

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

*United States - Countervailing Duty Investigation on
Dynamic Random Access Memory Semiconductors
(DRAMs) from Korea*

(AB-2005-4)

APPELLANT SUBMISSION
OF THE UNITED STATES OF AMERICA

April 5, 2005

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(DRAMS) from Korea*

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. This appeal involves the widely-documented bailout by the Government of Korea (“GOK”) of Hynix Semiconductor, Inc. (“Hynix”), a major Korean semiconductor company. The GOK implemented the bailout through Hynix’s creditor banks over a nine-month period of intense activity by senior Korean officials, GOK administrative agencies, government-owned Korean banks, and creditor committees under the control of the GOK.

2. At the end of 2000, Hynix was, in effect, bankrupt. It had over \$7 billion in debt and insufficient cash-flow to pay the interest on its debt, much less repay the principal. Even worse, however, Hynix had major bond payments coming due in 2001, which it simply could not cover. It was in this environment of extreme financial crisis that the GOK took a series of actions in 2000 and 2001 to prevent the complete failure of Hynix.

3. Among other things, the GOK raised the legally mandated credit limits on Hynix's major banks (thereby facilitating an 800 billion won syndicated loan), created a new government bond program through the Korean Development Bank (the “KDB”) specifically for Hynix and other companies in the Hyundai “chaebol” or family, blocked Hynix's creditors from pressing their liquidation claims against the company, and created a special government guarantee so that Korean banks could increase their export lending limits to Hynix. The GOK also enacted the following laws that enhanced the GOK’s ability to orchestrate the bailout of troubled companies, such as Hynix:

- Prime Minister Decree No. 408, which codified a longstanding GOK practice of telephoning banks to seek their assistance;
- the Corporate Restructuring Promotion Act (“CRPA”), which enabled the GOK to require that all of Hynix’s creditors participate in the bailout under the supervision of the GOK’s hand-picked lead bank and liaison; and

- the Public Fund Oversight Act, which formalized the GOK’s practice of intervening with bank management in return for sustaining the banks through capital injections.

4. It was no coincidence that the GOK undertook these actions, as Hynix was a creation of the GOK. Three years earlier, in a government-forced merger reported throughout the world press and covered daily in Korean newspapers, the GOK forced Hyundai Electronics, the third largest DRAM semiconductor company in the world, to merge with LG Semicon, the fourth largest. This so-called “Big Deal” was undertaken to save both companies, which already had enormous debt and deteriorating market positions. This effort was personally spear-headed by Kim Dae Jung, the Prime Minister of Korea. The newly-created company later changed its name to Hynix.

5. Unlike most mergers, the “Big Deal” did not result in any restructuring; the new company did not lay off any personnel or rationalize capacity. In fact, it was a hall-mark of the Kim Dae Jung political effort with respect to the Hyundai/LG merger that such rationalization would not take place. In addition to its economic concerns, the GOK thus had a political, vested interest in making sure that Hynix did not fail. Numerous statements by GOK officials reflected this concern, including statements made by the Financial Supervisory Commission (“FSC”), the Korean banking regulator. These GOK officials repeatedly cited as the rationale for their intervention the fact that Hynix accounted for 4 percent of Korea’s exports and employed tens of thousands of workers.

6. It was also no surprise to the world that Hynix was in trouble. DRAM semiconductors, a type of memory semiconductor, are a commodity product, and the highly cyclical DRAM market was in the midst of its worst downturn ever during 2001. Eight companies had gone out of the

DRAM business in the period leading up to and including the period during GOK's bailout of Hynix. The companies forced to exit the DRAM business included established companies such as Texas Instruments, IBM, Hitachi, and NEC. The market was simply not profitable, or even sustainable, for companies that were not at the cutting edge in terms of products and cost efficiency. Under these market conditions, Hynix's enormous debt-load and its substantial excess capacity resulting from the forced merger should have caused Hynix to declare bankruptcy or, at a minimum, to downsize its capacity. None of this occurred. Instead, the GOK pumped \$12 billion into Hynix, which enabled it to survive while others left the industry.

7. During this period, Micron Technology ("Micron") received no funding from the government, and was forced to close down capacity and lay off workers. The GOK's actions also had severe adverse consequences for Micron in Europe and Japan and for Infineon Technologies AG ("Infineon") in Europe and in the United States. In response, Micron filed a countervailing duty complaint in the United States, which gave rise to this dispute. Infineon filed a countervailing duty complaint with authorities of the European Communities ("EC), and Micron and Elpida Memory, Inc., filed a countervailing duty complaint with authorities in Japan.¹

8. In the U.S. investigation, the U.S. Department of Commerce ("DOC") investigated the initial funding programs organized in late 2000 and early 2001, as well as the other major elements of the bailout undertaken by the GOK in May and October 2001. The evidence in the

¹ The Japanese investigation is still pending and is the first countervailing duty investigation ever initiated in Japan. The EC investigation resulted in the imposition of a countervailing duty, and is the subject of an ongoing panel proceeding in the dispute numbered WT/DS299.

U.S. case overwhelmingly demonstrated that the GOK had acted to entrust or direct Korean banks to provide the staggering amount of financial assistance to Hynix.

9. For example, the GOK held four separate Ministers' meetings, all of which included the Minister of Finance and the Minister of Commerce and Industry. During the meetings, these Ministers gave written direction to the lead bank of the Hynix creditors' committee to administer the bailout and required the bank to "carry out its instructions perfectly." The GOK also called a series of meetings with Hynix's creditors to hammer out the bailout. These and many other details were featured in countless Korean newspaper articles attributing to the GOK the lead role in the bailout, and often including direct quotes from top GOK officials urging the banks to act to assist the company, as well as threats made against the banks, including Korea First Bank ("KFB"), KorAm, Shinhan and others, should they fail to "cooperate".

10. Corroboration of the GOK's actions was well-documented. A major investigation and report by Korea's National Assembly declared that the GOK's bailout of Hynix amounted to over 19 trillion won (approximately \$16 billion USD), and likened it to "injecting money into bottomless pits." Kookmin Bank and Housing and Commercial Bank, Hynix creditors, admitted in sworn statements to the U.S. Securities and Exchange Commission ("SEC") that the GOK "promotes lending to certain types of borrowers as a matter of policy, which we may feel compelled to follow ..." and that "government policy may influence us to lend to certain sectors or in a manner in which we would not in the absence of the government policy." Several of the banks articulated the GOK's Hynix policy as the basis for their lending decisions, and some spoke out against the GOK's strong-arm tactics. Even Hynix's own Vice President of

Worldwide Marketing boasted, “We won't be going bankrupt. The Korean government won't let us fail.”

11. The DOC considered and evaluated more than 31,000 pages of documentation and argument provided by the various interested parties during the countervailing duty investigation. The result of the DOC's seven months of evaluation and analysis was detailed findings on the GOK's entrustment or direction of Hynix creditors to bail out the financially distressed company. In brief, the DOC based its findings of entrustment or direction on the totality of record evidence evincing, *inter alia*, a GOK policy to save Hynix,² the GOK's exercise of control over Hynix's creditors by virtue of its role as lender, owner, legislator and regulator,³ and the GOK's coercion of Hynix's creditors by, for example, threatening banks and mandating attendance of bank officials at creditor meetings.⁴ The DOC published a final affirmative subsidy determination. Following the publication of a final affirmative injury determination by the U.S. International Trade Commission (“USITC”), the DOC published a countervailing duty order.⁵

12. Despite the overwhelming evidence of GOK entrustment or direction, the Panel found that the DOC's evidence supported a finding of GOK entrustment or direction with respect to only one bank – this despite the fact that the Panel affirmed the DOC's finding that the GOK had

² See, *First Written Submission of the United States of America*, May 21, 2004, paras. 38-53 (hereinafter “U.S. First Submission”).

³ See U.S. First Submission, paras. 54-103.

⁴ See U.S. First Submission, paras. 104-126.

⁵ With one exception, the Panel upheld the USITC's final injury determination. The United States is not appealing that exception.

a policy in place to save Hynix and prevent its failure. How did such a disconnect come about?

The answer lies in the Panel’s numerous legal errors.

13. Specifically, as demonstrated below, the Panel committed the following legal errors:

- The Panel incorrectly interpreted the phrase “entrusts or directs” in Article 1.1(a)(1)(iv) of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”), and then applied that erroneous interpretation to the record evidence. The Panel’s narrow interpretation of “entrusts or directs” failed to give meaning to the range of relevant actions that a government can use to provide subsidies through private bodies. The Panel’s erroneous interpretation affected the rest of its analysis, causing it to incorrectly find that the DOC’s determination of entrustment or direction was not supported by sufficient evidence.
- The Panel adopted and applied a “probative and compelling” evidentiary standard that has no basis under the SCM Agreement, the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), or any other covered agreement. Under the Panel’s standard, an authority must have “overwhelming” or “irrefutable” evidence that “forces” or “obliges” the authority to find entrustment or direction.
- In determining that the GOK entrusted or directed private bodies to provide subsidies to Hynix, the DOC analyzed the record evidence in its entirety. Instead of reviewing whether the DOC’s analysis was objective and adequate, the Panel adopted its own approach in considering the evidence. The Panel evaluated each piece of evidence in isolation from the combination of arguments and evidence relied upon by the DOC in determining entrustment or direction. The Panel’s approach has no basis in the SCM Agreement, the DSU or any other covered agreement, and is inconsistent with the approach taken by other panels in considering evidence. The Panel’s analytic framework profoundly affected its assessment of the DOC determination, leading to its erroneous finding that the DOC determination was not supported by sufficient evidence.
- The Panel disregarded the DOC’s proper reliance on circumstantial and secondary evidence. The Panel’s approach has no basis in the SCM Agreement, the DSU or any other covered agreement, and is inconsistent with the approach taken by other panels with respect to circumstantial and secondary evidence.
- The Panel adopted an analytic framework that effectively shifted the burden of proof from Korea to the United States. That is, the Panel essentially required that the United States produce a “smoking gun” of GOK entrustment or direction.

- The Panel failed to consider certain record evidence by erroneously finding that U.S. reliance on such record evidence constituted *ex post facto* rationalizations. However, neither the SCM Agreement nor any other covered agreement requires an authority to cite in its published determinations to every piece of evidence on which the authority relies. Moreover, the record evidence cited by the United States was not used to support new reasoning, but instead supplemented the reasoning contained in the DOC determinations. Finally, in most instances, the DOC had, in fact, cited to the evidence that the Panel improperly disregarded. The Panel’s disregard of this evidence was inconsistent with its obligation under Article 11 of the DSU to conduct an objective assessment of the matter before it.
- In finding that certain Hynix creditors actually exercised their mediation rights, the Panel relied upon unsupported and unverifiable facts that were not on the record before the DOC during the investigation. In so doing, the Panel acted inconsistently with its obligation under Article 11 of the DSU to conduct an objective assessment of the matter before it.
- Taken together, the Panel’s errors resulted in an impermissible *de novo* review of the DOC determination. The Panel’s conduct of a *de novo* review was inconsistent with its obligation under Article 11 of the DSU to conduct an objective assessment of the matter before it.
- Because they were based entirely on the Panel’s erroneous finding that the DOC determination of entrustment or direction was not supported by sufficient evidence, the Panel’s findings of inconsistency with Article 1.1(b) (benefit) and Article 2 (specificity) of the SCM Agreement were in error.
- The Panel failed to reject Korea’s claims regarding the DOC countervailing duty order on the grounds that Korea failed to comply with Article 4.4 of the DSU.

II. ARGUMENT

A. The Panel Erroneously Interpreted the Phrase “Entrusts or Directs” in Article 1.1(a)(1)(iv) of the SCM Agreement and Then Applied that Erroneous Interpretation to the Record Evidence

14. The Panel erred in its interpretation of the phrase “entrusts or directs” under Article 1.1(a)(1)(iv) of the SCM Agreement. In limiting the activities encompassed within the

phrase “entrusts or directs” to acts of “delegation or command,”⁶ the Panel adopted an incorrect and overly narrow interpretation that is inconsistent with the ordinary meaning of the phrase, in its context and in light of the object and purpose of the SCM Agreement. The Panel’s erroneous interpretation affected its entire analysis, and resulted in the Panel erroneously finding that the DOC had insufficient evidence to establish that the GOK actions to bail out Hynix fell within Article 1.1(a)(1)(iv).

1. The Panel’s Interpretation of the Term “Entrusts or Directs” Was Inconsistent With Its Ordinary Meaning, Which Encompasses a Wide Range of Actions

15. Article 3.2 of the DSU provides that the WTO dispute settlement system is to clarify the provisions of the covered agreements “in accordance with customary rules of interpretation of public international law.” Article 31 of the *Vienna Convention on the Law of Treaties* (“*Vienna Convention*”) reflects such rules.⁷ Article 31 provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” A corollary of this customary rule of interpretation is that an interpretation must give meaning and effect to all terms of the treaty.⁸

16. Thus, any interpretation of Article 1.1 of the SCM Agreement must begin with its ordinary meaning. Article 1.1(a)(1) provides that a “financial contribution” exists where:

- (i) a government practice involves a direct transfer of funds (*e.g.*, grants, loans and equity infusion) or potential direct transfers of funds or liabilities (*e.g.*, loan guarantees);

⁶ See, *e.g.*, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, Report of the Panel circulated 21 December 2004, para. 7.33 (hereinafter “Panel Report”).

⁷ *US – Gasoline*, p. 17.

⁸ *US – Gasoline*, p. 23.

- (ii) government revenue that is otherwise due is foregone (*e.g.*, tax credits)[[]];
- (iii) a government provides goods or services other than general infrastructure, or purchases goods;
- (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments

17. It is evident from the text of Article 1.1(a)(1) that Members recognized that governments have a wide variety of mechanisms at their disposal to provide a financial contribution to domestic enterprises or industries, and that they intended to bring those mechanisms within the disciplines of the SCM Agreement. The text of subparagraph (iv) of Article 1.1(a)(1) recognizes that in addition to conferring subsidies directly, governments may confer subsidies by “entrust[ing] or direct[ing]” private actors. Unfortunately, the Panel interpreted subparagraph (iv) incorrectly, and in a manner that improperly narrows the scope of subparagraph (iv). Unless corrected by the Appellate Body, the Panel’s interpretation would deprive subparagraph (iv) of a substantial part of its meaning.

a. The Ordinary Meaning of “Entrusts or Directs” Encompasses a Range of Actions

18. The Panel’s interpretation of the terms “entrusts” and “directs” was inconsistent with the ordinary meaning of these terms. These key terms in Article 1.1(a)(1)(iv) are simply not as narrow as the Panel concluded.⁹

⁹ The Panel’s interpretation is set forth at Panel Report, paras. 7.32-7.35. In this regard,
(continued...)

19. “Entrust” is defined, in relevant part, as “[i]nvest with a trust; give (a person, etc.) the responsibility for a task . . . [c]ommit the . . . execution of (a task) to a person.”¹⁰ This definition encompasses a range of actions. The word “entrust” implies that a degree of discretion is given to the person being entrusted. It is not necessary that the government spell out in minute detail the task which it is entrusting. Rather, the ordinary meaning of “entrust” captures situations in which the government leaves a certain amount of responsibility to the trustee.

20. Definitions of the word “direct” include “Cause to move in or take a specified direction; turn towards a specified destination or target;” “Give authoritative instructions to; to ordain, order (a person) *to do*, (a thing) *to be done*; order the performance of” or “Regulate the course of; guide with advice.”¹¹ Additional definitions of “direct” include “Inform or guide (a person) as to the way; show or tell (a person) the way (to);” and “govern the actions ... of.”¹² Thus, the ordinary meaning of “direct” also encompasses a wide range of actions. These actions are not limited to ordering a person or entity to do something.

21. The Panel, however, disregarded these definitions and settled on a definition of “entrusts or directs” as “delegation or command.”¹³ To arrive at this conclusion, the Panel relied

⁹ (...continued)

the United States notes the Panel’s finding that, “[t]here is no disagreement between the parties concerning the DOC’s determination that the relevant acts that private bodies were allegedly entrusted or directed to undertake constitute ‘financial contributions.’” Panel Report, footnote 42. The financial contributions at issue in this dispute (loans, equity infusions, grants) all fall within subparagraph (i) of Article 1.1(a)(1); *i.e.*, transfer of funds.

¹⁰ *The New Shorter Oxford English Dictionary* 831 (1993) (Exhibit US-89).

¹¹ *The New Shorter Oxford English Dictionary* 679 (1993) (Exhibit US-89).

¹² *The New Shorter Oxford English Dictionary* 679 (1993) (Exhibit US-89).

¹³ Panel Report, paras. 7.32-7.35.

exclusively on *US – Export Restraints*,¹⁴ stating that the term “entrusts or directs” contains a “notion of delegation (in the case of entrustment) or command (in the case of direction).”¹⁵ The approach taken by the panel in *US – Export Restraints* is itself too narrow. However, the Panel then further narrowed that approach by erasing the phrase “notion of” from its interpretation, arriving at the conclusion that in order for entrustment or direction to exist, there must be a “delegation or command.”¹⁶ In so doing, the Panel erroneously restricted the ordinary meaning of “entrusts or directs.” Clearly, even the range of actions that have a “notion of” delegation or command is broader than the range of actions that are *per se* delegations or commands.

22. The Panel also ignored several of the definitions of “entrusts or directs,” set forth above. For example, the Panel did not recognize that “direct” includes “[c]ause to move in or take a

¹⁴ The Panel’s reliance on *US – Export Restraints* is misplaced. Putting aside the fact that that panel’s findings on this issue were *obiter dicta* and were not subject to review by the Appellate Body, the panel addressed an entirely different situation; namely, whether a hypothetical restriction on exports of a particular input could constitute entrustment or direction under Article 1.1(a)(1)(iv) on the basis that downstream producers would ultimately benefit from lower prices. The panel itself recognized that its rulings were premised upon the unique hypothetical “facts” in that case, stating that the “essential characteristics” of an “export restraint”, as defined by Canada, “delineate the scope of Canada’s claims and of our rulings thereon.” *US – Export Restraints*, para. 8.17. The statement in *US - Export Restraints* that the term direct “must contain a notion of command” was part of the panel’s larger analysis that entrustment or direction must be premised upon affirmative action, as opposed to the reactions of producers of the restrained good.

Affirmative GOK steps to entrust or direct private bodies to take certain actions are precisely what fill the record of the DOC investigation and the record of the panel proceeding in this dispute. The record shows the GOK meeting with the creditors, planning aspects of the bailout, encouraging the creditors through public statements, ensuring that the bailout would not be undermined through the actions of the credit rating agencies or the creditors’ liquidation claims, and engaging in dozens of other actions. Unlike the situation in *US – Export Restraints*, this case implicates the full range of methods that a government may employ to undertake entrustment or direction.

¹⁵ Panel Report, para. 7.31

¹⁶ Panel Report, paras. 7.33-7.35.

specified direction” and “[i]nform or guide (a person) as to the way” and “[r]egulate the course of; guide with advice.”¹⁷ Instead, in reciting the dictionary definition of “direct,” the Panel ignores a significant portion of the definition, stating that “[t]he word ‘direct’ is defined, *inter alia*, as to ‘[g]ive authoritative instructions to; order (a person) to do . . . order the performance of.’”¹⁸ From this half-definition, the Panel was able to narrow the ordinary meaning of “direct” by settling on one meaning: “command.”¹⁹ Clearly, however, a government can “[i]nform or guide,” or “guide with advice,” without actually commanding a person or entity to do something. A government can also “[r]egulate the course of” a person’s conduct without explicitly commanding that person to do something. Thus, the Panel’s interpretation disregarded the wide range of ordinary meanings of “entrusts or directs.”

23. If the negotiators of Article 1.1(a)(1)(iv) had intended the term “entrusts or directs” to be as narrow as the Panel found, they would have used words other than “entrusts or directs.” The fact that they did not indicates their concern that a Member could engage in subsidization through actions that fell short of a delegation or command.

24. The proper interpretation of “entrusts or directs” is one that takes account of the full range of government actions that fall within the ordinary meaning of this term: a government investing trust in a private body to carry out a task, a government giving responsibility to a private body to carry out a task, a government informing or guiding a private body as to how to carry out a task, a government regulating the course of a private body’s conduct, as well as a government delegating or commanding a private body to carry out a task. By relying exclusively

¹⁷ *The New Shorter Oxford English Dictionary* 679 (1993) (Exhibit US-89).

¹⁸ Panel Report, para. 7.31.

¹⁹ Panel Report, paras. 7.32-7.35.

on those elements of the term “entrusts or directs” associated with delegation or command, the Panel erroneously ignored equally, if not more, relevant elements that speak to a government’s role in advising, guiding, supervising, or regulating a private body so that it will do what the government seeks to have done.

b. The Proper Interpretation of “Entrusts or Directs” Should Give Meaning and Effect to the Range of Relevant Government Actions

25. The Panel’s unduly narrow interpretation of “entrusts or directs” fails to recognize that, when faced with clarifying under international customary rules of treaty interpretation a term that carries a range of relevant meanings, prior panels have properly clarified the meaning of treaty text so as to encompass the full ordinary meaning of the text. For example, in construing the term “normal” under Article 13 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (“TRIPS Agreement”), the panel in *US – Copyright Act* found that the ordinary meaning of “normal” encompassed the multiple connotations of its dictionary definitions.²⁰

26. The same is true in disputes involving the SCM Agreement. The Appellate Body and panels, when considering terms that offer a range of equally relevant meanings, have been careful not to limit the “essence” of a term to one particularly narrow meaning. For example, in construing the term “benefit” in Article 1.1(b) of the SCM Agreement, the panel and Appellate Body in *Canada – Aircraft* agreed that the ordinary meaning of “benefit” encompassed a range of equally relevant meanings. These meanings included “advantage,” “good,” “gift,” “profit,”

²⁰ *US – Copyright Act*, para. 6.166. See also *Canada – Pharmaceutical Products*, paras. 7.69-7.73 (Panel defined the term “legitimate interests” under Article 30 of TRIPS Agreement to include both legal interests and other justifiable interests, consistent with its multiple dictionary definitions).

or, more generally, “a favourable or helpful factor or circumstance.”²¹ The Appellate Body stated: “Each of these alternative words or phrases gives flavour to the term ‘benefit’ and helps to convey some of *the essence of that term*.”²² The Appellate Body thus interpreted the term “benefit” based on a combination of these definitions, rather than on any single dictionary definition.

27. Thus, as the ordinary meaning of the phrase “entrusts or directs” encompasses a range of government actions, the Panel erred by limiting the universe of actions that can constitute entrustment or direction to the actions of “delegation or command.” This is further surprising given that, in addition to the reasons given above, other panels have taken a more realistic approach that recognizes the different ways in which a government can induce private body compliance. In *Canada – Autos*, for example, the panel interpreted the ordinary meaning of the word “requirement” under Article III:4 of GATT 1994 to imply “government action involving a demand, request or the imposition of a condition” and that when the government interacts with private parties, “it is necessary to take into account that there is a *broad variety of forms of government action* that can be effective in influencing the conduct of private parties.”²³ Similarly, in *Japan – Film*, the panel stated that “where administrative guidance creates incentives or disincentives largely dependent upon governmental action for private parties to act in a particular manner, it may be considered a governmental measure.”²⁴

²¹ *Canada – Aircraft (Panel)*, para. 9.112; *Canada – Aircraft (AB)*, para. 153.

²² *Canada – Aircraft (AB)*, para. 153 (emphasis added).

²³ *Canada – Autos (Panel)*, para. 10.107 (emphasis added).

²⁴ *Japan – Film*, para. 10.45. In *Japan- Film*, the panel examined whether government measures could encompass actions that were not legally enforceable. It noted that in Japan, for example, a company receiving administrative guidance from the government of Japan may not

(continued...)

28. In short, unlike prior WTO panels, the Panel in this case failed to give full meaning and effect to the treaty terms at issue. Specifically, the Panel erred by failing to interpret “entrusts or directs” in a way that gives meaning and effect to the range of relevant government actions.

2. The Panel’s Interpretation Was Inconsistent With the Context of the Phrase “Entrusts or Directs”

29. As noted above, Article 31 of the *Vienna Convention* provides that the words of a treaty must be interpreted according to their “ordinary meaning” in its “context”.²⁵ The Panel, however, failed to consider the context of the text at issue.²⁶ Such consideration would have shown how the context of Article 1.1(a)(1)(iv) supports a less restrictive interpretation of the phrase “entrusts or directs”. The context of the phrase “entrusts or directs” includes the remainder of Article 1.1(a)(1)(iv), specifically the language that a financial contribution exists where a government “entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments”

30. With regard to this language, the Panel concluded that the reference to functions “normally vested in the government” should be understood to mean functions of taxation and

²⁴ (...continued)

be legally bound to act in accordance with it, “but compliance may be expected in light of the power of the government and a system of government incentives and disincentives arising from the wide array of government activities and involvement in the Japanese economy.” *Japan – Film*, para. 10.44.

²⁵ The United States recognizes that under Article 31 of the *Vienna Convention*, the consideration of ordinary meaning, context and object and purpose forms part of a single analysis. However, for ease of discussion, we address each element in separate sections. “Object and purpose” is discussed in the subsequent section.

²⁶ Instead, the Panel limited its discussion of the “context” of Article 1.1(a)(1)(iv) to only an examination of Korea’s arguments that the context supported a more restrictive bank-by-bank analysis. Panel Report, para. 7.36.

expenditure of revenue.²⁷ The Panel properly rejected Korea’s argument that conventional loans and restructuring measures – *i.e.*, those not made pursuant to some government program – are not “normally vested in the government.”

31. The Panel did not, however, understand the larger implications of this language. Article 1.1(a)(1)(iv) reaches practices which would normally be vested in the government and which do not differ, in any real sense, from practices normally followed by governments. The use of the term “practice” clearly implies that entrustment or direction cannot be limited to an official or formal program, but also must include broader “practices.” In addition, the phrase “in no real sense” suggests that the drafters were seeking to avoid circumvention, which would support an interpretation of “entrusts or directs” that gives effect to its full range of meanings. In other words, Article 1.1(a)(1)(iv) captures subsidies that differ “in no real sense” from those provided by a government itself, except for the fact that they are provided through private bodies.

32. The context of “entrusts or directs” makes clear that the negotiators did not intend that governments be able to evade the subsidy disciplines by using other means – that is, means that differ in no real sense from those normally used by governments – of granting subsidies. The only way to ensure that governments do not provide market-distorting subsidies through private bodies is by according a proper interpretation to “entrusts or directs” under international customary rules of treaty interpretation.

33. The Panel’s interpretation, however, was inconsistent with the context of the term “entrusts or directs.” By limiting the meaning of “entrusts or directs” to “delegation or

²⁷ Panel Report, para. 7.37, n.57.

command,” the Panel failed to recognize that there are many ways in which a government might exercise its leverage over private bodies to accomplish tasks that normally the government would handle.

3. The Panel’s Interpretation of the Phrase “Entrusts or Directs” Was Inconsistent With the Object and Purpose of the SCM Agreement

34. Consideration of the object and purpose of the SCM Agreement is also appropriate in treaty interpretation. Recourse to consideration of object and purpose is also an aid to interpretation. The Panel, however, concluded that both the United States and Korea “identified plausible object and purpose arguments in support of their respective interpretations” and thus declined to consider the object and purpose of the SCM Agreement.²⁸ The Panel was not free to simply disregard the object and purpose of the SCM Agreement where the parties suggest “plausible” alternatives. By doing so, the Panel abandoned its obligation to clarify Article 1.1(a)(1)(iv) in accordance with customary rules of interpretation of public international law.

35. In *Brazil – Aircraft*, the panel found that “the object and purpose of the SCM Agreement is to impose multilateral disciplines on trade-distorting subsidization.”²⁹ In *Canada – Autos*, the Appellate Body rejected an interpretation of Article 3.1(b) of the SCM Agreement that “would make circumvention of obligations by Members too easy.”³⁰ Similarly, in *Australia – Leather*, the panel declined to make a finding of export contingency exclusively on the legal instruments

²⁸ Panel Report, para. 7.41.

²⁹ *Brazil – Aircraft (Panel)*, para. 7.80.

³⁰ *Canada – Autos (AB)*, para. 142.

or administrative arrangements surrounding the subsidy, stating that “[s]uch a determination would leave wide open the possibility of evasion of the prohibition of Article 3.1(a)”³¹

36. The Panel’s reading of Article 1.1(a)(1)(iv), however, would open the way to evasion of that Article’s provisions. Specifically, Article 1.1(a)(1)(iv) ensures that governments cannot mask trade-distorting subsidization by using private bodies to accomplish their goals. This provision recognizes the practical reality that governments might conceal their activity in order to avoid the application of countervailing measures or multilateral disciplines. Indeed, the Panel itself acknowledged that an overly narrow reading of the provision would mean that:

the utility of Article 1.1(a)(1)(iv) would be undermined That provision operates as a catch-all, so that indirect government action does not fall outside the scope of the SCM Agreement. We are not prepared to read into Article 1 ... terms that would allow such indirect government action to circumvent the WTO’s subsidy disciplines.³²

37. Notwithstanding the Panel’s recognition that Article 1.1(a)(1)(iv) operates as a “catch-all,” it adopted an interpretation of “entrusts or directs” that unduly circumscribes the ability of WTO Members to take appropriate actions to address subsidies provided by a government through private bodies. By equating “entrust or directs” with “delegation or command,” the Panel did not account for the full range of methods by which a government might provide a subsidy. The Panel’s narrow interpretation did not recognize the many and varied “real facts in

³¹ *Australia – Leather*, para. 9.56

³² Panel Report, para. 7.33, n.50. The negotiating history confirms an interpretation of the term “entrusts or directs” that encompasses a range of government actions using private entities to mask trade-distorting subsidization. See *US – Export Restraints*, para. 8.74, in which the panel, after reviewing the negotiating history of Article 1.1(a)(1), observed that the “clearly intended function” of the “entrusts or directs” language of subparagraph (iv) was that of “an anti-circumvention mechanism”.

real cases in the real world”³³ by which governments exert their influence on the private sector.

The Panel’s interpretation, therefore, contravenes the ordinary meaning of the “entrusts or directs” provision, in light of the object and purpose of the SCM Agreement that trade-distorting subsidies be subject to multilateral disciplines.

38. In short, the Panel should have interpreted and applied the term “entrusts or directs” to encompass government actions that give responsibility for, or commit the execution of, a government subsidy function to a private body, or that induce, invest trust in, order, regulate, guide, or cause a private party to carry out such function. Importantly, the phrase “entrusts or directs” is drafted in the disjunctive. Thus, the Panel should have permitted the DOC to rely on government actions falling within any of the above meanings. The Panel clearly failed to do this by erroneously limiting the interpretation of “entrusts or directs” to “delegation or command.”

4. The Panel’s Erroneous Interpretation of the Entrustment or Direction Standard Affected the Rest of Its Analysis

39. The Panel’s narrow interpretation of “entrusts or directs” influenced the rest of its analysis. By focusing on whether there were delegations or commands by the GOK to the Hynix creditors, the Panel erroneously found that GOK conduct – which did fall within the meaning of the phrase “entrust or directs,” properly interpreted – did not meet the Panel’s standard. A few examples suffice to demonstrate the consequences of the Panel’s misinterpretation.

³³ *Japan – Alcohol (AB)*, p. 31.

40. First, with regard to the GOK’s ownership or control of the Group B creditors,³⁴ the Panel found that “a government’s influence as shareholder is not *per se* evidence of entrustment or direction, since government influence does not necessarily entail affirmative acts of delegation or command.”³⁵ Under a proper interpretation of the entrustment or direction standard, the Panel would not have restricted its analysis to whether ownership or control entails delegation or command “*per se*”, but rather whether the DOC could have concluded that, in this case, such a condition enabled the GOK to regulate the course of the Hynix creditors’ conduct, to inform or guide the Hynix creditors, or to give the Hynix creditors responsibility for a task.

41. Second, the DOC found that Prime Minister Decree No. 408 provided a means by which the GOK could become involved in the Korean banking system. Article 5 of the Prime Minister Decree stated that Korean financial supervisory agencies could request cooperation from financial institutions, and Article 6 provided the GOK with the authority to intervene in the activities of banks in which it held ownership interests, through the exercise of its shareholder rights.³⁶ Regarding Article 5, however, the Panel found that the DOC could not properly

³⁴ In its *Answers of the United States of America to the Panel’s Questions to the Parties Following the First Substantive Meeting of the Panel*, July 9, 2004, see Panel Report, Annex E-4, the United States provided Figure US-4, which set out the extent of GOK ownership of Hynix’s creditors and the extent of each creditor’s participation in Hynix’s restructuring. In Figure US-4, Hynix’s creditors are divided into three groups. Group A creditors consisted of public entities owned/controlled by the GOK; *i.e.*, creditors that the DOC treated as “public” bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement. Group B creditors consisted of creditors that the DOC treated as private entities owned/controlled by the GOK; *i.e.*, “private” creditors in which the GOK had 100 percent ownership or was the single largest shareholder, and KFB, in which the GOK owned 49 percent. Group C creditors consisted of the remaining creditors that the DOC treated as private entities. The Panel used these designations in its report.

³⁵ Panel Report, para. 7.62; *see also* Panel Report, para. 7.63.

³⁶ U.S. First Submission, para. 80; *Preliminary Determination*, 68 Fed. Reg. at 16774

determine “that a request for co-operation amounts to evidence of affirmative acts of delegation or command” and that “[r]equesting co-operation in a matter is not the same as delegating a task, or commanding someone to do something.”³⁷ But clearly a request for cooperation from a government – which by its very nature has considerable power over those in the private sector – fits within the ordinary meaning of “entrusts or directs.”³⁸ In other words, it was not unreasonable for the DOC to conclude that by requesting cooperation, the GOK (perhaps subtly but no less effectively) could inform or guide the banks as to the proper actions to take or give the banks responsibility for certain tasks. And in Korea, as the DOC found, when the government publicly announced its commitment to saving Hynix – while concurrently holding a majority stake in the majority of Hynix creditors – those creditors “cooperated” with the government even if it meant abandoning any semblance of commercial reason.

42. Regarding Article 6 of the Prime Minister Decree, the Panel found that this Article also was not “evidence of affirmative acts of delegation or command.”³⁹ But, through the exercise of shareholder rights, a government certainly can regulate the course of conduct of a private body or cause that body to move in a certain direction, and it was not unreasonable for the DOC to have so found. Nevertheless, because of its narrow and erroneous interpretation of “entrusts or directs,” the Panel ignored the significance of Prime Minister Decree No. 408.

³⁶ (...continued)
(Exhibit GOK-4).

³⁷ Panel Report, para. 7.76.

³⁸ *Cf.*, *Japan – Film*, para. 10.44.

³⁹ Panel Report, para. 7.77.

43. Third, the DOC found that the GOK threatened numerous creditors in order to coerce them to participate in the Hynix bailout.⁴⁰ The Panel agreed that the DOC properly found coercion with respect to Korea First Bank (“KFB”).⁴¹ However, the Panel concluded that the DOC should not have found coercion with respect to KorAm Bank and Hana Bank and “that the DOC’s analysis could not properly support a finding of widespread coercion of Hynix’s creditors.”⁴² Here again, the Panel’s misinterpretation of the entrustment or direction standard resulted in an erroneous conclusion. It would only take one well-publicized instance⁴³ of governmental coercion of a private bank to cause other banks to take certain actions. As in this case, entrustment or direction need not take the form of a command with respect to every bank.⁴⁴ Rather, the actual force or coercion against one bank could, in the context of the totality of the evidence, lead an objective investigating authority to conclude that the GOK had the ability to coerce Hynix’s creditors, and that it was exercising that ability, when necessary, to ensure that all banks would comply.

44. Fourth, the DOC found that the GOK required Hynix creditors to attend meetings with government officials. For example, at the request of the Korea Exchange Bank (“KEB”), at least one official was present at the March 2001 meeting to “urge creditor banks to execute the

⁴⁰ U.S. First Submission, paras. 104-115; *Issues and Decision Memorandum* at 59-60 (Exhibit GOK-5).

⁴¹ Panel Report, para. 7.117.

⁴² Panel Report, para. 7.130.

⁴³ The coercion of KFB was well-publicized. See U.S. First Submission, paras. 105-113 (citing press reports of GOK coercion); *Issues and Decision Memorandum* at 59-60 (Exhibit GOK-5).

⁴⁴ This is not to say that the GOK did not employ actual force or coercion against banks other than KFB. The record before the DOC clearly established that it did. See U.S. First Submission, paras. 105-115; *Issues and Decision Memorandum* at 59-60 (Exhibit GOK-5)

resolutions made by creditors.”⁴⁵ Some of the creditors believed that if there was a government official present, the creditors who no longer wished to participate in the Hynix restructuring might change their minds.⁴⁶ Despite this obvious instance of GOK pressure on Hynix creditors, the Panel stated that “the fact that a regulatory authority attends a meeting of creditors at the request of the lead creditor in order to urge – and not instruct – creditor banks to execute resolutions made by creditors would not allow an investigating authority to properly conclude that such attendance amounted to governmental entrustment or direction of creditors to participate in the restructuring.”⁴⁷ The Panel’s language “to urge – and not instruct” further reveals its misinterpretation of the relevant legal standard. The ordinary meaning of “entrusts or directs” does not connote only an instruction. As described above, it includes “[c]ause to move in or take a specified direction” and “[i]nform or guide (a person) as to the way.” In other words, an objective investigating authority could have concluded, as did the DOC, that the GOK’s urging of private creditors to assist in the Hynix restructuring constituted evidence of entrustment or direction.

45. Fifth, the Panel’s erroneous interpretation of the entrustment or direction standard manifested itself in the Panel’s analysis of a September 2001 SEC prospectus filed by Kookmin Bank and Housing and Commercial Bank (two Hynix creditors) and a June 2002 SEC prospectus filed by Kookmin Bank. These prospectuses warned U.S. investors that the GOK as a matter of policy promotes lending to certain types of borrowers, specifically troubled corporate borrowers,

⁴⁵ U.S. First Submission, paras. 125-126; GOK Verification Report at 19 (Exhibit US-12).

⁴⁶ U.S. First Submission, para. 125 (quoting GOK Verification Report at 18 (Exhibit US-12)).

⁴⁷ Panel Report, para. 7.141 (emphasis in original).

and that this GOK policy may influence the banks to lend to certain sectors or in a manner in which they would not in the absence of the GOK policy.⁴⁸ The DOC concluded that Kookmin’s SEC prospectuses provided explicit evidence that government direction had occurred and provided crucial evidence of the GOK’s role in directing lending decisions.⁴⁹ The Panel, however, stated that the prospectuses indicated only “the pursuit of government policy through requests to banks, and the making available of low interest loans. Such conduct is indicative of a generalized government policy, rather than affirmative acts of delegation and command.”⁵⁰ However, by focusing on acts of delegation or command, the Panel missed the significance of the Kookmin prospectuses. The prospectuses establish that the GOK requested banks to participate in loans to troubled high technology companies and that Kookmin may feel “compelled” to follow the GOK policy.⁵¹ Thus, an objective investigating authority could have concluded that the prospectuses were evidence that the GOK guided, regulated or caused private banks to act in certain ways, and, as such, were evidence of entrustment or direction.

46. These examples, together with a significant number of other findings, show that the Panel’s erroneous interpretation of the Article 1.1(a)(1)(iv) affected its entire analysis of the

⁴⁸ U.S. First Submission, para. 71; *Issues and Decision Memorandum* at 57-59 (Exhibit GOK-5). See also *Kookmin Bank Prospectus* (September 10, 2001) at 24 (Exhibit US-45); *Kookmin Bank Prospectus* (June 18, 2002) at 22 (Exhibit US-46).

⁴⁹ U.S. First Submission, para. 71; *Issues and Decision Memorandum* at 58 (Exhibit GOK-5). In this regard, it must be emphasized that SEC prospectuses are submitted under oath and are subject to civil and criminal penalties if incorrect or fraudulent. See U.S. First Submission, para. 77; *Issues and Decision Memorandum* at 58 (Exhibit GOK-5).

⁵⁰ Panel Report, para. 7.164; see also Panel Report, paras. 7.167-7.168.

⁵¹ U.S. First Submission, para. 71; *Issues and Decision Memorandum* at 57-59 (Exhibit GOK-5). See also *Kookmin Bank Prospectus* (September 10, 2001) at 24 (Exhibit US-45); *Kookmin Bank Prospectus* (June 18, 2002) at 22 (Exhibit US-46).

DOC’s findings concerning the Hynix bailout.⁵² The Panel’s interpretation was inconsistent with the ordinary meaning of the phrase “entrusts or directs,” in its context and in light of the object and purpose of the SCM Agreement. For the above reasons, the Appellate Body should reverse the Panel’s findings with respect to its interpretation of “entrusts or directs”,⁵³ as well as the Panel’s erroneous conclusions, based on its flawed interpretation, that certain GOK actions did not fall within Article 1.1(a)(1)(iv).⁵⁴

B. The Panel Erred by Applying a “Probative and Compelling” Evidentiary Standard That Has No Basis in the SCM Agreement, the DSU or Any Other Covered Agreement

47. The key issue presented to the Panel was whether the DOC finding of entrustment or direction was supported by adequate evidence. In addressing this issue, the Panel, without any explanation and without citing to any legal authority, proclaimed that “evidence of entrustment or direction must in all cases be *probative and compelling*.”⁵⁵ This new “probative and compelling” evidentiary standard has no basis in the SCM Agreement, the DSU or any other covered agreement.

48. The Panel did not offer an explanation of what it thought its “probative and compelling standard” means. However, notwithstanding that such a standard is not found in the WTO

⁵² The Panel’s error permeates its entire analysis, and is evident in its concluding paragraph, in which it states as follows: “In order to meet the requirements of [Article 1.1(a)(1)(iv) of the SCM Agreement], the DOC was required to gather evidence of affirmative GOK acts of delegation or command vis-a-vis the Group B and C private creditors.” Panel Report, para. 7.176.

⁵³ Panel Report, paras. 7.29-7.46

⁵⁴ Panel Report, paras. 7.51, 7.56, 7.62-7.63, 7.76-7.78, 7.82-7.91, 7.99-7.104, 7.129-7.130, 7.135, 7.141, 7.155, 7.163-7.168, 7.172-7.174, and 7.175-7.178.

⁵⁵ Report of the Panel, para. 7.35 (emphasis added); *see also* para. 7.46.

agreements, according to *The New Shorter Oxford English Dictionary*, the ordinary meaning of “compelling” is “*ppl a. that compels*”.⁵⁶ “Compel”, in turn, is defined as follows:

1. Constrain, force, oblige, (a person). (Foll. By *to do, (in)to* an action etc.).
2. Force to come or go (in some direction); drive or force together. Now *literary*.
3. Take by force, extort, requisition.
4. Bring about or evoke by force.⁵⁷

Another dictionary defines “compelling” as: “not able to be refuted; inspiring conviction ...; not able to be resisted; overwhelming”⁵⁸

49. Thus, if used as part of an evidentiary standard, “compelling” would appear to mean evidence that “forces” or “obliges” a fact-finder to reach a particular conclusion, or evidence that is “overwhelming” or “irrefutable.” In the context of the DRAMS investigation, the Panel appears to be saying that the DOC had to have “overwhelming” or “irrefutable” evidence that “forced” or “obliged” it to find entrustment or direction.

50. The SCM Agreement utilizes different terms for facts and provides limited guidance as to evidentiary standards. Articles 2, 6.6, 12.1, 17.1, and others refer to “information,” and Articles 4.2, 7.2, 9.4, 11.2, and others refer to “evidence.” The terms “information” and “evidence,” in other words, appear throughout the SCM Agreement, but nowhere does the phrase “probative and compelling” appear.

⁵⁶ *New Shorter Oxford English Dictionary* (1993), p. 458. The United States does not take issue with the Panel’s requirement that evidence be “probative.” Even though that term is not found in the text of any covered agreement, including the SCM Agreement, the United States understands the Panel to be saying nothing more than the tautological proposition that “evidence” of a fact or conclusion must tend to be “probative” of that fact or conclusion. Otherwise, it would not be “evidence” of that fact or conclusion in the first place.

⁵⁷ *Id.*

⁵⁸ *Oxford Dictionary of English*, 2d ed. (2003), p. 352.

51. Articles 2.4 (regarding specificity), 15.1 (regarding demonstration of injury), and 27.8 (regarding demonstration that a subsidy granted by a developing country results in serious prejudice) all require the use of “positive evidence.” In *US – Hot-Rolled Steel*, the Appellate Body explained that positive evidence “relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination. The word ‘positive’ means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible... . [T]he term ‘positive evidence’ focuses on the facts underpinning and justifying the injury determination... .”⁵⁹ However, the requirement of “positive evidence” does not translate into an evidentiary standard of “probative and compelling.”

52. Article 12 of the SCM Agreement specifically addresses the use of evidence in countervailing duty investigations. Although Article 12 does not state an evidentiary standard, Article 12.5 does state that the investigating authorities “shall during the course of the investigation satisfy themselves as to the accuracy of the information supplied by interested Members” This requirement, too, does not translate into an evidentiary standard of “probative and compelling.”

53. Provisions of various WTO agreements set forth a number of types of evidence or evidentiary standards, such as “positive evidence,”⁶⁰ “relevant evidence,”⁶¹ or “sufficient evidence.”⁶² The negotiators of the SCM Agreement, however, did not include a reference to

⁵⁹ *US – Hot-Rolled Steel (AB)*, paras. 192-193.

⁶⁰ See, e.g., Article 3.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”).

⁶¹ See, e.g., Articles 3.5 and 5.2 of the AD Agreement, and Articles 42 and 50.1 of the TRIPS Agreement.

⁶² See, e.g., Articles 5.3, 5.6, 5.8, 10.7 and 12.1 of the AD Agreement, and Article 5.4 of
(continued...)

“probative and compelling” evidence in Article 1.1(a)(1)(iv) of the SCM Agreement. Moreover, Article 1 does not otherwise refer to any other specific evidentiary standard.

54. The Panel’s “probative and compelling” evidentiary standard likewise is not found in the DSU. Significantly, in describing the function of panels and the standard of review, Article 11 of the DSU does not set forth any such stringent evidentiary standard. Rather, a panel’s duty is to determine whether an investigating authority has provided a reasoned and adequate explanation as to why the evidence led to a particular conclusion.⁶³ Specifically, the Appellate Body has summarized the role of a panel under Article 11 as follows:

[P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assess whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority’s explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.⁶⁴

Thus, a panel’s role does not provide for the imposition of an evidentiary requirement – in this case that the evidence of entrustment or direction be “probative and compelling” – not found in the relevant WTO agreement. On the contrary, it is well-settled that a panel may not read into an agreement words or concepts which are not there.⁶⁵

⁶² (...continued)
the *Agreement on Textiles and Clothing*.

⁶³ See, e.g., *US – Lamb Meat (AB)*, para. 103.

⁶⁴ *US – Cotton Yarn (AB)*, para. 74.

⁶⁵ See, e.g., *India – Quantitative Restrictions (AB)*, para. 94; and *India – Patent Protection (AB)*, para. 45.

55. The United States does not dispute the proposition that a finding of entrustment or direction, like any other finding, must rest upon a “sufficient factual basis.”⁶⁶ Whether government actions amount to entrustment or direction always will present an evidentiary question. However, the WTO has never set a standard of “probative and compelling” evidence.⁶⁷ Therefore, the Panel erred when it articulated and applied a special evidentiary standard – “probative and compelling” – for entrustment and direction.

56. The Panel’s adoption and application of the “probative and compelling” standard for demonstrating entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement imposes an additional obligation on investigating authorities that is not found in the SCM Agreement. In addition, the logical consequence of the Panel’s findings is that any Member seeking to challenge subsidies provided through private bodies under Part II (Prohibited Subsidies) or Part III (Actionable Subsidies) of the SCM Agreement must also satisfy the overly stringent evidentiary standard articulated by the Panel. In other words, in such disputes, the complaining party must present “overwhelming” and “irrefutable” evidence that “forces” or “obliges” a panel to find entrustment or direction.

57. The Panel erred by applying a “probative and compelling” evidentiary standard that has no basis in the SCM Agreement, the DSU or any other covered agreement. The Appellate Body

⁶⁶ See, e.g., *US - Lamb Meat (AB)*, para. 131.

⁶⁷ Indeed, the covered agreements do not even set out rules regarding the type of evidence that can be used. See, e.g., *US - Argentina Sunset (Panel)*, para. 7.296 (“[T]here are no rules in the Anti-Dumping Agreement as to the type of evidence that can support an investigating authority’s findings ...”).

should reverse the Panel’s findings setting forth its erroneous evidentiary standard and the findings based on the Panel’s application of that standard.⁶⁸

C. The Panel Erred By Evaluating Entrustment or Direction for Each Piece of Evidence In Isolation From the Combination of Arguments and Evidence Relied On By the DOC in Determining Entrustment or Direction

58. In assessing the Department’s determination of entrustment or direction, the Panel stated that “we are conscious that the DOC relied on the totality of the evidence before it, without attaching particular importance to one or several evidentiary factors. We shall adopt the same approach in our review of the DOC’s determination.”⁶⁹ However, the Panel then stated that “we must consider the DOC’s assessment of the probative value of each evidentiary factor separately.”⁷⁰ Although this statement concerns the “probative value” of each factor, a reading of the Panel Report reveals that the Panel did not merely assess whether each factor was probative of entrustment or direction, but rather whether each piece of evidence *in and of itself* demonstrated entrustment or direction.⁷¹

59. The Panel’s proper function was to consider whether the DOC’s analysis – which considered the totality of the evidence in the record – was reasoned and adequate.⁷² However, the Panel did not once explain why the DOC’s analysis of the evidence in its entirety was not

⁶⁸ These findings are contained in Panel Report, paras. 7.35, 7.45-7.46, 7.51, 7.76-7.78, 7.99-7.103, 7.129-7.130, 7.141, 7.164, 7.168 and 7.173.

⁶⁹ Panel Report, para. 7.46

⁷⁰ Panel Report, para. 7.46.

⁷¹ Evidence has probative value merely if it “tend[s] to prove” a certain issue. BLACK’S LAW DICTIONARY 1220 (7TH ed. 1999). If, consistent with its role under Article 11 of the DSU, the Panel had properly assessed the probative value of each evidentiary factor, the Panel would have found that each factor was highly probative of the GOK’s entrustment or direction of the Hynix bailout.

⁷² See e.g., *US – Cotton Yarn (AB)*, para. 74.

reasoned and adequate. Instead, the Panel chose to embark on its own *de novo* analysis of the evidence.⁷³ Having made this choice, the Panel then proceeded to examine each piece of evidence in isolation, an approach that finds no support in any provision of the SCM Agreement, the DSU or any other legal authority. The Panel’s failure to assess the totality of the evidence stands in stark contrast to the reasoned and adequate approach of the DOC to the voluminous record evidence, is inconsistent with the manner in which the Appellate Body and other panels have considered evidence, and constitutes legal error.

60. Moreover, this was not some sort of abstract legal error that had no impact on the Panel’s ultimate findings. To the contrary, the Panel’s erroneous analytical framework profoundly affected its assessment of the DOC’s finding of entrustment or direction. Specifically, the Panel erred in its assessment of the arguments and evidence with respect to: (1) the GOK’s policy to save Hynix from failure; (2) the GOK’s manipulation at Economic Ministers’ meetings of banks’ loan limits to Hynix; (3) the GOK’s contractual rights to entrust or direct the Hynix bailout through the Public Funds Oversight Act; (4) the GOK’s threats against creditors to coerce their participation in the Hynix rescue; (5) statements in SEC prospectuses that the GOK intervened in bank lending decisions in order to assist troubled borrowers; and (6) the GOK’s ownership or control of creditors that were essential to the Hynix bailout and the role of those creditors.

61. First, the DOC found that the GOK had a policy to support Hynix and prevent its failure.

The DOC explained that:

The GOK attached such great importance to Hynix’ survival because it feared that the company’s collapse would have serious repercussions for the ROK’s

⁷³ The Panel’s performance of a *de novo* review constitutes a separate legal error that is discussed below.

corporate, labor and financial markets, and because Hynix was part of an industry sector considered to be of “strategic” importance to the GOK.⁷⁴

62. While the Panel found that the DOC properly determined that the GOK had a policy to save Hynix,⁷⁵ it then dismissed the significance of this fact, concluding erroneously that “the existence of a GOK policy to save Hynix *in and of itself* is could not [sic] properly be treated as evidence of government entrustment or direction.”⁷⁶ However, the existence of a policy to save Hynix clearly is probative – indeed, to use the Panel’s term, it is compelling – evidence that the GOK had a motive to entrust or direct Hynix’s creditors. Moreover, the Panel ignored the fact that the DOC considered that the GOK policy was just one item in the totality of the evidence. In contrast to the DOC’s reasoned and adequate approach, the Panel failed to consider the other evidentiary factors in light of this policy.

63. Second, the DOC found that at certain Economic Ministers’ meetings, the FSC resolved to increase certain banks’ credit limits for single borrowers.⁷⁷ The FSC stated that it approved these credit limits for these banks “in order to allow them to participate in the Hynix restructuring process.”⁷⁸ Moreover, the DOC found that the results of these Ministers’ meetings further signaled the GOK’s resolve that it would not allow Hynix to fail.⁷⁹ The Panel again walled this evidence off from everything else. It erroneously concluded that the DOC failed to

⁷⁴ U.S. First Submission, paras. 44-53; *Issues and Decision Memorandum* at 49 (Exhibit GOK-5).

⁷⁵ Panel Report, para. 7.51.

⁷⁶ Panel Report, para. 7.51 (emphasis added).

⁷⁷ U.S. First Submission, paras. 94-99; *Issues and Decision Memorandum* at 50-51 (Exhibit GOK-5).

⁷⁸ U.S. First Submission, paras. 96; *Issues and Decision Memorandum* at 50 (Exhibit GOK-5), citing GOK Verification Report at 16 (Exhibit US-12).

⁷⁹ U.S. First Submission, paras. 98; *Issues and Decision Memorandum* at 50-51 (Exhibit GOK-5).

demonstrate that the circumstances surrounding the Economic Ministers’ meetings “constituted evidence” of entrustment or direction, and that even if the DOC was correct that these meetings provided a signal that Hynix would not be allowed to fail, “that *alone* was not sufficient” for the DOC to find entrustment or direction.⁸⁰ By focusing on whether this evidence “alone” was sufficient for entrustment or direction, the Panel again failed to consider this evidence in light of the totality of information on the investigation record. The DOC, on the other hand, considered that the Economic Ministers’ meetings were one of the first of a series of interrelated actions that the GOK took to effectuate its policy to prevent the failure of Hynix.

64. Third, the DOC found that the Public Funds Oversight Act and Prime Minister Decree No. 408 provided a means by which the GOK could be directly involved in the fiscal operations of private banks.⁸¹ Pursuant to the Public Funds Oversight Act, when the GOK provided public funds to a bank, it executed a Memorandum of Understanding with that bank which provided the

⁸⁰ Panel Report, paras. 7.103-7.104 (emphasis added); *see also* Panel Report, para. 7.99 (Panel erroneously concluded “[t]hese instructions [by the GOK Economic Ministers to the FSC to grant loan limit waivers to Hynix creditors], therefore, could not properly be relied on as evidence of government entrustment or direction of private bodies.”); para. 7.100 (Panel erroneously concluded “this [granting of loan limit waivers by the FSC which were not based on commercial principles] concerns relations between the GOK and FSC, and could not properly be treated as evidence that private bodies were somehow entrusted or directed to do something.”); and para. 7.101 (Panel erroneously concluded “we do not consider that the DOC could properly have inferred from this that creditors were entrusted or directed to participate in the syndicated loan.”).

⁸¹ After Korea’s 1997-1998 financial crisis, the GOK injected trillions of won in capital into the banks, and in that process expanded its ownership in, and influence over, the banks exponentially. Significant government capital was provided to a number of banks that were major participants in the Hynix restructuring and recapitalization measures, including KEB, KFB, Chohung, Seoul Bank, Kwangju, and Peace Bank. U.S. First Submission, para. 83, n.139, and sources cited therein.

GOK with a contractual ability to control direction of credit to Hynix.⁸² Similarly, Prime Minister Decree No. 408 provided the GOK with the right to seek cooperation from and be involved in the operations of Hynix’s creditors.⁸³ The Panel, once again, failed to see the forest for the trees. It erroneously concluded that “[w]e fail to see how an objective and impartial investigating authority could properly have determined that there was evidence of entrustment or direction *on the basis of* the limited DOC analysis of the Public Funds Oversight Act set forth in the *Preliminary Determination*.”⁸⁴ The Panel also erroneously concluded “[w]e do not consider that an objective and impartial investigating authority could properly have determined that th[e] [GOK’s legal authority to intervene in the activities of government-owned banks by exercising its shareholder rights] amounts to evidence of affirmative acts of delegation or command.”⁸⁵ Of course, the DOC did not reach its finding of entrustment or direction on the basis of the Public Funds Oversight Act or the Prime Minister Decree alone; rather, the DOC found that these legislative measures were merely some of the many vehicles used by the GOK to prevent the complete financial collapse of Hynix. The DOC properly found that, in its role as legislator and regulator, the GOK had the ability to entrust or direct Hynix’s creditors.

⁸² U.S. First Submission, paras. 82-83; *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).

⁸³ U.S. First Submission, paras. 79-81; *Preliminary Determination*, 68 Fed. Reg. at 16774 (Exhibit GOK-4).

⁸⁴ Panel Report, para. 7.78 (emphasis added).

⁸⁵ Panel Report, para. 7.77; *see also* Panel Report, para. 7.76 (Panel erroneously concluding that “[w]e do not consider that an objective and impartial investigating authority could properly determine that a request for co-operation amounts to evidence of affirmative acts of delegation or command” and that “[w]e do not consider that an objective and impartial investigating authority could treat such a conditional statement [that Article 5 could be invoked in financial crises] as evidence that affirmative acts of delegation or command were actually taken by the GOK pursuant to Article 5 ...”).

65. Fourth, the DOC found that the GOK employed threats against numerous creditors in order to coerce those creditors to help prevent the failure of Hynix. Most importantly, the DOC found that the GOK coerced KFB, KorAm Bank and Hana Bank. For example, the DOC found that a GOK agency, the Financial Supervisory Service (“FSS”), “applied pressure to KFB and ‘strongly urged’ KFB to participate in the [restructuring] plan lest it risk losing some of its clients.”⁸⁶ The DOC also found that KorAm Bank reversed its decision not to participate in part of the May 2001 restructuring “after the FSS warned of a possible sanction” against it, and that the FSS “threatened to fine” Hana Bank if it did not provide emergency liquidity to Hyundai Petrochemical, which, like Hynix, was part of the Hyundai Group.⁸⁷ The Panel concluded that the DOC properly found GOK coercion with respect to KFB.⁸⁸ Yet the Panel, consistent with its piecemeal approach, erroneously concluded that:

While the DOC could properly find coercion in respect of the KFB, an objective and impartial investigating authority would have treated this *isolated incident* of coercion regarding a single creditor as being of limited probative value in respect of the alleged entrustment or direction of other private creditors.⁸⁹

66. Here again, the Panel failed to recognize that one must look at the evidence in its entirety, as had the DOC. Contrary to the Panel’s erroneous conclusion, no incident in the restructuring of Hynix was “isolated.” In reality, the GOK’s behavior in relation to one bank provides a proper basis to infer that, if necessary, the GOK would treat all other similarly situated banks in

⁸⁶ U.S. First Submission, paras. 110; *Issues and Decision Memorandum* at 60 (Exhibit GOK-5).

⁸⁷ U.S. First Submission, paras. 114-115; *Issues and Decision Memorandum* at 59-60 (Exhibit GOK-5).

⁸⁸ Panel Report, para. 7.117.

⁸⁹ Panel Report, para. 7.130 (emphasis added).

a comparable manner and that the banks understood this. Moreover, as discussed above, the DOC relied on argument and evidence that the GOK coerced a number of banks, not just KFB.

67. Fifth, the DOC properly concluded that Kookmin’s SEC prospectuses provided explicit evidence that government entrustment or direction had occurred and provided crucial evidence of the GOK’s role in directing lending decisions.⁹⁰ These prospectuses contained the clear warning to potential U.S. investors that Kookimin “may feel compelled to follow” the GOK’s directed lending policies.⁹¹ Moreover, as the United States explained before the Panel, the prospectuses added to the “totality of the evidence” of GOK entrustment or direction.⁹² The Panel again ignored the cumulation of evidence, of which the prospectuses were just a part, and erroneously concluded that the DOC “could [not] properly have found that the abovementioned submissions in the two Kookmin prospectuses constitute evidence of GOK entrustment or direction.”⁹³ The DOC, however, properly relied on the Kookmin prospectuses as admissions by a Hynix creditor that the GOK had directed the bank’s lending decisions. Thus, there was

⁹⁰ U.S. First Submission, paras. 70-74; *Issues and Decision Memorandum* at 57-59 (Exhibit GOK-5). See also *Kookmin Bank Prospectus* (September 10, 2001) at 24 (Exhibit US-45); *Kookmin Bank Prospectus* (June 18, 2002) at 22 (Exhibit US-46). As noted above, these prospectuses must be submitted under oath, and are subject to civil and criminal penalties if inaccurate or fraudulent.

⁹¹ *Kookmin Bank Prospectus* (September 10, 2001) at 24 (Exhibit US-45). As we know from the discussion above regarding the Panel’s “probative and compelling” evidentiary standard, “compelled to follow” means “forced or obliged to follow.”

⁹² U.S. First Submission, para. 73.

⁹³ Panel Report, para. 7.164. See also para. 7.168 (Panel erroneously concluded “we do not consider that an objective and impartial investigating authority could properly have relied on the above reference to a generalized policy ‘request’ [to participate in remedial programs for troubled corporate borrowers] from the government as evidence of government entrustment or direction ...”).

evidence that the GOK could and did direct the lending decisions of Hynix creditors, even ones like Kookmin that had a relatively low level of government ownership.

68. Sixth, even in the two instances in which the Panel purported to have viewed an isolated piece of evidence in conjunction with other factors, its actual approach was not to analyze the factor in any wider context but to dismiss it as not constituting evidence at all. In particular, the DOC found that the GOK-owned or GOK-controlled creditors (*i.e.*, the Group A and B creditors) played a dominant role in Hynix’s restructuring.⁹⁴ The DOC found that the GOK ownership or control of these banks enabled it to entrust to them the responsibility for implementing the Hynix bailout.⁹⁵ Because these banks were the dominant players on Hynix’s Creditors’ Councils,⁹⁶ the DOC found that they were able “to set the terms of the financial restructuring” of Hynix.⁹⁷ The Panel, however, dismissed the evidence of GOK ownership or control, erroneously concluding that “a government’s influence as a shareholder is not *per se* evidence of entrustment or direction,” and that the DOC could not have found “that government ownership, either in isolation or in conjunction with other factors, constituted compelling evidence of government entrustment or direction of Group B creditors.”⁹⁸ Certainly, at least in conjunction with other

⁹⁴ The DOC stated: “In each of the major restructuring steps, these banks accounted for a major portion of either new loans or debt that was swapped for equity.” U.S. First Submission, para. 62; *Issues and Decision Memorandum* at 53 (Exhibit GOK-5).

⁹⁵ U.S. First Submission, paras. 62-68; *Issues and Decision Memorandum* at 53-54 (Exhibit GOK-5).

⁹⁶ During the May restructuring, these banks accounted for more than 70 percent of the voting rights of the Creditors’ Council, and during the October restructuring, these banks accounted for more than 50 percent of the voting rights of the Creditors’ Council. U.S. First Submission, para. 67; *Issues and Decision Memorandum* at 53 (Exhibit GOK-5).

⁹⁷ U.S. First Submission, paras. 67-68; *Issues and Decision Memorandum* at 53 (Exhibit GOK-5).

⁹⁸ Panel Report, paras. 7.62-7.63.

factors, government ownership was evidence of entrustment or direction, because it established the ability of the GOK to entrust or direct the banks. For example, the DOC found that the GOK's ownership of these creditors enabled it to use these creditors to set terms for all Hynix creditors and to ensure compliance with the GOK's policy to ensure the survival of Hynix.

69. The DOC also found that the Korea Development Bank ("KDB"), a public body 100 percent owned by the GOK, played a vital role in the bailout of Hynix. Through the KDB Fast Track Program, the GOK "provided the necessary vehicle for the placement of new bonds at a time in which the maturation of existing bonds threatened the default of a number of Hyundai companies, including Hynix."⁹⁹ The DOC found that the KDB Fast Track Program was critical because it sent a clear signal to Hynix's private creditors that the GOK stood behind the restructuring of the company.¹⁰⁰ The Panel did not disagree with the accuracy of the DOC's finding that the KDB Fast Track Program was a critical part of Hynix's restructuring and that it sent a signal to private creditors that the GOK would work to ensure the survival of Hynix.¹⁰¹ However, as it did with the GOK policy to save Hynix, the Panel marginalized this evidentiary factor, stating that:

Even when viewed in conjunction with other evidentiary factors, we consider that an impartial and objective investigating authority would have refrained from attaching undue importance to the lending practices of public bodies when considering evidence of alleged government entrustment or direction of private bodies in the circumstances at issue.¹⁰²

⁹⁹ U.S. First Submission, paras. 56-61; *Issues and Decision Memorandum* at 52 (Exhibit GOK-5).

¹⁰⁰ U.S. First Submission, paras. 56, 60; *Issues and Decision Memorandum* at 52 (Exhibit GOK-5).

¹⁰¹ Panel Report, para. 7.56.

¹⁰² Panel Report, para. 7.56.

70. The DOC had relied on argument and evidence that the 100 percent, government-owned KDB – the single largest Hynix creditor – served a key role in implementing the GOK’s policy objectives with respect to Hynix.¹⁰³ Inexplicably, the Panel treated the KDB as if it were simply some random “public body” that merely happened to lend to Hynix.

71. As is readily apparent from this description of the Panel’s examination of the evidence, the Panel failed to follow through on its own commitment to “adopt the same [totality] approach in our review of the DOC’s determination.”¹⁰⁴ Moreover, the Panel did not once explain why the DOC’s analysis of the evidence in its entirety was not reasoned and adequate. Instead, the Panel dismissed each factor relied upon by the DOC by isolating it from the rest of the evidence and considering whether each individual piece of evidence, in and of itself, established GOK entrustment or direction.¹⁰⁵ Obviously, it is easy to pick apart complex finding based upon circumstantial evidence by looking at each piece of evidence in isolation and declaring that each piece, standing alone, does not establish entrustment or direction. Such an approach is also erroneous.

72. The Panel’s failure to assess the evidence in its entirety is inconsistent with the approach taken by prior panels, including panels considering claims under the SCM Agreement. Prior panel reports recognize the necessity of examining the combination of facts pertaining to the

¹⁰³ See, e.g., U.S. First Submission, paras. 55-61.

¹⁰⁴ Panel Report, para. 7.46

¹⁰⁵ For similar reasons, the Panel erred when it assessed argument and evidence related to the opinions of experts interviewed by the DOC to the effect that the GOK had influence over Hynix creditors. See Panel Report, para. 7.173 (Panel erroneously concluded “that evidence of government ‘influence’ does not amount to evidence of government entrustment or direction” and “we do not consider that an impartial and objective investigating authority could properly have relied on expert evidence of nothing more than mere GOK ‘influence’ over Group B creditors as evidence of GOK entrustment or direction of Group B creditors.”).

grant or maintenance of a subsidy. For example, in *Australia – Leather*, the panel stated: “The determination of whether a subsidy is ‘contingent ... in fact’ upon export performance requires us to examine all the facts concerning the grant or maintenance of the challenged subsidy, including the ‘nature of the subsidy, its structure and operation, and the circumstances in which it was provided.’”¹⁰⁶

73. A proper application of Article 1.1(a)(1)(iv) recognizes the importance of examining, on a case-by-case basis, all of the evidence, including primary, secondary, and circumstantial evidence, surrounding possible government entrustment or direction. In other words, an investigating authority must be able to assess the evidence in light of the totality of circumstances. The Panel’s requirement that each individual piece of evidence – in and of itself – be dispositive proof of entrustment or direction rules out examining the evidence in its totality, an analysis the Panel itself committed to when it stated it would “adopt the same

¹⁰⁶ *Australia – Leather*, para. 9.57 (emphasis added). In considering whether the Australian government had “in fact” conditioned a subsidy to Australian producer Howe on export performance, the panel considered that Howe had previously received subsidies under a different export-incentive program; that Howe exported a significant portion of its production, and the Australian government was aware of this; that Australia wanted to ensure that Howe remained in business; that the overwhelming majority of Howe’s sales were for export, which was a condition for the provision of financial assistance; that the government was aware that the market was too small to support Howe’s performance targets and that it must continue or increase its exports; and that Howe, the only exporter of automotive leather, received the subsidies. *Id.*, paras. 9.63-9.69. See also *Canada – Aircraft (AB)*, paras. 174-180 (The Appellate Body upheld the panel’s finding that assistance was contingent in fact upon export performance under the SCM Agreement, a finding which the panel reached after looking at sixteen different factual elements). Panels considering claims under provisions of other covered agreements also have looked at the totality of the evidence before them. *EC - Sardines (Panel)*, para. 6.21 (consideration of “the totality of the evidence” regarding a marketing standard for sardines), and para. 6.12 (weighing and balancing of the totality of evidence” regarding the meaning of the term “sardines”); *Chile - Alcohol (Panel)*, para. 7.85 (imported distilled spirits and “pisco” were directly substitutable based on the “totality of the evidence presented”).

approach” as the DOC. By adopting a test under which each individual piece of evidence must be dispositive, the Panel is effectively requiring that every piece of evidence be direct evidence of entrustment or direction. The Panel’s approach finds no support in any provision of the SCM Agreement, the DSU or any other covered agreement, and constitutes legal error. The Appellate Body, therefore, should reverse the Panel’s findings that were the product of this legally defective approach.¹⁰⁷

D. The Panel Erred By Disregarding the DOC’s Proper Reliance on Circumstantial and Secondary Evidence

74. By effectively requiring that every piece of evidence be direct evidence of entrustment or direction, the Panel’s analytic framework erroneously precludes drawing legitimate inferences from circumstantial and secondary evidence on the record in making a determination of entrustment or direction. The Panel’s analytic framework is inconsistent with Article 1.1(a)(1)(iv) of the SCM Agreement and Article 11 of the DSU, and is at odds with the manner in which prior panels and the Appellate Body have dealt with circumstantial evidence.

75. By examining individual pieces of evidence in isolation, especially under its erroneous “probative and compelling” evidentiary standard, the Panel erroneously disregarded the DOC’s reliance on circumstantial and secondary evidence. The Panel’s error in this regard is especially troubling, given that it recognized that entrustment or direction can be “explicit or implicit,

¹⁰⁷ The relevant findings are contained in Panel Report, paras. 7.46, 7.51, 7.56, 7.62-7.63, 7.76-7.78, 7.82-7.91, 7.99-7.104, 7.129-7.130, 7.141, 7.163-7.168, 7.173, and 7.175-7.178.

formal or informal”¹⁰⁸ and that “[t]here is no reason why a case of government entrustment or direction should not be premised on circumstantial evidence”¹⁰⁹

76. For example, in discussing a report demonstrating the GOK’s coercion of Hana Bank, the Panel stated that “[a]n objective and impartial investigating authority would not have treated a simple reference to a footnote in an article as *sufficient* proof of such a significant issue as government entrustment or direction.”¹¹⁰ The Panel failed to recognize that the value of a piece of circumstantial evidence is not its sufficiency, but rather the inferences created, together with other pieces of evidence, regarding the existence of a particular fact or set of facts.¹¹¹

77. Similarly, the DOC relied on the opinions of independent experts that the GOK influenced the financial restructuring of Hynix.¹¹² However, the Panel concluded that “evidence of government ‘influence’ does not amount to evidence of government entrustment or

¹⁰⁸ Panel Report, para. 7.33.

¹⁰⁹ Panel Report, para. 7.46.

¹¹⁰ Panel Report, para. 7.129 (emphasis added).

¹¹¹ The value of circumstantial evidence “rests on the premise that single inferences, though weak when taken individually, may be substantial and powerful when added together.” 1A WIGMORE, EVIDENCE, § 41, at 1138. *The New Shorter Oxford English Dictionary* defines “circumstantial evidence” as “tending to establish a conclusion by inference from known facts which are otherwise hard to explain.” *The New Shorter Oxford English Dictionary* 405 (1993) (Exhibit US-89). McCormick also dismisses any requirement that each link in the chain of circumstantial evidence be dispositive: “An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It need not even make that proposition appear more probable than not. See 1 MCCORMICK ON EVIDENCE (John W. Strong, ed. 1999), at 640 (citations omitted). In fact, McCormick asserts that simply objecting to an inference drawn from a fact is “untenable,” for it “poses a standard of conclusiveness that very few single items of circumstantial evidence ever could meet.” *Id.*, at 641.

¹¹² See U.S. First Submission, paras. 36, 66; *Issues and Decision Memorandum* at 55 (Exhibit GOK-5).

direction.”¹¹³ The Panel ignored the fact that when there is government influence in the financial sector, the circumstances are ripe for government entrustment or direction. More fundamentally, the Panel failed to explain why it was not reasoned and adequate for an investigating authority to make the logical inference from government influence to government entrustment or direction, especially in light of the enormous volume of additional evidence relating to the GOK’s policy objectives, the GOK’s actions, and Hynix’s severe financial crisis.

78. Furthermore, although recognizing that the GOK had a policy to save Hynix, the Panel opined that this policy “is not sufficient to attribute to GOK the participation of the private body ... creditors” in the Hynix restructuring.¹¹⁴ While it may not have been “sufficient” evidence of entrustment or direction in and of itself, the GOK policy certainly went to the GOK’s motive, and could lead an objective investigating authority to infer that the circumstances were ripe for entrustment or direction. The Panel failed to explain why it was not reasoned and adequate for the DOC to rely on this circumstantial evidence.

79. Beyond the individual facts highlighted above, the evidence before the DOC reflected significant contextual circumstances in Korea that supported reasonable inferences in support of the DOC’s finding of entrustment or direction. Specifically, the DOC had analyzed, *inter alia*, three contextual factors that made clear the motives and means of GOK entrustment or direction, and which should have framed the Panel’s analysis of all the record evidence: the GOK’s longstanding policy of supporting Hynix;¹¹⁵ the GOK’s powerful influence over Hynix’s

¹¹³ Panel Report, para. 7.173.

¹¹⁴ Panel Report, para. 7.51.

¹¹⁵ *See, e.g.*, U.S. First Submission, paras. 39-53.

creditors as a consequence of, *inter alia*, the significant GOK ownership interests in the Korean financial sector;¹¹⁶ and the utter lack of any commercial basis for assisting Hynix.¹¹⁷

80. The implications that the Panel should have drawn from these factors are that the GOK had an established practice, purpose, and process for entrusting and directing Hynix’s creditors and that the totality of the evidence, when viewed in this context, more than supported the DOC’s conclusions. Instead, by fixating on whether certain individual pieces of evidence were dispositive of entrustment or direction, the Panel ignored the implications of the vast amount of circumstantial evidence in the DOC investigatory record.

81. The Panel’s erroneous treatment of circumstantial evidence also is contrary to the approach taken by prior WTO panels and the Appellate Body. For example, in *Argentina – Footwear (US)*, the panel noted that “where direct evidence is not available, relying on inferences drawn from relevant facts of each case facilitates the duty of international tribunals in determining whether or not the burden of proof has been met.”¹¹⁸

82. In *Canada - Aircraft*, the panel recognized that it “may be required to make inferences on the basis of relevant facts when direct evidence is not available. This is especially true when direct evidence is not available because it is withheld by a party with sole possession of that evidence.”¹¹⁹ The Appellate Body in *Canada - Aircraft* also highlighted the importance of inferences:

[P]anels routinely draw inferences from the facts placed on the record. The inferences drawn may be inferences of fact: that is from fact A to fact B, it is

¹¹⁶ See, e.g., U.S. First Submission, paras. 54-115, 124-126.

¹¹⁷ See, e.g., U.S. First Submission, paras. 44-53, 180-181.

¹¹⁸ *Argentina – Footwear (US) (Panel)*, para. 6.39.

¹¹⁹ *Canada – Aircraft (Panel)*, para. 9.190.

reasonable to infer the existence of fact C. Or the inferences derived may be inferences of law: for example the ensemble of facts found to exist warrants the characterization of a ‘subsidy’ or a ‘subsidy contingent ... in fact ... upon export performance.’ The facts must, of course, rationally support the inferences made, but inferences may be drawn whether or not the facts already on the record deserve the qualification of a prima facie case. The drawing of inferences is, in other words, an inherent and unavoidable aspect of a panel’s basic task of finding and characterizing the facts making up a dispute.¹²⁰

83. Inferences based upon circumstantial evidence are critical in situations where a government uses private bodies as the vehicle for providing subsidies, because direct proof is usually held only by state actors or foreign interested parties. Such evidence therefore will be very difficult for outside parties to obtain, and indeed in almost all cases will be treated by the government or the foreign parties as proprietary or confidential information. Absent voluntary release of documentation providing direct evidence of entrustment or direction, such direct evidence will be unavailable to the authority. By disregarding circumstantial evidence, the Panel, in effect, has established an evidentiary requirement that is virtually impossible to meet in cases involving government entrustment or direction.

84. Additionally, the lack of direct evidence regarding a state actor’s actions may necessitate the use, as in this case, of secondary sources, such as press reports and articles. Thus, panels have recognized the importance of secondary sources. The panel in *Australia – Leather* stated that “[w]e consider the reports, both press and company, submitted by the United States as relevant to our analysis of the facts and circumstances surrounding the design and grant of that

¹²⁰ *Canada – Aircraft (AB)*, para. 198. As discussed previously, scholars and treatises also recognize the appropriate consideration of circumstantial evidence. See 1A WIGMORE, EVIDENCE, § 41, at 1138; and 1 MCCORMICK ON EVIDENCE (John W. Strong, ed. 1999), at 640-641.

[export] assistance.”¹²¹ Additionally, in *US – DRAMS*, the panel rejected the GOK’s argument that the DOC could not rely on materials from “independent market analysts’ reports from such reputable brokerage houses as Goldman Sachs, Merrill Lynch, Lehman Brothers, and ABN Ambro Hoare Govett; business and market news reporting by well-known news organizations such as the Wall Street Journal, New York Times, Financial Times, Reuters, Korea Herald, and Nikkei; and reports from various trade journals.”¹²²

85. The Panel’s analytic framework had the effect of requiring that entrustment or direction be demonstrated with direct evidence concerning each creditor. Such a requirement, however, ignores the nature of the evidence that will be available to the parties in a case involving subsidies provided through private bodies. As noted above, any documents in the possession of the GOK that would meet the Panel’s high evidentiary standard for entrustment or direction would be unavailable, either because they would be treated as proprietary information or because of the GOK’s desire to protect its actions from the glare of the public spotlight. The Panel’s adoption of an analytic framework that precludes the use of circumstantial and secondary evidence has no basis in the SCM Agreement, the DSU or any other covered agreement, and constitutes legal error. For these reasons, the Appellate Body should reverse the Panel’s findings affected by its legally erroneous analytical framework.¹²³

¹²¹ *Australia – Leather*, para. 9.65, n.210.

¹²² *US – DRAMS*, para. 6.79.

¹²³ These findings are contained in Panel Report, paras. 7.51, 7.56, 7.62-7.63, 7.76-7.78, 7.82-7.91, 7.99-7.104, 7.129-7.130, 7.141, 7.163-7.168, 7.173, and 7.175-7.178.

E. The Panel’s Erroneous Analytic Framework Effectively Shifted the Burden of Proof from Korea to the United States

86. It is well-settled that in a WTO dispute the burden is on the complaining party to demonstrate that a Member acted inconsistently with its obligations under the covered agreements.¹²⁴ Specifically, the burden here rested on the GOK to prove that, based upon the evidentiary record before the DOC, an objective investigating authority could *not* have reached a finding of entrustment or direction and that the DOC did *not* provide a reasoned and adequate explanation for its decision. The Panel recognized as much, stating that the GOK “bears the burden of demonstrating that the measures are not consistent with the relevant provisions of the *SCM Agreement* and *GATT 1994*.”¹²⁵

87. However, by analyzing each piece of evidence in isolation, requiring that each piece of evidence be compelling, and disregarding reasonable inferences drawn from circumstantial evidence, the Panel effectively imposed on the United States and the DOC an obligation to produce a “smoking gun” document which would be dispositive of entrustment or direction. When the Panel found no such smoking gun, it concluded that each individual item of evidence did not demonstrate entrustment or direction and that the DOC determination was inconsistent with Article 1.1(a)(1)(iv) of the *SCM Agreement*. Thus, the Panel impermissibly shifted the burden of proof in this case from Korea to the United States by erroneously evaluating each piece of evidence in isolation and through the lens of its “probative and compelling” evidentiary

¹²⁴ See, e.g., *US – Wool Shirts (AB)*, p. 16; and *EC – Hormones (AB)*, para. 98.

¹²⁵ Panel Report, para. 7.5.

standard, and without regard to the inferential value of the evidence. The Appellate Body should reverse the Panel’s findings that were affected by its improper shifting of the burden of proof.¹²⁶

F. The Panel Erred By Failing to Consider Certain Record Evidence Based on the Panel’s Erroneous Findings that U.S. Reliance on Such Evidence Constituted *Ex Post Facto* Rationalizations

88. In several instances, the Panel disregarded various pieces of evidence that were on the record of the DOC based on its finding that U.S. reliance on such evidence constituted *ex post*, or *post hoc*, rationalizations. In so doing, the Panel committed legal error, because neither the SCM Agreement nor any other covered agreement requires an investigating authority to cite in its published determinations to every piece of evidence on which the authority relies. Because the Panel’s error caused it to ignore vital pieces of record evidence, its findings should be reversed.

89. Several panels have rejected arguments and reasoning on the grounds that they constituted *ex post facto* rationalizations. For example, the panel in *Argentina – Floor Tiles* stated that “[w]e do not believe that, as a panel reviewing the evaluation of the investigating authority, we are to take into consideration any *arguments and reasons* that did not form part of the evaluation process of the investigating authority, but instead are *ex post facto* justifications which were not provided at the time the determination was made.”¹²⁷ Similarly, another panel found that “we shall confine ourselves to the *reasoning* provided by the [investigating authority] in its determinations.”¹²⁸ Other panels have applied a similar approach.¹²⁹

¹²⁶ These findings are contained in Panel Report, paras. 7.35, 7.46, 7.51, 7.56, 7.62, 7.63, 7.76-7.78, 7.82-7.91, 7.99-7.104, 7.129, 7.130, 7.141, 7.163-7.168, 7.173, and 7.175-7.178.

¹²⁷ *Argentina – Floor Tiles*, para. 6.27 (emphasis added).

¹²⁸ *Guatemala – Cement II*, para. 8.245 (emphasis added).

¹²⁹ See, e.g., *Argentina – Poultry*, para. 7.49.

90. However, what these panels have objected to is the introduction of new reasoning.

Nothing prohibits a Member from providing additional detail during WTO dispute settlement proceedings to support the reasoning in an investigating authority's determination, so long as this additional detail relates to that reasoning and is not based on extra-record material. Thus, in *US - Hot-Rolled Steel*, the panel found that an argument pertaining to a factor not addressed by the investigating authority was not an *ex post* rationalization because that particular factor was merely a subset of a larger factor which the investigating authority had in fact addressed.¹³⁰

Similarly, when a Member cites to a piece of record evidence that is merely a part of a factual or legal finding already articulated in the investigating authority's determination, the Member is not engaging in an *ex post* rationalization.

91. Moreover, nothing in the SCM Agreement required the DOC to cite in its published determinations to every piece of record evidence on which it relied. The relevant provision of the SCM Agreement is Article 22.5, which provides, in pertinent part, as follows:

A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty . . . shall contain, or otherwise make available through a separate report, all relevant information on matters of fact and law and reasons which have led to the imposition of final measures

Article 22.5 plainly does not require an investigating authority to cite to every piece of record evidence that supports its reasons for the imposition of final measures. Rather, it only requires an investigating authority to include in its determination the factual and legal bases for its decision and the reasons which have led to the imposition of countervailing measures.

¹³⁰ *US – Hot-Rolled Steel (Panel)*, paras. 7.245-7.246.

92. In *Brazil – Milk Powder*, a GATT panel addressed whether Brazil had properly set forth the factual bases for its determination in accordance with Article 2:15 of the *Tokyo Round Subsidies Code*, the relevant portions of which are quite similar to Article 22.5 of the SCM Agreement. That panel explained:¹³¹

While Article 2:15 could not be interpreted to require investigating authorities to make available in a public statement of reasons each and every fact upon which they had based their findings, the key findings and conclusions drawn from such facts which constituted the reasons for the finding must be articulated in a public statement of reasons

[A]rticle 2:15 did not preclude a panel from examining particular factual materials not actually reflected in a public notice under Article 2:15 where it could be inferred from the statement of reasons by the authorities that they had relied on such materials.

93. Similarly, the Appellate Body has found that a panel is not required to cite to every piece of evidence that supports its determination. In *US – Cotton*, in response to an argument that the panel ignored certain data, the Appellate Body stated that “[i]t would not amount to an error in the application of Article 6.3(c) [of the SCM Agreement] to the facts of this case for the Panel not to address specifically in its report every item of evidence provided and to refer explicitly to every argument made by the parties, if the Panel considered certain items or arguments less significant for its reasoning than others.”¹³² Likewise, an investigating authority should not be required to explicitly refer in its determinations to every item of record evidence in its determination; for example, if it considers some evidence less significant for its reasoning than other evidence. In proceedings with a voluminous record, such as the investigation at issue in

¹³¹ *Brazil – Milk Powder*, paras. 286-287.

¹³² *US - Cotton (AB)*, para. 446. See also *EC - Hormones (AB)*, para. 138 (“The Panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly.”).

this dispute, such a requirement would be unmanageable. Once again, the key concept is the *reasoning*: as long as evidence is not being cited to support new reasoning, there is no basis for disregarding it.

94. In several instances, the Panel erred by finding that certain U.S. citations to record evidence were *ex post* rationalizations and by disregarding these pieces of evidence and the arguments relating thereto. The Panel erred by:

- (1) finding that the U.S. citation to an article in the *Dong-A Daily*, entitled “*Gangster-Style*” *Solution for Hynix*, was an *ex post* rationalization;¹³³
- (2) finding that the U.S. citation to an article in the *Korea Economic Daily*, entitled *Direct Intervention by the Government in Supporting Hynix*, was an *ex post* rationalization;¹³⁴
- (3) finding that the U.S. citation to a February 2001 *Euromoney* article, entitled *Cooperate or Be Damned*, was an *ex post* rationalization;¹³⁵
- (4) finding that the U.S. citation to a June 21, 2001, *Korea Times* article, entitled *KorAm Reluctantly Continues Financial Support for Hynix*, was an *ex post* rationalization;¹³⁶ and
- (5) finding that the U.S. citation to certain evidence concerning mandatory creditor meetings was an *ex post* rationalization.¹³⁷

¹³³ Panel Report, para. 7.88. *See also* U.S. Answers to Second Set of Panel Questions, Panel Report, Annex E-6, para. 71, n.68 (citing ‘*Gangster-Style*’ *Solution for Hynix*, DONG-A DAILY (November 1, 2001) (Exhibit US-133)).

¹³⁴ Panel Report, para. 7.102. *See also* U.S. First Submission, para. 48 (citing *Direct Intervention by the Government in Supporting Hynix*, THE KOREA ECONOMIC DAILY (August 28, 2001) (Exhibit US-28)).

¹³⁵ Panel Report, para. 7.116. *See also* U.S. First Submission, para. 113, n.196 (citing *Cooperate or be Damned*, EUROMONEY (February 2001) (Exhibit US-61)).

¹³⁶ Panel Report, para. 7.121. *See also* U.S. First Submission, para. 114, ns. 200-203 (citing *KorAm Reluctantly Continues Financial Support for Hynix*, KOREA TIMES (June 21, 2001) (Exhibit US-64)).

¹³⁷ Panel Report, para. 7.141. *See also* U.S. First Submission, para. 124, ns. 228-230 (citing *The Creditor Group Finalizes Financing Package for 3 Hyundai Affiliates*, NAEOE

(continued...)

95. The Panel’s disregard of the evidence in question was erroneous, because the United States did not cite the evidence to support a new rationalization or reason. Tellingly, the Panel did not cite to a single legal authority for its novel findings. Rather, the Panel made such conclusory statements as “even though that article may have been on the DOC’s record, we consider that the US reliance on that article in these proceedings constitutes *ex post* rationalization, which we will not consider.”¹³⁸ Similarly, the Panel stated: “While the U.S. has cited from a number of articles on the DOC record, we note that the DOC only made express reference to a limited number of these articles. We shall therefore focus on the evidence that the DOC actually referred to in its Preliminary and Final Determinations, and Decision Memorandum.”¹³⁹ The Panel never even suggested that the evidence in question was cited in support of new rationalizations or reasoning.

96. In fact, each of these items of evidence directly related to, and was support for, DOC reasoning regarding entrustment or direction. The citation to the *Dong A-Daily* article related to the DOC’s finding that the GOK-owned and GOK-controlled banks were able to dictate terms for the remaining banks via the Corporate Restructuring Promotion Act (“CRPA”) during the October 2001 restructuring, an issue which the DOC discussed extensively in its *Issues and Decision Memorandum*.¹⁴⁰ The reference to the *Korea Economic Daily* article related to a

¹³⁷ (...continued)

ECONOMIC DAILY (March 10, 2001) (translated version) (Exhibit US-78), *The Grace Period Decision for Three Affiliates of Hyundai Group - Stories of Inside and Outside*, KOREAN SEOUL ECONOMIC DAILY (March 11, 2001) (translated version) (Exhibit US-79) and, *Never-ending Aid for Hyundai*, KOREA TIMES (March 12, 2001) (Exhibit US-80)).

¹³⁸ Panel Report, para. 7.102.

¹³⁹ Panel Report, para. 7.116.

¹⁴⁰ *Issues and Decision Memorandum* at 53-55 (Exhibit GOK-5).

decision at an Economic Ministers’ meeting to order Korea Export Insurance Corporation (“KEIC”) to resume insurance for D/A financing for HEI,¹⁴¹ another issue which the DOC discussed in the *Issues and Decision Memorandum*.¹⁴² The U.S. citation to the *Euromoney* article related to the GOK’s threats against KFB. This, too, was one of the DOC’s reasons for finding entrustment or direction and was discussed in the *Issues and Decision Memorandum*.¹⁴³ The citation to the *Korea Times* article related to the GOK’s threats against KorAm; once again, the DOC discussed such threats in its *Issues and Decision Memorandum*.¹⁴⁴ Finally, the references to evidence concerning creditor meetings related to the presence of GOK officials at these meetings in order to exert pressure on the creditors and to require that they execute certain tasks. Of course, the DOC also discussed this issue in its *Issues and Decision Memorandum*.¹⁴⁵ Thus, in not a single one of these instances did the United States engage in *ex post* rationalization, and the Panel erred in so finding.

97. Additionally, by effectively requiring an investigating authority to cite to every piece of record evidence that supports its reasoning, the Panel impermissibly added to the obligations contained in the SCM Agreement, in contravention of Articles 3.2 and 19.2 of the DSU. Article 22.5 of the SCM Agreement, which sets forth the obligations regarding the contents of an investigating authority’s final determination, does not require that an authority cite to every

¹⁴¹ Hyundai Electronics Industries (“HEI”) was renamed Hynix after the forced merger with LG Semicon.

¹⁴² *Issues and Decision Memorandum* at 51-52 (Exhibit GOK-5).

¹⁴³ *Issues and Decision Memorandum* at 59-60 (Exhibit GOK-5).

¹⁴⁴ *Issues and Decision Memorandum* at 59 (Exhibit GOK-5).

¹⁴⁵ *Issues and Decision Memorandum* at 59 (Exhibit GOK-5).

piece of record evidence upon which it relies. If such an obligation is to be imposed, only the WTO Members may do so.

98. Finally, the United States notes that, contrary to the Panel’s findings, the DOC, in fact, did explicitly cite to some of the above-mentioned articles in its *Direction Citations Memo*, including the articles in the *Korea Economic Daily*, *Euromoney*, and the *Korea Times*.¹⁴⁶

Specifically, page four of the *Direction Citations Memo* contains references to numerous places on the record containing evidence supporting the DOC’s finding of entrustment or direction.

One purpose of this memorandum was to list some of the numerous pieces of evidence upon which the DOC relied in reaching its determination. The DOC referenced the *Direction*

Citations Memo in both the *Preliminary Determination* and *Issues and Decision*

Memorandum.¹⁴⁷ Even though the Panel was obviously confused as to the nature of an *ex post* rationalization and the specific pieces of evidence relied upon by the DOC in reaching its final determination, it never asked for clarification from the parties. If it had, it would have learned that some of the documents that it (erroneously) considered to be *ex post* rationalizations were actually cited by the DOC.

99. Because of its erroneous treatment of certain record evidence as *ex post* rationalizations, the Panel erroneously refused to consider and address record evidence that supported the DOC’s finding of entrustment or direction. For these reasons, the Appellate Body should reverse the

¹⁴⁶ See March 31, 2003, memorandum entitled “Direction of Credit” (Exhibit US-8).

¹⁴⁷ See *Preliminary Determination*, 68 Fed. Reg. at 16770, 16773 and 16774 (Exhibit GOK-4); *Issues and Decision Memorandum* at 13, 17, 69 and 76 (Exhibit GOK-5).

Panel’s findings regarding *ex post* rationalizations rule, as well at the conclusions that resulted from those erroneous findings.¹⁴⁸

G. The Panel Erred By Relying Upon and Basing Findings On Unsupported and Unverifiable Facts That Were Not on the Record Before the DOC During the Investigation

100. At paragraphs 7.63, 7.91 and 7.155 of the Panel Report, the Panel made three important findings regarding the DOC’s determination of entrustment or direction. Each of these findings was expressly based on the Panel’s finding that certain creditors actually exercise mediation rights in connection with the October 2001 restructuring.¹⁴⁹ However, there was no evidence on the record before the DOC that these creditors exercised mediation rights, despite the DOC’s repeated requests for information and documentation regarding this process. It was only before the Panel that Korea first asserted that mediation had occurred, although even then Korea did not provide the supporting documents that it conceded to the Panel do, in fact, exist.

Notwithstanding the fact that the DOC record was devoid of evidence that mediation had occurred, the Panel relied upon Korea’s unsupported and unverified assertions in making key conclusions.

101. Article 11 of the DSU states that “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case”. Panels and the Appellate Body have repeatedly found that in reviewing an authority’s determination, a panel cannot rely on evidence that was not on the record before the authority at the time of its decision. The Panel did so in this case. By relying upon and basing findings on unsupported and

¹⁴⁸ These findings are contained in Panel Report, paras. 7.88, 7.91, 7.102, 7.103-7.104, 7.116, 7.121, 7.130 and 7.141.

¹⁴⁹ Panel Report, paras. 7.63, 7.82 and 7.152.

unverifiable facts that were not on the record before the DOC during the investigation, the Panel failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case, as required by Article 11 of the DSU.

1. Reliance on Non-Record Evidence Constitutes a *De Novo* Review and Represents a Failure to Objectively Assess the Matter under Article 11 of the DSU

102. It is well-settled that in reviewing determinations made by domestic investigating authorities, panels are not to consider evidence that was not on the investigation record at the time the investigating authority reached its determination. As the Appellate Body found in *US – Cotton Yarn*:

A Member cannot, of course, be faulted for not having taken into account what it could not have known when making its determination. *If a panel were to examine such evidence, the panel would, in effect, be conducting a de novo review and it would be doing so without having had the benefit of the views of the interested parties. The panel would be assessing the due diligence of a Member in reaching its conclusions and making its projections with the benefit of hindsight and would, in effect, be reinvestigating the market situation and substituting its own judgment for that of the Member. In our view, this would be inconsistent with the standard of a panel's review under Article 11 of the DSU.*¹⁵⁰

103. Consistent with the Appellate Body's finding, WTO panels have concluded that the consideration of information that was not on the record before the investigating authority would constitute impermissible *de novo* review. As the panel stated in *Egypt – Rebar*:

“The conclusion that we will not consider new evidence with respect to claims under the AD Agreement flows not only from Article 17.5(ii), but also from the fact that a panel is not to perform a *de novo* review of the issues considered and decided by the investigating authorities” It is clear to us (and indeed, there is no disagreement on this point between the parties) that the evidence in question, which was proffered by Turkey in the dispute to challenge determinations *made* by the IA during the anti-dumping investigation, was not made available to the

¹⁵⁰ *US - Cotton Yarn (AB)*, paras. 77-78 (emphasis added).

Investigating Authority in conformity with the appropriate domestic procedures during the investigation, as required by Article 17.5.(ii), and it is clear as well that consideration of new evidence of this sort can be construed as a *de novo* review, which is not permissible. We thus will not take this evidence into consideration when reviewing the measures of the determinations and actions of the Egyptian Investigating Authority.¹⁵¹

104. The bar on a panel’s consideration of information not placed before the investigating authority is consistent with Article 12.2 of the SCM Agreement. Article 12.2 provides that in countervailing duty investigations:

... Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation, due account having been given to the need to protect confidential information.

105. Accordingly, inasmuch as a panel must “put itself in the place of that Member at the time it makes its determination,”¹⁵² the Panel in this case was precluded from relying on evidence that was not before the DOC.

2. There Was No Evidence on the DOC Record That Mediation Occurred

106. The DOC concluded that the GOK-owned and GOK-controlled Hynix creditors (*i.e.*, the Group A and Group B creditors) were able to set the terms of the October 2001 restructuring for the Hynix private creditors (*i.e.*, the Group C creditors). This was an important element in the GOK’s entrustment or direction scheme. The vehicle by which the Group A and Group B creditors were able to dictate terms to the remaining creditors was the CRPA, which allowed the

¹⁵¹ *Egypt – Rebar*, paras. 7.20-7.21, quoting *US – Hot-Rolled Steel (Panel)*, para. 7.7.

¹⁵² *US – Cotton Yarn (AB)*, para. 78.

dominant Hynix creditors, acting through the Hynix Creditors’ Council, to set the financial restructuring terms for all of the creditors.¹⁵³

107. During the October restructuring, the Creditors’ Council presented the creditors with three options: (1) extend new loans, convert a majority of their debt to equity, and extend maturities and lower interest rates on the remainder of outstanding loans; (2) decline to extend new loans, convert a still significant portion of their debt to equity, and forgive the remainder; or (3) decline to extend new loans or convert debt to equity, and exercise their appraisal rights on a small part of their debt.¹⁵⁴ Four creditors (consisting of both Group B and Group C creditors) exercised their appraisal rights under option 3, and the DOC concluded that “those banks that were given the ‘option’ to sever their ties with Hynix had to do so on the terms that were established for them by the government-owned and controlled banks, whose voting rights were sufficient to set these terms.”¹⁵⁵

108. In a series of questionnaires to the GOK and Hynix during the course of the countervailing duty investigation, the DOC asked specific questions regarding the exercise of appraisal rights, but *at no time did the GOK or Hynix report any actual instances of mediation in connection with the appraisal rights.*¹⁵⁶ Additionally, Hynix and the GOK never mentioned in

¹⁵³ U.S. First Submission, paras. 84-93; *Issues and Decision Memorandum* at 54-55 (Exhibit GOK-5).

¹⁵⁴ See U.S. First Submission, para. 89; *Preliminary Determination*, 68 Fed. Reg. at 16776 (Panel Exhibit GOK-4).

¹⁵⁵ U.S. First Submission, paras. 88-90; *Issues and Decision Memorandum* at 54-55 (Exhibit GOK-5).

¹⁵⁶ As the United States explained to the Panel, the DOC asked specific questions regarding the CRPA and the three options provided to Hynix creditors during the October 2001 restructuring, but neither Hynix nor the GOK ever mentioned anything about mediation. See *U.S. Opening Statement at the Second Panel Meeting*, paras. 10-11. For example, in its first

(continued...)

their case briefs or rebuttal briefs to the DOC that mediation had actually occurred.¹⁵⁷ Because, as described below, Korea raised this issue numerous times before the Panel, one would expect that it and Hynix – if the facts were as they now claim – would have raised the issue during the course of the investigation.¹⁵⁸ Moreover, any mediation that might have occurred would most likely have been well-documented. Indeed, before the Panel, Korea alleged that there were

¹⁵⁶ (...continued)

questionnaire response, Hynix merely stated that “[f]our banks refused to participate in the second financial structuring, including [...]. This decision meant that they would not extend new loans to Hynix, nor would they agree to exchange their debt holdings for equity. Instead, they exercised appraisal rights against their debt holdings.” *Hynix Questionnaire Response* (January 27, 2003) at 60 (Exhibit US-129). Thus, despite this perfect opportunity, Hynix did not mention mediation. Similarly, in its supplemental questionnaire, the DOC asked Hynix to “explain in greater detail the final plan option which allowed creditors to exercise appraisal rights” and to explain “how that process worked and on what basis the appraisal rights were exercised.” *Supplemental Questionnaire to Hynix* (February 11, 2003) at 10, question 54 (Exhibit US-130). Again, Hynix in its response made no mention of mediation.

¹⁵⁷ The DOC’s regulations provide that a party’s case brief “must present all arguments that continue in the submitter’s view to be relevant to the [DOC’s] final determination ... including any arguments presented before the date of publication of the preliminary determination”. 19 C.F.R. 351.309(c)(2). A rebuttal brief “may respond only to arguments raised in case briefs”. 19 C.F.R. 351.309(d)(2).

¹⁵⁸ Instead, Hynix reported to the DOC during the investigation that the option 3 banks received a zero coupon debenture based on the value of their secured debt and the liquidation value of their unsecured debt. See *U.S. Opening Statement at the Second Panel Meeting*, para. 10; *GOK Questionnaire Response* (February 4, 2003) at A-19 (Exhibit US-128); and *Hynix Questionnaire Response* (January 27, 2003) at 60 (Exhibit US-129). Based on the version of events reported by Hynix during the investigation, a domestic interested party specifically argued in its case brief that the DOC should find the five-year interest-free debentures to be countervailable interest-free loans. See *Issues and Decision Memorandum* at 93 (Exhibit GOK-5). Faced with the prospect of a potentially higher countervailing duty rate, one would have expected Hynix to present the DOC with information the GOK first provided to the Panel about certain option 3 banks receiving cash payments during the period of investigation, and KFB receiving payment later, with interest. In fact, because such information was never presented during the course of the investigation, the DOC appropriately found that the five-year zero coupon bonds constituted countervailable interest-free loans. *Issues and Decision Memorandum* at 93-94 (Exhibit GOK-5).

mediation documents.¹⁵⁹ However, *no* mediation documents were ever provided to the DOC (or, for that matter, to the Panel).

109. At paragraph 7.84 of its report, the Panel concluded that, because CRPA was part of the record of the investigation, Article 29(5) of CRPA should have put the DOC on notice about the “possibility of mediation.” However, the Panel failed to recognize that, *absent evidence on the record from Hynix or the GOK regarding actual instances of mediation*, the DOC was in no position to consider how mediation would come into play for purposes of its findings. Moreover, a mere reference to the *possibility* of mediation alone does not constitute record evidence that mediation actually occurred.

110. Similarly, and contrary to the Panel’s assertion,¹⁶⁰ Hynix’s 2001 Audit Report does not establish that mediation occurred. Page 40 of the Notes to Financial Statements attached to that Report states:

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

111. The Panel found that this statement indicated that “the mediation provisions had actually been invoked” and should have put the DOC “on notice that a request for mediation had been

¹⁵⁹ Korea stated: “On 31 October 2001, the Creditors Council passed a resolution for those creditors having chosen to exercise their appraisal rights. In response to this decision, the dissenting creditors asked for resolution of the matter by a mediation committee as provided under the CRPA. *This back and forth is documented in the official letters exchanged between Kyungnam bank and the mediation committee.*” Korea Second Written Submission, para. 108 (emphasis added).

¹⁶⁰ Panel Report, paras. 7.85-7.86.

filed.”¹⁶¹ The Panel’s finding is flat out wrong. This excerpt does not indicate that mediation “actually” occurred or that these three banks invoked mediation. Rather, it indicates only that based on “this clause” – presumably “this clause” refers to the mediation clause but even this is unclear – these banks raised objections. At best, the Hynix 2001 Audit Report is ambiguous as to the occurrence of mediation and, as befitting an audit report, merely indicates the treatment of the monies involved for accounting purposes only. Quite simply, there was no evidence on the DOC investigation record that any mediation actually occurred, and there certainly was no evidence as to the terms of this non-existent mediation.

3. The Panel Relied on the Fact That Certain Banks Sought Mediation, a Fact That Was Not Supported by Evidence on the Record of the Investigation

112. The Panel found that the DOC could not properly have found that (1) government ownership constituted compelling evidence of government entrustment or direction of Group B creditors,¹⁶² (2) Group C creditors were constrained by the decision of the Creditors’ Council,¹⁶³ and (3) the financial contributions at issue all formed part of the same “single programme.”¹⁶⁴ All of these conclusions were, in turn, based on the Panel’s assertion that three of the four creditors (consisting of both Group B and Group C creditor financial institutions) that chose Option 3 and exercised their appraisal rights “actually exercised their right to seek mediation in respect of the October 2001 restructuring.”¹⁶⁵ However, as described above, there was *no*

¹⁶¹ Panel Report, para. 7.85-7.86.

¹⁶² Panel Report, para. 7.63.

¹⁶³ Panel Report, para. 7.91.

¹⁶⁴ Panel Report, para. 7.155.

¹⁶⁵ Panel Report, para. 7.82. *See also* Panel Report, para. 7.63 (“KFB ... was able to ... seek mediation in respect of the October 2001 restructuring”), and para. 7.152 (“certain Group B
(continued...)”)

evidence on the investigation record that mediation actually occurred. Rather than basing its findings on the record evidence, the Panel impermissibly relied on unsupported statements by Korea during the panel proceedings.

113. While conceding that the “actual payment with interest [following mediation] is a fact not before the DOC,” Korea repeatedly made references in the Panel proceedings to the fact that mediation had occurred.¹⁶⁶ In each instance, Korea made mere assertions about what it now says “really” happened with mediation.¹⁶⁷ For example, Korea stated that, following mediation, Kwangju, Kyungnam and H&CB received cash payments from the Creditors’ Council in May 2002, and KFB received cash payments (with interest) from the Council in October 2002 and December 2003.¹⁶⁸ Korea’s assertions regarding mediation are both unverified and unsupported, and should not have been relied upon by the Panel. It is telling that in none of these new assertions did Korea cite to any record evidence of mediation occurring.¹⁶⁹ Moreover, the Panel

¹⁶⁵ (...continued)
and C creditors sought mediation under option 3”).

¹⁶⁶ For example, Korea argued that given the fact of mediation, “the conclusion of entrustment or direction makes absolutely no sense for the October 2001 restructuring.” *Korea Answers to Panel Questions Following the Second Meeting*, Panel Report, Annex E-5, Answer to Question 54.

¹⁶⁷ See the following documents from Korea: *Closing Statement at Second Panel Meeting*, page 6; *Oral Statement at the Second Panel Meeting*, para. 61; *Answers to Panel Questions Following the First Meeting*, Panel Report, Annex E-3, Answers 25(iv) and 25(vii); *Answers to the Panel Questions Following the Second Meeting*, Panel Report, Annex E-5, Answers 20 and 54; *Korea Second Submission*, at para. 108; and *Comments on the U.S. Opening Statement at the Second Meeting*, Panel Report, Annex D-3.

¹⁶⁸ Panel Report, para. 7.68.

¹⁶⁹ For example, in its *Comments on the U.S. Opening Statement at the Second Substantive Meeting*, Panel Report, Annex D-3, Korea failed to reference any record evidence of mediation occurring. Rather, it alleged that “the text of the CRPA specifically provides for mediation in Articles 29 and 32, and the notes to the Hynix financial statement specifically note this fact.” As discussed above, these documents do not establish that mediation actually

(continued...)

was on notice that Korea’s assertions constituted new evidence, because the United States objected during the panel meeting.¹⁷⁰

114. Nevertheless, the Panel relied heavily on Korea’s unsupported assertions about mediation. As noted above, such reliance led directly to three important conclusions regarding the impact of government ownership, constraints on Group C creditors, and the DOC’s single program approach.¹⁷¹ Most importantly, the Panel used the new information on mediation to dispute the DOC’s findings regarding whether the CRPA was structured in a way that would permit the largest creditors, the vast majority of whom were owned and controlled by the GOK, to set the three options available to creditors.¹⁷² Based on this new information, the Panel concluded that the DOC could not “properly have found, on the basis of the CRPA, that ‘the terms on which these creditor banks terminated their relationship with Hynix were dictated by the banks that mattered in this case, namely the large government-owned and controlled creditors.’”¹⁷³ The Panel’s reliance on this new, unverified information was especially egregious, given its repeated rejection, as *ex post* rationalization, of arguments presented by the United States based on verified information on the DOC record.¹⁷⁴

¹⁶⁹ (...continued)

occurred. If mediation had actually occurred, surely the GOK or Hynix would have raised it at the investigation stage. But they did not, and therefore Korea never did point to record evidence of mediation before the Panel.

¹⁷⁰ See, e.g., *U.S. Opening Statement at the Second Panel Meeting*, para. 10.

¹⁷¹ Panel Report, paras. 7.63, 7.91, 7.155.

¹⁷² Panel Report, paras. 7.86, 7.87, 7.89, 7.91.

¹⁷³ Panel Report, para. 7.87.

¹⁷⁴ In this regard, the United States recalls its arguments set forth above regarding the Panel’s erroneous disregard of record evidence on the grounds that it constituted *ex post* rationalizations.

115. In addition to relying on this new information presented by Korea, the Panel held that the DOC also was on notice as to actual instances of mediation, based on the ambiguous statement, excerpted above, contained in Hynix’s 2001 Audit Report.¹⁷⁵ It is undisputed that the only evidence in the DOC’s 31,000-page administrative record concerning objections that *could lead to mediation (i.e., not mediation itself)* are the three sentences contained in the notes to Hynix’s 2001 Audit Report. However, as discussed above, these three sentences are essentially meaningless.

116. The new assertions regarding mediation submitted to the Panel by Korea go far beyond this sole cryptic reference on page 40 of the notes to one of Hynix’s financial statements.¹⁷⁶ Moreover, such assertions specifically contradict the information Hynix itself submitted to the DOC with regard to what actually happened when the four creditors exercised their appraisal rights. Korea’s attempt to have the Panel re-do the DOC’s legal analysis based on information never placed on the investigative record, despite specific requests from DOC to do so, must not be countenanced, and the Panel’s findings in reliance on this information and analysis should be reversed.¹⁷⁷

¹⁷⁵ Panel Report, paras. 7.85-7.86.

¹⁷⁶ This is quite different from the situations in *US – India Plate*, and *EC – Bed Linen*. In those cases, the panels declined to reject as “new” evidence record information that was merely presented to the panels in a different form than it had been to the investigating authorities. *US – Steel Plate*, para. 7.13; *EC – Bed Linen (Panel)*, para. 6.43.

¹⁷⁷ In fact, information submitted by Korea to the Panel regarding mediation actually corroborates the GOK’s continuing involvement in bailing out Hynix. Korea stated that it was the Creditors’ Council, *i.e.*, the largely GOK-owned and controlled banks, that made the Option 3 payments – not Hynix. See Korea Second Submission, para. 108; see also *Korea Answers to Panel’s Questions Following the First Meeting*, Panel Report, Annex E-3, Answer to Question 25(iv). In a normal workout situation, it is the company under workout that would pay off the creditors receiving the liquidation value, not other creditors. This highlights and reinforces the

(continued...)

117. Based on the foregoing, it is clear that in making numerous findings and in ultimately concluding that the GOK did not entrust or direct certain Hynix creditors, the Panel relied upon evidence that was not in the record before the DOC. The consideration of this evidence constitutes an impermissible *de novo* review and is inconsistent with the Panel’s role under Article 11 of the DSU. It is also inconsistent with Article 12.2 of the SCM Agreement, which explicitly prohibits an investigating authority from considering evidence not on the record. The Panel’s reliance on this extra-record evidence undermines its findings with regard to the control of the GOK-owned and controlled creditors during the October 2001 restructuring, and constitutes a failure to make an objective assessment of the matter before it. For these reasons, the Appellate Body should find that the Panel acted inconsistently with Article 11 of the DSU and should reverse the Panel’s findings regarding the CRPA and the October 2001 restructuring, as well as the additional findings conclusions that resulted from these errors.¹⁷⁸

H. The Panel Erred By Failing to Properly Apply the Standard of Review Required By Article 11 of the DSU

118. As described above, the Panel in this case committed numerous legal errors. First, it incorrectly interpreted Article 1.1(a)(1)(iv) of the SCM Agreement. Second, it adopted a “probative and compelling” evidentiary standard that has no basis under the SCM Agreement or any other covered agreement. Third, it evaluated entrustment or direction for each piece of evidence in isolation from the combination of arguments and evidence relied on by the DOC in

¹⁷⁷ (...continued)

key role played by the GOK-owned and controlled banks in bringing about and funding the bailout of Hynix; *i.e.*, payments by these banks made the Option 3 buyout possible. This actually enhances the finding of government entrustment and direction.

¹⁷⁸ The relevant findings are contained in Panel Report, paras. 7.63, 7.82-7.91, 7.152, and 7.155.

determining entrustment or direction. Fourth, it disregarded the DOC's proper reliance on circumstantial and secondary evidence. Fifth, it adopted an analytic framework that effectively shifted the burden of proof from Korea to the United States. Sixth, it disregarded record evidence based on erroneous findings that U.S. reliance on such evidence constituted *ex post* rationalizations. Seventh, it relied upon and based findings on unsupported and unverifiable facts that were not on the record before the DOC during the investigation.

119. For the reasons set forth above, each of these errors warrants reversal of the Panel's findings that the DOC could not properly have found entrustment or direction. Taken together, these errors demonstrate that the Panel exceeded the bounds of its discretion in reviewing the DOC's determination. In applying the standard of review under Article 11 of the DSU, the Panel's role was to determine whether the DOC properly established the facts and evaluated them in an unbiased and objective way. Put differently, the Panel's task in this case was to determine whether the DOC, considering the totality of the record evidence, including circumstantial evidence, could have found entrustment or direction. The Panel's role was not to substitute a new analytic framework for the DOC's framework, redefine the scope and structure of the DOC's analysis, or reweigh the evidence. Unfortunately, that is exactly what the Panel did. In so doing, the Panel failed to properly apply the standard of review prescribed by Article 11 of the DSU and, as a result, failed to make an objective assessment of the matter before it.

1. The DOC Properly Relied on the Totality of the Evidence

120. Under the circumstances of this case, the DOC properly considered the evidence in its entirety. Article 1.1(a)(1)(iv) of the SCM Agreement does not require an investigating authority to demonstrate that each piece of record evidence, in and of itself, proves entrustment or

direction. Rather, the Article’s silence with respect to evidentiary matters suggests that Members are permitted to adopt any reasonable approach to the evidence in a particular case. Indeed, in cases involving indirect subsidies, investigating authorities will rarely, if ever, be able to point to a “smoking gun” document, because such a document would most likely be in the possession of a government which might desire to conceal its actions. Thus, if Article 1.1(a)(1)(iv) is to have any meaning, an investigating authority must be able to assess the evidence in light of the totality of circumstances.

121. These circumstances would include, not only the specific actions taken by a government, but also the greater context for those actions, including any governmental interest in, and control over, the private parties it is alleged to be entrusting or directing, any inducements of the private bodies allegedly taking action at the government’s behest, any governmental policies concerning the company or industry that allegedly benefits from government entrustment or direction, and the views of objective third party observers and scholars who are knowledgeable about a government’s policies and practices regarding intervention in the decision-making of firms. With respect to the Hynix bailout, a particularly important circumstance would be Hynix’s dire financial state.

122. Thus, in determining whether or not the GOK had entrusted or directed Hynix’s creditors to bail out the company, the DOC looked at the evidence in its entirety. This approach is consistent with the manner in which the Appellate Body and other panels have approached evidentiary issues. For example, in *US – Cotton*, the panel stated that because it was engaging in “a fact-specific examination that will vary from case to case, we will conduct an examination of the arguments and evidence before us as a whole, and come to a conclusion on the basis of the

evidence in its entirety.”¹⁷⁹ In *Japan – Alcohol*, the Appellate Body emphasized that “WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind.”¹⁸⁰ Thus, in this case the DOC properly examined not just each item of evidence of entrustment or direction in a vacuum, but rather considered the *totality* of the evidence in light of the real-world circumstances of Hynix, its creditors, and the GOK.

123. Moreover, the DOC gave a reasoned and adequate explanation for considering the evidence in its entirety.¹⁸¹ As the DOC explained in its Final Determination: “We also disagree with respondents’ contention that, in order to determine whether the ROK financial institutions were directed by the GOK to provide loans and other benefits to Hynix during the POI, the Department must necessarily determine that there is specific evidence of direction for each event and for each individual bank that participated in Hynix’ overall financial restructuring.”¹⁸² The DOC explained that a subsidy is a *program* entrusted or directed by the government, pursuant to an “overarching government objective.”¹⁸³ When examining this program as a whole, the GOK’s influence permeated all of the actions by Hynix’s creditors; indeed, the DOC stated that “the GOK’s role was essential at each stage in directly supporting the restructuring process through its own actions and by directing, facilitating, and guiding the actions taken by the creditor

¹⁷⁹ *US – Cotton (Panel)*, para. 7.1345.

¹⁸⁰ *Japan – Alcohol (AB)*, page 31.

¹⁸¹ A panel’s role is to determine whether an investigating authority provided a reasoned and adequate explanation for its determination. See *US – Lamb Meat (AB)*, para. 103; *Argentina – Footwear (EC) (AB)*, para. 121; *US – Wheat Gluten (Panel)*, para. 8.5.

¹⁸² *Issues and Decision Memorandum* at 48 (Exhibit GOK-5).

¹⁸³ *Issues and Decision Memorandum* at 48, n.11, 48-49 (Exhibit GOK-5).

banks.”¹⁸⁴ Thus, the DOC rejected an item-by-item or event-by-event analysis of the evidence, and instead analyzed the evidence in a manner that was a reasoned and adequate method for determining the existence of GOK entrustment or direction.¹⁸⁵

2. The DOC Properly Relied on Circumstantial and Secondary Evidence, and the Inferences Therefrom

124. Similarly, the DOC properly relied on circumstantial evidence of entrustment or direction. As described above, circumstantial evidence is critical in cases involving entrustment or direction, where direct evidence held by a government may not be available.

125. Indeed, reliance on circumstantial evidence and reasonable inferences drawn therefrom was particularly essential in this case because the facts show that the GOK was keenly aware of the increasing international scrutiny of its actions, and took steps to shield its actions from public view. Even as the bailout was unfolding, the United States raised concerns with the Korea

¹⁸⁴ *Issues and Decision Memorandum* at 48-49 (Exhibit GOK-5).

¹⁸⁵ Contrary to the Panel’s assertion, the DOC’s finding of a single program did *not* enable “the DOC to rely on evidence of alleged entrustment or direction of a creditor in respect of one financial contribution as evidence of alleged entrustment or direction of that creditor in respect of the three other financial contributions.” Panel Report, para. 7.143. Rather, the DOC simply found that there was a “single program,” the objective of which was “the complete financial restructuring of Hynix in order to maintain the company as an ongoing concern.” U.S. First Submission, para. 35, n. 31; *Issues and Decision Memorandum* at 48 (Exhibit GOK-5). The reference to a “single program” was a convenient way of referring to the GOK policy and pattern of practices “to ensure the continued viability of Hynix.” U.S. First Submission, para. 35 n. 31; *Issues and Decision Memorandum* at 48-49 (Exhibit GOK-5). Thus, although the DOC considered the GOK orchestrated bailout of Hynix to be a single program, the DOC did not find that evidence of entrustment or direction of one creditor with respect to one financial contribution automatically meant that creditor was entrusted or directed with respect to a different financial contribution. The Panel’s findings with respect to a single program are therefore a mischaracterization of the DOC’s determination. Notably, the Panel’s discussion of this issue includes no citations to the GOK’s written submissions and only one citation to one of the U.S. written submissions. See Panel Report, paras. 7.142-7.155, n.167-175. Clearly, the single program issue was not an issue of major dispute between the parties.

bilaterally and in meetings of the WTO Committee on Subsidies and Countervailing Measures about its actions with respect to Hynix.¹⁸⁶ The bailout also received considerable press coverage. Observers in Korea noted that, because of this international scrutiny and the rising trade tensions with the United States, the GOK was “not in a position to openly talk about support”¹⁸⁷ and was “likely to tread very carefully.”¹⁸⁸

126. Not surprisingly, the sort of documentation that would memorialize the details of GOK entrustment or direction was not forthcoming from the GOK. For example, the DOC specifically asked Hynix for documents related to the GOK’s involvement with the bailout, including records of GOK meetings about Hynix. However, neither the GOK nor Hynix provided the documents to the DOC; they were subsequently produced by U.S. interested parties. In fact, in response to the DOC’s question about such meetings, the GOK flatly denied any involvement. Thus, because of the inherent difficulties in obtaining direct evidence in this case, it was proper for the DOC to rely on circumstantial and secondary evidence and make inferences on the basis of that evidence.

127. Additionally, the DOC provided a reasoned and adequate explanation for its reliance on circumstantial evidence and secondary sources such as press reports. As the DOC stated in its

Final Determination:

¹⁸⁶ *Committee on Subsidies and Countervailing Measures; Minutes of Meeting Held on 2-3 May 2001*, G/SCM/M/28, para. 87; *Committee on Subsidies and Countervailing Measures; Minutes at the Regular Meeting Held on 31 October 2001*, G/SCM/M/34, para. 46.

¹⁸⁷ *U.S. Answers to Second Set of Panel Questions*, Panel Report, Annex E-6, para. 93 (citing *Hynix, Will It Really Survive?*, NEWSMAKER, No. 439, Aug. 30, 2001 (Exhibit US-141)).

¹⁸⁸ *U.S. Answers to Second Set of Panel Question*, Panel Report, Annex E-6, para. 93 (citing *An Expensive Decision*, ASIA MONEY, Sept. 2001 (Exhibit US-142)).

With programs that involve indirect government involvement over bank lending decisions, most of the evidence of such directions i[s] from secondary sources, which, in our view, is not surprising. The heightened scrutiny that Hynix' financial restructuring was receiving in the domestic and overseas press was in large part because of such government activity. In such instances, secondary sources can be particularly credible as these observers are independent and without a vested interest in the outcome.¹⁸⁹

128. Thus, in its determination that the GOK entrusted or directed the financial bailout of Hynix, the DOC examined the voluminous record evidence in its totality, rather than determining whether each individual piece of evidence alone was sufficient to reach this determination. The DOC took account of all the record evidence, including circumstantial and secondary evidence, in reaching its findings. This approach was appropriate, particularly when considering Article 1.1(a)(1)(iv) of the SCM Agreement.

3. The Panel Exceeded the Bounds of Its Discretion in Reviewing the Findings of the DOC

129. As described above, the DOC provided a reasoned and adequate explanation for its approach to the evidence and why the evidence supported findings of entrustment or direction. The Panel, however, did not simply review the DOC's determination. Rather, by misinterpreting the term "entrusts or directs," imposing an impermissible evidentiary standard, adopting an analytic framework that failed to account for the totality of the evidence and precluded the use of circumstantial evidence, reversing the burden of proof, erroneously disregarding certain evidence as *ex post* rationalizations, and engaging in a *de novo* review, the Panel exceeded the bounds of its discretion in reviewing the findings of the DOC. Each of these actions by the Panel was erroneous. The Panel in effect redefined the framework, scope and structure of the DOC

¹⁸⁹ *Issues and Decision Memorandum* at 50 n.13 (Exhibit GOK-5).

investigation and, in so doing, failed to properly apply the standard of review required by Article 11 of the DSU.

130. In addition to the individual Panel errors, the cumulative effect of these errors undermines the Panel’s conclusion that the DOC could not properly have found entrustment or direction of Hynix’s Group B and Group C creditors. For all of the above reasons, the Appellate Body should reverse the Panel’s conclusions in paragraphs 7.175-7.178.

I. The Panel’s Conclusions on Benefit and Specificity (In Part) Should Be Reversed

131. The Panel concluded that the DOC’s benefit determination is inconsistent with Article 1.1(b) of the SCM Agreement.¹⁹⁰ The Panel also concluded that the DOC’s finding of specificity is inconsistent with Article 2 of the SCM Agreement “in so far as it relates to alleged subsidies by Group B and C creditors”.¹⁹¹ Because the Panel’s conclusions are based solely on its erroneous finding that the DOC’s determination of GOK entrustment or direction of certain

¹⁹⁰ Panel Report, para. 7.190.

¹⁹¹ Panel Report, para. 7.208. The Panel correctly found that the DOC’s finding of specificity is consistent with Article 2 “in so far as it relates to alleged subsidies provided by Group A creditors.” *Id.*

Hynix creditors is inconsistent with Article 1.1(a)(1)(iv) of the SCM Agreement,¹⁹² the Appellate Body should reverse the Panel findings in paragraphs 7.190-7.191, 7.206, 7.208.

J. The Panel Erred By Failing to Reject Korea’s Claims Regarding the DOC Countervailing Duty Order on the Grounds that Korea Failed to Comply with Article 4.4 of the DSU

132. In addition to the Panel’s numerous substantive errors, the Panel committed a procedural error by failing to reject Korea’s claims regarding the DOC countervailing duty order.

Specifically, insofar as the countervailing duty order is concerned, Korea failed to comply with Article 4.4 of the DSU, and the Panel should have so found.

133. By way of background, on June 30, 2003, Korea requested consultations with respect to the preliminary and final determinations of the DOC and the preliminary determination of the ITC.¹⁹³ In addition, and notwithstanding the injunction in the first sentence of Article 3.7 of the DSU, Korea requested consultations with regard to “any subsequent determinations that may be made during the [ITC’s] injury investigation”¹⁹⁴

134. By letter of July 10, 2003, the United States accepted Korea’s request to enter into consultations. However, the United States stated its position that the right to request

¹⁹² See Panel Report, para. 7.190 (“Since we have found that the DOC could not properly have found that [Group B and C] private creditors had been entrusted or directed by the GOK, government entrustment or direction of these creditors could not have been a proper basis for the DOC to reject them as market benchmarks); and para. 7.206 (“[T]he DOC’s finding of specificity in respect of Group B and C creditors was based on its finding of GOK entrustment or direction of private creditors to participate in the single programme of Hynix restructuring. We recall, however, that we have found that the DOC’s determination of government entrustment or direction is factually flawed, and inconsistent with Article 1 of the SCM Agreement. In the circumstances, the DOC’s finding of GOK entrustment cannot provide a proper basis for a determination of specificity in respect of alleged subsidies provided by Group B and C creditors.”).

¹⁹³ WT/DS296/1 (8 July 2003).

¹⁹⁴ WT/DS296/1 (8 July 2003).

consultations – and the corresponding obligation to consult – under Article 4 of the DSU did not extend to determinations that may or may not be made in the future.¹⁹⁵ Consultations took place in Geneva on August 20, 2003, and were limited to the preliminary and final determinations of the DOC.

135. On August 18, 2003, Korea made a new request for consultations with respect to the final determination of the USITC and the countervailing duty order published by the DOC.¹⁹⁶ Notwithstanding the requirements of Article 4.4 of the DSU, Korea did not identify any provision of any WTO agreement with which the DOC countervailing duty order was inconsistent.

136. By letter of August 28, 2003, the United States accepted Korea's new request to enter into consultations, but noted the failure of Korea to comply with Article 4.4.¹⁹⁷ In a letter dated September 8, 2003, Korea purported to explain how it had identified the legal basis for challenging the the DOC countervailing duty order, but it continued to refuse to identify the provision(s) with which the countervailing duty order was inconsistent.¹⁹⁸ By letter of September 10, 2003, the United States informed Korea of its view that Korea continued to be out of compliance with the obligations of Article 4.4.¹⁹⁹

¹⁹⁵ Letter from Amb. Linnet F. Deily to Amb. Chung Eui-yong Chung (July 10, 2003) (Exhibit US-1).

¹⁹⁶ WT/DS296/1/Add. 1 (21 August 2003).

¹⁹⁷ Letter from Amb. Linnet F. Deily to Amb. Chung Eui-yong (August 28, 2003) (Exhibit US-2).

¹⁹⁸ Letter from Amb. Chung Eui-yong to Amb. Linnet F. Deily (September 8, 2003) (Exhibit US-3).

¹⁹⁹ Letter from Amb. Linnet F. Deily to Amb. Chung Eui-yon (September 10, 2003) (Exhibit US-4).

137. On October 1, 2003, consultations took place via video conference. With respect to the DOC countervailing duty order, the parties agreed to disagree concerning the conformity of Korea's consultation request with Article 4.4 of the DSU. Because Korea continued to refuse to identify any provision with which the countervailing duty order was inconsistent, the United States declined to engage in any discussions regarding the order.

138. On November 19, 2003, Korea requested the establishment of a panel. At the meeting of the Dispute Settlement Body ("DSB") at which Korea's request was first considered, the United States objected to the establishment of a panel on the grounds that Korea's panel request sought to cover matters on which the parties had not consulted. The United States described Korea's failure to comply with Article 4.4 of the DSU and the resulting absence of consultations with respect to the the DOC countervailing duty order.²⁰⁰ Notwithstanding these deficiencies, the DSB established a panel at its meeting on January 23, 2004.

139. In its first submission, the United States requested the Panel to dismiss Korea's claims due to Korea's failure to comply with Article 4.4 of the DSU.²⁰¹ The second sentence of Article 4.4 provides as follows:

Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis of the complaint.

Notwithstanding these requirements, as demonstrated above, Korea's second request for consultations did not include any indication of the legal basis of its complaint with respect to the DOC countervailing duty order. Korea did not even indicate a provision of the WTO agreements

²⁰⁰ WT/DSB/M/159, paras. 32-38 (15 January 2004) (Exhibit US-5).

²⁰¹ U.S. First Submission, para. 492.

with which it believed the countervailing duty order to be inconsistent. Not until Korea filed its panel request did the United States learn of the legal basis of Korea’s complaint.

140. As demonstrated above, the United States promptly informed Korea that, in its view, Korea’s consultation request failed to satisfy the requirements of Article 4.4, but Korea declined to correct the problem.²⁰² In order to preserve its rights, the United States declined to consult regarding the countervailing duty order, and raised its concerns at the first DSB meeting at which Korea’s panel request was considered.²⁰³ Thus, this is not a situation where the respondent slept on its rights.

141. In response to the U.S. objection, Korea asserted that its second consultation request – which was the request that pertained to the countervailing duty order – “specifically cited to Article VI:3 of GATT 1994”²⁰⁴ However, as the United States pointed out to the Panel, Article VI:3 was not mentioned in the second consultation request.²⁰⁵

142. Notwithstanding this, the Panel found that Korea’s second consultation request satisfied the requirements of Article 4.4 because it contained the following language: “With reference to document WT/DS296/1 ... circulated on 8 July 2003, my authorities have instructed me to request further consultations with the Government of the US”²⁰⁶ According to the Panel, this reference to the first consultation request meant that Korea’s “claim in the [second request] should also be read in light of the provisions of the *SCM Agreement* and *GATT 1994* set out in

²⁰² See Exhibits US-1 through 4, which contains the correspondence between the United States and Korea regarding Korea’s consultation requests.

²⁰³ WT/DSB/M/159 (15 January 2004) (Exhibit US-5).

²⁰⁴ Korea Second Submission, para. 259.

²⁰⁵ WT/DS296/1/Add. 1 (21 August 2003); see also *Opening Statement of the United States of America at the Second Substantive Meeting of the Panel*, July 21, 2004, para. 53.

²⁰⁶ Panel Report, para. 7.414, quoting from WT/DS296/1/Add. 1.

[the first request].”²⁰⁷ Ironically, the Panel considered that the “totality of these provisions provides sufficient ‘indication of the legal basis for the complaint’ within the meaning of Article 4.4 of the *DSU*.”²⁰⁸

143. In the view of the United States, it is not credible to assert that by simply referring to the fact that it had filed a prior consultation request on one set of alleged measures, Korea satisfied its obligation to provide an indication of the legal basis for its complaint with respect to a different measure. Korea cited to many provisions in its first consultation request. Was the United States supposed to guess which provision(s) applied to the countervailing order? Apparently so, because the Panel ignored the fact that when asked by the United States, Korea refused to identify the provision(s) of a covered agreement with which it considered the countervailing duty order to be inconsistent.²⁰⁹

144. Although the requirements of Article 4.4 are minimal, they cannot be ignored. At a minimum, they require an indication of at least one provision with which a measure is considered to be inconsistent. Because Korea ignored the requirements of Article 4.4 insofar as the DOC countervailing duty order is concerned, the Panel should have rejected Korea’s claims regarding the order. The Panel’s failure to do so constitutes legal error, and the Appellate Body should reverse the Panel’s findings.²¹⁰

²⁰⁷ Panel Report, para. 7.415.

²⁰⁸ Panel Report, para. 7.415.

²⁰⁹ In this regard, the United States notes that the Panel’s findings of inconsistencies are limited to Articles 1 and 2 of the SCM Agreement. Panel Report, para. 8.1. Articles 1 and 2 are definitional provisions that do not, in themselves, impose obligations. *Cf.*, *US – Softwood Lumber IV (AB)*, para. 143.

²¹⁰ The relevant finding is contained in Panel Report, para. 7.415.

III. CONCLUSION

145. For the foregoing reasons, the United States respectfully requests that the Appellate Body find that the findings and conclusions of the Panel listed in the U.S. Notice of Appeal and further discussed herein are in error, and that the Appellate Body reverse those findings.