recipient by comparing the terms of the financial contribution to the terms that the relevant market—consisting of rational investors, be they inside or outside investors or both—would have offered. As the Appellate Body has previously said:

Article 14, which ... is relevant context in interpreting Article 1.1(b), supports our view that the marketplace is an appropriate basis for comparison. The guidelines set forth in Article 14 relate to equity investments, loans, loan guarantees, the provision of goods or services by a government, and the purchase of goods by a government. A "benefit" arises under each of the guidelines if the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.³⁵⁸

174. We therefore disagree with the Panel's approach in this case, which consisted only of examining "whether or not the JIA applied [the inside investor] standard in an appropriate manner."³⁵⁹ As we see it, the Panel should have identified the appropriate benchmark to apply for the purpose of assessing whether the JIA calculated the amount of benefit for the October 2001 and December 2002 Restructurings consistently with Articles 1.1(b) and 14 of the *SCM Agreement*. Instead, the Panel held that, since the parties had agreed that the inside investor standard constituted a valid benchmark, "there [was] no need for [the Panel] to make any findings on whether or not the inside investor perspective constituted [the] valid market benchmark"³⁶⁰ for purposes of its analysis.

175. We turn next to consider Japan's contention that the Panel erred by concluding that the JIA should not have treated the value of the equity that Hynix gave in return for the debt-to-equity swaps as zero.³⁶¹ Japan asserts that the JIA did not disregard the value of the equity provided in return.³⁶²

³⁵⁸ Appellate Body Report, *Canada – Aircraft*, para. 158.

³⁵⁹ Panel Report, footnote 512 to para. 7.310.

³⁶⁰ *Ibid.*

³⁶¹ Japan's appellant's submission, para. 219.

³⁶² *Ibid.*, para. 227.

Rather, according to Japan, the JIA examined the issue on its merit and determined, based on "uncontested facts on the record, that the value of such equity was zero."³⁶³

176. In response, Korea alleges that neither Hynix nor its creditors treated the equity provided to the creditors in the debt-to-equity swaps as having zero value, and that even when the banks recognized that the book value was less than the face value, they still assigned a "substantial value to equity".³⁶⁴ Moreover, Korea submits that the "accounting treatment" relied on by Japan does not support the JIA's calculations, which valued the debts that the creditors forgave at the face value of the debts, but valued the equity that Hynix gave the creditors in return as having no value.³⁶⁵

177. As noted above³⁶⁶, with respect to this issue, the Panel stated:

We note that the JIA did not explicitly treat the debt-to-equity swaps as grants. Nevertheless, the JIA did conclude that the value of the equity was zero. We recall that the JIA did so because "the major issue in the October 2001 Program and December 2002 Program was not to recover the equity infusion, but to maximize the recovery of the credit." In doing so, the JIA addressed the issue from the perspective of Hynix's creditors, rather than from the position of Hynix itself. ... [W]e consider that such an approach erroneously overstates the amount of benefit conferred on the recipient, for it overlooks the perspective of the recipient, *i.e.*, Hynix, which must dilute the ownership interest of existing shareholders in return.³⁶⁷
(footnote omitted)

178. We see no error in this reasoning by the Panel. The JIA did not sufficiently explain, in its determination, how it reached the conclusion that the value of the shares was zero from the perspective of Hynix, the recipient.³⁶⁸

179. We turn next to the Panel's statement regarding *dilution* of the ownership of existing shareholders. Japan submits that "dilution is irrelevant to this case", given that the Panel did not indicate any evidence showing that dilution had in fact occurred, and that, even if dilution had occurred, it would have taken place at the level of shareholders, not at the level of Hynix.³⁶⁹

³⁶³Japan's appellant's submission, para. 227.

³⁶⁴Korea's appellee's submission, para. 168.

³⁶⁵*Ibid.*

³⁶⁶*Supra*, para. 167.

³⁶⁷Panel Report, para. 7.313. (footnote omitted)

³⁶⁸Japan does not contest the Panel's observation that "the JIA itself acknowledged, and Japan confirmed, that an investment of zero value to *outside* investors might not necessarily have zero value to *inside* investors." (*Ibid.*, footnote 513 to para. 7.310) (original emphasis)

³⁶⁹Japan's appellant's submission, para. 220. In paragraph 7.312 of the Panel Report, the Panel recalled that another non-appealed panel had discussed this issue.

180. By contrast, Korea submits that the Panel rightly found that the JIA failed to take account of the fact that the additional shares issued to creditors would dilute the ownership interest of existing shareholders. Further, Korea submits that characterizing dilution as a cost to shareholders but not to Hynix would mean that debt-to-equity swaps would be considered as two separate transactions: one involving the company, and the other involving existing shareholders.³⁷⁰

181. Based on our reading of the Panel Report, we understand the Panel to have referred to the issue of dilution merely to support its finding that the JIA did not calculate the amount of benefit from the perspective of the recipient. The Panel's finding was not based on whether or not dilution occurred in the circumstances of this case. Instead, the Panel found that the JIA did not calculate the amount of benefit from the perspective of either Hynix or its shareholders, and, thereby, addressed the issue solely from the perspective of Hynix's creditors. As we see it, dilution of the rights of existing shareholders does not appear to be a relevant issue on the facts of this case. Having said this, we do not wish to exclude the possibility that there may be circumstances in other cases in which the relationship between a company and its shareholders might be relevant for calculating the amount of benefit to the recipient.³⁷¹

182. In the light of the above, we see no error in the Panel's finding that the JIA's approach "erroneously overstates the amount of benefit conferred on the recipient"³⁷² with respect to the October 2001 and December 2002 Restructurings.

183. We note that Japan advances certain additional arguments in support of its position that the Panel erred in finding that the JIA calculated the amount of benefit conferred by the October 2001 and December 2002 Restructurings inconsistently with Articles 1.1(b) and 14 of the *SCM Agreement*.³⁷³ We observe that these arguments are based on the distinction between an inside and an outside investor standard, a distinction we have found to be unsustainable under Article 14. Japan agreed at the oral hearing that the distinction between an inside and an outside investor perspective is not pertinent for the determination of the amount of benefit under the *SCM Agreement*.³⁷⁴ Under these

³⁷⁰Korea's appellee's submission, paras. 172-173.

³⁷¹See Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 116 and 118.

³⁷²Panel Report, para. 7.313.

³⁷³Japan alleges that the Panel erroneously considered a claim for which Korea had not established a *prima facie* case. Japan further alleges that the Panel erred in finding that the JIA calculated the amount of benefit using "facts available". (Japan's appellant's submission, paras. 234 and 237)

³⁷⁴Japan's response to questioning at the oral hearing. At the oral hearing, Japan stated that the amount of benefit is, rather, to be determined by comparing the terms of the financial contribution at issue with the terms that would have been available in a market consisting of rational creditors.

circumstances, we refrain from considering these arguments by Japan on, *inter alia*, whether Korea had made a *prima facie* case regarding the outside investor standard.

184. We have found that the Panel erred in its interpretation and application of Articles 1.1(b) and 14 of the *SCM Agreement* because it did not identify properly the appropriate market benchmark to be applied under those provisions. At the same time, we have found that the Panel did not err in finding that the JIA's determination "erroneously overstate[d] the amount of benefit conferred on the recipient".³⁷⁵ Moreover, based on our review of the Panel's reasoning and the Panel record, we *find* that the Panel did not act inconsistently with its obligations under Article 11 of the DSU in concluding that Japan improperly calculated the amount of benefit conferred by the October 2001 and December 2002 Restructurings. As the Appellate Body has previously found: "not every error of law or incorrect legal interpretation attributed to a panel constitutes a failure on the part of the panel to make an objective assessment of the matter before it."³⁷⁶

185. Therefore, we *uphold*, albeit for different reasons, the Panel's finding, in paragraphs 7.316 and 8.2(c) of the Panel Report, that the JIA calculated the amount of benefit conferred on Hynix by the October 2001 and December 2002 Restructurings inconsistently with Articles 1.1(b) and 14 of the *SCM Agreement*.

VII. Benefit Calculation Methods

186. The Panel found that the JIA had acted contrary to the chapeau of Article 14 of the *SCM Agreement* by using methods that were not provided for in Japan's national legislation or implementing regulations to calculate the amount of benefit conferred on Hynix by the October 2001 and December 2002 Restructurings.³⁷⁷

187. On appeal, Japan argues that the Panel erred in finding that the two mathematical formulae used by the JIA in its benefit calculation, referred to as Formula 1 and Formula 2, were "method[s] used" under the chapeau of Article 14. According to Japan, the two mathematical formulae were only an *application* of the methods provided for in Japan's national regulations. Japan further argues that, even if the Panel were correct in designating these mathematical formulae as the "method[s] used" by the JIA, the Panel failed to properly examine, in a manner consistent with Article 11 of the DSU, whether they were "provided for" in Japan's national legislation or implementing regulations.

³⁷⁵Panel Report, para. 7.313.

³⁷⁶Appellate Body Report, *US – Steel Safeguards*, para. 497.

³⁷⁷See Panel Report, paras. 7.334 and 8.2(d).

188. With respect to the meaning of the term "method used", Japan argues that the Panel's interpretation of the chapeau of Article 14 would imply that the applications of the methods be spelled out in the national legislation or implementing regulations in such detail so as to leave no room for an investigating authority to adapt them to the particular facts of an investigation. Japan further contends that the Panel's interpretation of "method" would require Members to foresee "each and every possible form" of financial contribution and to specify in detail the appropriate calculation methods in their national legislation or implementing regulations.

189. Korea contends that, while Formula 1 and Formula 2 in and of themselves constitute "methods", there were also other "methodologies" used by the JIA in calculating the amount of benefit in this case, which also fell under the concept of "method" for purposes of the chapeau of Article 14.³⁷⁸

190. The chapeau of Article 14 sets out three requirements. The first is that "any method used" by an investigating authority to calculate the amount of a subsidy in terms of benefit to the recipient shall be provided for in the national legislation or implementing regulations of the Member concerned. The second requirement is that the "application" of *that* method in each particular case shall be transparent and adequately explained. The third requirement is that "any such method" shall be consistent with the guidelines contained in paragraphs (a)-(d) of Article 14.

191. The chapeau of Article 14 provides a WTO Member with some latitude as to the method it chooses to calculate the amount of benefit. Paragraphs (a)-(d) of Article 14 contain general guidelines for the calculation of benefit that allow for the method provided for in the national legislation or regulations to be adapted to different factual situations. As the Appellate Body said in *US – Softwood Lumber IV*:

The chapeau of Article 14 requires that "any" method used by investigating authorities to calculate the benefit to the recipient shall be provided for in a WTO Member's legislation or regulations ... *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.*

³⁷⁸Korea's appellee's submission, paras. 198-199. Korea refers to paragraphs 90-106 of JIA's Final Determination, Annex 1 (Essential Facts), where it alleges that these other "methods" can be found.

... We agree with the Panel that the term "shall" in the last sentence of the chapeau of Article 14 suggests that calculating benefit consistently with the guidelines is mandatory. We also agree that *the term "guidelines" suggests that Article 14 provides the "framework within which this calculation is to be performed", although the "precise detailed method of calculation is not determined"*. Taken together, these terms *establish mandatory parameters within which the benefit must be calculated, but they do not require using only one methodology* for determining the adequacy of remuneration for the provision of goods by a government.³⁷⁹ (emphasis added)

192. We observe that the first requirement of the chapeau of Article 14 is that the method used be provided for in a WTO Member's national legislation or implementing regulations. Although the chapeau of Article 14 states that the calculation of benefit must be consistent with the guidelines in paragraphs (a)-(d) of that provision, it does not, in our view, contemplate that the method be set out in detail. The requirement of the chapeau would be met if the method used in a particular case can be derived from, or is discernable from, the national legislation or implementing regulations. We believe that this view strikes an appropriate balance between the flexibility that is needed for adapting the benefit calculation (consistent, however, with the guidelines of paragraphs (a)-(d) of Article 14) to the particular factual situation of an investigation, and the need to ensure that other Members and interested parties are made aware of the method that will be used by the Member concerned, under Article 14 of the *SCM Agreement*.

193. The Panel noted, in this case, that the provisions of Japanese law relating to the calculation of benefit are found in Japan's *Guidelines for Procedures Relating to Countervailing and Anti-dumping Duties* (the "*Guidelines*").³⁸⁰ The Panel observed that the JIA had made calculations regarding three main types of transactions entered into by Hynix with its creditors, namely, debt forgiveness, equity infusions, and loans. The Panel considered that the JIA was entitled to treat debt-to-equity swaps as

³⁷⁹Appellate Body Report, *US – Softwood Lumber IV*, paras. 91 and 92. In addition, the panel in *EC – Countervailing Measures on DRAM Chips* explained that:

In light of these problems dealing with the prescribed methodology for calculating benefit in Article 14 of the *SCM Agreement*, we consider that an investigating authority is entitled to considerable leeway in adopting a reasonable methodology.

(Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.213)

³⁸⁰These procedures were notified to the WTO pursuant to Article 32.6 of the *SCM Agreement*, in document G/ADP/N/1/JPN/2/Suppl.4.

comprising new equity infusions and loan maturity extensions as comprising new loans.³⁸¹ The Panel then found that, in calculating the amount of benefit with respect to these financial transactions, the JIA utilized two mathematical formulae: "Formula 2" for calculation of the amount of benefit to be allocated to the year in which the subsidy was allegedly received for transactions involving debt forgiveness and equity infusions³⁸²; and "Formula 1" for the calculation of the benchmark interest rate for uncreditworthy companies for transactions involving loans.³⁸³

194. At the outset, we wish to point out that neither before the Panel, nor before us, did the parties question the substantive content of Formula 1 and Formula 2 and their consistency with the guidelines of Article 14 of the *SCM Agreement*. Rather, the issue raised by Korea was only whether the "method[s] used" by the JIA complied with the procedural requirements of the chapeau of Article 14 of the *SCM Agreement*. The Panel first examined whether Formula 1 and Formula 2 were "methods" within the meaning of the chapeau. In construing the ordinary meaning of the word "method", the Panel accepted the definition suggested by Japan and not contested by Korea, that "method" means "a mode of procedure; a (defined or systematic) way of doing a thing".³⁸⁴ The Panel found that

³⁸¹Panel Report, footnote 524 to para. 7.329.

³⁸²Formula 2 provides:

$$A_k = \frac{y/n + [y-(y/n)(k-1)]d}{1+d}$$

[where]

A_k : the amount of subsidy allocated to year k

y: the amount of subsidy

n: the useful life (year)

d: the discount interest rate

k: the year the subsidy is allocated to. The year of receipt = 1, and $1 < k < n$

(See Panel Report, para. 7.329)

³⁸³Formula 1 provides:

$$i_b = (1+i_f)[(1-q_n)/(1-p_n)]^{1/n} - 1$$

[where]

n: the repayment term of the loan

i_b : the interest rate for uncreditworthy companies (the benchmark interest rate)

i_f : the interest rate for creditworthy companies

p_n : the default rate of uncreditworthy companies within n years

q_n : the default rate of creditworthy companies within n years

(See *ibid.*, para. 7.332)

³⁸⁴*Ibid.*, para. 7.328 (quoting Japan's first written submission to the Panel, para. 528, in turn quoting *The New Shorter Oxford Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 1759).

Formula 1 and Formula 2 were "methods" within the meaning of the chapeau. The Panel then examined whether Formula 1 and Formula 2 were "provided for" in Japan's *Guidelines*.³⁸⁵

195. We are unable to agree with the Panel that Formula 1 and Formula 2, in and of themselves, constitute the "method[s] used" by the JIA *to calculate the amount of subsidy in terms of benefit to the recipient* within the meaning of Article 14. Formula 1 was used to calculate a *benchmark interest rate*; and Formula 2 was used to *allocate benefit over time*. In our view, Formula 1 and Formula 2 constitute *components or elements of the methods used* by the JIA to calculate the amount of benefit conferred on Hynix. Neither, in isolation, was the complete "method used" in calculating the amount of subsidy in the transaction involved.

196. In identifying the applicable method for calculating benefit with respect to equity infusions, the JIA set out the three consecutive steps that it would follow. First, it would determine the appropriate market benchmark against which it would compare and from which it would subtract the amount of equity infusion actually received by Hynix. This would enable it to determine the actual amount of benefit received. For this purpose, the JIA would use as the appropriate benchmark the amount of equity infusion provided by private investors under equivalent conditions; or, if no such private investors existed, it would determine an "adequate amount of subsidy ... after examining the circumstances whereby the government may make a reasonable return on the investment".³⁸⁶ Secondly, the JIA would determine the time of receipt of the subsidy. Thirdly, the JIA would allocate the subsidy over a relevant period of time.³⁸⁷

³⁸⁵With respect to Formula 2, the Panel found that the *Guidelines* did not "provide for" the method used, because the provisions in the *Guidelines* relating to debt forgiveness and equity infusions did not contain any reference to the integers actually used in that formula, either in specific or general terms. (Panel Report, paras. 7.330 and 7.331) The Panel similarly concluded that Formula 1 was "quite *different* to the simplistic explanation in the *Guidelines*" relating to loans. (*Ibid.*, para. 7.333) (emphasis added)

³⁸⁶As the Panel itself noted, the JIA calculated the amount of benefit resulting from the October 2001 and December 2002 debt-to-equity swaps (treated by the JIA as "equity infusions") as follows:

As described above, the Investigating Authorities find that at the time of the October 2001 Program, there were no investors who would additionally invest in or make loans to Hynix from a normal commercial perspective, and thus, there were no normal investments by private investors that can be reasonably compared to the equity infusions granted by the creditor banks. An investment under such a situation is not consistent with the usual investment practice of the private investors in Korea at that time. Because the situation at the time was such that a return on such investment could not be expected within a reasonable period of time, the amount of the subsidy is the full amount of the investment.

(Panel Report, para. 7.308 (quoting JIA's Final Determination, Annex 1 (Essential Facts), para. 310) The Panel also referred to paras. 379 and 381 of Annex 1, where the JIA used the same approach in respect of the December 2002 debt-to-equity swap. (See *ibid.*, footnote 509 to para. 7.308)

³⁸⁷JIA's Final Determination, Annex 1 (Essential Facts), paras. 96-100.

197. In our view, Formula 2 applies to the third step of the above process. It relates to *allocation* of benefit over time once the amount of benefit has actually been determined under the first step of the JIA's calculation methodology. Formula 2, standing alone, does not constitute the "method used" by the JIA to calculate the *amount* of benefit. Rather, taken together, all three steps identified by the JIA for treating equity infusions constitute the "method used" by the JIA for calculating the amount of benefit in respect of the equity infusions. This applies equally to the JIA's use of Formula 2 for transactions involving debt forgiveness.³⁸⁸

198. With respect to loans also, the JIA set out a three-step process. First, it would identify the appropriate market benchmark for calculating the amount of subsidy. Secondly, it would determine the time of receipt of the subsidy. Thirdly, it would determine the manner in which the subsidy would be allocated.³⁸⁹ Formula 1 is a mathematical rule that related to only the first step of this process: it was used by the JIA to calculate the benchmark interest rate for uncreditworthy companies, where comparative commercial loans did not exist on the commercial market. As in the case of Formula 2, however, it was only a part, albeit an important part, of the "method used" by the JIA to calculate the amount of benefit for loans and loan extensions, because, after identifying the benchmark interest rate in accordance with Formula 1, the JIA then had to determine the difference between the amount so calculated and the actual interest amount paid by Hynix for the new loan.³⁹⁰

199. We agree with the Panel that, in accordance with the definition of "method" accepted by the Panel, Formula 1 and Formula 2 can be considered "methods" in the sense of a "mode of procedure". But it does not follow from this that they are the "method[s] used" *for calculating the amount of benefit* in this case. Rather, they are methods for *allocating benefit* once the amount of the benefit has been determined, and for *calculating interest rates* for loans to uncreditworthy companies where

³⁸⁸In calculating the amount of benefit for debt forgiveness, the JIA first determined the amount of the subsidy, which it treated as the total amount of debt forgiveness granted, and then allocated it over a five-year period using Formula 2. (See JIA's Final Determination, Annex 1 (Essential Facts), paras. 313 and 314)

³⁸⁹*Ibid.*, paras. 91-95.

³⁹⁰As the Panel itself noted, the JIA "calculated the amount of benefit resulting from the October 2001 [R]estructuring in Section 2.8.5 of [the] JIA's Final Determination, Annex 1 (Essential Facts). The JIA adopted the same approach for both new loans and extensions of loan maturities, finding that:

at the time of the October 2001 Program, there were no normal commercial loans that would be comparable to the loans granted by the creditor banks. Moreover, as examined above, the Investigating Authorities find that there were no investors who would additionally invest in or make loans to Hynix from a normal commercial perspective. Therefore, the Investigating Authorities calculate the benchmark interest rate in accordance with Formula 1 in 2.3.2.2.1 hereof, and obtain the difference between this amount and the actual interest amount paid for the new loan."

(Panel Report, para. 7.306 (quoting JIA's Final Determination, Annex 1 (Essential Facts), para. 302, and referring to paras. 103 and 306)

no comparable loans exist on the commercial market. The Panel should have gone further to determine the entire methodology used by the JIA in calculating the amount of benefit for each type of transaction. If it had done so, the Panel could then have properly proceeded to consider whether those methodologies, in their entirety, were "provided for" under Japan's *Guidelines*. The Panel, however, treated Formula 1 and Formula 2 as if they were, by themselves, the "method[s] used" to calculate the amount of benefit. They were not.

200. We therefore find that the Panel erred in finding in paragraphs 7.330, 7.331, and 7.333 of the Panel Report, that Formula 1 and Formula 2 were the "method[s] used" to calculate the amount of benefit conferred on Hynix, within the meaning of the chapeau of Article 14.

201. Japan claims that, even if the mathematical formulae could be considered the "method[s] used" in this case, the Panel erred in finding that Formula 1 and Formula 2 were not "provided for" under Japan's *Guidelines*, and thereby violated Article 11 of the DSU. This conditional claim would arise only if we upheld the Panel's finding on the "method[s] used". As we have found that the Panel erred in treating Formula 1 and Formula 2 as the "method[s] used", we do not proceed to consider whether the Panel properly found that Formula 1 and Formula 2 were not "provided for" in Japan's *Guidelines*. We also see no need to determine whether the Panel's findings were based on an objective assessment of the matter, as required under Article 11 of the DSU.

202. We therefore *reverse* the Panel's finding, in paragraphs 7.334 and 8.2(d) of the Panel Report, that the methods used by Japan to calculate the amount of benefit conferred on Hynix were not provided for in Japan's national legislation or implementing regulations, as required under the chapeau of Article 14 of the *SCM Agreement*.

VIII. Allocation of Benefit

203. The Panel found that "Japan imposed countervailing duties in 2006 on imports which the JIA itself had found were not subsidized at the time of imposition."³⁹¹ Accordingly, with respect to those subsidies, the Panel concluded that Japan acted inconsistently with Article 19.4 of the *SCM Agreement* by levying countervailing duties "in excess of the amount of the subsidy found to exist".³⁹²

³⁹¹Panel Report, para. 7.361.

³⁹²*Ibid.*

204. Japan appeals the Panel's finding on two grounds. First, Japan alleges that the Panel erred in its interpretation of Article 19.4 of the *SCM Agreement*. Secondly, Japan claims that the Panel acted inconsistently with Article 11 of the DSU by concluding that the JIA's "use of a five-year allocation period" for a non-recurring subsidy relating to the October 2001 Restructuring "is a finding (even if only implicit) that the benefit [of that subsidy] will expire after a period of five years"³⁹³, in other words, by the end of 2005. We address Japan's arguments in turn below.

1. Article 19.4 of the *SCM Agreement*

205. Japan asserts that the Panel's interpretation of Article 19.4 effectively requires that an investigating authority update its finding of subsidization at the time of imposition of the duty. In Japan's view, a finding of subsidization in respect of a past period of investigation suffices for the imposition of countervailing duties.³⁹⁴

206. Korea insists that it "never claimed that the JIA was required to update its decision based on more recent information."³⁹⁵ Instead, Korea argues that, by allocating benefit conferred by the October 2001 Restructuring to the years 2001 through 2005, the JIA itself had found that no benefit would be conferred in 2006, because that year "would be outside the five-year life of the subsidy".³⁹⁶ Korea suggests that duties could not be imposed after that time since, by the JIA's own logic, there would no longer be any subsidy left to countervail.

207. As we see it, this issue relates to the question of whether countervailing duties can be imposed, in the case of non-recurring subsidies, when the determination made by the investigating authority indicates that the subsidy will no longer exist at the time of imposition.³⁹⁷

³⁹³Panel Report, para. 7.360. We note that non-recurring subsidies are usually allocated over a certain period of time. This practice is not in dispute by the parties in this case.

³⁹⁴Japan's appellant's submission, para. 327 (referring to Panel Report, footnote 551 to para. 7.357).

³⁹⁵Korea's appellee's submission, para. 223.

³⁹⁶*Ibid.*, para. 221.

³⁹⁷As the Panel noted, the present case concerns non-recurring subsidies provided through the October 2001 Restructuring. We agree with the Panel that recurring subsidies would lend themselves to a different type of analysis. (See Panel Report, footnote 551 to para. 7.357)

208. We begin our analysis by considering the text of Article 19.4 of the *SCM Agreement*:

No countervailing duty shall be levied* on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

*[Original footnote 51] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

209. In our view, Japan misreads the Panel Report when it alleges that the Panel interpreted Article 19.4 to require that an investigating authority update its finding of subsidization and show that there is subsidization at the time of imposition of the countervailing duty. On the contrary, the Panel explicitly said that it was "not suggesting that an investigating authority [was] somehow required to conduct a new investigation at the time of imposition, in order to confirm the continued existence of the subsidization found to exist during the period of investigation. That will defeat the very purpose of using periods of investigation in the first place."³⁹⁸

210. By its terms, Article 19.4 refers to a subsidy "found to exist". We see no requirement in Article 19.4 for an investigating authority to conduct a new investigation or to "update" the determination at the time of imposition of a countervailing duty in order to confirm the continued existence of the subsidy. However, in the case of a non-recurring subsidy, a countervailing duty cannot be imposed if the investigating authority has made a finding in the course of its investigation as to the duration of the subsidy and, according to that finding, the subsidy is no longer in existence at the time that the Member makes a final determination to impose a countervailing duty. This is because, in such a situation, the countervailing duty, if imposed, would be in excess of the amount of subsidy found to exist, contrary to the provisions of Article 19.4.

211. In the light of the above, we do not find fault with the Panel's interpretation of Article 19.4 of the *SCM Agreement*.

2. Article 11 of the DSU

212. Japan claims that the Panel acted inconsistently with Article 11 of the DSU when it found that the use of a five-year allocation period by the JIA "is a finding (even if only implicit) that the benefit will expire after a period of five years."³⁹⁹ For Japan, "the purpose of the JIA's calculation was merely to determine the amount of the subsidies conferred in 2003, the period of investigation in this case"

³⁹⁸Panel Report, para. 7.356.

³⁹⁹Japan's appellant's submission, para. 333 (referring to Panel Report, para. 7.360).

for determining the existence of a subsidy.⁴⁰⁰ In Japan's view, "the Panel erred in equating a division by five of the total amount of the non-recurring subsidies to a determination that the subsidy would cease to exist after five years."⁴⁰¹ Japan maintains that "the JIA did not make any finding that the subsidy would expire in 2005 or any finding of the amount of subsidy that Hynix would receive in 2006."⁴⁰²

213. Korea rejects Japan's contention that the Panel acted inconsistently with Article 11 of the DSU. Korea observes that "the number of years over which the 'subsidy amount is allocated' equalled the five-year 'useful life of the facilities stipulated in Korean law'".⁴⁰³ Korea argues that "[t]he consequence of that determination was that the subsidies ceased to have a 'continuous effect,' and could not be 'allocated' once that period had expired."⁴⁰⁴ For Korea, this was not a *de novo* review by the Panel; it was a necessary consequence of the JIA's own determination.⁴⁰⁵

214. The Panel held that the JIA's determination contained an implicit finding that the subsidization in question would expire in 2005 at the end of the five-year period. We are not convinced by Japan's argument that, "[b]y stating 'even if only implicit,' the Panel admit[ted] that the JIA made no finding on the amount of subsidies in 2006" and, in effect, "second-guessed the JIA's finding".⁴⁰⁶ Put differently, we are not persuaded that the Panel overstepped the bounds of its review when it concluded that the JIA's use of a five-year period for the allocation is a determination by the JIA that the non-recurring subsidies granted in the October 2001 Restructuring would expire at the end of 2005.

215. We therefore reject Japan's claim that the Panel failed to discharge its duty under Article 11 of the DSU to conduct an objective assessment of the matter before it.

⁴⁰⁰Japan's appellant's submission, para. 333.

⁴⁰¹*Ibid.*, para. 335.

⁴⁰²Japan's appellant's submission, para. 333.

⁴⁰³Korea's appellee's submission, para. 243 (referring to JIA's Final Determination, Annex 1 (Essential Facts), para. 99).

⁴⁰⁴*Ibid.*

⁴⁰⁵*Ibid.*

⁴⁰⁶Japan's appellant's submission, para. 335 (referring to Panel Report, para. 7.360).

IX. The JIA's Determination of Benefit with respect to the October 2001 Restructuring

216. Korea appeals the Panel's finding relating to the JIA's determination that the October 2001 Restructuring conferred a benefit on Hynix within the meaning of Articles 1.1(b) and 14 of the *SCM Agreement*.⁴⁰⁷

217. The Panel observed that a "benefit" within the meaning of Article 1.1(b) exists when a financial contribution "is made available on terms that are more favourable than the recipient could have obtained on the market."⁴⁰⁸ Regarding the nature of the evidence that is required to support a finding as to existence of benefit, the Panel took the view that:

[i]n certain circumstances, an investigating authority might examine the existence of benefit by gathering available evidence of the terms that the market would have offered, and by comparing those terms with those of the financial contribution at issue. This is the approach advocated by Korea in the present case. In other circumstances, an investigating authority might rely on evidence of whether or not the financial contribution was provided on the basis of commercial considerations. This is the approach adopted by the JIA in the present case. In our view, both types of evidence are relevant in determining the existence of benefit. The first, because such evidence provides a market benchmark against which to determine whether or not the terms on offer were more favourable than those available from the market. The second, because evidence of reliance on non-commercial considerations indicates terms more favourable than those available from the market (as the market is presumed to operate on the basis of commercial considerations). Depending on the particular circumstances of a case, an investigating authority might also rely on other types of evidence that could be equally relevant.⁴⁰⁹ (footnote omitted)

218. Based on an analysis of the evidence relied upon by the JIA, the Panel upheld the JIA's determination that:

... the Four Creditors had failed to participate in the October 2001 [R]estructuring on the basis of commercial considerations. We have rejected Korea's arguments challenging that conclusion.⁴¹⁰

⁴⁰⁷Panel Report, para. 7.316.

⁴⁰⁸*Ibid.*, para. 7.275.

⁴⁰⁹*Ibid.*, para. 7.276.

⁴¹⁰*Ibid.*, para. 7.281.

219. The Panel no doubt conducted this analysis while dealing with the issue of "entrustment or direction". When it addressed the issue of "benefit", the Panel recalled its previous finding on entrustment or direction and observed:

Since we uphold the JIA's finding that the October 2001 [R]estructuring was not commercially reasonable, it follows that we also uphold the JIA's determination that the October 2001 [R]estructuring conferred a benefit on Hynix.⁴¹¹ (footnote omitted)

220. Finally, having reviewed the evidence relating to the Other Creditors' participation in the October 2001 Restructuring, the Panel concluded that "the JIA properly determined, on the basis of the available evidence, that the mere participation of Other Creditors in the October 2001 [R]estructuring should not outweigh the evidence directly concerning the Four Creditors that indicated that they participated in the [R]estructuring on the basis of non-commercial considerations."⁴¹² The Panel therefore rejected Korea's claim that the JIA's benefit finding with respect to the October 2001 Restructuring was inconsistent with Articles 1.1(b) and 14 of the *SCM Agreement*.

221. Korea challenges the Panel's finding on appeal. Korea's appeal is based on three main arguments. First, Korea submits that the Panel improperly conflated the two distinct concepts of "financial contribution" and "benefit" in Article 1.1 of the *SCM Agreement*.⁴¹³ Korea submits that, under the Panel's analysis, a finding that there has been "entrustment or direction" is, by itself, a sufficient basis for a finding that benefit exists.

222. Secondly, with respect to the Panel's conclusion that the JIA's determination of benefit was based on relevant economic evidence⁴¹⁴, Korea alleges that, for the Panel, "the mere fact that Hynix's creditors failed to undertake a market-consistent analysis before entering into the October 2001 [R]estructuring indicated that the terms of the restructuring they approved *must* have been more favourable than the terms of a purely market-driven restructuring."⁴¹⁵ Korea agrees that the analysis actually performed by creditors may be probative of the creditor's subjective intent in entering into the underlying transactions and that *intent* may be relevant to an analysis of "entrustment and direction". In Korea's view, however, the creditors' failure to undertake an analysis "does not permit

⁴¹¹Panel Report, para. 7.281.

⁴¹²*Ibid.*, para. 7.298.

⁴¹³Korea's other appellant's submission, para. 41.

⁴¹⁴Panel Report, para. 7.277.

⁴¹⁵Korea's other appellant's submission, para. 39 (referring to Panel Report, para. 7.276). (original emphasis)

any conclusion as to whether the 'recipient' *actually* received a benefit".⁴¹⁶ In addition, Korea refers to footnote 475 of the Panel Report and criticizes the Panel for not explaining why a creditor's imperfect analysis based on incomplete information cannot lead to the same result as would have been obtained in the market.⁴¹⁷ In Korea's view, it is "always possible to be right for the wrong reasons".⁴¹⁸

223. Thirdly, Korea refers to the analyses by Anjin Accounting and the Monitor Group, which it had submitted to the Panel, to demonstrate that the alleged government action had not conferred a benefit on Hynix, because the terms obtained from the Four Creditors were comparable with what Hynix would have been able to obtain from other creditors who were not subjected to the alleged government "entrustment or direction". Korea submits that these reports were available to the JIA at the time it conducted its benefit examination and should therefore have been taken into account by the JIA.

224. Japan submits that, contrary to assertions by Korea, the Panel did not hold that "a finding that there has been 'entrustment or direction' is, by itself, a sufficient basis for finding that a benefit exists."⁴¹⁹ Japan maintains that "the Panel's finding is based on a comparison of the particular factual situations in this case."⁴²⁰ Japan argues that the non-commercial nature of the decisions by Hynix's private creditors was not based solely on their insufficient analysis of the terms of the October 2001 Restructuring and the unavailability of the reports by Anjin Accounting and the Monitor Group.⁴²¹

225. In our analysis concerning the calculation of the amount of benefit in Section VI of this Report, we referred to the Appellate Body's interpretation, in *Canada – Aircraft*, of the benefit requirement of Article 1.1(b) of the *SCM Agreement*.⁴²² The Appellate Body held that "the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."⁴²³ We follow this approach in our assessment of the Panel's review of the JIA's determination of whether the October 2001 Restructuring conferred a benefit on Hynix.

⁴¹⁶Korea's other appellant's submission, para. 44. (original emphasis)

⁴¹⁷*Ibid.*, para. 51.

⁴¹⁸*Ibid.*, para. 46.

⁴¹⁹Japan's appellee's submission, para. 35 (quoting Korea's other appellant's submission, para. 43).

⁴²⁰*Ibid.*, para. 36.

⁴²¹*Ibid.*, para. 54.

⁴²²See *supra*, para. 173.

⁴²³Appellate Body Report, *Canada – Aircraft*, para. 157.

226. Korea suggests that the Panel's finding that the October 2001 Restructuring conferred a benefit on Hynix was merely consequential to its repudiation of Korea's claim that the JIA erred in concluding that the Four Creditors were entrusted or directed by the GOK.⁴²⁴ We disagree. Based on our review of the Panel's reasoning, we are not convinced that the benefit finding did not involve any additional analysis by the Panel.⁴²⁵ Instead, the Panel relied on evidence of "non-commercial considerations" as a criterion in its analysis of the JIA's review of whether private banks had been entrusted or directed by the GOK to make a financial contribution to Hynix.⁴²⁶ The Panel also relied on evidence of "non-commercial considerations" in its consideration of the JIA's analysis of whether the financial contribution conferred a benefit. Relying on the same or similar evidence for assessing distinct legal requirements does not, in our view, amount to a conflation of the benefit requirement with the financial contribution requirement. We are satisfied that the Panel in this case used evidence of non-commercial considerations first to assess the JIA's review of whether entrustment or direction had occurred under Article 1.1(a)(1)(iv), and then to determine the distinct legal question of whether the JIA properly established that the October 2001 Restructuring conferred a benefit under Article 1.1(b).

227. The Panel also recognized that an investigating authority might be confronted with different types of evidence, and that one type of evidence might not support the conclusion suggested by the other. In the specific circumstances of this case, the JIA had undertaken to investigate whether "creditors acting in accordance with the 'usual practice' in the relevant market' would have restructured Hynix on the same terms as the Four Creditors did".⁴²⁷ That inquiry, however, did not reveal any such evidence to the JIA. The JIA was not therefore confronted with evidence indicating that non-entrusted or non-directed creditors would have restructured Hynix on similar terms as the Four Creditors did.

⁴²⁴See Korea's other appellant's submission, para. 45 (referring to Panel Report, para. 7.281).

⁴²⁵The Panel explained that an "investigating authority might rely on evidence of whether or not the financial contribution was provided on the basis of commercial considerations ... because evidence of reliance on non-commercial considerations indicates terms more favourable than those available from the market (as the market is presumed to operate on the basis of commercial considerations)." (Panel Report, para. 7.276) The Panel also recognized that, in certain cases, "there might be evidence that, although the financial contribution was not provided on the basis of commercial considerations, it would in fact have been provided by 'creditors acting in accordance with the 'usual practice' in the relevant market'." The Panel stated that, "[i]n such cases, the investigating authority would need to weigh the probative value of one type of evidence against the probative value of the other." (*Ibid.*, footnote 475 to para. 7.276)

⁴²⁶See Sections IV and V of this Report.

⁴²⁷Panel Report, footnote 475 to para. 7.276 (quoting JIA's Final Determination, Annex 3 (Rebuttals and Surrebuttals), para. 136).

228. We also see no error in the Panel's review of the JIA's analysis of the Other Creditors' role in the October 2001 Restructuring.⁴²⁸ The Panel noted that "the JIA's finding regarding the commercial reasonableness of the decision of Hynix's Other Creditors to participate in the October 2001 [R]estructuring was based on facts available, as those Other Creditors contacted by the JIA (other than Kookmin) had failed to respond to its questionnaire."⁴²⁹ The Panel further stated that the "JIA was required to apply facts available in respect of the Other Creditors because none of the Other Creditors contacted by the JIA (except Kookmin) had responded to its questionnaire. In other words, there was no direct evidence on the JIA's record regarding the reasons why Other Creditors (other than Kookmin) had participated in the October 2001 [R]estructuring."⁴³⁰ In these circumstances, the Panel correctly found that "the mere participation of Other Creditors in the October 2001 [R]estructuring (absent evidence establishing that their participation was based on commercial considerations) should not have precluded a finding by the JIA that the participation of the Four Creditors in that [R]estructuring conferred a benefit on Hynix."⁴³¹

229. For these reasons, we *find* that the Panel did not err in finding that the JIA's determination of the existence of benefit with respect to the October 2001 Restructuring was not inconsistent with Articles 1.1(b) and 14 of the *SCM Agreement*.

X. Interested Parties

230. The Panel rejected Korea's claim that the JIA acted inconsistently with Articles 12.7 and 12.9 of the *SCM Agreement* by including certain financial institutions as "interested parties", and by using "facts available" for those financial institutions that had failed to provide information.

231. On appeal, Korea claims that the Panel improperly rejected its argument that entities included as "interested parties" under Article 12.9 of the *SCM Agreement* must "have an interest in the outcome of the proceeding".⁴³² Korea submits that the JIA's designation of certain creditors of Hynix as interested parties, when they did not "have an interest in the outcome of the proceeding", resulted in the JIA applying "facts available", under Article 12.7 of the *SCM Agreement*, in a manner prejudicial to Hynix.

⁴²⁸We understand the Panel's cross-reference in footnote 475 ("for the reasons set forth above") to refer to paragraphs 7.283-7.298 of its Report.

⁴²⁹Panel Report, para. 7.288.

⁴³⁰*Ibid.*, para. 7.289. (footnote omitted)

⁴³¹*Ibid.*, para. 7.291.

⁴³²See Korea's other appellant's submission, paras. 106 and 107.

232. Japan argues that Korea's appeal regarding the Panel's interpretation of the term "interested parties" should be rejected by the Appellate Body. According to Japan, Korea's definition cannot be reconciled with Article 12.9, as the entities listed there do not necessarily "have an interest in the outcome of the proceeding".⁴³³ In Japan's view, Korea's interpretation of "facts available" under Article 12.7 would distort the balance between the due process rights of interested parties, on the one hand, and the obligation of an investigating authority to carry out an objective investigation, on the other hand. Japan also contends that the due process rights of interested parties under Article 12 are not unlimited, and are subject to the discretion of investigating authorities to use "facts available".⁴³⁴

233. On 7 September 2004, the JIA sent questionnaires concerning subsidies to GOK, Hynix, and 16 financial institutions that had provided financing to Hynix.⁴³⁵ The JIA considered that it was reasonable to include these 16 financial institutions as interested parties in the investigation.⁴³⁶ The GOK, Hynix, and ten of the 16 financial institutions filed responses.⁴³⁷ Among these ten financial institutions were the Four Creditors for which the JIA ultimately made a final determination of entrustment or direction. For the institutions that failed to respond to the JIA's questionnaires or to provide the information requested, the JIA made certain findings in its determination on the basis of "facts available", pursuant to Article 12.7 of the *SCM Agreement*.⁴³⁸

234. Article 12.7 of the *SCM Agreement* governs the use of "facts available" in countervailing duty proceedings. It reads:

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.

235. Thus, the circumstances under which an investigating authority may make its determination on the basis of "facts available" are limited, pursuant to Article 12.7, to cases in which an interested Member or an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation".

⁴³³Japan's appellee's submission, paras. 129-131.

⁴³⁴*Ibid.*, para. 142.

⁴³⁵JIA's Final Determination, para. 8.

⁴³⁶Panel Report, para. 7.381 (referring to JIA's Final Determination, Annex 3 (Rebuttals and Surrebuttals), paras. 29 and 39).

⁴³⁷JIA's Final Determination, para. 10.

⁴³⁸Panel Report, para. 7.381.

236. Article 12.9 of the *SCM Agreement* provides that:

For the purposes of this Agreement, "interested parties" shall include:

- (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and
- (ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

237. As noted above, Korea's contention is that the JIA erred by designating certain financial institutions as interested parties although they had no "interest in the outcome of the proceeding". We observe that Article 12.9 of the *SCM Agreement* does not, by its explicit terms, require that an investigating authority must establish that a party has "an interest in the outcome of [a] proceeding". Nor do we see any provision of the *SCM Agreement* that defines the nature of the interest required for an entity to be included as an interested party.

238. Korea argues that the parties listed in subparagraphs (i) and (ii) of Article 12.9, which are required to be included by an investigating authority as interested parties—that is, exporters, importers, foreign producers, domestic producers, and their associations—all have a clear and direct interest in the outcome of a countervailing duty investigation. For Korea, the types of entities included in the list provide a "strong indication" that an entity cannot be an interested party if it does not have such an interest.⁴³⁹ We agree that the entities specified in subparagraphs (i) and (ii)—which are all involved in the production, export, or import of the product under investigation, or in the production of the like product in the importing country—are likely to "have an interest in the outcome of the proceeding", but we find nothing in Article 12.9 to suggest that interested parties are restricted to entities of this kind under the residual clause of Article 12.9.⁴⁴⁰ Although the term "interested party" by definition suggests that the party must have an interest related to the investigation, the mere fact that the lists in subparagraphs (i) and (ii) comprise entities that may be directly interested in the

⁴³⁹Korea's other appellant's submission, para. 114.

⁴⁴⁰The residual clause of Article 12.9 states: "This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties." We note that, even if the outcome of the investigation is no longer of interest to any of the entities required to be included as interested parties under subparagraphs (i) and (ii), these parties still do not lose their status as interested parties. This supports the view that interested parties are not confined to those that "have an interest in the outcome of the proceeding".

outcome of the investigation does not imply that parties that may have other forms of interest pertinent to the investigation are excluded.

239. The last sentence of Article 12.9 provides that Members are not precluded from *allowing* domestic or foreign parties other than those listed in subparagraphs (i) and (ii) to be included as interested parties. Korea takes issue with the Panel's interpretation of the term "allowing" in that sentence. Korea claimed before the Panel that the term "allowing" had the meaning of "granting permission".⁴⁴¹ The Panel found that, while the term could refer to an investigating authority allowing an entity to be designated as an interested party following a request, it could also refer to a Member "allowing, through national legislation or implementing regulations, certain parties to participate in investigations as interested parties."⁴⁴² The Panel further explained that, since there are a number of provisions of the *SCM Agreement*, for instance Article 21.2, that provide specifically for the term "upon request" where such a requirement is contemplated, the absence of this phrase in Article 12.9 supports the interpretation that the inclusion of a party as an interested party is not predicated on a request.⁴⁴³

240. We agree with the Panel's interpretation of the term "allowing" in Article 12.9. While a response to a request is certainly one way by which an investigating authority may allow an entity to be recognized as an interested party, we do not believe this is the only way for a party to be included. In our view, the term "allowing" in the residual clause connotes the power or authority given to a Member to include other parties as interested parties, rather than a restriction on such power of inclusion to those parties that make a request.

241. Korea further argues that Articles 12.3 and 12.8 of the *SCM Agreement* indicate that interested parties must have a case to present and an interest to defend.⁴⁴⁴ We recognize that

⁴⁴¹Korea's other appellant's submission, footnote 72 to para. 115.

⁴⁴²Panel Report, para. 7.390.

⁴⁴³*Ibid.*, para. 7.390. Japan makes similar arguments. (See Japan's appellee's submission, footnote 203 to para. 132)

⁴⁴⁴Article 12.3 provides:

The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 4, and that is used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information.

Article 12.8 provides:

The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

Articles 12.3 and 12.8 refer to rights that interested parties have in presenting their cases and defending their interests in investigations. However, we see differentiations in the nature of the interest that parties may have in participating in an investigation. As the Panel correctly noted, Articles 12.1 and 12.2 presuppose the existence of two groups of interested parties, that is, those that may be initially involved because they received questionnaires, but subsequently cease to participate; and those that decide to participate actively, and choose to present cases and defend interests, as provided for in Articles 12.3 and 12.8. We are therefore unable to accept Korea's argument that Articles 12.3 and 12.8—which relate to parties participating in an investigation—imply that entities must "have an interest in the outcome of a proceeding" to be designated as "interested parties".

242. We do not suggest that investigating authorities enjoy an unfettered discretion in designating entities as interested parties regardless of the relevance of such entities to the conduct of an objective investigation. As we have observed, the term "interested party" by definition suggests that the party must have some "interest" related to the investigation.⁴⁴⁵ Although that interest *may* be in the outcome of the investigation, a consideration of the interest should also take account of the perspective of the investigating authority. An investigating authority needs to have some discretion to include as interested parties entities that are relevant for carrying out an objective investigation and for obtaining information or evidence relevant to the investigation at hand.⁴⁴⁶ Nonetheless, in designating entities as interested parties, an investigating authority must be mindful of the burden that such designation may entail for other interested parties.

243. In this case, we do not believe that the JIA erred in designating the 16 financial creditor institutions of Hynix as interested parties. As the JIA was investigating an allegation of entrustment or direction with respect to the Restructurings, we consider that it was reasonable for the JIA to seek information from Hynix's creditor institutions. The Panel noted that "the JIA had information indicating that the relevant Other Creditors were, or had been, creditors of Hynix, and could possibly have become shareholders in Hynix through the debt-to-equity swaps in the two [R]estructurings at issue."⁴⁴⁷ In these circumstances, we see no error in the Panel's statement that "at the very least the JIA was entitled to treat these Other Creditors as interested parties for the purpose of distributing its questionnaire. The Other Creditors might then, in their responses, have provided the JIA with information indicating that they no longer had an interest in the outcome of the investigation."⁴⁴⁸

⁴⁴⁵See also Panel Report, para. 7.387.

⁴⁴⁶See also *ibid.*, para. 7.392 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293). We recognize that, in conducting its investigation, an investigating authority may also seek information from entities not designated as interested parties.

⁴⁴⁷*Ibid.*, footnote 582 to para. 7.394.

⁴⁴⁸*Ibid.*

244. Korea also argues that the JIA applied "facts available" under Article 12.7, in a manner that was prejudicial to Hynix.⁴⁴⁹ However, as we see it, this claim by Korea was premised on our acceptance of Korea's argument that an interested party must "have an interest in the outcome of [a] proceeding" and that, therefore, the JIA improperly included certain financial institutions as interested parties. Since we have rejected that argument by Korea, we do not need to consider Korea's claim regarding the use of "facts available" under Article 12.7. In any event, the Panel found that Korea had failed to substantiate its claim regarding the JIA's alleged improper use of "facts available", and we see no reason to disturb the Panel's finding.⁴⁵⁰

245. For the reasons above, we *uphold* the Panel's finding, in paragraphs 7.398 and 8.1(c) of the Panel Report, that Korea has failed to establish that the JIA acted inconsistently with Articles 12.7 and 12.9 of the *SCM Agreement* by including certain financial institutions as "interested parties" and by using "facts available" for those financial institutions that failed to provide information.⁴⁵¹

XI. Direct Transfer of Funds

246. We next examine the question of whether the financial transactions undertaken in the October 2001 and December 2002 Restructurings constituted "direct transfer[s] of funds" within the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement*.⁴⁵²

247. Before the Panel, Korea claimed that the JIA had acted inconsistently with Article 1.1(a)(1)(i) of the *SCM Agreement* by finding that the October 2001 and December 2002 Restructurings—in particular, the modification of the terms of pre-existing loans (including extensions of the maturities of existing loans, reductions of the interest rates on existing loans, and conversion of interest to principal) and debt-to-equity swaps—involved direct transfers of funds. Korea submitted that

⁴⁴⁹However, contrary to Korea's implication that the use of "facts available" under Article 12.7 of the *SCM Agreement* necessarily has a prejudicial effect on parties that are subject to the countervailing duty, we do not believe that the use of "facts available" necessarily entails a negative inference by the investigating authority. (See Korea's other appellant's submission, paras. 124 and 125)

⁴⁵⁰See Panel Report, para. 7.397.

⁴⁵¹We do not consider it necessary to address Korea's claim under Article 11 of the DSU, given that Korea explained at the oral hearing that it was not seeking a separate substantive finding under that provision.

⁴⁵²Article 1.1(a)(1)(i) of the *SCM Agreement* states: "[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)".

"transactions that merely change the terms of existing claims, and do not involve the provision of money to the alleged subsidy recipient, cannot be characterized as transactions involving a 'direct transfer of funds' within the meaning of Article 1.1(a)(1)(i)."⁴⁵³ The Panel rejected Korea's claim, finding instead that the JIA:

... could properly characterize the modification of loan repayment terms (including extensions of the maturities of existing loans, reductions of the interest rates on existing loans, and conversion of interest to principal) and debt-to-equity swaps as transactions involving a "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i).⁴⁵⁴ (footnote omitted)

248. On appeal, Korea suggests that a direct transfer of funds arises only where there is an incremental flow of funds to the recipient that enhances the net worth of the recipient. According to Korea, the initial issuance of a financial instrument may constitute a direct transfer of funds; but subsequent modifications of its terms do not. When a creditor agrees to modify the terms of existing loans, or to write off loans entirely, existing claims are modified without providing any money to the borrower and there is no direct transfer of funds. For Korea, "a 'transfer' of 'funds' occurs only when money changes hands from the government (or government-directed private body) to the subsidy recipient."⁴⁵⁵ Korea contends that, for the same reason, debt-to-equity swaps are not to be considered as transfers of funds. In Korea's view, however, modifications of the terms of existing loans might constitute "revenue ... foregone" in the sense of Article 1.1(a)(1)(ii).⁴⁵⁶

249. Japan asserts that Korea puts forward an overly narrow definition of the term "funds". Japan argues that Article 1.1(a)(1)(i) refers to "grants, loans, and equity infusion" as examples, rather than as items on an exhaustive list. According to Japan, this indicates that the *SCM Agreement* contemplates direct transfers of funds other than grants, loans, and equity infusion.⁴⁵⁷ Excluding modification of the terms of existing loans, or an exchange into equity of monetary value equivalent to existing debt,

⁴⁵³Panel Report, para. 7.426.

⁴⁵⁴*Ibid.*, para. 7.446.

⁴⁵⁵Korea's other appellant's submission, para. 134.

⁴⁵⁶*Ibid.*, para. 139.

⁴⁵⁷Japan's appellee's submission, para. 162.

from the definition of the phrase "direct transfer of funds", "would open the door to potential abuse of the subsidies and offer an easy way of circumventing the disciplines of the *SCM Agreement*."⁴⁵⁸

250. In our view, the term "funds" encompasses not only "money" but also financial resources and other financial claims more generally. The concept of "transfer of funds" adopted by Korea is too literal and mechanistic because it fails to encapsulate how financial transactions give rise to an alteration of obligations from which an accrual of financial resources results. We are unable to agree that direct transfers of funds, as contemplated in Article 1.1(a)(1)(i), are confined to situations where there is an incremental flow of funds to the recipient that enhances the net worth of the recipient. Therefore, the Panel did not err in finding that the JIA properly characterized the modification of the terms of pre-existing loans in the present case as a direct transfer of funds.

251. We observe that the words "grants, loans, and equity infusion" are preceded by the abbreviation "e.g.", which indicates that grants, loans, and equity infusion are cited examples of transactions falling within the scope of Article 1.1(a)(1)(i). This shows that transactions that are similar to those expressly listed are also covered by the provision. Debt forgiveness, which extinguishes the claims of a creditor, is a form of performance by which the borrower is taken to have repaid the loan to the lender. The extension of a loan maturity enables the borrower to enjoy the benefit of the loan for an extended period of time. An interest rate reduction lowers the debt servicing burden of the borrower. In all of these cases, the financial position of the borrower is improved and therefore there is a direct transfer of funds within the meaning of Article 1.1(a)(1)(i).

252. With respect to Korea's argument that debt-to-equity swaps cannot be considered as direct transfers of funds given that no money is transferred thereby to the recipient, the Panel reasoned that "the relinquishment and modification of claims inherent in such transactions similarly result[] in new rights, or claims, being transferred to the former debtor."⁴⁵⁹ Again, we see no error in the Panel's analysis. Debt-to-equity swaps replace debt with equity, and in a case such as this, when the debt-to-equity swap is intended to address the deteriorating financial condition of the recipient company, the cancellation of the debt amounts to a direct transfer of funds to the company.

253. Korea further alleges that the financial contributions at issue in this case can, at most, fall under "revenue ... foregone" within the meaning of Article 1.1(a)(1)(ii).

⁴⁵⁸Japan's appellee's submission, para. 170.

⁴⁵⁹Panel Report, para. 7.442.

254. In that respect, the Panel found:

[W]e do not exclude that certain of the relevant transactions might be covered simultaneously by different sub-paragraphs of Article 1.1(a)(1). The issue before us, though, is not whether the modification of loan repayment terms and debt-to-equity swaps might also be treated, for example, as government revenue foregone. The issue is whether the JIA erred in treating such transactions as "direct transfers of funds".⁴⁶⁰ (footnote omitted)

255. We agree with the Panel that the issue before it was whether the JIA erred in treating the October 2001 and December 2002 Restructurings as direct transfers of funds. The legal question was not whether one or several transactions at issue could additionally be treated as revenue foregone under Article 1.1(a)(1)(ii) of the *SCM Agreement*.

256. For these reasons, we *uphold* the Panel's finding, in paragraphs 7.446 and 8.1(d) of the Panel Report, that the JIA could properly characterize the modifications of loan repayment terms (including extensions of the maturities of existing loans, reductions of the interest rates on existing loans, and conversion of interest to principal) and debt-to-equity swaps as transactions involving "direct transfer[s] of funds" within the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement*.

XII. Causation of Injury

257. We turn now to the issue of causation. Korea argued that Articles 15.5 and 19.1 of the *SCM Agreement* require more than a demonstration that "the subsidized imports are causing injury": they require an additional demonstration that the injury is caused "through the effects of subsidies".⁴⁶¹

258. The Panel found that Articles 15.5 and 19.1 do not impose an additional requirement on an investigating authority to demonstrate that the volume and price effects of the subsidized imports and the consequent impact of these imports on domestic industry, as set forth in Articles 15.2 and 15.4 of the *SCM Agreement*, are the effects of subsidies.⁴⁶² In the light of this interpretation of Articles 15.5 and 19.1, the Panel found that it was unnecessary to rule on whether the JIA properly demonstrated that the volume and price effects of the subsidized imports and the consequent impact of these imports on the domestic industry were the "effects of subsidies" allegedly received by Hynix.⁴⁶³ The Panel,

⁴⁶⁰Panel Report, para. 7.439.

⁴⁶¹Korea's other appellant's submission, para. 72.

⁴⁶²Panel Report, para. 7.424.

⁴⁶³*Ibid.*

therefore, concluded that Korea had failed to demonstrate that, in making its determination of causation, the JIA had acted inconsistently with Articles 15.5 and 19.1 of the *SCM Agreement*.⁴⁶⁴

259. Korea asks us to reverse the Panel's finding on the grounds that the Panel erred in its interpretation of Articles 15.5 and 19.1 of the *SCM Agreement*. According to Korea, the Panel effectively read the "through the effects of subsidy" language out of those provisions. For Korea, the Panel's interpretation of the phrase "through the effects" is not consistent with the ordinary meaning, context, or negotiating history of the relevant provisions of the *SCM Agreement*.⁴⁶⁵ Further, Korea contends that the Panel's reading of the phrase "through the effects" cannot be reconciled with the text of Article 19.1, which repeats this phrase and sets forth the substantive conditions for the imposition of a countervailing duty.⁴⁶⁶

260. Japan requests us to uphold the Panel's interpretation of Articles 15.5 and 19.1 of the *SCM Agreement* for the reasons given by the Panel.⁴⁶⁷ Specifically, Japan contends that, in challenging the Panel's interpretation of the phrase "through the effects" in Article 15.5, Korea fails to make reference to footnote 47 attached to that phrase.⁴⁶⁸ In Japan's view, the Panel's interpretation is borne out by the non-attribution rules in the subsequent sentences of Article 15.5 and the other paragraphs of Article 15.⁴⁶⁹ Korea's interpretation of the phrase, however, requires an additional demonstration of a causal relationship between the effects of the subsidy and injury.⁴⁷⁰

⁴⁶⁴Panel Report, para. 7.425. In addition, with respect to the "effects of subsidies", the Panel noted that the JIA had found as follows:

As examined in Chapter 2, Hynix was in a financial situation such that it could not raise funds from the commercial market. The subsidies provided by the Government of Korea to Hynix enabled Hynix to maintain and continue its production and export of DRAM products. As the result, the Investigating Authorities find that Hynix significantly increased its volume of the exports to Japan of the subject products, sold large volumes of products at low prices in Japan's domestic market, and thereby caused the price of domestic products to fall.

(See *ibid.*, para. 7.405 (quoting JIA's Final Determination, Annex 1 (Essential Facts), para. 550)

⁴⁶⁵Korea's other appellant's submission, paras. 70-94.

⁴⁶⁶*Ibid.*, paras. 76-79.

⁴⁶⁷Japan's appellee's submission, paras. 77-112.

⁴⁶⁸*Ibid.*, paras. 80-82.

⁴⁶⁹The European Communities and the United States also agree with the Panel's interpretation of Articles 15.5 and 19.1. (European Communities' and United States' response to questioning at the oral hearing)

⁴⁷⁰Korea's other appellant's submission, para. 72.

261. We begin our consideration of this issue with the text of Article 15.5 of the *SCM Agreement*, which provides that:

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

*[Original footnote 47] As set forth in paragraphs 2 and 4.

262. Article 15.5 as a whole deals with the causal relationship between subsidized imports and injury to the domestic industry. The first sentence of Article 15.5 requires that an investigating authority demonstrate that "the subsidized imports are, through the effects of subsidies, causing injury" to the domestic industry. The second sentence emphasizes that the demonstration of the causal relationship between the subsidized imports and the injury shall be based on all relevant evidence before the investigating authority. In both sentences, the subject to which the phrase "are causing injury" applies, or in respect of which "a causal relationship" is to be established, is "the subsidized imports".

263. By virtue of footnote 47 to Article 15.5, which forms an integral part of the first sentence, the demonstration of the causal relationship envisaged in the first two sentences of Article 15.5 is to be carried out by following the analysis set forth in Articles 15.2 and 15.4 for examining the "effects" of the subsidized imports. According to these paragraphs, such an examination will comprise of: (i) whether there has been a significant increase in subsidized imports; (ii) the effect of the subsidized imports on prices; and (iii) the consequent impact of the subsidized imports on the domestic industry.

264. It is clear from the architecture of Articles 15.2, 15.4, and 15.5 that, for determining whether the "subsidized imports are, through the effects of subsidies, causing injury" to the domestic industry, what is required is the examination of the effects of the subsidized imports as set forth in Articles 15.2 and 15.4. These paragraphs neither envisage nor require the two distinct types of examinations suggested by Korea, namely, an examination of the effects of the subsidized imports as per

Articles 15.2 and 15.4; and, a second examination of the effects of the subsidies as distinguished from the effects of the subsidized imports on a case-by-case basis.

265. Korea's argument that the effects of subsidies must be distinguished from the effects of the subsidized imports is based on the premise that the increase in the volume of subsidized imports or the price at which they are sold on the importing Member's market may not have been caused by the subsidies received by the exporting company. To illustrate its point, Korea has suggested that the increased volumes of sales of the product may be due to better quality, design, innovation, or customer preference, rather than the subsidy.⁴⁷¹

266. We are not persuaded by these arguments of Korea. In our view, they would imply additional inquiry by an investigating authority into two matters: first, the use to which the subsidies were put by the exporting company⁴⁷²; and, secondly, whether, absent the subsidies, the product would have been exported in the same volumes or at the same prices. Such additional examinations are not contemplated by Articles 15.2 and 15.4.

267. Furthermore, the "non-attribution" provisions contained in the third sentence of Article 15.5 already address adequately the concern that the injurious effects of any known factors *other than subsidized imports* are not attributed to the subsidized imports.⁴⁷³ This ensures that injuries that may have been caused by other known factors are not attributed to the subsidized imports. The third sentence of Article 15.5 does not envisage the kind of additional enquiry implied in Korea's arguments.

268. We are therefore of the view that, if an investigating authority carries out the examination required under Articles 15.2, 15.4, and 15.5, such examination suffices to demonstrate that "subsidized imports are, through the effects of subsidies, causing injury" within the meaning of the *SCM Agreement*.

⁴⁷¹Korea, however, recognizes that there may be cases where the nature of the subsidy itself would be sufficient to show that the injurious effects are due to the subsidy, such as a subsidy given specifically for export. In the case of such subsidies, Korea acknowledges that no additional examination is warranted beyond the examination of the effects of the subsidized imports, as set forth in Articles 15.2 and 15.4. (See Korea's other appellant's submission, para. 91)

⁴⁷²In respect of the quality of an imported product, Korea has stated that, "unless the subsidy were in fact the impetus behind the superior quality", the injury to the domestic industry cannot be attributed to the subsidy. (*Ibid.*, para. 74) In our view, this would imply an examination of the purpose to which the subsidy has been put.

⁴⁷³The factors relevant to this examination "include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry." (Article 15.5 of the *SCM Agreement*)

269. Article 11.2 of the *SCM Agreement* provides contextual support for our reading of the first sentence of Article 15.5. Article 11.2 sets forth guidance as to what may constitute "sufficient evidence" for purposes of an application for the initiation of a countervailing duty investigation⁴⁷⁴ and further describes the type of evidence that should be included in the application. Article 11.2 provides, in relevant part, that:

... evidence that alleged injury to a domestic industry is caused by *subsidized imports through the effects of the subsidies; this evidence includes* information on the evolution of the volume of the allegedly subsidized imports, the *effect of these imports on prices* of the like product in the domestic market and the consequent *impact of the imports* on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15. (emphasis added)

270. We agree with the Panel that Article 11.2 thus indicates that information relating to the volume effects, the price effects, and the consequent impact of the subsidized imports on the domestic industry serves as evidence to demonstrate that injury is caused by the "subsidized imports through the effects of subsidies".⁴⁷⁵ By its terms, Article 11.2 does not require an applicant to provide specific evidence regarding the effects that the subsidies may have on import volumes and prices so as to cause injury.

271. Korea argues that there is nothing in the *SCM Agreement* "that indicates that the standard for initiating an investigation under Article 11.2 is the same as the standard for making an affirmative injury determination under Article 15."⁴⁷⁶ Korea further argues that Article 11.2 does not prohibit investigating authorities from requiring additional information "to satisfy the 'through the effects of subsidies' requirement" in the context of making an affirmative injury determination.⁴⁷⁷ We are not persuaded by this argument. If a demonstration of an additional causal link between the effect of the subsidy and injury is to be established as a prerequisite for an injury determination, as Korea contends, there is no reason why Article 11.2 would not have prescribed submission of evidence for that purpose.

⁴⁷⁴An application "shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury." (Article 11.2 of the *SCM Agreement*)

⁴⁷⁵Panel Report, para. 7.417.

⁴⁷⁶Korea's other appellant's submission, para. 89.

⁴⁷⁷*Ibid.*, para. 90.

272. Korea further argues that the "through the effects of subsidies" language in Article 15.5 should be interpreted as requiring the same type of causation analysis that has been developed in dispute settlement practice for the "effect of the subsidy" language in Article 6.3 of the *SCM Agreement*.⁴⁷⁸ However, in our view, the Panel rightly rejected Korea's argument in this regard. Like the Panel, we do not see how the terms of Article 6.3 or prior panel reports interpreting this provision that relate to the different concepts of "serious prejudice" and "adverse effects" in Part III of the *SCM Agreement* support Korea's interpretation of Article 15.5 in Part V on countervailing measures. In view of the difference between the text, context, rationale, and object of the provisions in Part III and Part V of the *SCM Agreement*, we see no basis for importing the specific obligations of Part III into the provisions of Part V of the *SCM Agreement*.⁴⁷⁹ Although both Articles 6.3 and 15.5 refer to effects of the subsidies, the meaning of this phrase must be interpreted in the light of the substantive obligations within which the phrase is located. Articles 6.3 and 15.5 deal with different subject matters and therefore it is not appropriate to accord an identical meaning to the common phrase in these Articles.

273. We turn next to address Korea's argument that the Panel's understanding of the context provided by Article VI:6(a) of the GATT 1994 effectively repeals the obligations under that Article.⁴⁸⁰ According to Korea, that Article allows a Member to levy a countervailing duty only if it determines

⁴⁷⁸Article 6.3 of the *SCM Agreement* provides that:

Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

(a) *the effect of the subsidy* is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

(b) *the effect of the subsidy* is to displace or impede the exports of a like product of another Member from a third country market;

(c) *the effect of the subsidy* is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;

(d) *the effect of the subsidy* is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted. (emphasis added)

⁴⁷⁹See also Panel Report, *US – Upland Cotton*, para. 7.1177.

⁴⁸⁰Korea's other appellant's submission, para. 73.

that the effect of the subsidized imports is to cause injury to the domestic industry. As we have observed above, if an investigating authority carries out an examination as required under Articles 15.2, 15.4, and 15.5 of the *SCM Agreement*, this suffices to demonstrate that subsidized imports are, through the effects of subsidies, causing injury. We do not see any inconsistency between our interpretation of the first sentence of Article 15.5 and the provisions of Article VI:6. We therefore do not consider that the Panel's reading of the first sentence of Article 15.5 repeals the obligations provided for in Article VI:6 of the GATT 1994.⁴⁸¹

274. In addition, Korea argues that the fact that Article 19.1 of the *SCM Agreement* refers to "the effects of the subsidy", "confirms that this language was intended to impose a substantive requirement that must be met in order for countervailing duties to be imposed." According to Korea, "[t]he Panel's assertion that this language was intended to indicate, instead, that there was no such requirement cannot be reconciled with the provisions of Article 19.1."⁴⁸²

275. On appeal, Korea does not purport to claim that the phrase "through the effects of subsidies" in Article 19.1 should be assigned a meaning that is different from that of the same phrase in Article 15.5.⁴⁸³ Nor does Korea submit any further arguments in support of its interpretation other than those we have rejected above.

276. Korea submits, "more generally", that the Panel's interpretation of the "through the effects of subsidies" language of Articles 15.5 and 19.1 is also inconsistent with the object and purpose of the *SCM Agreement*. According to Korea, "the object and purpose of that Agreement is 'to offset government subsidies that distort trade, thereby causing injury to competing industries in other countries.'⁴⁸⁴ Therefore, for Korea, Article 15.5 does "not permit countervailing duties to be imposed unless the *effect* of the subsidies is to distort trade, by altering the volume or prices of the imports in a manner that causes injury."⁴⁸⁵ We see our interpretation of the first sentence of Article 15.5 to be in harmony with the object and purpose of the *SCM Agreement*.

277. As we have found above, if an investigating authority carries out the examination required under Articles 15.2, 15.4, and 15.5 of the *SCM Agreement*, such examination suffices to demonstrate that "subsidized imports are, through the effects of subsidies, causing injury" within the meaning of that Agreement. We have also found that there is no additional requirement to examine the effects of

⁴⁸¹Korea's other appellant's submission, para. 73.

⁴⁸²*Ibid.*, para. 79.

⁴⁸³*Ibid.*, para. 76.

⁴⁸⁴*Ibid.*, para. 95 (referring to Appellate Body Report, *US – Lead and Bismuth II*, para. 17 (summarizing the United States' argument); and Appellate Body Report, *Canada – Aircraft*, para. 157).

⁴⁸⁵*Ibid.*, para. 96. (original emphasis)

the subsidies as distinguished from the effects of the subsidized imports on a case-by-case basis. In the light of our analysis, we *uphold* the Panel's finding, in paragraphs 7.425 and 8.1(g) of the Panel Report, that the JIA did not act inconsistently with Articles 15.5 and 19.1 of the *SCM Agreement* by not demonstrating separately that the allegedly subsidized imports were, "through the effects of subsidies", causing injury within the meaning of the *SCM Agreement*.

278. In the light of our finding, we do not consider it necessary to address the question of whether the JIA properly demonstrated that the volumes and price effects of the subsidized imports and the consequent impact on these imports on the domestic industry were the "effects of subsidies" allegedly received by Hynix.⁴⁸⁶

XIII. Business Confidential Information

279. We note that several passages have been omitted from the public version of the Panel Report on the basis that Japan and Korea indicated that those passages contained business confidential information ("BCI"). The European Communities has complained that, while BCI must be respected, the Panel has dealt with it in such a sweeping manner that the Panel Report has become unintelligible for third parties, and as a result its rights as a third party have been affected.⁴⁸⁷ While a panel must not disclose information which is by its nature confidential⁴⁸⁸, a panel, in deciding to redact such information from its report at the request of one or both of the parties, should bear in mind the rights of third parties and other WTO Members under various provisions of the DSU, such as Articles 12.7 and 16. Accordingly, a panel must make efforts to ensure that the public version of its report circulated to all Members of the WTO is understandable. On appeal, Japan and Korea have designated certain information contained in their written submissions as BCI. We have found it possible to render our Report without disclosing any BCI, designated as such.

⁴⁸⁶Korea's other appellant's submission, para. 64 and footnote 34 thereto.

⁴⁸⁷ See European Communities' third participant's submission, para. 10 (quoting Panel Report, paras. 7.205 and 7.206).

⁴⁸⁸ See, for example, Article 12.4 of the *SCM Agreement*.

XIV. Findings and Conclusions

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

- (a) as regards the Panel's review of the JIA's finding of "entrustment or direction" of the Four Creditors with respect to the December 2002 Restructuring:
 - (i) finds that the Panel erred, in paragraphs 7.250-7.254 of the Panel Report, in failing to examine the JIA's evidence in its totality, and that the Panel thereby failed to apply the proper standard of review in a manner consistent with its obligations under Article 11 of the DSU; and, consequently,
 - (ii) reverses the Panel's finding, in paragraphs 7.254 and 8.2(a) of the Panel Report, that the JIA's determination of "entrustment or direction" of the Four Creditors is inconsistent with Article 1.1(a)(1)(iv) of the *SCM Agreement*.
- (b) upholds the Panel's findings, in paragraphs 7.282 and 8.2(b) of the Panel Report, that the JIA acted inconsistently with Article 1.1(b) and Article 14 of the *SCM Agreement* by determining that the December 2002 Restructuring conferred a benefit on Hynix;
- (c) upholds, albeit for different reasons, the Panel's findings, in paragraphs 7.316 and 8.2(c) of the Panel Report, that the JIA calculated the amount of benefit conferred on Hynix by the October 2001 and December 2002 Restructurings inconsistently with Articles 1.1(b) and 14 of the *SCM Agreement*; and finds that the Panel did not fail to conduct an objective assessment of the matter before it, as required by Article 11 of the DSU;
- (d) reverses the Panel's finding, in paragraphs 7.334 and 8.2(d) of the Panel Report, that the methods used by Japan to calculate the amount of benefit conferred on Hynix were not provided for in Japan's national legislation or implementing regulations as required under the chapeau of Article 14 of the *SCM Agreement*;
- (e) upholds the Panel's finding, in paragraphs 7.361 and 8.2(e) of the Panel Report, that Japan acted inconsistently with Article 19.4 of the *SCM Agreement* by levying countervailing duties on imports which the JIA itself had found were not subsidized at the time of duty imposition; and finds that the Panel did not fail to conduct an objective assessment of the matter before it, as required by Article 11 of the DSU;

- (f) upholds the Panel's findings, in paragraphs 7.316 and 8.1(b) of the Panel Report, that the JIA's determination of the existence of benefit with respect to the October 2001 Restructuring was not inconsistent with Articles 1.1(b) and 14 of the *SCM Agreement*;
- (g) upholds the Panel's finding, in paragraphs 7.398 and 8.1(c) of the Panel Report, that the JIA did not act inconsistently with Article 12.7 and 12.9 of the *SCM Agreement* by including certain financial institutions as "interested parties" and by using "facts available" for those financial institutions that failed to provide information;
- (h) upholds the Panel's finding, in paragraphs 7.446 and 8.1(d) of the Panel Report, that the JIA could properly characterize the transactions at issue in the October 2001 and December 2002 Restructurings as "direct transfer[s] of funds" within the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement*; and
- (i) upholds the Panel's finding, in paragraphs 7.425 and 8.1(g) of the Panel Report, that the JIA did not act inconsistently with Articles 15.5 and 19.1 of the *SCM Agreement* by not demonstrating separately that the allegedly subsidized imports were, "through the effects of subsidies", causing injury within the meaning of the *SCM Agreement*.

281. The Appellate Body recommends that the DSB request Japan to bring its measure, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *SCM Agreement*, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 9th day of November 2007 by:

David Unterhalter
Presiding Member

A.V. Ganesan
Member

Giorgio Sacerdoti
Member

ANNEX I

**WORLD TRADE
ORGANIZATION**

WT/DS336/8
30 August 2007

(07-0000)

Original: English

**JAPAN – COUNTERVAILING DUTIES ON DYNAMIC
RANDOM ACCESS MEMORIES FROM KOREA**

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

The following notification, dated 30 August 2007, from the Delegation of Japan, is being circulated to Members.

Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, Japan hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report on *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea* (WT/DS336/R) ("Panel Report"), and certain legal interpretations developed by the Panel in this dispute. Japan seeks review by the Appellate Body of the Panel's conclusions and related findings and legal interpretations that:

1. Japan improperly found government "entrustment or direction" of four of the private creditors of Hynix Semiconductor, Inc. ("Hynix") to participate in the December 2002 Restructuring of Hynix, contrary to Article 1.1(a)(1)(iv) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").¹ This conclusion was based on an erroneous interpretation and application of this provision. In particular, the Panel erred in law by:

- (i) failing to conduct the objective assessment of the matter required by Article 11 of the DSU by limiting the scope of its analysis of the findings by the investigating authorities of Japan (the "JIA") regarding the December 2002 Restructuring to only the Deutsche Bank Report without any assessment of other evidence on the record and the JIA's findings thereon, denying the "totality of evidence approach" actually adopted by the JIA, and conducting thereby a *de novo* review of the evidence, the JIA's findings and its determination²; and
- (ii) failing to conduct the objective assessment of the matter required by Article 11 of the DSU with respect to the intervention into the preparation of

¹See Panel Report, paras. 7.245-47, 7.253-54 and 8.2 a.

²See, e.g., Panel Report, para. 7.157 in conjunction with paras. 7.155-56; para. 7.162 in conjunction with paras. 7.158-60, 7.246-47, 7.253-54.

the Deutsche Bank Report by the Government of Korea, the lack of independent third party characteristics of the Deutsche Bank Report and the content of the Deutsche Bank Report, by making a *de novo* review of the evidence, the JIA's findings and its determination, by making findings on the characteristics of the Deutsche Bank Report which Korea neither presented the relevant evidence or arguments nor sought any findings by the Panel and failing to accord the due process right of defence to Japan, and by improperly rejecting as *ex post* rationalization arguments presented by Japan.³

2. Japan improperly found that the December 2002 Restructuring conferred a benefit on Hynix, contrary to Articles 1.1(b) and 14 of the *SCM Agreement*.⁴ This conclusion is in error because it was not based on any analysis of these provisions and was wholly dependent on its conclusions relating to "entrustment or direction" in the context of the December 2002 Restructuring under Article 1.1(a)(1)(iv) of the *SCM Agreement*.⁵ It is based solely on the Panel's erroneous conclusion, described in paragraph 1 above, which was made inconsistently with Article 11 of the DSU.

3. Japan improperly calculated the amount of benefit conferred by the October 2001 and December 2002 Restructurings of Hynix, contrary to Articles 1.1(b) and 14 of the *SCM Agreement*.⁶ This conclusion was based on an erroneous interpretation and application of these provisions. In particular, the Panel erred in law by:

- (i) failing to conduct the objective assessment of the matter required by Article 11 of the DSU by finding that the JIA applied exclusively an outside investor benchmark giving rise to an internal inconsistency in the JIA's calculation of benefit, based on an inaccurate understanding of the JIA's actual findings and a *de novo* review of the evidence, the JIA's findings and its determination⁷;
- (ii) finding that the JIA failed to adopt an insider investor benchmark, even though neither Article 1.1(b) nor 14 of the *SCM Agreement* requires the application of a particular methodology, and the benchmark alleged by the Panel lacked necessary support in the evidence on the record required under Article 12.2 of the *SCM Agreement*⁸;
- (iii) erroneously interpreting the provisions of Articles 1.1(b) and 14 of the *SCM Agreement* and failing to conduct the objective assessment of the matter required by Article 11 of the DSU in finding that the JIA made its calculation of the benefit amount from the creditor's perspective⁹;

³See, e.g., Panel Report, para. 7.168 in conjunction with paras. 7.163-67; para 7.188 in conjunction with paras. 7.169-87, para. 7.189, and para. 7.190; paras. 7.199, 7.206, 7.217, 7.221, 7.225, 7.231, 7.238 and 7.244 in conjunction with paras. 7.191-243; and para. 7.245.

⁴See Panel Report, paras. 7.282 and 8.2 b.

⁵See Panel Report, para. 7.282.

⁶See, e.g., Panel Report, paras. 7.315, 7.316 and 8.2 c.

⁷See, e.g., Panel Report, para. 7.315 in conjunction with paras. 7.304-14.

⁸See, e.g., Panel Report, para. 7.315 in conjunction with paras. 7.304-14.

⁹See, e.g., Panel Report, para. 7.315 in conjunction with para. 7.313.

- (iv) failing to conduct the objective assessment of the matter required by Article 11 of the DSU by reaching conclusions on the JIA's benefit calculation formulae, for which Korea failed to establish a *prima facie* case of inconsistency with Articles 1.1(b) and 14 of the *SCM Agreement*¹⁰; and
- (v) failing to conduct the objective assessment of the matter required by Article 11 of the DSU without according the due process right of defence to Japan and erroneously interpreting the requirements under Article 22.5 of the *SCM Agreement* as informed by Articles 12.2 and 12.8 thereof and the meaning of facts available under Article 12.7 thereof in rejecting rebuttal arguments presented by Japan¹¹;

4. Japan improperly used methods to calculate the amount of benefit to the recipient that were not provided for in Japan's national legislation or implementing regulations, contrary to the *chapeau* of Article 14 of the *SCM Agreement*.¹² This conclusion was based on an erroneous interpretation and application of this provision. In particular, the Panel erred in law by:

- (i) erroneously interpreting the requirement to provide for the methods in the national legislation or implementing regulations to calculate the amount of benefit under the *chapeau* of Article 14 of the *SCM Agreement*¹³; and
- (ii) failing to conduct the objective assessment of the matter required by Article 11 of the DSU in considering whether the methods provided for in Japan's implementing regulations were used and actually applied in the investigation to calculate the benefit amount.¹⁴

5. Japan improperly levied countervailing duties in 2006 to offset some of the subsidies provided by the October 2001 Restructuring, contrary to Article 19.4 of the *SCM Agreement*.¹⁵ This conclusion was based on an erroneous interpretation and application of this provision as well as other relevant provisions under the *SCM Agreement*. In particular, the Panel erred in law by:

- (i) erroneously interpreting the provisions of Articles 19.1 and 19.4 of the *SCM Agreement*¹⁶;
- (ii) failing to conduct the objective assessment of the matter required by Article 11 of the DSU by finding that the JIA levied the countervailing duty despite its determination that the non-recurring subsidies in the October 2001 Restructuring would expire in 2005, based on an inaccurate understanding of the actual determination by the JIA and a *de novo* review of evidence on the record and findings and determination by the JIA.¹⁷

¹⁰See, e.g., Panel Report, para. 7.315 in conjunction with paras. 7.305-14.

¹¹See, e.g., Panel Report, para. 7.315 in conjunction with paras. 7.304 and 7.314.

¹²See Panel Report, paras. 7.334 and 8.2 d.

¹³See, e.g., Panel Report, paras. 7.327, 7.330, 7.331, 7.333 and 7.334 in conjunction with paras. 7.326-33.

¹⁴See, e.g., Panel Report, paras. 7.330, 7.331, 7.333 and 7.334 in conjunction with paras. 7.326-33.

¹⁵See Panel Report, paras. 7.361 and 8.2 e.

¹⁶See, e.g., Panel Report, para. 7.361 in conjunction with paras. 7.351-57.

¹⁷See, e.g., Panel Report, paras. 7.360 and 7.361 in conjunction with paras. 7.358-59.

In sum, Japan considers that the Panel erred in law in the interpretation and application of Articles 1.1(a)(1)(iv), 1.1(b), 12.2, 12.7, 12.8, 14, 19.1, 19.4 and 22.5 of the *SCM Agreement* and failed to meet the requirements of Article 11 of the DSU. Japan requests that the Appellate Body reverse the Panel's erroneous findings and conclusions identified above.

ANNEX II

**WORLD TRADE
ORGANIZATION**

WT/DS336/9
11 September 2007

(07-0000)

Original: English

**JAPAN – COUNTERVAILING DUTIES ON DYNAMIC
RANDOM ACCESS MEMORIES FROM KOREA**

Notification of an Other Appeal by Korea
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 11 September 2007, from the Delegation of Korea, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23 of the Working Procedures for Appellate Review, the Republic of Korea ("Korea") hereby notifies its decision to appeal to the Appellate Body certain issues of law and legal interpretations contained in the report of the panel *Japan – Countervailing Duties on Imports of Certain Dynamic Random Access Memories (DRAMs) from Korea* (WT/DS336) (the "Panel Report"). Korea seeks review by the Appellate Body of the following legal conclusions and related findings and legal interpretations in the Report of the Panel:

- (a) The Panel's finding that Japan acted consistently with its obligations under Articles 1.1(b) and 14 of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"), when the Japanese investigating authorities ("JIA") determined that Hynix Semiconductor, Inc. ("Hynix") received a "benefit" from a transaction restructuring Hynix's debts in October 2001.¹ The Panel incorrectly interpreted Articles 1.1(b) and 14 of the SCM Agreement to permit an investigating authority to assume that a "benefit" exists based solely on a finding that allegedly entrusted or directed private creditors failed to undertake a satisfactory analysis of the transaction before approving it, in the absence of evidence or a finding by the investigating authority that the alleged entrustment or direction actually made the recipient "better off." The Panel's analysis is inconsistent with the provisions of Article 1.1 of the SCM Agreement, which requires a separate analysis of (i) whether the government action constituted a "financial contribution" as a result, *inter alia*, of government entrustment or direction of non-governmental entities; and (ii) whether the government action has conferred a "benefit" on the recipient. In addition, the Panel's analysis is inconsistent with the requirement of Articles 1.1(b) and 14 of the SCM Agreement that a "benefit" exists when the recipient of the government financial contribution has been made "better off", because the terms of the

¹These findings include paragraphs 7.271 to 7.277, 7.280 to 7.281, and 7.316 to 7.317 of the Panel Report.

transaction provided through the government financial contribution are more favourable than the terms that would have been available in the absence of government action.

- (b) The Panel's finding that Japan acted consistently with its obligations under Articles 15.5 and 19.1 of the SCM Agreement, when the JIA made a determination of injury and imposed countervailing duties, without making a reasonable determination that the allegedly subsidized imports were causing injury to a competing domestic industry through the effects of subsidies.² Article 15.5 requires a demonstration "that the subsidized imports are, *through the effects of subsidies*, causing injury within the meaning of this Agreement."³ Article 19.1 permits the imposition of countervailing duties only if "a Member makes a final determination ... that, *through the effects of the subsidy*, the subsidized imports are causing injury ...".⁴ The Panel adopted an interpretation of these provisions that rendered inutile the language of the provisions referring to "the effects of the subsidy." As a result, the Panel incorrectly allowed an affirmative determination of injury to be made, and countervailing duties to be imposed, when the evidence did not support the conclusion that the volume or price of the imports, or the injury to the domestic industry, would have been any different in the absence of subsidies.
- (c) The Panel's finding that Japan acted consistently with its obligations under Articles 12.7 and 12.9 of the SCM Agreement, when the JIA designated as "interested parties" entities that were not demonstrated to have any interest in the proceeding, and then applied "facts available" when some of those entities failed to provide information requested by the JIA within the time limits established by the JIA. The Panel's interpretation of the term "interested party" was not consistent with the ordinary meaning of that term or with the context and purpose of the relevant provisions of the SCM Agreement. As a result, the Panel approved a determination that was not consistent with the due process obligations that the SCM Agreement imposes on investigating authorities, and authorized Japan to subject an exporter to punitive duties based on the non-responsiveness of entities over which the exporter had no influence or control.⁵
- (d) The Panel's finding that Japan acted consistently with its obligations under Article 1.1(a)(1) of the SCM Agreement, when (i) the JIA classified transactions that did not involve a transfer of funds from the government (or government-entrusted or -directed private entities) to Hynix as "direct transfers of funds" within the meaning of sub-paragraph (i) of Article 1.1(a)(1); and (ii) the JIA failed to demonstrate that the transactions met the requirements for classification as foregone revenue within the meaning of sub-paragraph (ii) of Article 1.1(a)(1). The Panel's analysis is inconsistent with the ordinary meaning of the relevant terms of the SCM Agreement and with the context of the relevant provisions of the SCM Agreement. As a result, the Panel disregarded the SCM Agreement's scheme for classifying financial contributions, and the different analyses that investigating authorities are required to apply when making findings under sub-paragraphs (i) and (ii) of Article 1.1(a)(1).⁶

²These findings include paragraphs 7.405 to 7.425 of the Panel Report.

³(Emphasis added, footnote deleted.)

⁴(Emphasis added.)

⁵These findings include paragraphs 7-381 to 7.398 of the Panel Report.

⁶These findings include paragraphs 7.439 to 7.446 of the Panel Report.